MAINE REPORTS

161

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

JANUARY 1, 1965 to DECEMBER 31, 1965

CHARLES B. RODWAY, JR.

REPORTER

AUGUSTA, MAINE
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1965

JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

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HON. DONALD W. WEBBER

HON. WALTER M. TAPLEY, JR.

[1] HON. FRANCIS W. SULLIVAN

[2] HON. CECIL J. SIDDALL

HON. HAROLD C. MARDEN

[3] HON. ABRAHAM M. RUDMAN

[4] HON. ARMAND A. DUFRESNE, JR.

[1] Retired July 9, 1965
[2] Retired February 27, 1965
[3] Qualified March 30, 1965
[4] Qualified August 24, 1965

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DURING THE TIME OF THESE REPORTS

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[1] Qualified August 24, 1965

Attorney General

HON. RICHARD J. DUBORD

Reporter of Decisions

CHARLES B. RODWAY, JR.

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CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

FRANK S. CARPENTER, TREASURER OF THE STATE OF MAINE
vs.
MASSACHUSETTS BONDING & INSURANCE CO., ET AL.

Cumberland. Opinion, January 7, 1965.

States. Contracts. Appeal and Error. Consideration.

Where subcontractor on state building brought action of debt on bond against bonding company in name of State Treasurer to recover amounts allegedly due, the prime contractor was not a party and bonding companies' evidence showed no assignment of prime contractor's claims against subcontractor, referee properly excluded consideration of prime contractor's alleged set-off charges.

Consideration for the execution of a new bond on state building project to cover items covered by instructions to bidder but which had been omitted from original bond was presumed where new bond, retroactive to date of original bond, was under seal and there was no evidence to overcome presumption of consideration.

Resolution of issues presented by subcontractor's claim for furnishing of extras was factual as to which referee's findings in proceeding against bonding company was conclusive if supported by any credible evidence.

ON APPEAL.

This is an appeal from the denial by the Superior Court, upon motion, to reject a referee's report awarding subcon-

tractor damages. Appeal sustained as to interest charges only and case remanded with directions.

Linnell, Perkins, Thompson, Hinckley & Thaxter
By: *Franklin G. Hinckley and*
Charles P. Barnes II, for Plaintiff.

Verrill, Dana, Walker, Philbrick & Whitehouse
By: *Roger A. Putnam and Loyall F. Sewall,*
for Defendant.

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

MARDEN, J. On appeal from a denial by the Superior Court, upon motion, to reject a referee's report awarding plaintiff damages.

A contract for the construction of the so-called State Office Building was executed by the State and one Rugo as prime contractor. A sub-contract for certain of the interior work was executed between Rugo and Sherman Plastering Corp. (Sherman). By the terms of the prime contract Rugo furnished a performance bond with the three defendant corporate sureties[1], hereinafter referred to as "defendant," running to the Treasurer of the State of Maine and conditioned upon his faithful performance of the contract and, later, conditioned upon satisfaction of all bills for labor, material and equipment contracted for or used by him. From controversies arising out of the sub-contract Sherman brought an action of debt on the bond, under our pre-rule practice in the name of the State Treasurer, to recover amounts alleged to be due him. The prime contractor, Rugo, is not a party defendant.

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[1] Massachusetts Bonding & Insurance Company; United States Fidelity & Guaranty Company and American Automobile Insurance Company.

Sherman's claims are of two categories:

(a) For a balance due upon his sub-contract, in the amount of $37,041.05.

(b) For work and material supplied as "extras" to his sub-contract, in the amount of $16,531.01.

To these claims totalling $53,572.06, defendant pleaded multiple defenses, including failure of Sherman to comply with his contract, denial of authority from Rugo within the prime contract terms to perform some of the alleged extra work and denial of obligation by Rugo on the remaining items.

By agreement the matter was heard by a member of the Superior Court, as a referee, with right of appeal reserved, whose report favored Sherman as to the balance allegedly due under the sub-contract in the amount demanded.

	$37,041.05
Extra No. 1:	
Change in finish of certain interior columns, $9,540.00, which amount had been paid except for the 10% retained.	$ 954.00
Extra No. 4:	
Removal of rubbish without chute.	$ 1,948.10
	$39,943.15

Claims for the other extras were denied.

The referee also awarded interest upon the total award from November 20, 1956.

During trial the defendant offered evidence of charges which the prime contractor, Rugo, had against Sherman. Over objection defendant was allowed to introduce evidence *de bene* of such of these charges as were related

to performance by Sherman of his sub-contract, but excluded evidence bearing upon non-performance-related claims. Ultimately the referee refused to consider as relevant any evidence of counter-claims by Rugo based upon the Rugo-Sherman contract.

To the acceptance of the referee's report defendant's points of appeal challenge the validity of:

(1) The refusal of the referee to consider "back charges" of Rugo against Sherman;

(2) permitting Sherman to recover upon a bond not in existence at the time the prime contract was executed;

(3) finding that any breach of the contract by Sherman was immaterial;

(4) finding that failure by Sherman to request arbitration was not a bar to his complaint;

(5) finding that Sherman had insurance coverage as required by the prime contract;

(6) allowing so-called extras to Sherman which were not authorized in writing in accordance with the prime contract;

(7) allowing Sherman Extra No. 1 (finish of interior columns);

(8) allowing Sherman Extra No. 4 (work occasioned by absence of rubbish chute);

(9) finding defendants jointly and severally liable;

(10) ordering execution in the amount of his findings, and

(11) allowing interest from November 20, 1956.

These points of appeal will be considered in order.

Point 1. *Back-Charges*

This proceeding seeks to enforce defendant's guarantee. The prime contractor is not a party. Defendant evidenced no assignment to him of Rugo claims against Sherman. The referee held that *Rumery Co.* v. *Merrill Trust Co., et al.,* 127 Me. 298; 143 A. 54 controls this phase of the issue. We agree, and excluding consideration of Rugo's alleged set-off charges was not error.

Point 2. *Bond*

Within the "Instruction to Bidders" on the prime contract, which was executed June 9, 1954, the contents of which were a part of the contract, the successful bidder was obligated to deliver to owner an executed bond in the amount of 100% of the accepted bid "as surety for the faithful performance of his contract and for payment of all persons performing labor or furnishing materials in connection therewith." (Plaintiff's Exhibit #1, Page 5.) Rugo seasonably furnished a bond for "faithful performance" but the additional condition covering "payment of all persons" was omitted. Although the prime contract was by reference made a part of the bond, after the work on the building was substantially completed the absence of the "payment" condition in the bond was discovered and a new bond, including the previously omitted condition, was supplied, with an additional provision that "the effective date of this bond shall be the 9th day of June, 1954." Defendant's contention that there was no consideration for the latter bond must fail. The bond being under seal, consideration is presumed. *Goodwin, Executor, Estate of Harry E. Gustin* v. *Cabot Amusement Company,* 129 Me. 36, 41; 149 A. 574. There is no evidence to overcome the presumption. See also *Van Valkenburgh* v. *Smith,* 60 Me. 97, 98.

Points 3 and 5. *Insurance Coverage*

It is obvious, by stipulation, that Sherman seasonably applied and paid for the liability and workman's compensation insurance required by Article 4 of his sub-contract, and his insurer did in fact process a claim for personal injury sustained by one of his employees, although by inadvertence the certificate of such coverage was not seasonably filed with Rugo. While this tardiness was a breach of Sherman's obligation, Rugo's remedy which he chose not to apply, was contract provided (in Articles 4 and 6), and the certificates were ultimately supplied. Work and materials were accepted from Sherman for several months between the dates of technical default and the filing with Rugo of the certificates. Sherman's performance was accepted as full. No damage resulted from the lapse. The referee held this assigned breach as immaterial. We hold it to be a "trifle," within the maxim *de minimis non curat lex,* which does not bar plaintiff's recovery. See *Van Clief, et al.* v. *Van Vechten, et al.,* 29 N. E. 1017, 1019 (1st Col.) (N. Y. 1892); *LeRoy Dyal Co., Inc.* v. *Allen,* 161 F. (2nd) 152, [5, 6] 156 (4 CCA 1947); *A. Belanger & Sons, Inc.* v. *United States of America for the Use and Benefit of National U. S. Radiator Corporation,* 275 F. (2nd) 372, [9] 376 (1 CCA 1960).

Point 4. *Arbitration*

Defendant's challenge of the proceeding upon the basis that plaintiff had not followed arbitration procedure is specifically waived in brief.

Points 6, 7, and 8. *Extras*

The resolution of these issues is factual, as to which the referee's finding, if supported by any credible evidence, is conclusive. *Marshall, Collector* v. *Inhabitants of Town of Bar Harbor,* 154 Me. 372, 380; 148 A. (2nd) 687.

The factual dispute pertaining to Extra No. 1, is clarified significantly by documentary evidence in the way of letters, drawings or clauses in the contracts, upon which no finding other than that which the referee made could be maintained. Not only did the State concede that Sherman was requested to perform this extra work, but the cost of the work had been paid to Sherman during the course of construction, but for the ten percent held back under the terms of the prime contract. Liability of the State for this extra had been acknowledged before the building was accepted.

As to Extra No. 4 (rubbish chute), the prime contract (Plaintiff's Exhibit No. 1) section 15, paragraph 10, page 109 provides that Rugo should provide rubbish chutes for "all contractors" which chutes were to be maintained during the progress of the work. Under prime contract section 13, paragraph 10, Sherman is charged with removing his surplus material from the premises.

Admittedly rubbish chutes never existed, but by agreement a hoist was installed and made available to Sherman in lieu of the chute. This hoist was removed by Rugo before Sherman completed his work and the charge presented by Sherman for this "clean up" was allowed. The evidence supporting the referee's so finding is completely adequate.

Point 9. *Defendant's liability, nature of*

Error is alleged in the referee's finding of "joint and several" liability. As we read the report, the liability was imposed as "joint." The obligation of the bond was assumed "jointly and severally" and the respective "several" portions of the penal sum each exceed the total award. The point raised by defendant is not clear and was not briefed. We find no error.

Point 10. *Order for Execution*

Technically the authority of the referee ended at his determination of condition (of the bonds) broken and estimate (assessment) of the damage (Chapter 113, § 53, R. S.) *Inhabitants of Machiasport* v. *Small, et al.*, 77 Me. 109, 111. Reference to issue or stay of execution was a matter for the court upon action upon the acceptance of the report, but such orders from the standpoint of the reference "are mere surplusage unless such parts affect, to the prejudice of the excepting party, the portions of the award which are authorized and valid." *Hexter* v. *Equitable Fire and Marine Insurance Company,* 123 Me. 77, 78; 121 A. 555. There is no prejudice to the defendant to be found in this surplusage.

Point 11. *Interest*

The date or dates from which interest is to be allowed warrants review. As indicated above, the referee awarded interest from November 20, 1956 upon the total of the three items to which he found Sherman entitled.

In *Inhabitants of Town of Norridgewock* v. *Inhabitants of Town of Hebron,* 152 Me. 280, 283; 128 A. (2nd) 215, our rule as to the allowance of interest (as an incident of compensatory damage) was reviewed and we said:

> "In the absence of a definite agreement to pay interest, our law now recognizes the use of money as valuable and allows interest, in proper cases, as damages for detention of money, when the debtor is in default, * * *. Interest is imposed by law, as damages, for not discharging a debt when it ought to be paid. The principle has long been settled, that if a debt ought to be paid at a particular time, and is not then paid, through the default of the debtor, compensation in damages. equal to the value of money, which is the legal interest upon it, shall be paid during such time as the party is in

> default. The important practical inquiry, in each case, in which interest is in question, is, what is the date at which this legal duty to pay, as an absolute present duty, arose."

See also *Milo Water Company* v. *Inhabitants of Town of Milo,* 136 Me. 228, 232; 7 A. (2nd) 895.

The rule in another context was expressed in *Hall* v. *Huckins,* 41 Me. 574, 580 and *Bither* v. *Packard,* 115 Me. 306, 316; 98 A. 929, where it was declared that "(i)nterest, * * * is to be allowed where the law by implication makes it the duty of a party to pay over money to the owner without previous demand."

These principles, as applied to surety bonds, are announced in *Wyman* v. *Robinson,* 73 Me. 384, 386, 390 (in action of debt on replevin bond, interest allowed from the date of the breach of the bond, which breach is evidenced by the judgment in the replevin action); *Pennell* v. *Card,* 96 Me. 392, 396; 52 A. 801 (in action on a bond guaranteeing payment of land damage within stated time after adjudication of the County Commissioners, interest allowed from date damages were awarded); and *Foster, Treasurer* v. *Kerr & Houston, Inc., et al.,* 133 Me. 389, 401; 179 A. 297 (in action of debt for the benefit of suppliers to prime contractor on contractor's performance and payment bond with damages stipulated "with interest from such date as the court shall determine the same recoverable," interest allowed from the date the bills were due from the contractor), which cases in turn apply the rule recorded in Section 337, Restatement of the Law of Contracts. "Unless made in terms conditional, the promise of a surety is as absolute as that of the principal." 50 Am. Jur., Suretyship, § 176. See also *Foster, supra,* where the performance and payment bond was conditioned in terms in all pertinent parts identical to the bond in issue, and the court said at page 402 "as to notice of breach, or demand of payment,

none need be proved." See also *Maine Central Railroad Company* v. *National Surety Company,* 113 Me. 465, 470; 94 A. 929.

As indicated in *Hebron* our current problem is to determine the date at which the defendant's legal duty to pay arose.

By the terms of the prime contract the entire balance due the contractor was "due and payable" upon acceptance of the work by the owner and issue of final certificate by the owner's architect. The State-owner, through its architect, accepted the State Office Building as completed and authorized final payment on November 20, 1956. By the terms of the Rugo-Sherman sub-contract, payment by Rugo to Sherman was due within 10 days after receipt of the same by Rugo "provided that the Sub-Contractor (Sherman) shall have fulfilled all of the obligations to be performed under this agreement, and has given the Contractor (Rugo) satisfactory evidence that the premises are free from all liens or claims that might be or have been filed against the premises or the moneys due under the Contract to the Contractor."

The referee found upon substantial evidence that Sherman had fulfilled his contract, by performance or mutually acceptable arrangements, and that there were no lienable claims against the building.

Not only is there testimony in the record, but a stipulation, that the money due Rugo, under the contract, with a minor exception not here relevant, was paid by "draft payable jointly to the principal (Rugo) on the bond and the named sureties." Rugo's construction Superintendent stated that "the payment was made approximately in November, 1956. The payment was due, and I believe it was paid when due, and it was due 61 days after July the 31st." Owner's architect testified that on November 20 (1956), he authorized the final payment of some $275,000.00 "to the

Massachusetts Bonding Company." The date of receipt by Rugo or his sureties does not appear in the record.

Comment may be proper upon the category into which the three claims allowed by the referee fall, whether the so-called "extras" stand upon the same footing as the balance due Sherman for work expressly covered by his sub-contract. Sherman claimed as "Extra No. 1" the balance due for changing the finish of certain interior columns. The amount involved in this change was $9,540.00. While there was some controversy as to whether this requirement of Sherman was or was not partially covered by an amendment in the Notice to Bidders, it is undisputed that the State not only acknowledged the validity of this work as an extra, but that it was fully paid for in the progress payments on the contract, except for the retained 10%. This item of work was accepted by the parties as an addition to the contract and assumed the same status as the balance due on the work expressly obligated by the sub-contract.

The extra charge for work entailed by the absence of a rubbish chute falls into another category and became due only upon demand by Sherman, which demand was made in August of 1956 and thereafter became a claim against Rugo, the payment of which was guaranteed by the bond. It follows that for purposes of determining when payment was due, the three claims of the plaintiff stand upon the same footing. They became due and payable to plaintiff within 10 days after Rugo, or his sureties, received final payment under the contract.

Rugo obligated himself to pay Sherman at that time. The purpose and terms of the defendant's bond was to assure that payment. The terms of the bond required no antecedent demand or notice to the defendant. Failure of Rugo to so pay was a breach of his contract. Failure of defendant to so pay was a breach of the bond. Defendant, by electing to litigate, elected to expose itself to liability

for interest. The claims were liquidated and they did not become unliquidated because the defendant disputed them, *Milo, supra,* at page 232, if indeed the liquidity of the claims is important. See Annot. 36 A. L. R. (2) 337-500 Interest on Damages for period before Judgment.

In this connection it is to be noted, although the liability for interest does not turn upon the fact, that the defendant was a party to the final settlement by reason of the final payment being made to Rugo and it, or to Massachusetts Bonding Company. As a party, it must have had notice of Rugo's default in performance not later than the time for final payment. Additionally the defendant, — or Massachusetts Bonding Company, actually received the final payment from the State and has had the use of the money since sometime in November, 1956.

It follows that $39,943.15, the amount found due Sherman by the referee, was due and payable to the plaintiff within 10 days after Rugo, or Rugo and sureties, or sureties, received the final payment. Plaintiff is entitled to 6% interest on said amount from the expiration of 10 days after Rugo, or Rugo and sureties, or sureties received final payment. If this date cannot be stipulated by the parties, certainly records exist from which it can be determined by the trial court. So ordered.

Appeal sustained as to interest charges only and case is remanded to the Superior Court for computation of interest in accordance with this opinion. Plaintiff's costs are unaffected.

CARLETON CHANDLER WOOD, PETITIONER
vs.
STATE OF MAINE, ET AL.

Knox. Opinion, January 18, 1965.

Appeal. Post Conviction. Habeas Corpus. Bail.

Statute permitting presiding justice in his discretion in habeas corpus proceedings to admit applicant to bail following adverse decision and pending review by law court was not operative in post-conviction habeas corpus proceeding under later modulated and conformed provisions of statute.

Habeas corpus is civil and not criminal proceeding.

Petitioner, who appealed from decision dismissing his petition for post-conviction habeas corpus relief, was not entitled to bail pending appeal.

ON APPEAL.

On appeal from the denial of petitioner's request for bail pending hearing on his appeal from the denial of his petition for post-conviction relief. Appeal denied.

Christopher S. Roberts, for Petitioner.

John W. Benoit, Asst. Atty. Gen., for State.

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

SULLIVAN, J. Carleton Chandler Wood had filed a petition for post conviction-habeas corpus relief. R. S., c. 126, §§ 1-A 1-G, additional. After a hearing the presiding justice had dismissed the petition. Wood had appealed from that decision. He thereafter and pending determination of his appeal petitioned the court to enlarge him on bail. The court ruled that it was without authority to permit bail.

Wood then appealed from that latter adjudication and here prosecutes such second, interim appeal.

In post conviction-habeas corpus R. S., c. 126, § 1-D is directive of pleading and procedure to the phase of rendition of "final judgment for the purpose of review." Section 1-D provides the following:

> "- - - - Such justice may make such order as the case requires for the custody of the petitioner pending hearing and judgment or for admitting to bail."

Section 1-D delimits itself to regulatory measures antecedent to "final judgment for the purpose of review."

Section 1-G of R. S., c. 126 legislates as to method of review of final judgment and prescribes as follows:

> "A final judgment entered under section 1-D may be reviewed by the Supreme Judicial Court sitting as a law court in an appeal brought by the petitioner or the State in the same mode and scope of review as any civil action.
>
> "If the justice upon hearing determines that the petitioner should be immediately discharged, pending review of a decision discharging a petitioner, said petitioner shall be enlarged upon recognizance, with surety, for his appearance to answer and abide by the judgment in the appellate proceedings; and if in the opinion of the justice rendering the decision surety ought not to be required the personal recognizance of the prisoner shall suffice."

It must be noted that by force of this Section 1-G and subsequent to the "final judgment for the purpose of review" afforded by Section 1-D a restricting and exclusive stipulation as to bail is imposed. If the ruling of the presiding justice dictates the immediate discharge of the petitioner that justice must enlarge the petitioner upon recognizance with or without surety but Section 1-G is otherwise

significantly and impressively mute as to any concession of bail to that petitioner to whom relief has been denied by the sitting justice. The rationale of this legislative differentiation between the two eventualities is transparent. The petitioner who after consideration or after a hearing has been judicially determined to be imprisoned illegally has succeeded in demonstrating very persuasive pretension for being enlarged during the period of appellate review so long as fit and precautionary guarantees are exacted of him for his appearance and abiding of the appellate court judgment. It would be paradoxical, however, to admit to bail and respite pending review a petitioner whose application for release from confinement has been judicially considered or heard but disapproved.

R. S., c. 126, § 6 in habeas corpus proceedings would permit the presiding justice in his discretion to admit an applicant to bail following a decision adverse to the applicant and pending review by the law court. That section is not operative in the instant case which invokes and is regulated by the later modulated and conformed provisions of R. S., c. 126, §§ 1-A - 1-G, additional, P. L., 1963, c. 310.

Nor can the circumstances of the case at bar be understandably said to *require* that the petitioner here be bailed pending review. R. S., c. 126, § 33.

Sections 1-D and 1-G of R. S., c. 126 differ in their latitudes for bail. As the Arizona Court said in *Waller* v. *Jordan,* 118 P. (2nd) 450, 452:

> "- - - - We think when the legislature in one instance gives the right to bail pending the appeal but fails to give any right to bail in the other instance, it is equivalent to denying the right to bail in the latter case."

Habeas corpus is a civil and not a criminal proceeding.

In re Frederick, Petitioner, 149 U. S. 70, 75.

Fisher v. *Baker,* 203 U. S. 174, 181.
Coram nobis is a civil process.
Dwyer v. *State,* 151 Me. 382, 396.

Post conviction-habeas corpus procedure in criminal cases, providing amongst multiple remedies relief in the nature of habeas corpus and of *coram nobis* is regarded as civil. R. S., c. 126, § 1-G, *supra.*

This court said in *Ruggles* v. *Berry,* 76 Me. 262, 268:

> "- - - - It was well said by SHAW, C. J., in *Crane v. Keating,* 13 Pick. 342, that 'the whole subject of the giving and taking of bail in civil actions is founded on statute, limited, regulated, and controlled by it; that a bail bond partakes very little of the nature of a contract between the parties in whose names it is taken, but is rather *a legal* proceeding in *the course of justice,* the effect of which is regulated by statute;' - - - -"

The Legislature has afforded no enacted provisions for admitting this petitioner to bail under the circumstances of the case at bar.

The mandate shall be:

Appeal denied.

STATE OF MAINE

vs.

BURLEIGH JAMES

Kennebec. Opinion, January 18, 1965.

Criminal Law. Evidence. Jury Charge.

Testimony of accomplice hoping to avoid prosecution or punishment is not incompetent, but its credibility is a matter for the jury, and such testimony need not be corroborated.

Defendant who failed to object to charge and offered no request for further instructions regarding testimony of accomplice waived any complaint with respect thereto.

ON EXCEPTIONS.

On exceptions by the respondent after conviction by a jury of the crime of breaking and entering with intent to commit larceny. Four exceptions overruled and one dismissed.

Jon Lund, County Atty., for State.

Henry Steinfeld,
John Fitzgerald,
Robert A. Wilson, for Defendant.

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

WEBBER, J. The respondent was tried by a jury and convicted of the crime of breaking and entering with intent to commit larceny. The issues raised on review are set forth in the bill of exceptions and will be considered in the order in which they appear.

EXCEPTION 1.

"The Respondent examined the State's chief witness, Conrad Sirois, in the absence of the jury. On the basis of the facts brought out that the witness stated that he was in fear and was testifying only because of pressures applied on him, the Court was asked to declare the witness incompetent which the Court refused to do."

The evidence discloses that the State's witness was the accomplice of the respondent and that for some time after the arrest of the witness he had been reluctant to name or identify his accomplice. He ultimately gave the requested information to the authorities in an effort to avoid or minimize the possibility that he might be prosecuted upon a criminal charge presently on file and receive a severe sentence thereon. He offered no objection to testifying as a witness for the State. He acknowledged that the authorities had requested only that he tell the truth and that no promises had been made in return for his cooperation. These were all matters which were fully disclosed to the jury as a part of the evidence for their consideration. The respondent seems to be proceeding upon the mistaken theory that a witness for the State whose willingness to give truthful evidence against a respondent is motivated by "fear" of consequences to himself if he remains silent should be declared "incompetent" by the presiding justice. The effect of the motion would be to suppress evidence otherwise admissible. The witness was entirely competent and the attempted impeachment by the respondent merely raised questions to be considered by the jury in assessing the credibility of the witness and the weight to be given to his testimony. It should be noted in passing that no constitutional rights of the respondent or the witness were asserted or in any way involved.

EXCEPTION 2.

"Several Exhibits were admitted in the case which were not tied in to the Respondent in any way. The Respondent seasonably objected but was overruled."

The exception does not adequately inform us as to what exhibits are alleged to have been improperly admitted or where in the record the rulings objected to may be found. The respondent's brief does not give us references to the record but does indicate that the exhibits referred to are a revolver, a flashlight and a screwdriver. A reading of the entire record indicates that these articles, owned by the State's witness, were used by him and the respondent in their concerted activities while engaged in the criminal acts alleged by the State. Under these circumstances their admissibility in evidence cannot seriously be questioned.

EXCEPTION 3.

"At the conclusion of the evidence, the Respondent moved for a directed verdict on the ground that the testimony of the State's chief witness, Conrad Sirois, was uncorroborated and, secondly, that it was inconsistent. In one breath he places the Respondent at the scene of the crime and he says that he was not. The Motion was denied."

The respondent recognizes that this court has heretofore adhered to the rule that one may be convicted upon the uncorroborated testimony of an accomplice. In *State* v. *Morey, et al.*, 126 Me. 323, 327, 138 A. 474, 475, the rule was thus stated:

> "The testimony of an accomplice is received, though with great caution and discrimination. His credibility is a question for the jury and they may convict on his testimony without corroboration, if sufficient to satisfy them beyond a reasonable doubt."

This rule was reaffirmed in *State* v. *Hume,* 146 Me. 129, 143, 78 A. (2nd) 496, 504. The respondent urges that we overrule these decisions and hold that a conviction based upon the uncorroborated testimony of an accomplice cannot be sustained. We see no occasion to depart from a rule which has served well for many years. The problem is essentially one of weight and credibility and we are satisfied that a jury, acting under proper instructions, can exercise that care and caution in evaluating the testimony of the accomplice which insure a fair trial to the respondent.

The respondent further contends that the testimony of the State's witness was so inconsistent as to be unworthy of belief and a convicion based thereon cannot be sustained. The witness first described the events which occurred some time before the commission of the crime. He and his father and the respondent were all present at a place known as the "Polish Club." The witness and his father were the first to leave these premises. They rode in the father's truck driven by the witness. They left at the "Polish Club" an automobile owned by the witness which was to be used and in fact was used by the respondent later in the evening. The witness testified that he "got off" the truck in Gardiner and waited for the arrival of the respondent James. When James arrived a few minutes later in the automobile owned by the witness, the latter joined the respondent and they proceeded together to Augusta and the scene of the crime. The witness described in detail their combined acts of burglary and their subsequent attempt to escape, an attempt in which the respondent was successful but the witness was not. During his cross-examination the witness was asked by the respondent's attorney:

"Q. Isn't it a fact, Conrad, that Burleigh was not with you that evening after you left the Polish Club?

A. Yes sir.

Q. That is a fact?
A. Yes sir.

THE COURT: May the Reporter read that question again to the witness.

(The last two questions were read by the Reporter)

THE COURT: Do you understand that question?

THE WITNESS: Yes sir, I was with my father.

THE COURT: May I have that question again?
(The question was read again by the Reporter)

THE COURT: Well, you have answered you were with your father. You may proceed."

Later in redirect examination the witness was asked:

"Q. Conrad, has anybody asked you to say anything on the stand other than the truth?
A. No sir.
Q. When you have been on the stand today, have you told the truth?
A. Yes sir.

This was immediately followed by the following recross examination:

"Q. And everything that you have testified today right there has been the truth?
A. Yes sir.
Q. You haven't varied once?
A. No sir."

The respondent reads into this bit of testimony a complete repudiation by the witness of all of his detailed narrative account of the events which occurred that evening after he rejoined the respondent in Gardiner. The jury, however, was entitled to take into account its observation of the witness and the extent of his apparent comprehension of semantics and his mastery of the niceties of English

grammar. The jury was entitled to conclude that the witness intended no more than that he was not in the company of the respondent at the time he left the Polish Club and immediately thereafter. The jury must have determined, and properly so, that the witness did not intend by his use of the word "after" to convey the impression that he was never again during that entire night in the company of the respondent. The answer when so construed is entirely consistent with the narration of the events of the night and is further consistent with the above quoted unqualified affirmation by the witness that he had at no time in his testimony deviated from the truth. We are satisfied that the evidence in the case was not marked by that degree of inconsistency and lack of credibility which would preclude a finding of guilt beyond a reasonable doubt.

EXCEPTION 4.

"Nowhere in the instructions to the jury did the Court inform them that while a jury may convict on the testimony of an accomplice, they may not unless the testimony of the accomplice is supported by corroborative evidence, which it was not in this case."

The legal principle which the respondent here seeks to invoke has been fully analyzed and discussed in our comment on Exception 3. We need only add that the respondent offered no objections to the instructions given to the jury and offered no requests for further instructions. Maine Criminal Rules, Rule 8 (155 Me. 645, 646) provides in part: "Objections to any portion of the charge or omission therefrom must be made before the jury retires to consider its verdict *or be regarded as waived.*" (Emphasis ours.)

EXCEPTION 5.

"The verdict is against the law and the weight of the evidence."

This exception must be dismissed.

The entry will be

Exceptions 1 to 4 inclusive overruled.
Exception 5 dismissed.
Judgment for the State.

STATE OF MAINE
vs.
RONALD BEY

Kennebec. Opinion, January 20, 1965.

Criminal Law. Evidence. Assault and Battery. Appeals. Exceptions.

Appeals in criminal cases are unknown to the common law and are wholly statutory.

In failing to present trial court with a motion for a new trial due to alleged lack of evidence and to thereby secure denial of motion upon which an appeal could be founded, assault and battery defendant had not established basis for an appeal.

Trial court's determination that assault and battery of which defendant was found guilty was of a high and aggravated nature could be attacked by exception despite failure to reserve exception upon trial.

Whether an assault and battery shall be punished as of a high and aggravated character depends upon the proof; the conduct may constitute a misdemeanor or a felony.

"Assault and battery of a high and aggravated nature" is an unlawful act of violent injury to person of another."

ON EXCEPTIONS.

This is upon respondent's exceptions to the finding by presiding justice that an assault was of a high and aggravated nature. Exceptions overruled.

Foahd Saliem, Asst. County Atty., for State.

Robert Martin,
Philip S. Bird, for Defendant.

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

MARDEN, J. On exceptions. A jury found the appellant guilty of assault and battery. The presiding justice found that the assault and battery was of a high and aggravated nature and sentenced accordingly.

Appellant purports to come to this court on exceptions and appeal. He assigns as exceptions:

1. That the verdict was against the evidence.

2. That the verdict was against the weight of the evidence, and

3. That the finding by the presiding justice that the offense was of a high and aggravated nature, was erroneous as a matter of law.

The record indicates, and indeed counsel concedes, that no exceptions were reserved during the trial. No motion for a new trial was presented to the trial court.

The common law provided no appeal, and access to this court for review of exceptions as to matters of law and the record as to matters of fact, is gained only by provisions of the statute. *Sears, Roebuck & Co.* v. *City of Portland, et al.*, 144 Me. 250, 254 68 A. (2nd) 12; R. S., 1954, Chapter 103, § 15 and Supplement; R. S., 1954, Chapter 106, § 14 and Supplement; R. S., 1954, Chapter 148, § 30 and Supplement, and see "Some Suggestions on Taking a Case to the Law Court" by the late Chief Justice, Edward F. Merrill as printed in 1951 Proceedings Maine Bar Association.

The insufficiency of evidence to support this verdict is not reviewable by the exceptions here expressed. There was no denial by the presiding justice of a motion by the accused for a directed verdict upon which an exception could be reserved. *State* v. *Navarro,* 131 Me. 345, 347, 163 A. 103. There was no denial by the presiding justice of a motion by the respondent for a new trial due to alleged lack of evidence and denial of that motion upon which an appeal could be founded. *State* v. *Sutkus,* 134 Me. 100, 101, 182 A. 15. There was no basis established in the present case for an appeal.

While no exception was reserved on the legality of the trial court's determination that the assault and battery of which the appellant was found guilty was of a high and aggravated nature, such ruling may be attacked by exception and the allowance by the trial court of an exception upon this point, we accept as conclusive. *Peter P. Carey* v. *Bourque-Lanigan Post No. 5, The American Legion, et al.,* 149 Me. 390, 394, 102 A. (2nd) 860. The only point before us for review is upon that exception.

We have, however, studied the record and the procedural lapse which forecloses exceptant from a review of the facts upon which his conviction is found is of no prejudice to him. The verdict of guilt on assault and battery came from dispute of fact supplied by a number of witnesses and in the light of all the evidence the jury was warranted in believing beyond a reasonable doubt that the accused was guilty. *State* v. *Bernatchez,* 159 Me. 384, 193 A. (2nd) 436.

The prosecution of the exception is in reality an "appeal" from the sentence imposed.

A discussion of the offense of assault and battery as defined in R. S., Chapter 130, § 21[1] will serve only to update

[1] "Whoever unlawfully attempts to strike, hit, touch or do any violence to another however small, in a wanton, willful, angry or insulting manner, having an intention and existing ability to do

the case law on the subject. *Rell* v. *State,* 136 Me. 322, 9 A. (2nd) 129; and *State* v. *McKrackern,* 141 Me. 194, 41 A. (2nd) 817, establish the law controlling the present case. Our statute does not create an offense of *aggravated* assault whereby an aggravated assault must be defined. At common law there were, and are, no degrees of the offense of assault and battery. The term aggravated assault had, and has, no technical meaning. There was, and is, but one grade of the offense and the penalty varies according to the discretion of the court. "(F)rom early times, * * * it has been the judicial habit to look upon assaults as more or less aggravated by such attendant facts as appealed to the discretion for a heavy penalty." *Rell,* at 325. Whether an assault and battery shall be punished as of a high and aggravated character depends upon the proof. The offensive conduct may constitute a misdemeanor or a felony.

The "facts which establish that the offense is or is not of a high and aggravated nature go only to the measure of punishment * * * ." *McKrackern,* at 207.

We do not understand the exceptant to urge that *Rell* and *McKrackern* have not established the law, but that a definition of assault and battery of a high and aggravated nature should be established as a matter of judicial policy whereby the trial court may have definitive bounds within which to operate, which bounds, applied in the present case, would as a matter of law prevent a finding of aggravation.

Our statute is only declaratory of the common law, *Rell, supra,* and the common law defines assault and battery of a

---

some violence to such person, is guilty of an assault; and if such attempt is carried into effect, he is guilty of an assault and battery. Any person convicted of either offense, when it is not of a high and aggravated nature, shall be punished by a fine of not more than $100 or by imprisonment for not more than 6 months, or by both such fine and imprisonment; and when the offense is of a high and aggravated nature, the person convicted of either offense shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 5 years, when no other punishment is prescribed."

high and aggravated nature "as an unlawful act of violent injury to the person of another, accompanied by circumstances of aggravation, such as the use of a deadly weapon, the infliction of serious bodily injury, the intent to commit a felony, great disparity between the ages and physical conditions of the parties, a difference in the sexes, indecent liberties or familiarities with a female, the purposeful infliction of shame and disgrace, resistance of lawful authority, or other aggravating circumstances." 6 Am. Jur. (2nd), Assault and Battery, § 50.

Whether or not facts exist to constitute aggravation of the charge is a matter for the presiding justice and "if in his opinion aggravation did attend the commission of the assault, then under the statute he had a right to give the more severe sentence as he did." *McKrackern,* at 208.

The presiding justice did not record his reasons for his finding of aggravation, nor was he required to do so. The record does reflect that, at time of trial, the person assaulted was 20 years of age, 5 feet 7 inches tall and weighed 120 pounds, and the assailant, here exceptant, was 26 years of age, "around" 6 feet tall and weighed 185 pounds. We cannot say that, at time of the event, there was not a "great disparity" between, if not the ages, the physical conditions of the parties. The presiding justice observed the two men, we cannot. We cannot say that there was not "purposeful infliction of shame and disgrace" upon the smaller man. There was credible evidence that the respondent continued to strike the complainant after the latter had been rendered unconscious by blows dealt by the respondent. The presiding justice could properly conclude on the basis of the evidence that the assault was wholly unprovoked and that there were no extenuating circumstances whatever. We cannot say that there were not "other aggravating circumstances." The exception must be overruled.

So ordered.

Judgment for the State.

STATE OF MAINE
vs.
ROBERT F. VILES, SR.

Cumberland. Opinion, January 28, 1965.

Sodomy.

Penetration of anus is essential element of offense of sodomy.

ON APPEAL.

This is an appeal from the denial of defendant's motion for a new trial. Appeal denied; judgment for the state.

Walter G. Casey, Asst. County Atty., for State.

Joseph E. Brennan, for Defendant.

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

MARDEN, J. On appeal. After a verdict of guilty to a charge of sodomy, seasonable motion for a new trial upon allegation that the verdict was against the evidence and denial of that motion, the respondent appealed. The single question before this court is whether in view of all the testimony, the jury was warranted in believing beyond a reasonable doubt that the respondent was guilty as charged. *State* v. *Croteau,* 158 Me. 360, 361, 184 A. (2nd) 683.

The charge is founded upon complaint by the respondent's daughter, 15 years of age at the time of the alleged offense, that on December 21, 1963 in the absence of the wife and mother, the respondent and complainant engaged in perversive sexual conduct in which the girl's anus was involved. The crucial element of fact is whether or not during the incident there was penetration of the complain-

ant's *anus* by the male sex organ of the accused. Such penetration is an essential element of the offense. 48 Am. Jur., Sodomy, § 2.

The word *"anus"* (or any synonymous word) appears no where in the record. All reference to that portion of the complainant's body allegedly involved is recorded as "rectum." The two words identify separate portions of the human anatomy.

The rectum is "the terminal part of the intestine * * * from the sigmoid flexure to the anus." The anus is "the posterior opening of the alimentary canal." Webster's Third New International Dictionary, Unabridged, 1961.

Any penetration of the rectum from without, would, by physical necessity, involve a penetration of the anus, but there could be a penetration of the anus without penetration of the rectum.

Apart from the conclusion which would have to follow a finding of penetration of the rectum, whether or not the rectum were penetrated is technically irrelevant to this case. The fact that State's counsel, witnesses and the presiding justice used the word in obvious reference to the anal orifice, cures no deficiency in the record. We can test the validity of the verdict only upon the premise that if the jury were justified in finding that there were penetration of the complainant's rectum by the virile sex organ of the respondent, there had to be penetration *per anum,* — upon which the charge necessarily has to be based.

The accusation stands or falls upon the direct testimony of the complainant and certain statements made by the accused in the presence of the complainant, her mother, and attending officers. The extraction of the facts controlling the charge is complicated by the allegations that the respondent's sexual endeavors were directed both to the anterior and posterior portions of the complainant's body.

Portions of both her testimony and the statements attributed to the respondent are unclear as to which feature of the incident the testimony and statements relate. Evidence relating the defendant's conduct to the girl's genitals is fully as specific as that relating to her anus.

If there were conduct on the part of the accused directed toward what might be considered as conventional sexual intercourse, while this conduct might well violate some of our statutes (R. S., 1954, Chapter 134, § 6, indecent liberties; Chapter 130, § 11, carnal knowledge; Chapter 134, § 2, incest), such evidence would not warrant a finding of commission of a crime against nature. The validity of the finding of guilt upon the offense with which the respondent was charged, must turn upon the evidence dealing with the respondent's efforts directed to the posterior region of the girl's anatomy.

Without rehearsing the evidence, and conceding that the testimony of the girl was at times equivocal, that her understanding of the meaning of the word "penetration" was unclear, that she was perhaps academically slow and, at trial, a bewildered girl of teen age, — all of which bear upon the weight which the jury might give her narration, there is evidence to support the verdict.

Complainant testified upon recall:

"Q. (By Mr. Casey) When you testified previously this morning, did you understand what I meant?

"A. No, I didn't.

"Q. And I am going to ask you one other question, Sally. Did some part of his penis enter your rectum?

"A. Yes."

An officer testified as to an interview with the respondent:

"A. He would — the act of which he was, about which he was accused was explained to him in detail and he told me, 'I did it.' "

The case presented a typical jury question.

Upon the record, the jury was warranted in finding, beyond a reasonable doubt, that the respondent was guilty as charged.

Appeal denied.
Judgment for the State.

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

* * * * *

QUESTIONS PROPOUNDED BY THE HOUSE IN AN ORDER DATED JANUARY 14, 1965 ANSWERED JANUARY 26, 1965

HOUSE ORDER PROPOUNDING QUESTIONS

STATE OF MAINE

IN HOUSE
January 14, 1965

WHEREAS, in connection with the proposed examination by the House Committee on Elections into the ballots cast in the general election of November 3, 1964, for the House seat in the class towns of Brooks, Burnham, Jackson, Monroe, Swanville, Thorndike, Troy, Unity and Waldo, certain questions have arisen with regard to the validity of certain ballots because of a contest for said seat by Herbert E. Ryan of Brooks who contests the seating of John A. Burwell of Unity; and

WHEREAS, Herbert E. Ryan of Brooks caused a recount to be had before the convening of the Legislature before the appropriate election officials of the State of Maine at which recount both parties were represented; and

WHEREAS, this recount resulted in an agreement between Mr. Ryan and Mr. Burwell that there were 921 votes cast for each, and that there were four ballots in dispute, three challenged by Mr. Ryan and one challenged by Mr. Burwell, and

WHEREAS, this matter was brought to the attention of the House of Representatives when it organized on January 6, 1965, and

WHEREAS, the House referred to the Committee on Elections for its review the question of who should have the seat for the class towns above mentioned, and

WHEREAS, Mr. Burwell and Mr. Ryan have agreed that the recounted ballots are, as far as the tie is concerned, acceptable, and that the ballots in dispute will decide the election, and

WHEREAS, the ballots in dispute are attached hereto and made a part hereof and are identified by markings affixed to each ballot which have been placed there by officials of the State of Maine and are not considered distinguishing marks, namely, number 1 through 4, inclusive, and

WHEREAS, no evidence has been offered to the House of Representatives or to the Committee on Elections that there has been any fraud of any nature or description in the casting of the votes in question, and

WHEREAS, it appears that the reason for counting these questionable ballots one way or another must appear upon the face thereof and must, therefore, be reduced to a question of law, and

WHEREAS, it appears to the Members of the House of Representatives of the 102d Legislature that questions of law have arisen which make this occasion a solemn one;

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

I

Is ballot No. 1 a valid ballot?

II

If the answer to question No. I is in the affirmative, for whom should the ballot be counted?

III

Is ballot No. 2 a valid ballot?

IV

If the answer to question No. III is in the affirmative, for whom should the ballot be counted?

V

Is ballot No. 3 a valid ballot?

VI

If the answer to question No. V is in the affirmative, for whom should the ballot be counted?

VII

Is ballot No. 4 a valid ballot?

VIII

If the answer to question No. VII is in the affirmative, for whom should the ballot be counted?

Presented by: BISHOP
Town: PRESQUE ISLE

Order reproduced and distributed under the direction of the Clerk of the House.

HOUSE OF REPRESENTATIVES
READ AND PASSED
UNDER SUSPENSION OF RULES
JAN. 14, 1965
(s) Jerome G. Plante
Clerk

A true copy.
ATTEST: Jerome G. Plante
Jerome G. Plante, Clerk

ANSWERS TO THE JUSTICES

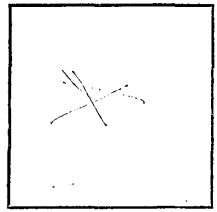
To the Honorable House of Representatives
of the State of Maine:

In compliance with the provisions of Section 3 of Article VI of the Constitution of Maine, we, the undersigned Justices of the Supreme Judicial Court, have the honor to submit the following answers to the questions propounded on January 14, 1965.

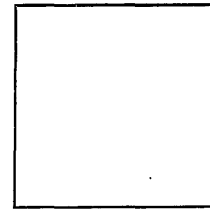
QUESTION NO. I: "Is ballot No. 1 a valid ballot?"

ANSWER: This ballot bears a symbol in the Republican Party square, and two portions of a line in the Democratic Party square, which portions could have been opposite ends of a single line partially erased or each an outside end of crossing line partially erased as shown by a photostatic copy below.

TO VOTE A STRAIGHT TICKET MARK A CROSS (X) OR A CHECK MARK (√) WITHIN THIS SQUARE



TO VOTE A STRAIGHT TICKET MARK A CROSS (X) OR A CHECK MARK (√) WITHIN THIS SQUARE



IF YOU DO NOT VOTE A STRAIGHT TICKET, MAKE A CROSS (X) OR A CHECK MARK (√) IN THE SQUARE AT THE RIGHT OF THE NOMINEE FOR WHOM YOU WISH TO VOTE. FOLLOW DIRECTIONS AS TO THE NUMBER OF NOMINEES TO BE ELECTED TO EACH OFFICE. YOU MAY VOTE FOR A PERSON WHOSE NAME DOES NOT APPEAR ON THE BALLOT BY WRITING IT IN THE PROPER BLANK SPACE AND MARKING A CROSS (X) OR A CHECK MARK (√) IN THE PROPER SQUARE AT THE RIGHT. DO NOT ERASE NAMES.

REPUBLICAN	DEMOCRATIC
For President and Vice President of the United States	**For President and Vice President of the United States**
GOLDWATER and MILLER ☐	JOHNSON and HUMPHREY ☐
☐	☐
For United States Senator Vote for One	**For United States Senator** Vote for One
CLIFFORD G. McINTIRE, Perham ☐	EDMUND S. MUSKIE, Waterville ☐
☐	☐
For Representative to Congress Vote for One	**For Representative to Congress** Vote for One
STANLEY R. TUPPER, Boothbay Harbor ☐	KENNETH M. CURTIS, Cape Elizabeth ☐
☐	☐
For State Senator Vote for One	**For State Senator** Vote for One
RICHARD W. GLASS, Belfast ☐	DONALD J. RUTTENBERG, Searsport ☐
☐	☐
For Register of Probate Vote for One	**For Register of Probate** Vote for One
LYTLE E. EATON, Belmont ☐	☐
☐	
For Sheriff Vote for One	**For Sheriff** Vote for One
FREDERICK B. MESERVEY, Belfast ☐	☐
☐	
For County Attorney Vote for One	**For County Attorney** Vote for One
ROGER F. BLAKE, Belfast ☐	☐
☐	
For County Commissioner (Short Term—2 Years) Vote for One	**For County Commissioner (Short Term—2 Years)** Vote for One
PHILIP S. HAWKINS, Knox ☐	PHILIP R. STEELE, Troy ☐
☐	☐
For County Commissioner (Long Term—6 Years) Vote for One	**For County Commissioner (Long Term—6 Years)** Vote for One
CLARENCE A. PAUL, Belfast ☐	JAMES S. FROST, Swanville ☐
☐	☐
For Representative to the Legislature Vote for One	**For Representative to the Legislature** Vote for One
JOHN A. BURWELL, Unity ☐	HERBERT E. RYAN, Brooks ☐
☐	☐

Challenge to the validity of this ballot must rest upon either (a) a faulty symbol manifesting the intent of the voter, or (b) that the symbol used is a distinguishing mark.

The statute (R. S., 1954, Chapter 3-A, § 88) Title 21, § 922 M.R.S. provides that "a voter shall mark his ballot at the general election with a (X) or a check mark (√) according to the following provisions: * * * "

The statute (R. S., Chapter 3-A, § 1) Title 21, § 1 subsection 9, defines a "distinguishing mark" as "a mark on a ballot of a type or in a place not specifically permitted by this chapter, indicating the apparent intent of the voter to make his ballot distinguishable." This statute has incorporated the holdings of prior case law.

In *Murray* v. *Waite,* 113 Me. 485, 488 it was held that a ballot having a cross "with an extra line entering into it" was valid.

> "The plain intendment of the statute seems to be that all ballots marked with a cross in the square at the head of the column shall be counted, if the intention of the voter can be ascertained, no matter whatever other casual, accidental, mistaken or unnecessary marks the voter may have placed upon the ballot, provided the same are not deemed to have been fraudulently made." *Libby v. English* 110 Me. 449, 455, followed in *Murray, supra.*

In Opinion of the Justices 124 Me. 490, ballots were under examination where the cross on the square bore an additional mark or marks in, through or across it and the court said:

> "We think all these should be counted. They are all crosses and more, and the more did not vitiate the cross. In the absence of any evidence of intentional fraud in making them as distinguishing marks, they are not to be rejected."

The fact that a cross is irregular, does not of itself vitiate the ballot. *Frothingham* v. *Woodside,* 122 Me. 525, 535.

In so far as the symbol is a cross, though modified, this ballot is valid.

As to its characteristic as a distinguishing mark, our law was declared in *Bartlett* v. *McIntire,* 108 Me. 161, when the court said:

> "After a careful consideration of the subject in view of the purpose of the law and the sacredness of the right of franchise, we are of opinion that before a ballot is rejected because of an alleged distinguishing mark, we should be satisfied from an inspection of the ballot itself, which is the only evidence before us, of three things:
>
> "First, that the mark is in fact a distinguishing mark, that is a mark or device of such a character as to distinguish this ballot from others.
>
> "Second, that it was made intentionally and not accidentally.
>
> "Third, that it was intended to be a distinguishing mark. In other words we think no ballot should be rejected on the ground of bearing a distinguishing mark unless it is such a one as fairly imports, upon its face, design and a dishonest purpose.
>
> "A mark upon a ballot may be a distinguishing mark in fact, and yet be of such a character as to show that it was accidentally made, or even that it was intentionally made, but for some other purpose than a distinguishing mark, because a distinguishing mark in fact is not necessarily a distinguishing mark in law."

As to the remnants of a symbol in the Democratic Party square, the erasure, if any there were, without breaking the paper does not make the ballot a mutilated ballot. *Murray, supra,* at 488. Within the Democratic Party square on this ballot is the appearance of a single line intended as part of a cross, with a change of mind or dis-

covery of a mistake on the part of the voter, and an attempt to erase the line followed with an "emphasized" cross in the Republican Party square. Applying the principles reviewed above, Ballot No. 1 is a valid ballot.

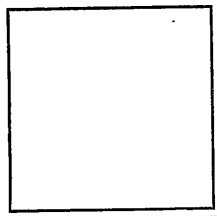
QUESTION NO. II: "If the answer to question No. I is in the affirmative, for whom should the ballot be counted?"

ANSWER: Ballot No. 1 should be counted for John A. Burwell.

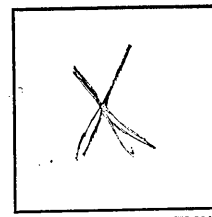
QUESTION NO. III: "Is ballot No. 2 a valid ballot?"

ANSWER: Ballot No. 2 bears a symbol in the Democratic Party square and a short line in the square after the names of the candidates for President and Vice President of the United States, as shown by the following photostatic copy.

TO VOTE A STRAIGHT TICKET MARK A CROSS (X) OR A CHECK MARK (√) WITHIN THIS SQUARE



TO VOTE A STRAIGHT TICKET MARK A CROSS (X) OR A CHECK MARK (√) WITHIN THIS SQUARE



IF YOU DO NOT VOTE A STRAIGHT TICKET, MAKE A CROSS (X) OR A CHECK MARK (√) IN THE SQUARE AT THE RIGHT OF THE NOMINEE FOR WHOM YOU WISH TO VOTE. FOLLOW DIRECTIONS AS TO THE NUMBER OF NOMINEES TO BE ELECTED TO EACH OFFICE. YOU MAY VOTE FOR A PERSON WHOSE NAME DOES NOT APPEAR ON THE BALLOT BY WRITING IT IN THE PROPER BLANK SPACE AND MARKING A CROSS (X) OR A CHECK MARK (√) IN THE PROPER SQUARE AT THE RIGHT. DO NOT ERASE NAMES.

REPUBLICAN		DEMOCRATIC	
For President and Vice President of the United States		**For President and Vice President of the United States**	
GOLDWATER and MILLER	☐	JOHNSON and HUMPHREY	√
For United States Senator Vote for One		**For United States Senator** Vote for One	
CLIFFORD G. McINTIRE, Perham	☐	EDMUND S. MUSKIE, Waterville	☐
For Representative to Congress Vote for One		**For Representative to Congress** Vote for One	
STANLEY R. TUPPER, Boothbay Harbor	☐	KENNETH M. CURTIS, Cape Elizabeth	☐
For State Senator Vote for One		**For State Senator** Vote for One	
RICHARD W. GLASS, Belfast	☐	DONALD J. RUTTENBERG, Searsport	☐
For Register of Probate Vote for One		**For Register of Probate** Vote for One	
LYTLE E. EATON, Belmont	☐		☐
For Sheriff Vote for One		**For Sheriff** Vote for One	
FREDERICK B. MESERVEY, Belfast	☐		☐
For County Attorney Vote for One		**For County Attorney** Vote for One	
ROGER F. BLAKE, Belfast	☐		☐
For County Commissioner (Short Term—2 Years) Vote for One		**For County Commissioner (Short Term—2 Years)** Vote for One	
PHILIP S. HAWKINS, Knox	☐	PHILIP R. STEELE, Troy	☐
For County Commissioner (Long Term—6 Years) Vote for One		**For County Commissioner (Long Term—6 Years)** Vote for One	
CLARENCE A. PAUL, Belfast	☐	JAMES S. FROST, Swanville	☐
For Representative to the Legislature Vote for One		**For Representative to the Legislature** Vote for One	
JOHN A. BURWELL, Unity	☐	HERBERT E. RYAN, Brooks	☐

The symbol qualifies as a cross. The intent of the elector to vote a straight ticket is clear. The small line in the square after the names of the Presidential and Vice Presidential candidates neither adds nor detracts from the clearly expressed intent and do not justify a conclusion that it is a distinguishing mark in law. Applying the principles expressed in answer to Question No. I, Question No. III is answered in the affirmative.

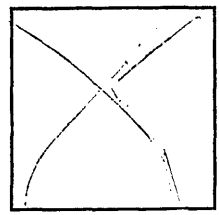
QUESTION NO. IV: "If the answer to question No. III is in the affirmative, for whom should the ballot be counted?"

ANSWER: Ballot No. 2 should be counted for Herbert E. Ryan.

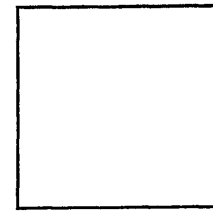
QUESTION NO. V: "Is ballot No. 3 a valid ballot?"

ANSWER: Ballot No. 3 has a symbol in the Republican Party square as shown by photostatic copy below.

TO VOTE A STRAIGHT TICKET MARK A CROSS (X) OR A CHECK MARK (√) WITHIN THIS SQUARE



TO VOTE A STRAIGHT TICKET MARK A CROSS (X) OR A CHECK MARK (√) WITHIN THIS SQUARE



IF YOU DO NOT VOTE A STRAIGHT TICKET, MAKE A CROSS (X) OR A CHECK MARK (√) IN THE SQUARE AT THE RIGHT OF THE NOMINEE FOR WHOM YOU WISH TO VOTE. FOLLOW DIRECTIONS AS TO THE NUMBER OF NOMINEES TO BE ELECTED TO EACH OFFICE. YOU MAY VOTE FOR A PERSON WHOSE NAME DOES NOT APPEAR ON THE BALLOT BY WRITING IT IN THE PROPER BLANK SPACE AND MARKING A CROSS (X) OR A CHECK MARK (√) IN THE PROPER SQUARE AT THE RIGHT. DO NOT ERASE NAMES.

REPUBLICAN		DEMOCRATIC	
For President and Vice President of the United States		**For President and Vice President of the United States**	
GOLDWATER and MILLER	X	JOHNSON and HUMPHREY	
For United States Senator Vote for One		**For United States Senator** Vote for One	
CLIFFORD G. McINTIRE, Perham	X	EDMUND S. MUSKIE, Waterville	
For Representative to Congress Vote for One		**For Representative to Congress** Vote for One	
STANLEY R. TUPPER, Boothbay Harbor	X	KENNETH M. CURTIS, Cape Elizabeth	
For State Senator Vote for One		**For State Senator** Vote for One	
RICHARD W. GLASS, Belfast	X	DONALD J. RUTTENBERG, Searsport	
For Register of Probate Vote for One		**For Register of Probate** Vote for One	
LYTLE E. EATON, Belmont	X		
For Sheriff Vote for One		**For Sheriff** Vote for One	
FREDERICK B. MESERVEY, Belfast	X		
For County Attorney Vote for One		**For County Attorney** Vote for One	
ROGER F. BLAKE, Belfast	X		
For County Commissioner (Short Term—2 Years) Vote for One		**For County Commissioner (Short Term—2 Years)** Vote for One	
PHILIP S. HAWKINS, Knox		PHILIP R. STEELE, Troy	
For County Commissioner (Long Term—6 Years) Vote for One		**For County Commissioner (Long Term—6 Years)** Vote for One	
CLARENCE A. PAUL, Belfast	X	JAMES S. FROST, Swanville	
For Representative to the Legislature Vote for One		**For Representative to the Legislature** Vote for One	
JOHN A. BURWELL, Unity	√	HERBERT E. RYAN, Brooks	

In addition to the symbol in the Republican Party square, crosses are placed in each square after the names of the several candidates including the name of John A. Burwell. The symbol in the party square is an acceptable cross to indicate the voter's intention to vote a straight ticket, and the additional crosses after the name of each candidate in the party column must be interpreted either as an act of the elector to make his intent doubly clear or as a "distinguishing mark."

> "The general rule regarding the validity of ballots which are properly marked by crosses, yet contain an additional mark, is that where the additional marks are not intended to distinguish the ballot and are of such a character that they cannot identify the voter afterward, ballots so marked are considered to be valid unless they contravene some express statute." 18 Am. Jur., Elections § 188. See also § 187.

While election statutes throughout the country are peculiar to their respective states, the following cases support the rule above quoted upon facts which closely parallel those before us. *Potts* v. *Folsom,* 104 P. 353 (Okla. 1909); *State* v. *Clark,* 182 P. (2nd) 68, [2] 72 (Wash. 1947); *Spurrier* v. *McLennan,* 88 N. W. 1062, ¶ 5 1064 (Iowa 1902); *Whittam* v. *Zahorik,* 59 N. W. 57, ¶ 2 61 (Iowa 1894); and *Appeal of Gallagher,* 41 A. (2nd) 630, [1-4] 631 (Pa. 1945).

In *Libby, supra,* at page 455, and quoted above, we have said that "unnecessary" marks, innocently made, do not vitiate the ballot. The applicable statute (R. S., 1954, Chapter 3-A, § 88) Title 21, § 922, prescribing the manner by which an elector may vote a straight ticket (originating in a new draft of the laws pertaining to elections by P. L., 1961, Chapter 360, § 1) makes it *mandatory* that the voter mark his ballot by either a cross (X) or a check mark (√) but in voting a straight ticket those marks *may* be applied

in either of two ways, — a mark in the party square or a mark in the square at the right of (the name of) each nominee for whom he wishes to vote. Mandate in one clause and permission in the other are significant. We cannot say that the legislature intended (by P. L., 1961, Chapter 360, § 1 incorporated in R. S., 1954, Chapter 3-A, § 88 and now Title 21, § 922) to nullify ballots which clearly evidence the intention of the voter and merely contain additional "unnecessary" marks innocently made. Applying these principles and those expressed in answer to Question No. I, we find that the superfluous crosses are not distinguished marks and that Ballot No. 3 is a valid ballot.

QUESTION NO. VI: "If the answer to question No. V is in the affirmative, for whom should the ballot be counted?"

ANSWER: Ballot No. 3 should be counted for John A. Burwell.

QUESTION NO. VII: "Is ballot No. 4 a valid ballot?"

ANSWER: Ballot No. 4 contains a check mark in the Democratic Party column after the name of the Presidential and Vice Presidential candidates; a check mark in the square after the name of the candidate for United States Senator; a cross in the square after the name of the Representative to Congress and a symbol in the square after the name of John A. Burwell in the Republican Party column as shown in the photostatic copy below.

TO VOTE A STRAIGHT TICKET MARK A CROSS (X) OR A CHECK MARK (√) WITHIN THIS SQUARE

TO VOTE A STRAIGHT TICKET MARK A CROSS (X) OR A CHECK MARK (√) WITHIN THIS SQUARE

IF YOU DO NOT VOTE A STRAIGHT TICKET, MAKE A CROSS (X) OR A CHECK MARK (√) IN THE SQUARE AT THE RIGHT OF THE NOMINEE FOR WHOM YOU WISH TO VOTE. FOLLOW DIRECTIONS AS TO THE NUMBER OF NOMINEES TO BE ELECTED TO EACH OFFICE. YOU MAY VOTE FOR A PERSON WHOSE NAME DOES NOT APPEAR ON THE BALLOT BY WRITING IT IN THE PROPER BLANK SPACE AND MARKING A CROSS (X) OR A CHECK MARK (√) IN THE PROPER SQUARE AT THE RIGHT. DO NOT ERASE NAMES.

REPUBLICAN		DEMOCRATIC	
For President and Vice President of the United States		**For President and Vice President of the United States**	
GOLDWATER and MILLER		JOHNSON and HUMPHREY	X
For United States Senator Vote for One		**For United States Senator** Vote for One	
CLIFFORD G. McINTIRE, Perham		EDMUND S. MUSKIE, Waterville	X
For Representative to Congress Vote for One		**For Representative to Congress** Vote for One	
STANLEY R. TUPPER, Boothbay Harbor		KENNETH M. CURTIS, Cape Elizabeth	
For State Senator Vote for One		**For State Senator** Vote for One	
RICHARD W. GLASS, Belfast		DONALD J. RUTTENBERG, Searsport	
For Register of Probate Vote for One		**For Register of Probate** Vote for One	
LYTLE E. EATON, Belmont			
For Sheriff Vote for One		**For Sheriff** Vote for One	
FREDERICK B. MESERVEY, Belfast			
For County Attorney Vote for One		**For County Attorney** Vote for One	
ROGER F. BLAKE, Belfast			
For County Commissioner (Short Term—2 Years) Vote for One		**For County Commissioner (Short Term—2 Years)** Vote for One	
PHILIP S. HAWKINS, Knox		PHILIP R. STEELE, Troy	
For County Commissioner (Long Term—6 Years) Vote for One		**For County Commissioner (Long Term—6 Years)** Vote for One	
CLARENCE A. PAUL, Belfast		JAMES S. FROST, Swanville	
For Representative to the Legislature Vote for One		**For Representative to the Legislature** Vote for One	
JOHN A. BURWELL, Unity	X	HERBERT E. RYAN, Brooks	

This symbol might be accepted as either a cross or a check mark and its peculiarity alone does not justify a conclusion that it was intended as a distinguishing mark. Applying the principles expressed in answer to Question No. I, Ballot No. 4 is a valid ballot.

QUESTION NO. VIII: "If the answer to question No. VII is in the affirmative, for whom should the ballot be counted?"

ANSWER: Ballot No. 4 should be counted for John A. Burwell.

Dated at Augusta, Maine, this 26th day of January, 1965.

Respectfully submitted:

s/ ROBERT B. WILLIAMSON

s/ DONALD W. WEBBER

s/ WALTER M. TAPLEY, JR.

s/ FRANCIS W. SULLIVAN

s/ CECIL J. SIDDALL

s/ HAROLD C. MARDEN

STATE OF MAINE
vs.
DAVID ROSS

Aroostook. Opinion, February 2, 1965

Appeals. Criminal Law.

By filing no brief and making no argument, defendant abandoned challenge to legal sufficiency of State's complaint.

ON APPEAL.

Defendant appeals from judgment of Superior Court. Held, by filing no brief and making no argument, defendant abandoned the challenge to legal sufficiency of the State's complaint. Case remanded to Superior Court.

John O. Rogers, County Attorney, for State.

Nathan H. Solman, for Defendant.

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

MEMORANDUM DECISION

This case was reported to the Law Court by agreement of the parties upon defendant's demurrer and State's joinder.

The defendant has filed no brief and has made no argument. Defendant has accordingly abandoned his challenge of the legal sufficiency of the State's complaint.

The entry will be:

Case remanded to the Superior Court.

JOSEPH A. FOURNIER D/B/A ROYAL SIDING & ROOFING CO.
vs.
MAINE EMPLOYMENT SECURITY COMMISSION

Androscoggin. Opinion, February 5, 1965

Taxation.

Employer claiming exemptions has burden of satisfying Employment Security Commission as to application of elements of test set forth in unemployment compensation statute as to relationship to him of individuals who received commissions as salesmen.

In proceeding before Employment Security Commission to determine whether additional contributions were due from employer based upon remuneration paid as commissions to salesmen the weight and credibility of employer's testimony was for the commission.

ON APPEAL.

Employer appeals from decision of the Superior Court which sustained holding of the Maine Employment Security Commission. Held, that individuals who were paid commissions as salesmen, were not engaged in an independently established trade, occupation, profession or business and that therefore Plaintiff was liable for additional contribution to unemployment compensation fund for remuneration paid them. Appeal denied.

John G. Marshall, for Plaintiff.

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

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

WEBBER, J. The appellant Fournier is engaged in the business of selling and installing roofing and siding ma-

terials. He is admittedly a covered employer within the meaning of the Maine Employment Security Law, R. S., 1954, Chap. 29 (now 26 M.R.S.A. Sec. 1041 *et seq.*). The only issue raised is whether or not additional contributions are due from appellant based upon remuneration paid as "commissions" to "salesmen" in 1959 and subsequently. The appellant denies liability and contends that the individuals who received such remuneration were without exception independent contractors, brokers or so-called "free lancers" and not employees within the meaning of the Act.

Decision necessarily rests on the application of the so-called ABC tests set forth as R. S., 1954, Chap. 29, Sec. 3, Subsec. XI, Par. E, Subpar. 1, 2 and 3; now 26 M.R.S.A. Sec. 1043 - 11E (1, 2, 3). Exemption is established only if all three conditions are met. *Hasco Mfg. Co.* v. *MESC* (1962), 158 Me. 413, 185 A. (2nd) 442. The Commission found that the employer had failed to meet any of the three required tests. On appeal the Superior Court determined as a matter of law that the Commission was in error as to proof of the A and B tests but sustained its conclusion with respect to the C test. Since the employer may prevail here only if the decision below was "clearly erroneous" (*Hasco, supra*), we confine ourselves to the allegation of error with respect to the C test as set forth in Subparagraph 3.

The pertinent portion of the statute is as follows:

> "E. Services performed by an individual for remuneration shall be deemed to be employment subject to the provisions of this chapter unless and until it is shown *to the satisfaction of the commission that:* * * * and
>
> 3. Such individual is customarily engaged in an independently established trade, occupation, profession or business." (Emphasis ours.)

It is not disputed that certain individuals received remuneration from the appellant treated on his books as

"commissions" paid for services rendered. The latter then has the burden of satisfying the Commission as to the application of the elements of the C test set forth in Subparagraph 3 above to these individuals. In this connection the Commission stated in its decision, "We find that the salesmen in question are not engaged in an independently established trade, occupation, profession or business."

The record before us discloses no error. We are not informed as to the names of the persons whose remuneration has been included for computation purposes. The sole witness with respect to the C test was the appellant himself. His testimony was in general terms and with respect to other alleged business activities of his "salesmen" may properly have been regarded by the Commission as vague and inconclusive. None of the so-called "salesmen" was presented to describe his business activities apart from services performed for the appellant. There was no other independent or impartial evidence as to the activities of these individuals. Reference was made by the appellant to his business transactions with a firm known as Lotti & Stuart. This testimony was not helpful since it appears that Lotti & Stuart was treated for computation purposes as a straight subcontractor and was not included as a claimed "employee." Reference was also made to a Mr. Goldstein but the record is nowhere clear as to whether or not he was ever paid for services and, if so, when or in what amount. The appellant testified in part with respect to Mr. Goldstein: "So, when I seen that that was the kind of man he was, I refused to take his contract and I told him that I wouldn't have no business with him whatsoever." Whether or not Mr. Goldstein may have operated an independent business is not material unless it is first shown that an effort is being made to treat him as an "employee" of the appellant. The same may be said of references in the testimony as to alleged independent activities of a Mr. Bergeron. The appellant indicated that there are at least

three other unnamed "salesmen" who "really never sold for anybody but (appellant)."

We cannot see beyond the record here presented. The weight and credibility of the appellant's testimony was for the Commission. We can only say that the evidence before us does not show with any certainty whatever that each of these unidentified "employees" was "customarily engaged in an independently established trade, occupation, profession or business" as required by the so-called C test.

Appeal denied.

CHARLES SHANE, ET AL.
vs.
MARCIA COLSON, ET AL.

Waldo. Opinion, February 12, 1965.

Appeal and Error.

Appellants abandoned points made as basis for appeal where they filed no brief and made no argument.

ON APPEAL.

Plaintiff's appeal from judgment for defendant on complaint and counterclaim. Held: that appellants abandoned points made as basis for appeal where they filed no brief and made no argument. Appeal denied.

Brann and Isaacson,
by *Irving Isaacson,* for Plaintiffs.

David A. Nichols, for Colson.
George A. Wathen,
William M. Finn, for Hills.

MEMORANDUM DECISION

This case comes to the Law Court on plaintiffs' appeal from orders of judgment for the defendant Marcia Colson upon the complaint and upon her counterclaim.

The plaintiffs have filed no brief and have made no argument. They have accordingly abandoned the points made as a basis for appeal.

The entry will be

Appeal denied.

GEORGE E. HOWARD II

vs.

ROBERT BROWN

Piscataquis. Opinion, February 15, 1965.

Property. Chattel Mortgages. Torts. Trover and Conversion. Estoppel.

Possession of personal property is deemed prima facie evidence of title and right to possession and person who claims adversely has burden of showing right to immediate possession superior to that of one in actual possession.

In appropriate circumstances equitable estoppel can defeat recovery for alleged conversion.

One may be bound by his conduct, and where there is duty to speak, by his silence.

Purported assignee of mortgage could not maintain action of trover where mortgage assignment never was legally recorded, his attempted foreclosure was interrupted by intervention of bankruptcy proceeding and mutual agreements placing property in hands of trustee, and defendant another mortgagee was in actual possession of chattels at time action was instituted.

Plaintiff, who had agreed with defendant and referee in bankruptcy of mortgagor to accept settlement whereby plaintiff and defendant would receive approximately two-thirds of amount claimed and whereby they were permitted to file claims for unpaid balance as unsecured creditors, was estopped from continuing his action for conversion where defendant, in reliance on agreement, abandoned his own claim of mortgage priority.

ON APPEAL.

Plaintiff appeals decision of Superior Court. Held, plaintiff was estopped from proceeding with his action because of his agreement with referee in bankruptcy of mortgagor and defendant, another mortgagee, whereby plaintiff and defendant received approximately two-thirds of amount claimed and were permitted to file claims for unpaid balance as unsecured creditors and as consequences of which defendant abandoned his own claim of mortgage priority. Appeal denied.

John L. Easton, for Plaintiff.

Arthur C. Hathaway, for Defendant.

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

WEBBER, J. On August 10, 1959 the plaintiff commenced an action against the defendant for an alleged conversion of chattels by writ sounding in trover returnable to the September term of the Superior Court within and for the County of Piscataquis. On March 23, 1962 the matter was submitted to the determination of the justice below upon an agreed statement of facts. Decision having been rendered for the defendant, the plaintiff now appeals.

The material facts agreed upon may be restated as follows: On February 18, 1958 the Piscataquis Contracting Company gave a chattel mortgage to one Gellerson covering

a number of items of personal property including a truck, compressor and roller which are the subject of this trover action. The mortgage was intended to secure an indebtedness of $2971.21 which as of August 1, 1959 had been reduced to $2564.58. This mortgage was recorded in the office of the town clerk of Dover-Foxcroft in Book 14, Page 325, but no notation of the date and time of the recording was made on the records of the clerk. It is agreed, however, that the mortgage was in fact recorded at 11:25 A.M. on February 21, 1958. On that day, February 21, 1958, Gellerson gave an assignment of the mortgage to the plaintiff. This assignment was never recorded. On April 22, 1959 Piscataquis gave a chattel mortgage to the defendant which also covered numerous items including the three chattels here in controversy. This mortgage was given to secure an indebtedness of $1500. The defendant's mortgage was recorded in the same office of the town clerk in Vol. 14, Page 381, but again no record was made of the date and time of recording. A notation was made on the mortgage itself showing a recording date of May 1, 1959. Some time in June, 1959 Piscataquis delivered the three items together with a certain jackhammer to the defendant in payment of the debt owed the defendant. On July 24, 1959 the plaintiff instituted foreclosure of his assigned mortgage by causing notice to be served on the president of Piscataquis. Service was made on July 27, 1959 by a deputy sheriff. On August 1, 1959 the plaintiff instituted replevin action against both Piscataquis and the defendant but the officer was unable to take possession of the chattels in the defendant's possession. At that time or shortly thereafter the plaintiff did obtain possession of those chattels remaining in the hands of Piscataquis. On August 4, 1959 Piscataquis filed a petition in the bankruptcy court. On August 10, 1959 a deputy sheriff made demand upon the defendant for the items here in controversy and upon the defendant's refusal to relinquish them he made service

on the defendant of the writ now before us. On August 19, 1959 a trustee in bankruptcy was appointed. Some time in September the trustee ordered both plaintiff and defendant to deliver to him the personal property in their possession which had belonged to the bankrupt company. After some delay and an initial refusal, both plaintiff and defendant delivered the personal property in their hands to the trustee with the understanding that the proceeds of the sale thereof would be held in escrow until a determination could be made as to the disposition thereof. In October, 1959 the property was sold at public auction and several thousands of dollars came into the hands of the trustee. The trustee then challenged the efficacy of the mortgages on the basis of inadequate record and the status of the priority claims of the parties remained in abeyance and under consideration until 1961. In November, 1961 the referee in bankruptcy conferred with the parties, reviewed the assets on hand and the claims filed. He gave it as his opinion that the failure in recording placed the plaintiff and the defendant on an equal footing and offered a compromise settlement by which the plaintiff would receive $1,750 and the defendant $1,000, in each case approximately two-thirds of the amount claimed. He further offered to permit the plaintiff and defendant to file claims for the unpaid balance as common creditors. It is further agreed that the value of the chattels at the time of the alleged conversion as evidenced by their sale value at public auction was $1,670. Although the fact was not expressly included in the agreed statement, the justice below in his findings noted that the parties accepted the compromise settlement offered by the referee in bankruptcy and the parties by their brief and argument here concede this to be the fact.

R. S., 1954, Chap. 178, Sec. 2, which, although since repealed, was in force and governed the rights of the parties in 1959 provided in part:

> "The clerk shall record all such mortgages * * * in a book or books kept for that purpose, *noting therein* and on the mortgage * * * the time when it was received, and it shall be considered as recorded when received. * * * ." (Emphasis ours.)

The requirement of noting the time of receipt on the clerk's record was essential to an effective and valid recording. *Monaghan* v. *Longfellow* (1889), 81 Me. 298, 17 A. 74; see *Stafford* v. *Morse* (1902), 97 Me. 222, 227, 54 A. 397, 399. In *Monaghan* the clerk had the original mortgage in his possession with the time of reception noted upon it and the court held that the notice thus afforded was binding on the subsequent attaching creditor. The opinion made it clear, however, that the attempted recording itself was incomplete and null and void. In the instant case, even though we were to assume that the time of receipt was noted on the original Gellerson mortgage, there is no suggestion that the clerk had that mortgage in his possession either at the time the defendant accepted his mortgage or later when he took delivery of the mortgaged items from the mortgagor. As between the plaintiff and the defendant, therefore, the plaintiff's mortgage must be viewed as though never recorded.

This defendant received delivery of the articles here in controversy from his mortgagor in a non-tortious manner. The possession of personal property is deemed prima facie evidence of title and the right to possession. One who claims adversely has the burden of showing a right to immediate possession superior to that of the one in actual possession. *Stevens* v. *Gordon* (1895), 87 Me. 564, 567; 33 A. 27; *James* v. *Wood* (1889), 82 Me. 173, 177, 19 A. 160, 161; see *State* v. *Mitchell* (1955), 150 Me. 396, 397, 113 A. (2nd) 618, 619.

With what evidence does the plaintiff seek to overcome the prima facie title of the defendant? He shows the giv-

ing of a mortgage to one Gellerson, never legally recorded. We are not told whether by the terms of the mortgage the mortgagee was entitled to immediate possession upon default or when, if ever, any default occurred. He shows an assignment of the mortgage, never recorded. He shows an attempted foreclosure by plaintiff in his own name as purported assignee, which foreclosure if it had any legal significance whatever was in any event interrupted by the intervention of bankruptcy proceedings and mutual agreements placing the property in the hands of the trustee. We discover here no evidence of title or the right to immediate possession superior to the right of the defendant who at the time the action was instituted was in actual possession. The required basis for an action of trover is not laid.

The justice below rested his decision for the defendant on the ground that the plaintiff was estopped to proceed with his action by the fact of his agreement with the referee in bankruptcy and the defendant. With this conclusion we concur. That equitable estoppel can defeat recovery for alleged conversion in appropriate circumstances is clear. *Rogers* v. *Street Railway* (1905), 100 Me. 86, 90, 60 A. 713, 714. One may be bound by his conduct and, where there is a duty to speak, by his silence. What were the circumstances here? The referee made a single offer to plaintiff and defendant simultaneously. In substance it was that each should abandon his claim of priority based upon mortgage and should accept the lesser amount proffered by way of compromise. Each was to then proceed by proof of claim as on an unsecured debt. It is inconceivable that the offer did not hinge on the acceptance thereof by both the plaintiff and the defendant. We are satisfied that the referee in bankruptcy could not have intended otherwise, and the plaintiff and defendant must reasonably have so understood. In accepting the offer, therefore, the defendant had a right to assume that the plaintiff by his ac-

ceptance intended to and did thereby waive and abandon all further claim arising by or through his mortgage or assignment. The plaintiff was then in an appropriate tribunal for the determination of his claim of priority as an alleged mortgage creditor and could have insisted on maintaining and asserting that position. In reliance upon this apparent waiver on the part of the plaintiff the defendant made his own election. He changed his position, abandoned his own claim of mortgage priority, accepted a lesser sum than the amount owed him, and assumed the position of an unsecured creditor. Moreover the effect of the agreement was to permit the plaintiff to share in the proceeds from the sale of chattels which the defendant in good faith had claimed. The plaintiff could not thereafter in equity and good conscience be permitted to assert against the defendant a right to immediate possession arising under the very mortgage which he had purported to waive and abandon in order to induce the defendant to change his position. At the very least he had a duty before participating with the defendant in a settlement agreement requiring the consent of both to inform the defendant that he intended and proposed to pursue further his pending action for alleged conversion. We are satisfied that both by conduct and silence the plaintiff was estopped to continue with the action now before us.

Appeal denied.

STATE OF MAINE
vs.
NAGEB COREY

Aroostook. Opinion, February 16, 1965.

Criminal Law.

Supreme Court would not decide important question of law on report wholly unaided by brief or argument of counsel for criminal respondent, but would discharge report and remand case.

ON REPORT.

This criminal prosecution on report by agreement of parties upon agreed statement of facts. Held, that the Supreme Court would not decide important question of law on report wholly unaided by brief or argument of counsel for criminal respondent but would discharge report and remand case. Report discharged and case remanded.

John O. Rogers, Aroostook County Attorney, for State.

David Solman, for Defendant.

MEMORANDUM DECISION

This case was reported to the Law Court by agreement of the parties upon an agreed statement of facts.

The defendant has filed no brief and has made no argument. The court deems it inexpedient to decide an important question of law *on report* wholly unaided by brief or argument of counsel for a criminal respondent.

The entry will be

Report discharged.
Case remanded to the Superior Court.

HAROLD KENNEDY

vs.

LESTER LACOMBE

Kennebec. Opinion, February 24, 1965.

Torts. Directed Verdict.

The accountability for sustaining the preponderant proof of negligence imputable to the defendant as a proximate cause of the plaintiff's injuries rested with the Plaintiff.

Evidence that adequate passing room remained, that oncoming motorist had obstructed vision, and that trucker attempted to warn motorist of hazard, supports decision that trucker was entitled to a directed verdict.

ON APPEAL.

In this tort action for personal injuries resulting from a collision of motor vehicles, the plaintiff appeals the granting of a motion for a directed verdict for defendant which was entered after jury had returned verdict for plaintiff. Held that evidence was adequate to support lower court's granting of a directed verdict. Appeal denied.

Richard J. Dubord,
Robert A. Marden, for Plaintiff.

Brown, Wathen and Choate,
by *George A. Wathen and*
William M. Finn, for Defendant.

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

SULLIVAN, J. This is a tort action for personal injuries consequential to a collision of motor vehicles. The plaintiff

who related that he was a passenger in an automobile driven northerly on the divided four lane public highway near Freeport asserted that the defendant had negligently parked the latter's truck illegally and dangerously upon a traveled portion of that highway and thus became the occasion of a collision of the car in which the plaintiff was riding with the defendant's stationary truck and of plaintiff's resultant injuries. Defendant traversed plaintiff's complaint in the main and countered that the plaintiff was the negligent operator of the automobile and not a passenger. A jury trial culminated in a verdict for damages in favor of the plaintiff. Defendant moved that such verdict be set aside and that judgment be entered for him in accordance with his earlier motion made at the close of the evidence for a directed verdict in defendant's favor. The presiding justice directed entry of judgment for the defendant as if defendant's requested verdict had been directed. *M. R. C. P., 50 (b).* The plaintiff has appealed.

The evidence establishes some unrefuted details. At dusk on March 25, 1958 the defendant drove his truck northerly on Route #95 at a location somewhat less than 3 miles from the center of Brunswick and about 15 miles from Yarmouth. On the median strip dividing the 4 travel lanes of Route #95 into 2 roadways he saw a Chevrolet car stuck fast in the snow. In that vehicle were a young man and 2 boys. Defendant stopped to be helpful. He attached his towing chain to the Chevrolet and dragged the latter on to the double pavement of Route #95 a distance of 100 feet, more or less. The roadway was free of snow and dry. The weather was fair. Defendant and the car's occupants were hoping by traction in gear to start the car's stalled motor. It had become evident from ominous noises that there had developed a mechanical rupture in the car and that continued hauling might be damaging. Defendant drew to the right border of the highway. To his rear he had a view for a distance between 500 and 600 feet and no

traffic was proceeding northerly on the one way division of the route. Defendant entered upon the breakdown strand at his right. He noticed in his mirror that the young man was steering the Chevrolet by the end of defendant's truck body toward the guard rail alongside the highway. Defendant stopped, leaving his truck in gear. It was becoming dark. The lights of the truck and of the Chevrolet were illuminated save for the missing right tail light of the latter. Lights on the truck were blinking at intervals. There were reflectors upon the truck at the back corners on the frame underneath the body. The truck stood partly on the concrete slab and in part on the breakdown area which was 10 or 12 feet wide. The 2 concrete road strips comprising that half of Route #95 were each 12 feet in width. To the left of the truck on the concrete was a clearance of 15 feet. Behind the truck stood the Chevrolet, one half upon the concrete lane and one half upon the breakdown strip leaving a clear passage to its left on the 2 lane travel highway of some 17 feet.

Defendant walked to the rear of his truck and unhooked the towing cable from the Chevrolet. He noticed the Ford car containing the plaintiff coming over the hill some 500 feet to the south or west at considerable speed. Defendant had a flashlight. He walked back of the Chevrolet. He swung the illuminated flashlight to signal, warn or direct the driver of the approaching Ford car. Without slackening its speed or changing its course or leaving its lane the Ford car collided with the left portion of the truck. Some of the right side of the Ford car was sheared off. Plaintiff and a companion became injured.

Defendant had halted his truck some 5 minutes before the collision.

Plaintiff testified that he had no memory of the accident or of events which preceded the collision earlier in the day. His companion in the Ford asserted to the court that plain-

tiff was the operator of the Ford at the time of the accident and was not a passenger.

R. S., 1954, c. 22, § 126 provided in pertinent application here as follows:

> "No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any way outside of a business or residence district, when it is practicable to park or leave such vehicle standing off of the paved or improved or main traveled portion of such way; provided in no event shall any person park or leave standing any vehicle, whether attended or unattended, upon any way unless a clear and unobstructed width of not less than 10 feet upon the main traveled portion of said way opposite such standing vehicle shall be left for free passage of other vehicles thereon, nor unless the operator of an approaching vehicle can have a clear view of the way for a distance of 300 feet beyond the parked or standing vehicle, before approaching within 200 feet of such vehicle - - - -"

The parking of the truck by the defendant was the resultant of such factors as the mechanical plight of the disabled Chevrolet and the steering of its youthful operator away from the truck and toward the guard rail. It had become temporarily unpracticable for the defendant to drive his truck completely off the paved highway. A clear and unobstructed width of 15 feet was left opposite the standing truck and upon the concrete travel lane for the free passage of other vehicles. The testimony imparts that a clear view to the rear of the truck for 500 or 600 feet was available to vehicles which might approach from the south or west and photographic exhibits disclose an additional view of more than 300 feet to the north of the truck's position without visual interruption or break. Route #95 was an access controlled highway and was restricted to one way

travel southerly and northerly of the truck's position. There was considerable illumination at the position of the truck and Chevrolet. Defendant with his flashlight aglow forewarned the driver of the approaching Ford and indicated the clear and unobstructed portion of the concrete highway to the truck's left. Some 5 minutes had elapsed between the halting of his truck by the defendant and the disastrous collision.

The accountability for sustaining the preponderant proof of negligence imputable to the defendant as a proximate cause of the plaintiff's injuries rested with the plaintiff. The evidence fails to demonstrate such negligence.

The mandate must be:

Appeal denied.

KENDALL A. YOUNG, PETITIONER
vs.
ERNEST H. JOHNSON, STATE TAX ASSESSOR
ROSCOE B. JACKSON MEMORIAL LABORATORY,
INTERVENOR
MOUNT DESERT ISLAND BIOLOGICAL LABORATORY,
INTERVENOR

Penobscot. Opinion, February 26, 1965.
Mandamus. Taxation.

Mandamus is proper remedy to compel State Tax Assessor to perform duty he is obliged to perform if requirements of such writs are met.

Although writ of mandamus is authorized by statute, it is governed by rules of common law.

Mandamus is extraordinary remedy; it requires doing of some specific duty imposed by law, which applicant otherwise without remedy, is entitled to have performed.

Mandamus is designed to compel action and not to control decision; the writ is granted in sound discretion of the court; it is not a writ of right.

If public officers are required to act in judicial or deliberate capacity, court cannot control their official discretion, but by mandamus may compel them to exercise it.

Mandamus is available to promote justice when there has been an abuse of discretion which has resulted in manifest injustice.

Peremptory writ of mandamus may grant relief short of the full extent requested and ordered by the alternative writ.

Duties and authority of local tax assessors are imposed by law; assessors are not liable to direction and control of municipality. Town has no power to abate tax assessed by local assessors.

Peremptory writ of mandamus must state duty required in clear, distinct and explicit terms.

Commands of peremptory writ of mandamus cannot enlarge upon those contained in alternative writ.

State tax assessor could not be compelled by writ of mandamus to cause to be placed upon assessment rolls for taxation real or personal property.

Peremptory writ of mandamus is tested by same principles applicable in construing sufficiency of alternative writ; it differs from alternative writ only in omission of alternative clause, substituting therefor peremptory and absolute command against which no cause can be shown.

ON APPEAL.

Petitioner appeals from decision of lower court and petitions for writ of mandamus to compel State Tax Assessor to cause to be placed upon assessment rolls for taxation certain real estate and personal property. Held, a direct order to the local assessor was entirely discretionary on part of State Tax Assessor and that the State Tax Assessor could not be compelled by mandamus to order local assessors. Appeal dismissed and peremptory and alternative writ quashed.

Orman G. Twitchell, for Petitioner.
Ralph W. Farris, Asst. Atty. Gen.,
for State Tax Assessor.

Mitchell and Ballou,
by *James E. Mitchell,* for Jackson Memorial Lab.

Edwin R. Smith,
for Mount Desert Island Biological Laboratory.

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

SIDDALL, J. This is a petition for mandamus brought by the plaintiff, a resident and taxpayer of the Town of Bar Harbor, hereafter called the Appellant, against the State Tax Assessor, hereafter called the Assessor. The complaint, as amended, seeks to compel the Assessor to cause to be placed upon the assessment rolls for taxation at their just value, certain real estate and personal property of the Roscoe B. Jackson Memorial Laboratory, hereafter called the Memorial Laboratory, and of the Mt. Desert Island Biological Laboratory, hereafter called the Biological Laboratory. The Memorial Laboratory and the Biological Laboratories each filed a petition for leave to participate in the action in such manner as the court might direct, and was ordered to show cause against the issuance of the writ and granted leave to make a return to the writ. An alternative writ of mandamus was issued by the court ordering the Assessor to cause to be placed upon the assessment rolls for the Town of Bar Harbor the said real estate and personal property. The Assessor, as well as the Laboratories, filed an answer thereto.

The Assessor filed a motion to dismiss the alternative writ on the grounds that (1) the petition and alternative writ, as amended, fails to show any legal duty on the part of the Assessor that he had not already performed, (2) the

statute involved is discretionary on the part of the Assessor, (3) mandamus is no longer available for review of administrative action. (R. 80, B1 R.C.P.), (4) said alternative writ upon its face shows that all legal duties imposed upon the Assessor by R. S., 1954, Chap. 16, Sec. 68 and 72 have been fully complied with, (5) that the alternative writ fails to allege sufficient facts to show that the Assessor has the ability to perform the commands of the alternative writ. The issues raised in the motion to dismiss were disposed of in the judgment rendered by the court below.

The court, after hearing, found the great bulk of the real and personal properties of the Laboratories to be tax-exempt, and directed the Assessor to cause certain other properties to be placed upon the assessment rolls for taxation. From this decision an appeal was taken by the Appellant.

In his petition the Appellant sets forth the duties of the Assessor as they are contained in R. S., 1954, Chap. 16, Sec. 68, as amended, and in Sec. 72 of the same chapter. We quote the pertinent parts of these sections as follows:

> "The state tax assessors shall have and exercise general supervision over the administration of the assessment and taxation laws of the state, and over local assessors and all other assessing officers in the performance of their duties, to the end that all property shall be assessed at the just value thereof in compliance with the laws of the state." R. S., 1954, Chap. 16, Sec. 68, as amended.

> "The state tax assessor shall, at his own instance or on complaint made to him, diligently investigate all cases of concealment of property from taxation, of under valuation and of failure to assess property liable to taxation. He shall bring to the attention of town assessors all such cases in their respective towns. He shall direct proceedings, actions, and prosecutions to be instituted to enforce all laws relating to the assessment and

> taxation of property and to the liability of individuals, public officers and officers and agents of corporations for failure or negligence to comply with the provisions of the laws governing the assessment or taxation of property, and the attorney general and county attorneys, upon the written request of the state tax assessor, shall institute such legal proceedings as may be necessary to carry out the provisions of this chapter. The state tax assessor shall have power to order the reassessment of any or all real and personal property, or either in any town wherein his judgment such reassessment is advisable or necessary to the end that all classes of property in such town shall be assessed in compliance with the law. Neglect or failure to comply with such orders on the part of any assessor or other official shall be deemed willful neglect of duty and he shall be subject to the penalties provided by law in such cases."
>
> R. S., 1954, Chap. 16, Sec. 72.

The Assessor contends that mandamus does not lie in this case because the Appellant has an adequate remedy for review by filing a complaint with the court under the provisions of Rule 80B MRCP. Under Rule 80B (a) MRCP, when a statute provides for review by the Superior Court of any action by a government agency, etc., whether by appeal or otherwise, or when any judicial review of such action has theretofore been available by extraordinary writ, proceedings for such review shall be instituted by complaint. We agree with the conclusions of the justice below, that this rule, supplemented by Rule 81, (b) (1) is not applicable to the administrative action taken in this case, and that mandamus is the proper remedy provided that the requirements of such a writ are met. R. S., 1954, Chap. 16, Sec. 72 provides that the Assessor shall, at his own instance or on complaint made to him, investigate all cases of failure to assess property liable to taxation, and requires that the Assessor diligently investigate all such cases and bring

them to the attention of the local assessors. The Assessor in the instant case made an investigation, made findings, and notified the local assessors and the complainant. The statute does not provide for an appeal from the decision of the Assessor and a judicial review of that decision by extraordinary writ has never been available to a complainant. Our rules, undoubtedly, in many cases, require proceedings to be initiated by complaint, instead of by a petition for mandamus. The present case is not one of those cases. We consider the petition in this case to be a petition for mandamus brought by the Appellant to compel the Assessor to perform a duty which the Appellant claims the Assessor was obliged to perform, to wit: to cause certain property to be placed upon the assessment rolls of the Town of Bar Harbor. The proceedings are governed by the technical rules of law relating to mandamus.

The writ of mandamus is of ancient origin. Although the writ is authorized by R. S., 1954, Chap. 129, Sec. 17, as amended, it is governed by the rules of common law. *Weeks* v. *Smith, et al.,* 81 Me. 538, 544. Mandamus is an extraordinary remedy. The writ is one requiring the doing of some specific duty, imposed by law, which the applicant, otherwise without remedy, is entitled to have performed. *Rogers* v. *Selectmen of Brunswick,* 135 Me. 117, 119.

Mandamus is designed to compel action and not to control decision. The writ is granted in the sound discretion of the court. It is not a writ of right. *Chequinn Corporation* v. *Mullen, et al.,* 159 Me. 375, 377. If the officers are required to act in a judicial or deliberative capacity, the court cannot control their official discretion, but may compel them to exercise it. *Littlefield, Attorney General, et al.* v. *Newell, et al.,* 85 Me. 246, 249.

> "Mandamus is an appropriate and necessary proceeding where a petitioner shows: (1) that his right to have the act done, which is sought by the

> writ, has been legally established; (2) that it is the plain duty of the party against whom the mandate is sought to do the act, and in the doing of which no discretion may be exercised; (3) that the writ will be availing, and that the petitioner has no other sufficient and adequate remedy. *Dennett v. Mfg. Co.,* 106 Maine, 476, 478."
>
> *Webster* v. *Ballou,* 108 Me. 522, 524.

> "While authorities are numerous and in entire harmony upon the point in issue, we find a well expressed statement in a very recent note to *State v. Stutsman,* 776 Ann. Cases, 1914D, where the following language is used; 'When the law requires a public officer to do a specified act, in a specified way, upon a conceded state of facts, without regard to his own judgment as to the propriety of the act, and with no power to exercise discretion, the duty is ministerial in character and performance may be compelled by mandamus if there is no other remedy. When, however, the law requires a judicial determination to be made, such as the decision of a question of fact, or the exercise of judgment in deciding whether the act should be done or not, the duty is regarded as judicial and mandamus will not lie to compel performance.' See also High's Extraordinary Legal Remedies, Sec. 24; Wood on Mandamus Page 19; extensive note to *Dane v. Derby,* (54 Maine, 95) found in 89 Am. Dec., 722; and extensive note to *State v. Gardner,* 98 Am. St. Rep., 858; *Denett v. Acme Mfg. Co.,* 106 Maine, 476."
>
> *Nichols* v. *Dunton,* 113 Me. 282, 283, 284.

However, mandamus is available to promote justice when there has been an abuse of discretion which has resulted in manifest injustice. *Chequinn Corporation* v. *Mullen, et al., supra.*

It is here noted that the Appellant argues that the Assessor did not conduct a diligent investigation. If not, he undoubtedly could be compelled to make such an investigation,

as it was clearly his statutory duty to do so. However, we are not concerned with the claim of the Appellant in this respect. The Appellant does not seek to compel the Assessor to conduct a diligent investigation but to cause the properties of the Laboratories to be placed upon the tax rolls.

At this time we note also that the claim is made that the peremptory writ must strictly follow the alternative writ, and that if the full relief requested and ordered by the alternative writ cannot be granted no relief at all may be given. We consider such a harsh rule not applicable to the situation present in the instant case in which the peremptory writ does not enlarge upon the terms of the alternative writ, and orders the performance of only part of the acts referred to in that writ. It is sufficient for the purposes of this case to state that the peremptory writ was not broader in its terms than the alternative writ. We take this occasion, however, to suggest that we would not now be disposed to follow *Dane* v. *Derby,* 54 Me. 95, 102 insofar as that case holds that the peremptory writ may not grant relief short of the "full extent" requested and ordered by the alternative writ.

Was there a plain duty on the part of the Assessor to cause the property of the Laboratories to be placed upon the tax rolls?

Local assessors in this state have historically occupied a unique position as public officers. Their duties and authority are imposed by law. They are not liable to the direction and control of the municipality. A town has no power to abate a tax assessed by the local assessors. *Inhabitants of Brownville* v. *U. S. Pegwood and Shank Company,* 123 Me. 379, 382. R. S., 1954, Chap. 16, Sec. 68, as amended, gives the Assessor general supervision over the administration of the assessment and taxation laws of this state and over local assessors and all other assessing officers

in the performance of their duties. The provisions of this section, however, are not broad enough to authorize the Assessor to order the local assessors to include in the assessment rolls property considered by the local assessors to be tax exempt. Any authority on the part of the Assessor in this respect must be found, if any exists, in Section 72.

Under the provisions of Section 72 the Assessor has the power to order the reassessment of any or all real and personal property, or either, in any town where in his judgment such reassessment is advisable or necessary to the end that all classes of property in such town shall be assessed in compliance with the law. Assuming that this provision is broad enough to authorize the Assessor to order the local assessors to include in the tax rolls property theretofore carried as exempt property, we rule that under the terms of the statute action thereunder is entirely within the discretion of the Assessor. After receiving such an order the local assessors, upon failure to comply therewith, become liable for willful neglect of duty and subject to all penalties provided by law in such cases. Furthermore, the only appeal provided in such a case is by petition and appeal as from the original assessment. There is no provision for a hearing or for an appeal by the local assessors. Taking these factors into consideration, the Assessor might well hesitate to exercise his discretion by issuing such an order. The Assessor has the privilege of resorting to this procedure in all cases coming within the meaning of the statute but cannot be compelled by mandamus to do so.

In no other part of Section 72 is the Assessor empowered to control the action of the local assessors by ordering them to place property on the assessment rolls. He may thereunder direct the attorney general or the county attorney to institute legal proceedings to compel local assessors to comply with the provisions of law governing the assessment or taxation of property. In such event the local assessors

cannot be compelled to place property on the assessment rolls except after hearing and judgment against them. The Appellant does not ask that the Assessor be ordered to direct legal proceedings against the local assessors. He asks that the Assessor be ordered to cause the property to be placed upon the tax rolls, and the order in the alternative writ follows this request.

The alternative writ is regarded as the foundation of all the subsequent proceedings in the case. It should expressly and clearly state the precise thing which is required of the respondent. In its form and general features, the peremptory writ of mandamus differs only from the alternative writ in the omission of the alternative clause, substituting therefor a peremptory and absolute command against which no cause can be shown. It is tested by the same principles applicable in construing the sufficiency of the alternative writ. See High's Extraordinary Remedies, Sections 537, 538, 539, 548, and 564.

The *peremptory* writ of mandamus is a stern, harsh writ and when issued is an inflexible peremptory command to do a particular act without condition, limitation, or terms of any kind. Disobedience to its commands may subject the person against whom the writ is issued to proceedings for contempt. It is therefore essential that the mandate state the duty required in clear, distinct, and explicit terms. See *Bangor* v. *County Commissioners,* 87 Me. 294, 297. *Hartshorn* v. *Assessors of Ellsworth,* 60 Me. 276, 281; *Nolan* v. *McCoy* (R. I.) 73 A. (2nd) 693 (1950); 55 C. J. S. Mandamus, Secs. 318, and 319; 35 Am. Jur., Mandamus, Sec. 351 and 381.

An examination of the alternative writ discloses the following allegations, to wit, that it is the duty of the State Tax Assessor to exercise general supervision over the administration of the assessment and taxation laws of the

State of Maine, and over local assessors and all other assessing officers in the performance of their duties to the end that all property shall be assessed at their just value thereof in compliance with the laws of the state, and that it is the further duty of the State Tax Assessor to bring to the attention of the town assessors all cases in their respective towns consisting of failure to assess property liable to taxation, and it is his further duty to direct proceedings, actions, and prosecutions to be instituted to enforce all laws relating to the assessment and taxation of property.

The mandatory clause of the alternative writ commands the appellant to cause certain properties of the laboratories to be placed upon the assessment rolls.

It is clear that the commands of the peremptory writ cannot enlarge upon those contained in the alternative writ.

We have already determined that a direct order to the local assessors under Section 72 is entirely discretionary on the part of the Assessor. If the mandatory clause of the alternative writ was designed to order the Assessor to compel the local assessors to place the property on the tax rolls, on the theory that the Assessor had authority to do so under his general supervisory powers, the mandatory order was not proper because he had no general power to compel the local assessors to take such action. If it was the purpose of the alternative writ to compel the Assessor to direct the attorney general or county attorney to institute proceedings against the local assessors, the mandate does not so state with the clarity and explicitness to which the Assessor was entitled, and which the law requires to be given.

For the reasons hereinbefore stated no writ of mandamus may as a matter of law be issued to "cause to be placed upon the assessment rolls for taxation" real or personal property. At this point, under the facts peculiar to

this case, the entry as to the appeal poses a dilemma. Of the 13 points of appeal, all but 1 challenges the trial court's finding on the facts. The remaining point contends that the trial court erred in failing to order the peremptory writ upon the terms of the alternative writ. The effect of sustaining the appeal would imply that the appellant is entitled to all of the remedy which he seeks. A denial of the appeal would affirm the action of the trial justice and leave the peremptory writ in effect. Neither result is possible as a matter of law. We, therefore, dismiss the appeal and direct that both the peremptory and alternative writ be quashed. No costs to either party on appeal.

So ordered.

FARRAR BROWN COMPANY

vs.

ERNEST H. JOHNSON, STATE TAX ASSESSOR

Cumberland. Opinion, March 2, 1965.

Sales Tax. Assessments.

Tax assessor could not make sales tax deficiency assessment when taxpayer's sales records showed gross sales and credits due retailers on exempt sales were adequate to enable tax assessor to determine retail sales tax liability.

ON APPEAL.

Defendant, tax assessor, appeals from decision of lower court; issue is whether tax assessor may make a deficiency assessment covering sales for a 23-month period based upon an audit of sales during 4 months of the period when records were available for the entire 23-month period. Held, that tax assessor could not make deficiency assessment. Appeal denied.

Jensen and Baird,
by *Raymond E. Jensen* and
Robert W. Donovan, for Plaintiff.

Jon R. Doyle, John W. Benoit,
Ralph W. Farris, Asst. Attys. Gen., for Defendant.

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

TAPLEY, J. On appeal. Plaintiff, Farrar Brown Company, is registered as a retailer under the Maine Sales and Use Tax Law. It is primarily a wholesaler of automotive supplies and general merchandise. It operates 8 branches in addition to its main office located in Portland. In March of 1960 the State Tax Assessor made a deficiency sales tax assessment against Farrar Brown Company and later in June of 1960, after a hearing on a petition for reconsideration, the Tax Assessor reduced the amount of the assessment to $861.52. The plaintiff appealed the reduced assessment to the Superior Court, within and for the County of Cumberland. The case was heard before a single justice who found for the defendant in the total sum of $180.36, with interest to date of payment. Both parties seasonably appealed. Subsequently Farrar Brown Company, after notice to the attorneys for the Tax Assessor, withdrew its appeal. The case is before us on the appeal of the defendant.

The real issue in this case is whether the Tax Assessor may make a deficiency assessment covering sales for a 23-month period based on an audit of sales during 4 months of the period when the taxpayer had records for the entire 23-month period and made such records available for audit. The plaintiff from its main office and its 8 branch stores received approximately 1000 invoices each day. They were

processed and filed. Some of them contained taxable items and others did not. The auditors for the Tax Assessor's Department audited the records for August, September, October and November of 1959. The procedure the auditors employed was to check invoices and other records representing sales for the 4-month period. From an examination of these invoices and records they totaled the number of what they considered to be errors in taxable sales and then applied the total alleged errors against the gross sales volume for the 4-month period and determined a margin of error of .0089%. This margin of error was applied to a 23-month period. The application of this margin of error determined the amount of deficiency tax claimed to be due. The margin of error was projected over a period of 19 months "on the theory of ratio." This was the formula used and applied for the purpose of determining the amount of the deficiency tax assessment.

In considering this method of determining a deficiency assessment the presiding justice said:

> "These statutes, by implication, indicate that a deficiency tax assessment shall be determined on the basis of the records required to be kept by every retailer, and if necessary, on the basis of evidence gathered at hearings. Farrar Brown Co. has such record requirements. There is no provision for assessment by formulae and it is a general rule that taxing statutes will be strictly construed. The Tax Assessor would need specific authority to make an assessment based upon his 'margin of error' formula. Adoption of a rule authorizing a 'margin of error' assessment would seem to be inconsistent with legislative intention.
>
> "I am not satisfied by the testimony that authorized representatives of the parties to this litigation understood, agreed or stipulated that a margin of error, if any uncovered in an audit of a four-month test period would apply to an addi-

> tional twenty-month period resulting in a two-year tax deficiency assessment."

The ruling of the presiding justice is under attack by the defendant.

> "The Court erred in finding that the four-month test period used by appellant to determine tax liability could not be projected over or used as a basis for the entire period of the assessment."

The justice below also ruled:

> "I am satisfied that the plaintiff has maintained its records in accordance with applicable regulations."

The defendant in his statement of points on appeal takes issue by stating:

> "The Court erred in finding that the records of the plaintiff were of the kind and form prescribed by Revised Statutes 1954, Chapter 17, Section 29."

The statutory provisions pertinent to the issues in this case are:

> *"Deficiency assessment*
>
> "After a report is filed under chapters 211 to 225, the Tax Assessor shall cause the same to be examined, and may make such further audits or investigations as he may deem necessary and if therefrom he shall determine that there is a deficiency with respect to the payment of any tax due under chapters 211 to 225, he shall assess the taxes and interest due the State, - - - -." Chap. 17, Sec. 20, R. S., 1954 (36 M.R.S.A., Sec. 1955).
>
> *"Arbitrary assessment*
>
> "If any person shall fail to make a report as required, the Tax Assessor *may make an estimate of the taxable liability of such person from any information he may obtain, and according to*

such estimate so made by him, assess the taxes, interest and penalties due the State from such person, - - - -." Chap. 17, Sec. 19, R. S., 1954 (36 M.R.S.A., Sec. 1954). (Emphasis supplied.)

"*Jeopardy assessment*

"If the Tax Assessor finds that a person liable for a tax designs quickly to depart from this State or to remove his property therefrom, or to conceal himself or his property, or to discontinue business, or to do any other act tending to prejudice or to render wholly or partially ineffective proceedings to collect such tax, unless such proceedings be brought without delay, the Tax Assessor shall cause notice of such finding to be given such person, together with a demand for an immediate report and immediate payment of such tax. If report and payment are not made upon demand, the Tax Assessor *may make an estimate of the taxable liability of such person, from any information he may obtain, and according to such estimate, assess the taxes and interest due the State from such person.* - - - -." (Emphasis supplied.) Chap. 17, Sec. 21, R. S., 1954 (36 M.R.S.A., Sec. 1956).

"*Examination of records and premises*

"The Tax Assessor, whenever he shall deem it expedient, may make or cause to be made by any employee of the Tax Assessor engaged in the administration of chapters 211 to 225, an examination or investigation of the place of business, the tangible personal property, and the books, records, papers, vouchers, accounts and documents of any retailer. It shall be the duty of every retailer and of every director, officer, agent or employee of every retailer to exhibit to the Tax Assessor or to any such employee of the Tax Assessor, the place of business, the tangible personal property, and all of the books, records, papers, vouchers, accounts and documents of the said retailer, and to facilitate any such examination or investigation so far

as it may be in his or their power to do so. - - - -." Chap. 17, Sec. 25, R. S., 1954 (36 M.R.S.A., Sec. 1903).

"Records or retailers

"Every retailer shall keep records of his sales, - - - the kind and form of which shall be adequate to enable the Tax Assessor to determine the tax liability. - - -." Chap. 17, Sec. 29, R. S., 1954 (36 M.R.S.A., Sec. 2061).

Plaintiff corporation is primarily engaged in the wholesale business of selling automotive parts and general merchandise. Sales at wholesale comprise 99% of plaintiff's business. It operates 9 places of business located throughout the State of Maine. The type of merchandise and automotive equipment it sells varies from time to time — some new items are taken on and others are discontinued. The record describes in detail the method of operating the business. The invoices reflecting the sales, as to kind of merchandise, price, whether items are taxable or not and resale certificates, are kept for a 5-year period. They were all available for audit. When the auditors arrived the records were made available to them. In making the audit they were faced with a tremendous number of invoices and, after a few weeks of work, they decided that time would not permit the analysis of each invoice and other pertinent records. In order to facilitate the audit they made a judgment as to how much tax was due, as a deficiency assessment, by applying the percentage of error they found to exist in the 4-month period to the remaining 19 months.

Plaintiff contends there is no statutory authority for the audit procedures as were applied in the instant case. A review and study of the sections of statute pertaining to audits for determination of tax liability fail to show any statutory authority to employ the auditing practice as obtains here. The Legislature did, however, provide that if a

person fails to make a report to the Assessor, he may *estimate* the taxable liability from any information he may obtain and assess taxes on such procedure, Chap. 17, Sec. 19, R. S., 1954 (36 M.R.S.A., Sec. 1954), or the Assessor may determine tax liability *by estimate* under other circumstances not applicable to this case, Chap. 17, Sec. 21, R. S., 1954 (36 M.R.S.A., Sec. 1956). Most significant is the fact that under the section providing for further audit or investigations to determine a deficiency tax there is no authority to make a determination on the basis of the projection of a *margin of error* based upon a test period audit.

Farrar Brown Company is basically a wholesaler. Its annual gross sales, approximating $2,000,000, are produced from the sale of 50,000 different types of items. The plaintiff is subject to a tax on those items which it sells at retail. Most of the business is done through customers' retail sales certificates which demonstrate the fact that the customer has purchased the merchandise for resale, provided the certificate is "taken in good faith from a person engaged in selling tangible personal property who, at the time of purchase, intends to sell the property in the regular course of business or cannot then ascertain whether it will be sold or not," and, in addition, the seller satisfies other regulatory requirements pertaining to the resale certificate (Regulation #1). When the wholesaler complies with the requirements of Regulation #1 the resale certificate stands as evidence of no tax liability on the personal property described in the certificate. All resale certificates are on file at the main office and customers' invoices are checked against the resale certificates. An audit to determine tax would require a check of the invoice against a resale certificate. There are some circumstances where a direct retail sale is made but these situations are unusual and not many in number. The business is fluid and flexible in types and lines of merchandise sold by the plaintiff. Good business

policies require frequent changes in the types and character of the merchandise.

There is a marked distinction between the application of the sales and use tax law against a wholesaler as compared with a retailer. The wholesaler is not liable for a sales tax on any tangible personal property sold for resale but only when sold by the wholesaler at retail. In order to facilitate the determination of tax liability, the State Tax Assessor has issued Regulation #1 relating to the sale of taxable personal property for resale. The seller is relieved of the burden of proof "if he requires from his purchaser a resale certificate in accordance with the provisions of this regulation."

The plaintiff, being to all intents and purposes, a wholesaler, operated its business through the use and effect of resale certificates. It had on file in its main office 2000 resale certificates. The wholesaler is charged with a tax liability on all retail sales excepting those, of course, which are tax exempt. A test period applied to the records of a strictly retail business, where taxable items are more uniform and constant, would, no doubt, reflect a more accurate result.

The defendant contends that the presiding justice erred in finding that the records of the plaintiff were of the kind and form prescribed in Chap. 17, Sec. 29, R. S., 1954 (36 M.R.S.A., Sec. 2061) which reads in part:

> "Every retailer shall keep records of his sales, - - - the kind and form of which shall be adequate to enable the tax assessor to determine the tax liability."

The Tax Assessor does not claim that the books of account, bills, receipts and invoices were not kept or were not made available to the Assessor.

The statutory authority for a deficiency assessment is found in Chap. 17, Sec. 20, R. S., 1954 (36 M.R.S.A., Sec. 1955) wherein the Assessor is authorized to "make such further audits or investigations as he may deem necessary." There is no language in this section authorizing an audit by taking a test period, determining a margin of error therefrom and applying the percentage of error to the remaining period under investigation, thereby establishing a tax liability. It is reasonable to deduce that had the Legislature intended to authorize a determination of a deficiency tax by spot-check test period or projection of a "margin of error" it would have so provided in the same general manner as it did for *estimates* under Chap. 17, Secs. 19-21, R. S., 1954, (36 M.R.S.A., Secs. 1954-1956).

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear impact of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen."
>
> *Gould* v. *Gould,* 245 U. S. 151, 153.

> "- - - - We find no justification in the law for making assessment against vendors according to a flat rate, a weighted average percentage or any mathematical probabilities."
>
> *State* v. *Evatt,* 56 N. E. (2nd) 265, 281 (Ohio).

There are factual similarities between the case at bar and *State* v. *Mims,* 30 So. (2nd) 673 (Ala.) wherein *Mims,* under the Sales Tax Act, was charged with a final tax assessment. There was much to be desired in *Mims'* bookkeeping methods but they were sufficient to show sales and tax exempt items. The examiners audited a 13-months' period, finding that the taxpayer was 56% correct in his returns and was, therefore, 44% deficient. The 44% deficiency was

applied to the remaining time of the 5-year period and in this manner the tax was determined. The court said, on page 676:

> "As we view it, to hold for the State we must conclude, without proof to that effect, and notwithstanding Mims' testimony to the contrary, that because there was an error for the period of thirteen months, let it be said for 44%, that a like error was committed for the other years here involved, and that upon such percentage basis his assessment should be increased.
>
> "After a careful study of this record - - - we have concluded that such a holding would not be here justified."

There are no statutory auditing procedures prescribed excepting in Sec. 19 (Sec. 1954) and Sec. 21 (Sec. 1956) *supra,* where the Legislature has specifically conferred the right to base a tax liability on estimates. The two instances where the Legislature has authorized estimates are (1) where a taxpayer fails to make a report; and (2) where the departure from the State of a taxpayer is imminent or he removes his property therefrom, conceals himself or his property, or discontinues business. It is understandable under these circumstances that the Legislature deemed it necessary for a proper and efficient administration of the Sales and Use Tax Law to clothe the Assessor with the authority and power to determine tax liability by estimate. Under all other conditions the Legislature requires an audit based upon an examination of taxpayers' records and not the establishment of a tax liability by surmise and conjecture. Due to the fact that the plaintiff is engaged in a wholesale and not a retail business; that it follows from the nature of the business and the testimony that the lines of merchandise which it sells frequently change; that resale certificates play a major part in the determination of tax liability, it would appear that a deficiency tax

assessment under Sec. 20 (Sec. 1955) *supra* requires an examination of all the records.

We understand and appreciate the problem faced by the auditors in such a time-consuming task as they were confronted with but according to our analysis of the sales and use tax statute in its entirety, we find no alternative. This may constitute a serious administrative problem time-wise for the Tax Assessor's Department but it is one for the Legislature to consider and not the courts.

The defendant further contends that he had a right to make a test period audit because the plaintiff did not keep "adequate" records.

> "Every retailer shall keep records of his sales, - - - the kind and form of which shall be adequate to enable the Tax Assessor to determine the tax liability." Sec. 29 (Sec. 2061) *supra.*

The books, records and other documentary evidence are required to be kept by the retailer in order that the Tax Assessor, on examination, may determine tax liability. These records not only show gross sales but also reflect the credit due the retailer on exempt sales. *Scott Paper Co.* v. *Johnson,* 156 Me. 19.

The defendant cites *Bouchard, et al.* v. *Johnson,* 157 Me. 41 as to the requirement of keeping "adequate" records by the retailer. *Bouchard* is not applicable for two reasons: (1) it concerns a taxpayer who is engaged only in retail business wherein resale certificates are not involved; and (2) the issue being the number of retail sales of 10c or less, this court held the taxpayer's records were inadequate to show that the taxpayer was primarily engaged in the making of sales for 10c or less. The word "adequate" as used in *Bouchard, supra,* means the records were not sufficient in substance to show the number and price of sales. There was a complete lack of sufficient, substantive records from

which tax liability could be determined. This is not the situation in the instant case. We conclude that the records of the plaintiff were adequate to satisfy the requirements of Sec. 29 (Sec. 2061) *supra.*

There is contention on defendant's part that plaintiff corporation waived a complete audit of the records but we find evidence that a complete and full audit was not waived.

The justice below found (1) that the plaintiff kept adequate records; (2) that plaintiff did not consent to the employment of the "margin of error" audit; and (3) that there is no statutory authority for the application of the theory of "margin of error" to determine tax liability in order to make a deficiency assessment under Sec. 20 (Sec. 1955) *supra.*

Chap. 17, Sec. 33 (36 M.R.S.A., Sec. 1958) provides in part:

> "The decision upon all questions of fact shall be final."
>
> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Rule 52 (a) M.R.C.P.

See *Harriman* v. *Spaulding,* 156 Me. 440.

The findings of the justice below are correct.

The entry will be:

Appeal denied.

CARLETON CHANDLER WOOD
vs.
STATE OF MAINE, ET AL.

Knox. Opinion, March 5, 1965

Criminal Law. Habeas Corpus. Evidence. Witnesses. Procedure.

Motion for new trial in felony case must be decided in first instance by justice presiding at *nisi prius* in Superior Court and if motion is denied by such justice, then defendant may appeal to Law Court, and motion may not be presented directly to Law Court.

Generally, it is within the province of jury to weigh and resolve conflicting evidence and not reviewing court on review.

Degree of credibility to which witnesses are entitled is for jury and not for court to decide.

ON APPEAL.

Petitioner appeals from denial of petition for post conviction. Held, evidence established no plain reversible error at trial and that petitioner was not prejudiced in not receiving a review of his case by appeal. Appeal denied.

Christopher S. Roberts, for Plaintiff.

John Benoit, for State.

SITTING: WEBBER, TAPLEY, SULLIVAN, MARDEN, JJ.
SIDDALL, J. sat but retired before rendition of this opinion.
WILLIAMSON, C. J., did not sit.

SULLIVAN, J. The Petitioner before the Superior Court in October 1956 was accused by indictment, tried and found guilty of the felony of attempted escape from State Prison. He is serving the sentence for that crime and at State expense has petitioned for post conviction - habeas corpus relief under the provisions of R. S., 1954, c. 126, §§ 1-A - 1-G,

additional. A hearing has been held upon his petition which was denied by the presiding justice. Petitioner appeals from that decision.

Subsequent to the jury's verdict of guilty in 1956 through his trial counsel the petitioner had filed in conventional form a motion for a new trial but had improperly addressed that motion to "The Supreme Judicial Court."

In felony cases a motion for a new trial must be decided in the first instance by the justice presiding at *nisi prius* in the Superior Court. If denied by such justice the respondent may appeal to the Law Court. R. S., 1954, c. 148, § 30. The motion may not be presented directly to the Law Court. *State* v. *Perry,* 115 Me. 203, 98 A. 634; *State* v. *Steeves,* 115 Me. 220, 98 A. 708; *State v. Gustin,* 123 Me. 307, 122 A. 856; *State* v. *Gross,* 130 Me. 161, 154 A. 187.

In 1956, simultaneously with his misdirected motion for a new trial, the Petitioner had by his attorney filed a companion motion asserting the petitioner's indigency and praying at State cost the procurement of a transcript of the trial evidence, a record of the court proceedings and the services of a legal advocate. This latter motion was denied by the presiding justice who correctly and realistically stated that no funds were at his disposal for accommodation of the motion. The Legislature made funds available for such a motion for the first time in 1957.

The ineffectual motion for a new trial became inert and lapsed.

The Petitioner, in suing for a writ of habeas corpus, remonstrates that after verdict he had requested his trial counsel to file a motion for a new trial and a motion for financial subsidy because of petitioner's indigency, that the trial justice had denied the latter motion with resultant prejudice to the Petitioner who, because of his poverty, was

consequentially deprived of his appeal, of due process and of equal protection of the laws in contravention of the prohibitions of the United States Constitution. The Petitioner further protests that his court appointed trial attorney was so "unqualified, incompetent or inefficient in the matter of criminal procedure that by reason thereof an appeal was not duly prosecuted, as requested by the petitioner" to the additory and vitiating deprivation of the petitioner's constitutional rights. The respondents joined issues.

The presiding justice afforded a preliminary hearing to the parties and sequentially made the following findings and rulings:

> "- - - - The basic reason for not carrying forward an appeal was, I find, the ruling of the presiding Justice denying counsel and a record to the indigent petitioner at State expense. *Griffin v. Illinois,* 351 U. S. 12, - - - 351 U. S. 958 - - - The ruling in the instant case was made in October 1956. No funds were available for the purposes requested until action by the 1957 Legislature. Resolves 1957, c. 146. The ruling by the presiding Justice was in accord with our then practice.
>
> "I find and rule:
>
> "(1) That whether an appeal was taken and abandoned, or was not taken, there was no intentional relinquishment of the petitioner's right to appeal within the principles of *Fay v. Noia,* 372 U. S. 391, 439, - - - -
>
> "(2) That the petitioner is entitled on this petition to a hearing and determination whether he suffered any prejudice in not securing a review of his case by appeal. *Dodd v U. S.,* 321 F. 2ed 240, 246 - - - -
>
> "(3) That the test is whether there 'was plain reversible error in the trial.' *Mitchell v. U. S.,* 254 F. 2d 954 - - - *U. S. v. Peabody,* 173 F. Supp.

> 413. - - - I shall therefore retain the case for further hearing on the record of the October 1956 trial and such other evidence as may be proper - - - -"

The presiding justice then heard the testimony of the Petitioner and that of his trial counsel who had represented the latter during the jury trial of October, 1956. The justice received in evidence the transcript of the testimony presented at the 1956 trial.

The justice reviewed the transcript and noted that the 1956 trial produced issues of fact which had been decided adversely to the Petitioner.

The justice rendered his decision:

> "I find and rule (1) that 'the jury were warranted in believing beyond a reasonable doubt, and therefore in finding, that the respondent was guilty of the crime charged against him' - - - - and (2) that there were no errors in the charge or elsewhere appearing in the transcript to warrant reversal.
>
> "I find and rule that the petitioner has failed to show that there was 'plain reversible error in the trial,' and that thereby he was prejudiced in not securing a review of his case by appeal in 1957 *(sic.)* - - - -
>
> "It is accordingly
>
> "Ordered:
>
> "That judgment be entered: Petition denied."

The Petitioner founds his present appeal upon asserted bifold grievances and errors, that the denial in 1956 by the trial justice of Petitioner's appeal or the means of appeal was a constitutional infringement sufficiently vacating and voiding Petitioner's conviction and that at his trial there was plain and reversible error.

The Petitioner contends that the testimony of State witnesses at his trial, in salient details, was in reciprocal and

annihilative conflict, inducing an insufficiency of credible evidence to justify rendition of the verdict against him. We have painstakingly examined the transcript and we conclude with the presiding justice that there was "no plain reversible error at the trial" and that the Petitioner was not "prejudiced in not receiving a review of his case by appeal" in 1956. In the transcript is contained adequate and credible evidence in support of the verdict.

> "- - - - The general rule is that it is within the province of the jury to weigh and resolve conflicting evidence, and not of the appellate court in review. - - - -"
> *State* v. *Hamilton,* 149 Me. 219, 240.

> "- - - - There was a conflict of credible evidence, sufficient either to establish or to defeat the claim of the plaintiff. The degree of credibility to which witnesses are entitled is for a jury and not a court to decide. *Parsons v. Huff,* 41 Me. 410; *Kimball v. Cummings,* 144 Me. 331, 68A (2nd) 625. The jury made its election as to what should be accepted as true."
> *Wyman* v. *Shibley,* 145 Me. 391.

> "- - - - The jury had the privilege denied us of seeing and hearing the witnesses testify on the stand. Its ability to adjudge veracity was superior to that now afforded us.
>
> " 'The credence to be given to witnesses, the resolving of conflicts in testimony and the weight to be given to it, are all matters for the jury to settle.' *State of Maine v. Vallee,* 137 Me. 311, 316, 19 A (2d), 429, 431."
> *State* v. *Smith,* 140 Me. 44, 47.

The presiding justice found in the case at bar that "there was no intentional relinquishment of the petitioner's right to appeal within the principles of *Fay* v. *Noia,* 372 U. S. 391, 439 - - - -"

In *Fennell* v. *U. S.* (1964), D. C. Okla., 229 Fed Supp. 451, 10 Cir. 313 F. (2nd) 941), the court held:

> "Since the Court finds that there was no intentional relinquishment of petitioner's right to appeal, the next question is whether or not the trial record reveals any plain reversible error. Or to put it another way did petitioner suffer 'any prejudice in not securing a review by appeal of his trial, conviction and sentence?' See *Dodd v. United States,* 9 Cir., 321 F. 2d 240, 246, and cases cited therein."

It is manifest that the presiding justice adopted and observed the impressive and sensibly just reasoning and prescription of *Dodd* v. *United States, supra,* in his resolution of the issues generated in the case at bar.

> "We summarize the cases in the margin. They demonstrate generally the following principles:
>
> (1) failure to appeal may not be excused by a mere showing of *neglect* of counsel;
>
> (2) relief will be denied where there was a calculated decision not to appeal;
>
> (3) in any event there would have to be the additional showing of 'plain reversible error at the trial' in order for relief to be granted.
>
> \- - - - - - - -
>
> "There is logic to support a proposition that a failure of counsel to file notice of appeal will only justify relief under Section 2255 (28 U. S. C. A.) where there is also a showing of 'plain reversible error in the trial' (*Mitchell v. United States,* supra,)" (259 F. 2d 954) "*United States v. Peabody* (supra)" (173 F. Supp. 413) "and *Glouser v. United States* (supra)" (296 F. 2d 853, cert. den. 369 U. S. 825) "(Note 6, supra)"
>
> \- - - - - - - -
>
> "We think the sound administration of criminal justice in a case such as ours, requires that the district judge do three things,

(1) Decide if petitioner should be returned for a hearing. Possibly a deposition of petitioner and his trial attorney may supply the needed information.

(2) Hold a hearing, make findings and determine if there was an 'intentional relinquishment' of petitioner's 'known right' to appeal by a 'considered choice' on his own part.

(3) If there was no intentional relinquishment of petitioner's right to appeal, then as a further part of the hearing, consider evidence, make findings and determine if petitioner suffered any prejudice in not securing a review by appeal of his trial, conviction and sentence."

Dodd v. *United States* (1963), 321 F. (2nd) 240, 243, 245.

It is our deliberated opinion that the determination of the issues in the instant case by the presiding justice was sound and correct. The petition and the present appeal have afforded the virtue of having extended to the Petitioner, even if belatedly, the very consideration with the same impartial result as would have attended upon his motion had it been properly instituted and conclusively prosecuted in 1956.

The mandate shall be:

Appeal denied.

GLADYS JEFFRY AND WALTER JEFFRY
vs.
ALLSTATE INSURANCE COMPANY

Androscoggin. Opinion, March 9, 1965.

Insurance. Automobile Liability.

Where plaintiff passenger paid a contractual fee and not a share of joint expenses, such arrangement, under Nova Scotia law, constituted "carrying passengers for compensation or hire" within exclusionary clause of automobile liability policy, and insurer was thus not liable to satisfy judgments obtained by Plaintiffs against son in connection with accident occurring during trip.

ON APPEAL.

On appeal from judgment upon an agreed statement of fact entered for the defendant by a single justice for determination of meaning of Nova Scotia law of "carrying passenger for compensation or hire." Appeal denied.

John G. Marshall, for Plaintiff.

Woodman, Thompson, Chapman and Hewes, by *Richard D. Hewes,* for Defendant.

SITTING: WILLIAMSON, C. J., TAPLEY, SULLIVAN, SIDDALL, MARDEN, JJ. WEBBER, J., did not sit. SIDDALL, J., sat at argument but retired before the opinion was adopted.

MARDEN, J. On appeal from judgment upon an agreed statement of fact entered for the defendant by a single justice.

The case involves the construction and interpretation of an automobile liability insurance policy issued by the defendant in Halifax, Nova Scotia, in consideration of pre-

miums paid in Nova Scotia, upon a motor vehicle owned in Nova Scotia.

The stipulated facts in brief are as follows:

One Ronald W. Woodworth, whose home was in Halifax, Nova Scotia, was a member of the Royal Canadian Air Force and service-stationed in the vicinity of Trenton, Ontario. In arranging transportation to return from his home in Halifax, Nova Scotia to Trenton, Ontario, he borrowed, with his mother's consent, her car, she, Frances T. Woodworth, being the named assured in the reference policy. Sometime prior to the date Woodworth was to leave Halifax, an advertisement appeared in a Halifax newspaper reading as follows: "Car leaving for Trenton on Saturday morning. Can accommodate three passengers. Call 3-3718." Gladys Jeffry, one of the plaintiffs, answered this notice and arranged with Woodworth that she and her two children would ride as passengers in the car driven by Woodworth from Halifax to Toronto for a sum of $30.00, which sum was paid by Mrs. Jeffry to Woodworth.

Another passenger, one Earl G. Zuick, also became a passenger and paid Woodworth $15.00 for the trip. Woodworth paid all of the expenses for the operation of the motor vehicle.

The trip from Halifax to Trenton was the only trip proposed with this vehicle. The car was not regularly operated as a taxi cab or in jitney service.

Following an overnight stop at a motel in the vicinity of Norridgewock, Maine, for which accommodation each party paid his own expense, an accident occurred in which Gladys Jeffry was injured.

In a complaint based upon this accident and resultant injury, returnable to and tried in the Maine court system, Gladys Jeffry and her husband, Walter, recovered judg-

ment against Woodworth. In the present proceeding plaintiffs seek against this defendant, satisfaction of their judgments.

An Automobile Insurance Act in Nova Scotia (Chapter 18, R.S.N.S. (1954) Schedule A), established certain standard terms for automobile liability insurance policies, which statutory conditions were printed in the reference policy and among which was the following:

> "3. Unless permission is expressly given by an endorsement of the policy and in consideration of an additional stated premium, the automobile shall not be rented or leased nor shall it be used;
>
> "(a) * * *
>
> "(b) as a taxicab, public omnibus, livery, jitney, or sight-seeing conveyance or for carrying passengers for compensation or hire. * * *."

Defendant resists the efforts of the plaintiffs to reach and apply its funds in satisfaction of their tort judgments, contending that the use of the reference motor vehicle was prohibited within the above quoted statutory condition and that, by such prohibited use, the motor vehicle was excluded from its insurance coverage.

The single justice found for the defendant. We consider the matter *de novo, Allen* v. *Kent,* 153 Me. 275, 276, 135 A. (2nd) 540, measured by Nova Scotia law. By Nova Scotia law what is meant by "carrying passengers for compensation or hire"?

No case has been brought to our attention, nor do we find any, where Nova Scotia has ruled upon the point.

As among the United States, decisions of Provincial Courts of last resort are persuasive and accepted as authority among provinces of Canada. We find that among these provinces, highway or motor vehicle acts commonly govern

the imposition of liability as between a passenger and the driver of a motor vehicle and commonly, by such acts, the passenger is given no remedy for injuries occasioned by the conduct of his driver, unless gross negligence on the part of the driver can be shown, or that the passenger was, broadly stated, a "paying" passenger. Illustrative of these acts is the Ontario Highway Traffic Act of 1937[1] which provides that a passenger was given remedy against his driver in the event the vehicle was being operated "in the business of carrying passengers for compensation." The New Brunswick Motor Vehicle Act of 1934[2] granted remedy to a passenger only where the vehicle was being operated "in the business of carrying passengers for hire or gain." The British Columbia Motor Vehicle Act Amendment Act 1938[3] provided that such passenger had remedy if the vehicle was "transporting a passenger for hire or gain." The Manitoba Highway Traffic Act of 1940[4] permitted a passenger to impose liability upon his driver if he were making "payment for such transportation." The Alberta Vehicles and Highway Traffic Act of 1955[5] provided that "no person transported by the owner or driver of a motor vehicle as his guest without payment for the transportation has any cause of action for damages * * * unless the accident was caused by the gross negligence * * * ."

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[1] See Highway Traffic Act, R.S.O. 1937 c. 288 as discussed in *Shaw* v. *McNay, et al.* (1939), 3 D.L.R. (Dominion Law Reports) 656.

[2] Discussed in *Poirier, et al.* v. *Warren* (1942), 1 D.L.R. 739.

[3] Discussed in *Guerard, et al.* v. *Rodgers, et al.* (1942), 2 D.L.R. 646.

[4] Discussed in *McKay, et al.* v. *Minard,* 5 W.W.R. (Western Weekly Reports) (NS) 175. Western Weekly Reports is available through the courtesy of the Harvard Law School Library.

[5] As discussed in *Kryzanowski* v. *Chudyk, et al.,* 40 D.L.R. (2nd). 1062 (1963).

Decisions defining transportation "for compensation," "for hire or gain," "for compensation or hire," under these acts, are, by analogy, helpful.[6]

From such cases it is clear that the Canadian Courts draw a distinction, broadly stated, between instances where a passenger and his driver entered into a "share the expense" arrangement and one where consideration for the transportation was expressed in a stated amount with no significant regard to the expense involved in the operation of the vehicle. This is expressed in *McKay, et al.* v. *Minard,* 5 W.W.R. (Western Weekly Reports) (NS) 175, before the Queen's Bench in Manitoba in 1952, by the presiding justice, as follows, at page 182:

> "I consider 'payment for such transportation' to have a commercial connotation and it does not extend to relations where friendship or friendliness is the basis of the arrangement and the sharing of expenses is incidental, as in the present case."

The Supreme Court of Canada, on an appeal from the Ontario Court of Appeal, in one of the latest cases to come to our attention, and in interpreting the updated Ontario

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[6] *Ontario*
Shaw, supra, Footnote 1; *Chote* v. *Rowan, et al* (1943), 1 D.L.R. 339; *Lemieux and Lemieux* v. *Bedard* (1952), 4 D.L.R. 421; *Csehi* v. *Dixon* (1953), 2 D.L.R. 202; *Regan* v. *Edgill,* The Ontario Weekly Notes (1956), available through the courtesy of the Harvard Law School Library; *Bohm* v. *Maurer, et al.,* 9 D.L.R. (2nd) 349 (1957); *Feldstein* v. *Alloy Metal Sales, Ltd., et al.,* 32 D.L.R. (2nd) 628 (1962); *Ouelette* v. *Johnson,* 37 D.L.R. (2nd) 107 (1963).
New Brunswick
Poirier, supra, Footnote 2; *Bourgeois* v. *Tzrop,* 9 D.L.R. (2nd) 214 (1957); *Smith* v. *Steeves,* 17 D.L.R. (2nd) 68 (1958).
British Columbia
Guerard, supra, Footnote 3; *Sneddon* v. *Querns,* 15 D.L.R. (2nd) 140 (1958); *Neufeld* v. *Prior,* 38 D.L.R. (2nd) 718 (1963).
Manitoba
McKay, supra, Footnote 4; *Johnson* v. *Reisel,* 40 D.L.R. (2nd) 916 (1963).
Alberta
Kryzanowski, supra, Footnote 5.

Highway Traffic Act (R. S., Ontario 1960), held that an arrangement whereby two passengers and fellow workers of the driver paid him $2.00 for each trip to and from work on weekends was operating his motor vehicle in the business of carrying passengers for compensation and said:

> "In my respectful view, once it has been determined that the arrangement between the parties was of a commercial nature the manner in which the amount of the fee to be paid was decided upon becomes irrelevent." *Ouelette* v. *Johnson,* 37 D.L.R. (Dominion Law Reports) (2nd) 107, 110 (1963).

This decision substantially overrules *Csehi, supra,* in Footnote 6.

In *Bourgeois* v. *Tzrop,* 9 D.L.R. (2nd) 214 (1957) the New Brunswick Supreme Court held, without discussion, where an injured passenger had been traveling to and from work with his driver for a period of not less than two months under a verbal arrangement by which the passenger paid $1.00 for each round trip, that the plaintiff passenger was not a gratuitous passenger and that the driver was in the "business of carrying him for hire or gain." This case was followed in 1958 by *Smith* v. *Steeves,* 17 D.L.R. (2nd) 68.

The rationale in the above cases in the interpretation of the Highway Acts has been accepted in Nova Scotia. The Nova Scotia Motor Vehicle Act of 1932 provides that:

> "No person transported by the owner or operator of a motor vehicle as a guest without payment for such transportation shall have a cause of action for damage * * * unless such accident shall have been caused by gross negligence * * *, but if the guest were a paying passenger he would be entitled to prosecute his claim for injuries by reason of negligence of the driver." (See *Williams, et al.* v. *Brown, et al., post*).

In *Williams and Reid* v. *Brown and Brown* (1955), 4 D.L.R. 454, on appeal to the Nova Scotia Supreme Court from a judgment dismissing plaintiff-passengers' action for damage, the issue was (1) whether plaintiff was a guest "without payment for such transportation" and (2) whether defendant was guilty of gross negligence. The trial court found for the defendant on both issues, which was reversed on appeal. The factual relationship between passenger and driver involved the payment by passenger to driver of a stated sum, comparable to the bus fare for the same travel.

In the present instance, the interpretation of the controlling phrase "carrying passengers for compensation or hire" is required not by virtue of the pertinent highway act, but by reason of the phrase appearing in the liability insurance contract carried on the Woodworth motor vehicle, and we have found no Canadian cases on point other than *Semon* v. *Canada West Insurance Co.* (1951), 4 D.L.R. 522 (Alberta) and *Rose* v. *Merit Insurance Co.*, 13 D.L.R. (2nd) 270 (Newfoundland 1957), both briefed by counsel and cited by the single justice. Both cases involved a statutory policy condition in pertinent parts identical to the case at hand. In *Semon* the transportation was for a consideration equivalent to the taxi charge for the travel. The passengers were strangers to the operator and the transportation challenged by way of the exclusion clause involved a single trip solely for the accommodation of the passengers. In *Rose* the consideration was the payment of money in an amount between the amount required for a bus fare and that required for a taxi fare. The court observed that the carriage of paying passengers tended to increase the risk which the insurer contractually assumed, and against which the policy condition was imposed. Both cases sought indemnity from an automobile insurance company and in both cases the

insurer was relieved of liability, by reason of violation of the policy condition.

In the instant case nothing indicates that the passengers and their driver were either relatives or social friends. It was a "commercial transaction." Their relationship for the trip to Ontario may be best described as characterized by the single justice. "They had no common interest in the proposed journey other than a desire to reach a common destination. The plaintiff passenger paid a contractual fee and not a share of joint expenses. The risk to the company was increased by this carriage for compensation and, if it had been desired that that risk be covered by insurance, the assured should have procured the permission of the defendant by endorsement of the policy and paid any additional premium required therefor."

The case law of Canada which, without question, would be accepted by Nova Scotia as persuasive, supports the conclusion of the single justice. We hold that that is the law of Nova Scotia.

We have had no occasion to consider nor do we intimate what our holding would be upon a similar set of facts involving an automobile liability insurance policy issued in Maine, in consideration of premiums paid in Maine upon a motor vehicle owned in Maine.[7]

Appeal denied.

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[7] See *Myers, et al.* v. *Ocean Accident & Guarantee Corporation,* 99 F. (2nd) 485 (Fourth Cir.), (N.C. 1938); *Pimper* v. *National American Fire Insurance Co.,* 296 N.W. 465 (Neb. 1941); and *Sleeper, et al.* v. *Massachusetts Bonding & Insurance Co.,* 196 N.E. 778 (Mass. 1933).

JOSEPH L. HOLBROOK

vs.

STATE OF MAINE

Kennebec. Opinion, March 25, 1965.

Habeas Corpus. Criminal Law. Legislative Intent.

The legislature has made mandatory the requirement of verification; a lack thereof must be considered a fatal jurisdictional defect.

There is as much reason for requiring verification of an amendment which recites new facts as for requiring verification of the original petition.

Signature of petition appended to and made a part of a proper form of verification under oath, satisfied statutory and jurisdictional requirements.

Ordinarily, post conviction relief will not reach inequalities alleged to have occurred in felony cases at the District Court level.

Events occurring at or in connection with the preliminary hearing stage may become significant but only insofar as such events have an appreciable effect upon subsequent proceedings at the higher court level.

The justice at post conviction stage is compelled to determine whether or not to grant a full evidentiary hearing; the record of state court proceedings may be such as to leave no room or necessity for further hearing.

ON APPEAL.

Plaintiff appeals from court order dismissing amended petition for post-conviction relief. Held, that ruling was discretionary, no abuse of discretion in the face of the record which was produced. Appeal denied.

Harlan J. Choate, for Plaintiff.

Frank Hancock, Atty. Gen.,
John W. Benoit, Asst. Atty. Gen., for State.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, JJ. MARDEN, J., did not sit. SIDDALL, J., sat at argument, but retired before decision was rendered.

WEBBER, J. On May 12, 1964 the petitioner filed a petition for the writ of habeas corpus signed by him and verified as required by statute. A court appointed counsel was duly assigned to represent him. On July 8, 1964 an amended petition was filed and the original petition was treated as withdrawn. The amended petition was signed only by counsel. The verification thereof, however, was signed by the petitioner and his oath thereto was taken. The State seasonably filed a motion to dismiss based upon two grounds, (1) that the amended petition fails to allege valid facts evidencing a basis for the issuance of the writ; and (2) that the amended petition has not been signed as required by law. The court was furnished a transcript of the record of the information proceedings which culminated in the sentencing of the petitioner and the petition was thereafter dismissed without further hearing. The matter comes forward on appeal from that order. The justice below made findings preliminary to his decision and it is apparent that he did not rely upon the second ground for dismissal urged by the State. In our view the form of the amended petition satisfied the requirements of the statute and we first consider those requirements. 14 M. R. S. A., Sec. 5503 (R. S., 1954, Chap. 126, Sec. 1-B) states in part: "Facts within the personal knowledge of the petitioner * * * must be sworn to affirmatively as true and correct. * * * Amendments when allowed shall be filed in the same manner as an original petition." The Maine Rules for Proceedings for Post-Conviction Relief, Rule 2 (159 Me. 528), prescribes the form for verification. The Legislature has wisely made mandatory the requirement of verification, and a lack thereof must be considered a fatal jurisdictional defect. There is obviously as much reason for requiring

verification of an amendment which recites new facts as for requiring verification of the original petition. We construe the above quoted statutory reference to amendments as imposing the requirement of both the signature of the petitioner and his sworn verification upon any amendment alleging facts. The reason for the rule becomes even more apparent when as in the instant case the original petition is treated as withdrawn and the proceeding continues on the amended petition alone. We conclude, however, that the signature of the petitioner appended to and made a part of a proper form of verification under oath satisfied statutory and jurisdictional requirements and effectively raised issues to be considered by the court.

We therefore turn to an examination of those issues and the basis for dismissal relied upon by the justice below. He found that the allegations set forth in the amended petition were for the most part addressed to matters related to proceedings in the District Court which culminated in a finding of probable cause on which to hold the petitioner for subsequent grand jury consideration. Such irregularities, if any there were, were subsequently cured by the petitioner's waiver and plea of guilty to an information in the Superior Court. Ordinarily post-conviction relief will not reach irregularities alleged to have occurred in felony cases at the District Court level. The reason for the rule was well stated in *Arrington* v. *Warden* (1963), 232 Md. 672, 195 A. (2nd) 38, in which the court said:

> "To demonstrate that the preliminary hearing was not a critical stage of the trial, it is only necessary to consider what would follow if we were to set aside the conviction, appoint counsel and order a new trial. There would be no preliminary hearing, because the whole purpose of that proceeding was to determine whether to hold the accused for the action of the grand jury. * * * A new trial would therefore be no more than an exercise in futility."

We recognize as did the court in *Arrington* that events occurring at or in connection with the preliminary hearing stage may become significant but only insofar as such events have an "appreciable effect" upon subsequent proceedings at the higher court level. The averments here are not of such a nature as to raise an issue as to such a subsequent "appreciable effect." There was, for example, no plea of guilty at the District Court level which might in some manner have been used adversely to the petitioner in the Superior Court.

In the instant case the petitioner while awaiting grand jury action initiated an information proceeding pursuant to 15 M. R. S. A. Sec. 811 (R. S., 1954, Chap. 147, Sec. 33 as amended). He was afforded the services of court appointed counsel. When he was presented for arraignment, the presiding justice made certain that the petitioner fully understood the charge set forth by information, his right to grand jury consideration, and his right to jury trial if indicted. Having assured himself that the petitioner was fully cognizant of his rights and the effect of a waiver thereof, the presiding justice permitted the filing of waiver and subsequent arraignment. A plea of guilty was then offered and accepted. In the course of these proceedings the following exchange occurred:

> "The Court: 'Was your plea of guilty made because of any threats or promises anyone made to you?'
>
> A.: 'No, your honor.'"

After this colloquy the court was addressed by counsel for the petitioner and by the petitioner himself. These remarks, addressed exclusively to reasons for leniency in sentence, were entirely devoid of any suggestion that waiver or plea had been improperly induced. The petitioner admitted his felonious act which he said occurred while he was intoxicated. The remarks of counsel are of

such a nature as to make it abundantly clear that he had been given no information whatever by his client that would lead him to suppose that the waiver and plea were other than voluntary. The petitioner was thereafter sentenced to serve not less than one nor more than two years in our State Prison. In imposing sentence the presiding justice indicated that he was taking into account the petitioner's "rather extensive criminal record."

By his amended petition for post conviction relief the petitioner asserted, in addition to his claim of irregularities leading to a finding of probable cause at the District Court level, that his plea of guilty to the information was improperly induced. The allegation states:

> "(f) After the hearing held on October 25, 1963 (District Court hearing on probable cause), your Petitioner pleaded guilty on an information charging the offense of forgery. Petitioner contends that this plea of guilty was the result of the threats and coercive measures employed by said William MacDonald, and foregoing allegations. It is further alleged that the said William MacDonald made certain promises regarding probation to your Petitioner and that such statements served to induce your Petitioner to enter the plea of guilty."

As already noted, the justice below caused the record of the information proceedings to be prepared and submitted for his consideration. He thereupon dismissed the petition without further hearing. Petitioner now contends that he was entitled to hearing upon the above quoted allegations charging an inducement to plead. We have not heretofore had occasion to consider whether or not a full evidentiary hearing is mandatory under such conditions as here obtained.

In passing upon the constitutionality of the information statute, we said in part in *Tuttle, Petr.* v. *State of Maine,* 158 Me. 150, 153, 180 A. (2nd) 608, 610:

> "R.S. c. 147, sec. 33, as amended, the waiver of indictment statute, affords an *optional and voluntary* procedure to a respondent and not an adversary process or one *in invitum*. A person bound over for an alleged felony not punishable by life imprisonment must be notified by the lower court magistrate of the provisions of this statute and if the accused decides *of his own free will to avail himself of a prompt arraignment*, he may affirmatively and in writing petition the Clerk of the Superior Court to be arraigned on information forthwith or at the earliest opportunity. In open court a Superior Court Justice is obligated to advise the accused of the nature of the offense with which the latter is charged and of the latter's rights to grand jury consideration, presentment or indictment, to jury trial, to counsel, to confrontation, witnesses, to a privilege against self incrimination, etc. Only then in open court and upon the record may the accused waive an indictment and only then may the prosecutor proceed against him by a signed and sworn information containing a plain, concise and definite written statement of the essential facts constituting the offense charged. * * * *By that statute a criminal respondent is deprived of no right. He may appropriate or reject the alternatives afforded. If he accedes to them he is accorded a further and deferred opportunity midway in the arraignment for reconsideration and retrieval.*" (Emphasis supplied.)

It must be emphasized that the petitioner, not the State, initiated the information proceeding as is always the case when resort is had to this process. He does not now contend or suggest that that initiation was other than his own voluntary and independent action. He urges only that he suffered a deprivation of due process of law and of governmental fair play at the moment of pleading. But the record of the proceeding itself clearly reveals that the court in effect offered to him its full protection and accepted his plea only because it was induced to do so by representations

which he now and for the first time says were false. The justice then presiding was as well able to protect the petitioner as is any justice of the court at the post conviction stage. If he had shown the slightest reluctance to plead, no plea would have been accepted. The petitioner had the services of competent counsel to protect him from the consequences of ill considered action. To permit the petitioner now to repudiate the representations by which he induced the court to take an action which the court would not otherwise have taken in a proceeding voluntarily initiated by the petitioner would seriously undermine and jeopardize the entire information process. This process has proved most beneficial to many criminal respondents and should be preserved. It is impossible to imagine what further steps a court could take to assure governmental fair play in the face of stubborn and inexcusable concealment of complaints which the petitioner now says he had to make against police officers. Although we limit our present holding to information proceedings voluntarily initiated and to the peculiar facts of this case, we are satisfied that it was not error for the justice below to dismiss this petition on the basis of the record without further hearing.

No case dealing with the requirement of full evidentiary hearing and involving false representations made by a petitioner adequately represented by counsel to induce a court to take the very action later and at the post conviction stage complained of as a violation of due process has been called to our attention. We have attempted to assess constitutional requirements with respect to full hearing by examining recent guidelines laid down by the Supreme Court. We think the conduct of the petitioner in the instant case amounts to inexcusable neglect within the spirit although not within the letter of *Fay* v. *Noia* (1963), 372 U. S. 391, 438, 83 S. Ct. 822, 848, in which it was stated:

> "Furthermore, habeas corpus has traditionally been regarded as governed by equitable principles.

> * * * Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks. Narrowly circumscribed, in conformity to the historical role of the writ of habeas corpus as an effective and imperative remedy for detentions contrary to fundamental law, the principle is unexceptionable. We therefore hold that the federal habeas judge may in his discretion deny relief to an applicant who has *deliberately bypassed* the orderly procedure of the state courts and in so doing has forfeited his state court remedies." (Emphasis ours.)

In *Townsend* v. *Sain* (1963), 372 U. S. 293, 317, 83 S. Ct. 745, 759, the court discussed situations in which full evidentiary hearings by federal district judges are or are not mandatory. It was recognized that the record of state court proceedings may be such as to leave no room or necessity for further hearing. Here again it was noted that the conduct of the petitioner may be such as to bar his right to such further hearing. The court said: "The standard of inexcusable default set down in *Fay* v. *Noia* adequately protects the legitimate state interest in orderly criminal procedure, for it does not sanction needless piecemeal presentation of constitutional claims in the form of deliberate bypassing of state procedures." We think the underlying principle has equal application here where, entirely within the state court system, the justice at post conviction stage is compelled to determine whether or not to grant a full evidentiary hearing. The petitioner substituted deliberate concealment and falsehood for the orderly presentation of constitutional claims at the information stage. Assuming the truth of his present allegations, he rendered the court powerless to protect him. We treat the ruling as discretionary and find no abuse of discretion in the face of the record which was produced. See *Commonwealth* v. *Myers* (1962), 406 Pa. 117, 176 A. (2nd) 448.

The petitioner relies in part on *James* v. *State* (1964), 204 A. (2nd) (Me.) 187. In that case, under somewhat similar circumstances, the petitioner had pleaded guilty to an information. In his petition for post conviction relief he alleged that his plea was the result of force and coercion on the part of state officials and that his constitutional rights had thereby been violated. He further alleged that he lacked the intelligence to waive any constitutional right and proceed by information. As in the instant case he had been afforded counsel before pleading to the information and had informed the court that his plea was not induced by fear or the promise of reward. The justice dealing with the petition had before him the record of the information proceeding. He saw fit, the issue of mental capacity having been raised, to hold a full evidentiary hearing. He found that the petitioner had sufficient mental capacity and comprehension to participate intelligently in the information process and that his plea was not improperly induced. We merely reviewed the record and found "ample credible evidence to corroborate his findings." We had no occasion to consider or determine whether or under what circumstances such a petition may be disposed of on the basis of the record of prior proceedings without further hearing. Without doubt there are many cases, of which *James* may well be illustrative, in which it would be preferable to hold a full evidentiary hearing. We are satisfied that nothing in the allegations in the instant case makes such action mandatory.

The entry will be,

Appeal denied.

STATE OF MAINE

vs.

LEROY W. MERROW

Somerset. Opinion, April 12, 1965

Criminal Law. Intoxication. Blood Samples. Appeals. Evidence.

The statute does not expressly state that a blood analysis, to be admissible, must be of blood extracted with consent of the defendant. However, there are strong and compelling statutory implications that consent is required.

It has been the rule in Maine for a substantial number of years to require a prior determination by the presiding justice of circumstances surrounding the giving of a confession in order to determine its voluntariness before submitting it to the jury.

In the absence of evidence all confessions are presumed to be voluntary, and the burden is on the respondent to rebut that presumption by evidence.

There was error in not making a finding of fact as a result of the preliminary hearing.

The Trial Court must (1) determine at a preliminary hearing, without the presence of the jury, the issue of voluntary consent; (2) if the court finds and formally rules the consent was involuntary the evidence should not be admitted; and (3) if the court finds the consent was voluntary then the question is submitted to the jury with instructions that they may first determine its voluntariness and if they so find, then to accept it, giving to it such weight, credibility and probative force as they may determine.

ON EXCEPTIONS.

Defendant excepts from judgment of conviction. Held, that the presiding judge's failure to make a finding of fact as to the voluntariness of defendant's consent to the taking of a blood sample before submitting the question to the jury was reversible error. Exceptions sustained.

SITTING: WILLIAMSON, C. J., TAPLEY, SULLIVAN, MARDEN, JJ. WEBBER, J., concurring opinion. SIDDALL, J., sat, but retired before rendition of decision.

Clinton B. Townsend, County Attorney for Somerset County, for State.

Carl R. Wright, Esq., for Defendant.

TAPLEY, J. On exceptions. The defendant, Leroy W. Merrow, was charged by complaint with the crime of operating a motor vehicle while under the influence of intoxicating liquor. The case was tried before a drawn jury at the September Term, 1963, of the Superior Court, within and for the County of Somerset and State of Maine. The jury returned a verdict of guilty, whereupon the defendant was sentenced. Counsel for the defendant seasonably filed exceptions.

The legal issues in the case arise out of the circumstances involved in the withdrawal of a blood sample from the person of the defendant and the result of the analysis of the sample being submitted to the jury for a determination of its evidentiary value.

The defendant takes exceptions to the admission of the analysis of the blood sample for the reasons: (1) that the defendant was not mentally capable of understanding and realizing the effect of his consent to the withdrawal of the blood sample; (2) that he was unable to comprehend the possible consequences of his consent; and (3) that his mental condition was such he was unable to knowingly give his consent. He further contends that he was denied due process as guaranteed by the Constitution of the United States and of the State of Maine; that his constitutional rights were further violated as to an unlawful search and seizure and by using the result of the analysis of the blood taken

from his body his constitutional rights against self incrimination were violated.

Counsel for the defendant contends that the alleged violation of his client's constitutional rights are questions of law to be decided by the court and not questions of fact to be resolved by the jury and when the presiding justice submitted these constitutional questions to the jury he committed an error prejudicial to the defendant.

The defendant, Mr. Merrow, on July 3, 1963, was operating a truck on and along Route 8 in Smithfield, Maine and while operating said truck it collided with another motor vehicle, left the road and went into a pasture. Both the defendant and his wife, who was a passenger in the truck, were rendered unconscious as a result of the collision. Mr. Merrow regained consciousness at the scene and was later transported by ambulance to the Fairview Hospital in Skowhegan. At the hospital a State Police Officer stated to him "that a blood test would be taken by his permission and it would be used in court." According to the officer's testimony Mr. Merrow said "he would take a blood test, that he had nothing to lose by taking it." After this conversation the physician in attendance upon Mr. Merrow, one Dr. Kemezys, extracted a quantity of blood from Mr. Merrow's arm.

The crux of the defendant's case is, according to his contention, that he was incapable of consenting to the extraction of blood from his body and thereby his constitutional rights were violated, which raised an issue of law for the court and not one of fact for the jury.

The statutory law involved pertaining to the use of blood tests in prosecutions for operating a motor vehicle while under the influence of intoxicating liquor is found in Sec. 150, Chap. 22, R. S., 1954 (29 M.R.S.A., Sec. 1312). It reads in part:

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

The defendant contends that at the time the blood was extracted from his body he was incapable of consenting and, therefore, the extraction of blood was in violation of his constitutional rights in that he was compelled to give evidence against himself and, further, that the extraction amounted to an unlawful search and seizure. He says the act was in violation of the Fourth and Fifth Amendments to the Constitution of the United States. In substance, he argues that the evidence in the form of the blood analysis was illegally obtained and, therefore, inadmissible.

The statute does not expressly state that a blood analysis, to be admissible, must be of blood extracted with consent of the defendant. However, there are strong and compelling statutory implications that consent is required. Under the statute the defendant has a choice (1) he may refuse a blood test, and this refusal is not to be used against him; or (2) he may desire to have the test made. We neither intimate nor suggest what our holding might be in a case involving the testing of blood not physically extracted from a respondent's body.

With reference to the expressed terms of the statute, we said:

> "The statute itself establishes no rights as to the making of the tests and imposes no obligations on the part of either arresting officers or the respondent." *State* v. *Munsey*, 152 Me. 198, 200.

In the case at bar the defendant makes the claim that his consent to the extraction of blood from his body was not

given voluntarily as he was not mentally capable of understanding and realizing the effect of his consent. This contention puts in issue the question of *voluntary* consent. Under the circumstances of this case the voluntariness of a confession and the rules of trial procedure pertaining to the finding of the element of voluntariness are analogous to the question of voluntary consent in cases prosecuted under the statute prohibiting the operation of motor vehicles while intoxicated.

The question of whether a confession was voluntary or involuntary arose in *Jackson, Petitioner* v. *Denno, Warden,* 378 U. S. 368, 12 L.Ed. (2nd) 908, 84 S. Ct. 1774. Jackson claimed his will "was affected by the drugs administered to him" while the State's evidence was that the drugs did not affect him at all. Jackson was tried under the New York practice where the involuntariness of a confession is submitted to the jury for factual determination along with instructions that if the confession was found to be involuntary, it was to be disregarded. The court did not accept the New York procedure but, in effect, gave approval to the Massachusetts rule. In Massachusetts the judge hears the evidence surrounding the obtaining of the confession, resolves evidentiary conflicts and makes his own judgment as to the question of voluntariness. If he deems the confession to be involuntary he rules it inadmissible. If he finds the confession to be voluntary, it is admitted. The jury then may determine the factual issue of voluntariness separately and distinctly from the finding of the court. If the jury finds the confession voluntary it then considers its probative effect on the case. We approve of this procedure.

In the recent case of *Commonwealth* v. *Maroney,* 206 A. (2nd) 379 (Pa.) (1965), the court had occasion to concern itself with an issue involving a confession claimed to have been involuntarily given because the petitioner, being under the oppressive effect of the withdrawal treatment of

narcotic addiction had made the confession in an attempt to obtain drugs. The trial court submitted the question of voluntariness to the jury without first making an independent determination of voluntariness. The court held that submitting the question of voluntariness of a confession to a jury without first conducting a preliminary hearing before the trial judge as to whether the confession was voluntary or involuntary was error.

It has been the rule in Maine for a substantial number of years to require a prior determination by the presiding justice of circumstances surrounding the giving of a confession in order to determine its voluntariness before submitting it to the jury. In such cases the jury is instructed to determine if the confession was given with a free will and if so, what probative force it has on the merits of the case as to the guilt or innocence of the defendant.

> "- - - - the question whether a particular confession offered in evidence was voluntary or was obtained by constraint or coercion - - - - is not a question of law. It is to be determined by evidence. The evidence upon this issue may be conflicting and confused. Even when the evidence is uncontradicted, different inferences may often be drawn from it by different men and each inference be logically possible. Hence, the question must be determined by the presiding justice as a question of fact. - - - -
>
> "- - - if the presiding justice does err in his finding of fact and admits the confession in evidence - - - - the respondent can then appeal to the jury to exclude it from consideration as improperly obtained, and can show all the circumstances tending to destroy or weaken its probative power. He can also require the presiding justice to instruct the jury it should not give credit to the confession if thus improperly obtained.
>
> "- - - - in the absence of evidence all confessions are presumed to be voluntary, and the burden is

> on the respondent to rebut that presumption by evidence - - - - ." *State* v. *Grover,* 96 Me. 363, 365, 366, 368 (1902).

See *State* v. *O'Donnell, et al.,* 131 Me. 294 and *State* v. *Robbins, et al.,* 135 Me. 121.

We hold that the rule established in *State* v. *Grover, supra,* relative to the trial procedure involving the consideration of confessions, is applicable and shall apply to the issue of consent as an element in the prosecution of a defendant charged with the operation of a motor vehicle while intoxicated when consent is claimed by the defendant to have been involuntary. We now apply the approved procedure to the circumstances of the instant case as reflected by the record.

There is a substantial and vital issue raised by counsel for the defendant as to whether voluntary consent was given by the defendant to extract blood from his body for the purpose of analysis. The evidence discloses on the side of the defendant that he was mentally incapable of freely giving his consent and of appreciating the consequences thereof, while the State, on the other hand, produced evidence showing mental capability and an appreciation of the quality of his act and possible consequences, thus a question of fact was raised as to whether consent came from a mind capable of giving consent.

The only issue raised by the exceptions is that of consent.

> "(a) that said Respondent was not then mentally capable of understanding and realizing the effect of his consent,
>
> "(b) that at the time of the alleged consent, the Respondent did not have the mental capacity to appreciate and realize the significance of what he was doing and a knowledge of the possible consequences;

"(c) and that the Respondent did not have sufficient possession of his mental processes to be able to knowingly give his consent thereto."

During the course of the trial there was an objection made by defense counsel to a question propounded by State's attorney relative to an alleged admission or statement purported to have been made by the respondent. Following this objection a preliminary hearing was held before the court in the absence of the jury for the purpose of determining whether the admission or statement were voluntary. The court, after the preliminary hearing, overruled the objection, allowed the question and other pertinent questions involving the same subject matter to be answered. When the court charged the jury he instructed them that they were to determine as a factual matter whether the admissions or confessions were voluntary and if they were found to be so, the jury was to give them such weight and credence as their judgment dictated. He also said, in reference to the admissions or confessions: "Again I will say: the fact that the court has ruled that the minimum requirements of the law have been met does not constitute a finding that you the jury must give any weight whatsoever to the finding."

Although questions involving admissions or confessions are not before us for determination, it becomes necessary for us to consider the manner in which the presiding justice dealt with them in order to properly understand and clarify the court's charge to the jury as to those instructions pertaining to consent. Counsel for the defendant claimed the consent was not voluntary, whereupon the presiding justice conducted a preliminary hearing as to the circumstances surrounding the obtaining of consent to the extraction of blood from the person of the defendant. After the completion of the testimony the court made this statement: "Then when the jury returns I will overrule

the objection to the pending question and your rights are saved. You may state for the record the basis of your objection if you wish. At the appropriate time I will give the jury detailed instructions concerning due process." With this language the presiding justice determined that the question of consent should be submitted to the jury with "detailed instructions concerning due process." He later referred to the issue of consent: "- - - - the question of due process is one of fact which ought to be submitted to the jury under proper instructions, and I determine that is the law of Maine. That being so, in view of the state of the evidence in this case a jury question arises as to whether or not there was a consent given by this particular respondent in and under such circumstances that he was capable of judgment." The presiding justice in his charge to the jury instructed them on the issue of consent as follows:

> "Now in the event you find in this particular case that the State has established beyond a reasonable doubt, first, that he was driving, and, secondly, that while he was driving he was under the influence of intoxicating liquor, you have a very serious problem then to discuss and decide.
>
> "The claim in this case is — and it is affirmatively made by the respondent — that in its conduct the State has denied him, the respondent, the due process of law which is guaranteed by various provisions of the Constitution of the United States and the Constitution of the State of Maine. I instruct you as a matter of law that if you find it affirmatively established that evidence was taken from this respondent, that is specifically that a blood sample was taken from his body at a time when he was unconscious or incapable of exercising reasoning processes by reason of physical injury resulting from the accident — I do not recall that there is any other evidence of physical injury, and that is why I say 'physical injury re-

> sulting from the accident — and that such evidence was thereafter knowingly used by the State against the respondent, that there would thereby result a denial of the due process of the law that is guaranteed to all persons.' "

The presiding justice did not make a finding of fact on the issue of voluntariness.

> "Whether in a given case the alleged confession is voluntary or involuntary is a question of fact to be determined by the presiding Justice upon evidence offerable by both sides, *and his ruling upon that preliminary point can be reversed by the Law Court only when the court can find as a matter of law that the confession was involuntary in the legal sense.* His finding has the force of the verdict of a jury and is allowed to stand unless the contrary inference is held to be the only reasonable one." (Emphasis supplied.) *State* v. *Priest,* 117 Me. 223, 228, 229.

See *State* v. *Grover, supra.* Where the decision of the presiding justice on the preliminary hearing is subject to review, a finding of fact must be made in order to provide a ruling from which an appeal may be taken.

A careful review of the record leaves us to conclude that there was error in not making a finding of fact as a result of the preliminary hearing.

Questions arose as to the application of the principles in *State* v. *Munsey,* 152 Me. 198; *State v. Couture,* 156 Me. 231 and *State* v. *Tripp,* 158 Me. 161 relative to rule of submitting issues of due process to the jury for factual determination. These cases are not pertinent or controlling in the instant case. Factually, they are distinguishable from the instant case.

In *Munsey, supra,* there were no facts in dispute respecting the alleged deprivation of reasonable opportunity to secure a blood test; *Couture, supra,* held that *where no facts*

were in dispute the issue of violation of constitutional rights was one of law to be determined by the court; in *Tripp, supra,* the issue as to whether or not the trial judge should have passed on the voluntariness of consent was not raised.

In summary, it is to be noted that in all cases involving questionable consent the court must (1) determine at a preliminary hearing, without the presence of the jury, the issue of voluntary consent; (2) if the court finds and formally rules the consent was involuntary the evidence should not be admitted; and (3) if the court finds the consent was voluntary then the question is submitted to the jury with instructions that they may first determine its voluntariness and if they so find, then to accept it, giving to it such weight, credibility and probative force as they may determine.

The entry shall be:

Exceptions sustained.

WEBBER, J. (CONCURRING)

I concur in the result. I would add only a comment as to the rationale which underlies the rule pertaining to confessions. *Jackson* v. *Denno,* 378 U. S. 368, 12 L.Ed. (2nd) 908; 84 S. Ct. 1774, cited and discussed in the opinion of the court, not only makes it clear that the procedure long followed in Maine meets all constitutional requirements but also indicates why preliminary findings by the court are deemed necessary. A jury, satisfied that a confession is factual and truthful and leaves no doubt as to the guilt of the respondent, might find it difficult to make an impartial and objective assessment of its voluntariness. The Supreme

Court was of opinion that a presiding justice, trained and experienced in the difficult art of rejecting even the most convincing evidence if it be improperly obtained, would be better able to make that unemotional evaluation of the voluntariness of the confession which justice requires. Like considerations prompt the use of similar procedure when the issue is the voluntariness of consent to the making of a blood test which may be used against a criminal respondent. Where, as in the instant case, there is no doubt that the blood tested was the respondent's and the test clearly demonstrates that he must have been intoxicated at the time of his allegedly unlawful operation of a motor vehicle, there is a demonstrable hazard that a jury might not be disposed to examine too closely the circumstances under which purported consent was obtained. It is natural and instinctive for the layman serving as juror to go directly to the heart of the matter which is guilt or innocence. He has not been schooled by legal training to concern himself with the methods by which guilt is shown. He tends understandably to resist the concept that the man who is obviously guilty must nevertheless go free unless his guilt can be demonstrated by legally admissible evidence lawfully obtained. It is reasonable to hope and believe that one trained in the law and fortified by judicial experience can more readily insulate his mind from the near certainty of guilt and make a dispassionate judgment as to the methods by which blood test evidence was obtained. In the instant case the justice below expressly declined to make a preliminary factual determination as to the existence or nonexistence of voluntary consent to the making of the test. The respondent has consistently and inaccurately referred to this issue as one of law for the court. It is rather one of fact which must first be determined by the court before being submitted to the jury. I agree with the conclusion of the court that the exceptions must be sustained and the case tried anew.

STATE OF MAINE

vs.

KENNETH MACKENZIE

Penobscot. Opinion, May 6, 1965.

Criminal Law. Search. Arrest.

A search implies some exploratory investigation; it is not a search to observe that which is open and patent.

An arrest without warrant was lawful, a felony having been committed, if the officer had "reasonable grounds of suspicion" that the person arrested was guilty of the felony.

"Reasonable grounds" and "probable cause" to justify an arrest are synonymous.

A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

Arrest without a warrant is lawful if a felony has been committed and if the arresting officer has "reasonable grounds of suspicion" that the person arrested is guilty of a felony.

"Reasonable grounds" and as more often expressed, "probable cause" to justify an arrest are synonymous.

ON EXCEPTIONS.

On exceptions to the denial of a motion to suppress evidence and to the admission of the same evidence. Exceptions overruled. Judgment for the State.

Howard M. Foley, County Attorney, for the State.

Gene Carter, Esq., for Defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, MARDEN, JJ. SIDDALL, J., sat at argument but retired before opinion was adopted.

MARDEN, J. On exceptions. (1) to the denial of a pretrial motion to suppress evidence and (2) to the trial admission of the evidence to which the motion to suppress had been addressed, — each before a different member of the Superior Court.

The facts, derived from the testimony presented at the hearing on the motion to suppress, out of which exception (1) arises, are as follows:

On the night of March 3-4, 1963 the store of one Hikel was forcibly entered and 2 six-packs of bottled beer (Budweiser), several wrist watches (1 Admiral and 13 Timex), and a coin collection, consisting of both old and mint coins, among other things, were taken. On the morning of March 4, Officers Rideout and Montgomery of the local police department in the course of investigating the break, and aware that ones Albert, MacKenzie and another had been on the street and drinking the previous night, that Albert had broken into the same store in 1957 and that the method of operation of the two breaks was the same, sought one John Albert for questioning. They had neither arrest nor search warrant. It was learned that John Albert was a tenant in W's rooming house, and the officers, aided by the landlady, located and went to separate doors of Albert's room. In this room was John Albert and an invited guest, Kenneth MacKenzie, the exceptant, neither yet arisen from bed. While MacKenzie is the party at interest, Albert's participation in the events under review is relevant.

From the moment of the officers' arrival outside Albert's room until the subsequent arrest and removal of both Albert and MacKenzie, the incidents and sequence are confused. Testimony covering this period supporting the motion to suppress is supplied by MacKenzie and Officer Rideout. Albert claimed, and was granted, constitutional immunity. Both witnesses agree that Officer Rideout knocked

on the door, and that Albert said "Who is it?" MacKenzie testified that the reply was "Millinocket Police Department. * * * Open up." Officer Rideout testified that his reply was "Dick Rideout of the Millinocket Police Department, I would like to talk to you." Both MacKenzie and Officer Rideout state that Albert's reply was "just a minute." They agree that shortly thereafter Albert opened the door to his room.

MacKenzie testified that thereupon Officer Rideout "burst himself in the room, forced himself in the room" and that Albert had to move aside or "get shoved down." Officer Rideout testified that Albert opened the door and walked away from the door toward a dresser upon which rested a pack of bottled Budweiser beer, saying "the door is open, come in." On cross-examination were the following questions and answers:

> "Q. And you entered into that room in pursuance of your duties as a police officer and under your authority as a police officer?
>
> "A. Yes, sir.
>
> Mr. FOLEY: I object to that question. I would like to have those two questions asked separately.
>
> "Q. Did you enter into John Albert's premises in the performance of your duties as a police officer?
>
> "A. Yes, sir.
>
> "Q. Did you enter into the premises of John Albert at that time under your authority as a police officer?
>
> "A. No, sir, under the authority granted by Mr. Albert.
>
> "Q. When the question was asked the first time your answer was yes.

"A. You put them both together in the first question."

After Officer Rideout entered Albert's room, Officer Montgomery also entered through the other door, which entry MacKenzie characterizes as "bursting in," "with his hand on his weapon." MacKenzie also adds that "he (it is not clear to whom reference is made) said he would put the lead to me" (if MacKenzie tried to get out of bed). Up to this point MacKenzie remained on the bed and Officer Rideout stated that MacKenzie was in bed with blankets pulled up, with such appearance of sleep that he "woke him by shaking his shoulder" and that "he (MacKenzie) came out of a groggily type of sleep" though it might have been feigned. Albert, after opening the door and heading toward the dresser, continued in his course and procured a bottle of Budweiser beer from a pack on the top of the bureau, and apparently searched for an opener, without success.

The conduct of the officers, which MacKenzie characterized as a search, is described by him as:

"Q. Would you describe the nature of this search? What did he do?

"A. Well, he was looking *in* (emphasis added) the bureau and found a paper bag, and he looked in the corner and found some other items.

"Q. Do you have any knowledge what those items were?

"A. Ao. (sic). There was two tool boxes he picked up and he said, Montgomery said something about a coin collection, something about coins.

"Q. Did you see him examine any other object in the room?

"A. No.

* * * *

"Q. Would you tell whether or not he was examining other items?

"A. Yes, he was.

"Q. Would you tell the Court whether or not Officer Montgomery took these articles into his possession?

"A. Yes, he did.

"Q. And would you tell the Court whether or not, if you know, he examined these items?

"A. Yes, he did.

Mr. FOLEY: I will have to object to this because I don't know what this means.

"Q. After Officer Montgomery had examined these items did he make any statement?

"A. He said, that is all we need to hold.

"Q. And what did you take that to mean?

"A. It means that we was arrested.
* * * *

"Q. Were you then placed under arrest?

"A. Yes."

The record is silent as to other statements and acts, if any, of the officer(s) from which MacKenzie concluded that he was under "arrest."

MacKenzie then testified that no restraint was placed upon him, at that time, but that handcuffs were put upon Albert. In the interval between this occurrence, and the time the officers and the men left the room to go to the police station, which MacKenzie states to have been about four or five minutes, MacKenzie states that the officers "went back to the room again to search."

In cross-examination of MacKenzie we have this testimony:

"Q. Now you say the officers made a search of the apartment. You started to say they looked at a paper bag *on* (emphasis added) the bureau, is that right?

"A. I said they looked at the items around the room.

"Q. Well, one statement you made was they looked at a paper bag *on* (emphasis added) the bureau, is that right?

"A. Yes.

"Q. Now isn't it true that Mr. Albert went over to that paper bag just before that and took out a bottle of beer?

"A. I couldn't say yes to that.

* * * *

"Q. How do you know the officers looked at this bag *on* (emphasis added) the bureau?

"A. Because he had it in his hand.

* * * *

"Q. The officers didn't touch that bureau or any of the drawers did they?

"A. I would say yes to that question they did.

"Q. You say yes, they did?

"A. I would say yes.

"Q. Do you remember that they did go into the bureau?

"A. I would say yes, they did. They was going around the bureau *on top of it.* (Emphasis added.)

* * * *

"Q. You say the officer also searched the corner by going over and looking in the corner?

"A. Yes.

* * * *

"Q. There were some articles there weren't there?

"A. They found some, yes.

"Q. In the corner?

"A. Yes.

"Q. They were just laying on the floor weren't they?

"A. I guess so, yes.

* * * *

"Q. Where else did they get some articles?

"A. I told you *on* (emphasis added) the bureau."

Later with relation to the bureau.

"Q. You don't know if they took anything out of there do you?

"A. I couldn't rightfully say. I wouldn't say yes or no."

MacKenzie's testimony specifies only two tool boxes and coins in a paper bag as having been taken by the officers from the room.

Chronology of events dealing with the alleged search and seizure and arrest, is reflected by Officer Rideout's testimony on cross-examination, as follows:

"Q. Now once you were in this room, Officer Rideout, did you place either of these people immediately under arrest?

"A. No, sir.

"Q. Isn't it true it was only after you observed certain of the contents of that room you placed these persons under arrest?

"A. Yes, sir. Lying in plain sight.

"Q. Isn't it true that as of that time you made a determination you had probable cause to believe that a felony had been committed and that these persons committed it?

"A. Yes, sir, after the evidence was found.

* * * *

"Q. It was only after you entered the room and saw the items in the room that you have testified to on direct examination that you made a determination that you had probable cause to make this arrest, is that correct?

"A. Yes, sir."

In neither the testimony of MacKenzie nor that of Officer Rideout are the acts and statements of the occupants in Albert's room related in strict chronology which would be most helpful to the record. For the trial court to have determined the facts, and for us to now determine if there be error in the trial court's conclusion, the record has to be studied with great care to conclude with any degree of certainty in just what order the incidents occurred. The testimony of the exceptant is fairly represented by the excerpts given above. His narration of the key facts is equivocal. With relation to all of the testimony covering the room episode it is not inaccurate to conclude that everything which occurred, took place in less time than it takes to tell it. Observation of unconcealed objects in the room, conversation among the men, and conclusions by the officers from what they saw and heard, certainly were taking place simultaneously. The observation of something in plain

sight, a decision based upon that observation, and a physical act with or without comment naturally occurred in a fraction of the time it takes to write this sentence, and segregating by periods of time the elements of such observation, mental process based upon it, and conduct is impossible. The judge presiding at the hearing on the motion to dismiss was warranted in finding that after the officers entered the room both Albert and MacKenzie began to dress. Immediately upon entering the room a six pack of Budweiser beer was observed on the dresser, but because such an item was not peculiar to Hikel's store, the officers' action was not governed by it. As Albert was dressing, an Admiral wrist watch was observed on his wrist, Officer Montgomery asked to look at it, Albert gave it to him and because such a watch had been taken from the Hikel store and the officers were aware that Hikel's store was the only store in town dealing with that item, its presence was significant. In the process of dressing, Albert asked for his jacket and in the officer's passing the jacket to him, wrist watch straps were protruding from the pocket and Officer Rideout testified: "I found those at the time of the arrest. Almost instantaneously at the time of the arrest was the time of the discovery of the 13 Timex watches, plus the watch on his wrist. That was almost within the same instant."

Meantime, MacKenzie was dressing, in the process of which he attempted to put on two pair of trousers, and when Officer Montgomery asked him if he always wore two pair of trousers, he started to throw the second pair off and in doing so, about two coins fell on the floor, one of them being a gold coin.

The exact time and manner of execution of his arrest is not fixed by MacKenzie. The testimony recited above justifies only the conclusion that after the officers observed the gold coin fall from the trousers pocket and unidentified

articles *on* the bureau and *in* the corner, he was arrested. This does not conflict with Officer Rideout's testimony. Both MacKenzie and Officer Rideout say that immediately after the arrest one or the other did search *in* the bureau, where nothing of significance was found, but a large quantity of foreign coins was found *in* a paper bag, which was *on* the floor, change, foreign and mint coins were *in* a shoe *on* the floor and coins were found within a wardrobe in the room. Nothing was seized from within anything except as just noted.

Both Albert and MacKenzie were in due course charged with breaking and entering Hikel's store in the nighttime and larceny of the items referred to.

After indictment, dated April 4, 1963, and pre-trial, the exceptant filed a motion to suppress the evidence obtained at Albert's room, claiming that the officers' entry, search and seizure were illegal, that "the officers then acting in concert forced respondent (MacKenzie) and John M. Albert to the floor and handcuffed them," then proceeded to make an illegal general search and seizure of unspecified items belonging to said Albert.

This alleged conduct attributed to the officers culminating in the application of handcuffs is not supported even by MacKenzie's testimony.

The recited basis for the allegation of the illegal search and seizure was that the entry and search were without warrant, without consent of either Albert or the exceptant, that any arrest was without probable cause and that the search was not incident to a lawful arrest.

The motion to suppress was heard April 24, 1963, and the decree of the presiding justice dated and filed April 29, 1963, in which the motion to suppress was denied. Exceptions to the denial of the motion to suppress were filed and allowed.

From the bill of exceptions, it appears that the presiding justice denied the respondent permission to file, pending trial and verdict, an extended bill of exceptions to the denial of the motion, to which the respondent also claimed exception. This exception was not pressed before this court.[1]

On September 19, 1963, the charge against Albert and MacKenzie came on for trial, at which time Albert pleaded guilty, and in due course was called and responded as a witness for the State. Upon MacKenzie's trial the respondent seasonably objected to the evidence within the scope of the motion to suppress, based upon evidence then before the trial court, and the record of the evidence taken at the hearing on the motion to suppress. Upon the overruling of respondent's objection, and the admission of the evidence, respondent took exception (2).

Inasmuch as this is a case of first impression dealing with a motion to suppress, supported by the ruling in *Mapp* v. *Ohio*, 367 U. S. 643, 81 S. Ct. 1684 (1961), we propose to deal with the issues with reasonable fulness. Wherein constitutional issues are involved we shall cite decisions of the United States Supreme Court, the Circuit Courts and the District Courts in order of their availability,

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[1] And rightly so. Except in such cases as the pre-trial motion raises an issue independent of the criminal charge, as, for example, a motion to return seized property, the ruling is interlocutory and may be reviewed only after final judgment in the case. See *United States* v. *Wallace & Tiernan Co., Inc., et al.*, 336 U. S. 793, 69 S. Ct. 824, [6-8] 829 (1949); *DiBella* v. *United States*, 369 U. S. 121, 82 S. Ct. 654, [9] 660 (1962). This principle is recognized in Rule 73 M.R.C.P. except as affected by Rule 72(c) M.R.C.P., both of which may be expected to appear in our proposed Rules of Criminal Procedure. While we have not been called upon to interpret Rule 72(c) M.R.C.P., the interpretation given in *DiBella* for the federal rule is persuasive. A need has been recognized for exception to the rules as applied to interlocutory orders "in certain types of proceedings where the damage of error unreviewed before the judgment is definitive and complete, * * * has been deemed greater than the disruption caused by intermediate appeal." *DiBella* [3] at page 657.

and, for want of the same, decisions of State Courts of last resort. The legal issues are as follows:

(1) Upon what basis is the denial of the Motion to Suppress to be reviewed?

(2) Was the entry of Albert's room by the officers lawful, as applied to MacKenzie?

(3) Was there a search before arrest?

(4) When was an arrest made?

(5) Was there a search incidental to the arrest?

TEST OF THE SUPERIOR COURT RULING

By what rule is the finding of the single justice to be reviewed?

The finding of the single justice "shall not be set aside unless clearly erroneous." Rule 52 M.R.C.P.

While the criterion by which the finding of the single justice is to be reviewed has been expressed in varying terms (See Reporter's Notes under Rule 52, M.R.C.P. and § 52.7 Field and McKusick's Maine Civil Practice), such terms are synonymous with "clearly erroneous."

"A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395, 68 S. Ct. 525, 542; rehearing denied 333 U. S. 869, 68 S. Ct. 788.[2]

The basis of our civil rule 52 and the test to be applied is that "due regard shall be given to the opportunity of

[2] We adopt this rule not unaware that *United States* v. *Page*, 302 F. (2nd) 81, 84 (9 CCA 1962) in reviewing a motion to suppress considered a distinction between a "substantial evidence" rule and a "clearly erroneous" rule.

the trial court to judge of the credibility of the witnesses." This principle has been affirmed in reviewing a motion to suppress in *In re Fried, et al.*, 161 F. (2nd) 453, [1, 2] 457 (2 CCA 1947), certiorari denied 67 S. Ct. 1751 and certiorari dismissed 68 S. Ct. 105; *Burge* v. *United States*, 332 F. (2nd) 171, [1-3] 173 (8 CCA 1964).

OFFICERS ENTRY OF ALBERT'S ROOM

While Albert is not a party to this case, the rights of MacKenzie in at least two significant areas (entry and disclosure of stolen goods) are affected by Albert's status and conduct at the scene under consideration. The only person who had any proprietary or possessory rights in the room involved, was Albert. He was the tenant, he was present, and he was in possession. He was the only person present to whom the constitutional right to have his "house" free from unreasonable searches and seizures was extended.[3] He, as an accused, did not challenge the entry of the officers. He did not testify at the hearing on MacKenzie's motion to suppress evidence and MacKenzie did not testify at that hearing that Albert challenged, in any way, the entry of the officers. The exceptant, MacKenzie, had "standing" neither then nor now to challenge the entry of the officers. The entry is not significant per se. It is significant only as it bears upon any subsequent search and seizure of property affecting MacKenzie's rights.

It is in no way contended that the officers physically forced their way into Albert's room. The legal question is

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[3] U. S. Constitution, Amendment 4. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *." Constitution of Maine, Article I, § 5. "The people shall be secure in their persons, houses, papers and possessions from all unreasonable searches and seizures * * *."

The motion to suppress alleges "illegal entry and search of certain premises * * * lawfully rented to * * * Albert * * * and used by said * * * Albert as his home, place of abode and residence" which premises the exceptant "was then and legally upon."

whether the officers were invited, expressly or impliedly, by Albert, to enter the room or whether, as urged by exceptant, the principles of *Johnson* v. *United States,* 333 U. S. 10, 68 S. Ct. 367 (1947), as to the entry apply. *Johnson* is urged upon us as controlling wherein, on facts somewhat analogous, the court held that the officers gained entrance, without warrant, to Johnson's living quarters "under color of office" and that admission was granted "in submission to authority rather than as an understanding of intentional waiver of a constitutional right" [1] at page 368. In *Johnson* the petitioner to suppress evidence was the accused and the person whose living quarters were entered. The case would be on point were Albert the exceptant here. In *Johnson* the tenant upon being informed that a Lieutenant Belland was at the door, who stated that he wished to talk with her, "stepped back acquiescently and admitted" the officers.

The rationale of the court is that the tenant, overawed by the mere presence at the door of a Lieutenant (the case does not indicate that she was aware he was a police lieutenant), did not voluntarily permit the officers to enter, and that any evidence thereafter found by a search should have been suppressed. We do not accept *Johnson* as controlling the facts of this case.

The single justice here found, upon disputed facts, that Officer Rideout's entry of Albert's room was with Albert's permission, voluntarily given and his volition unaffected by any aura of the law. As applied to the entry, no constitutional violation is established. There is no error in the conclusion of the single justice, — even though MacKenzie were in a position to challenge it.[4]

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[4] We recognize the distinction between "standing" to challenge the entry and "standing" to challenge the use in evidence of material gained by search and seizure after entry. See *Jones* v. *United States,* 80 S. Ct. 725 (1960).

SEARCH, ARREST, SEARCH INCIDENTAL TO ARREST

The motion to suppress is grounded upon an alleged unlawful search for and seizure of property which might be offered in evidence against the exceptant. As the word "search" is both defined and implies, "a search implies some exploratory investigation. It is not a search to observe that which is open and patent, * * * ." *State* v. *Griffin, et al.,* 202 A. (2nd) 856, [3-4] 861 (N. J. 1964); *United States* v. *Lee,* 274 U. S. 559, 563 (1927); *Ker* v. *State of California,* 83 S. Ct. 1623, IV 1635 (1963); *Petteway* v. *United States,* 261 F. (2nd) 53, 54 (4 CCA, 1958); *United States* v. *Lee,* 308 F. (2nd) 715, [2, 3] 717 (4 CCA, 1962); and *State* v. *Nelson,* 196 A. (2nd) 52, [5, 6] 57 (N. H. 1963).

In the present case it is urged that there was an unlawful search before the arrest and that the arrest was based upon the search rather than the search being based upon (incidental to) the arrest, which, by *Johnson, supra,* [9] page 370 is constitutionally prohibited.

Here again the involvement of Albert, as well as MacKenzie, the statements and the reported conduct of all four men present leads to an unoriented state of facts.

An arrest in criminal law "signifies the apprehension or detention of the person of another in order that he may be forthcoming to answer for an alleged or supposed crime." 5 Am. Jur. (2nd) Arrest, § 3.

> "The elements of an 'arrest' comprehend a purpose or intention to effect an arrest under a real or pretended authority, the actual or constructive seizure or detention of the person to be arrested by the one having the present power to control him, communication by the arresting officer to the one whose arrest is sought of his intention or purpose then and there to make the arrest, and an understanding by the person who is to be arrested that

> it is the intention of the arresting officer then and there to arrest and detain him." *Range* v. *State,* 156 So. (2nd) 534, [1-3] 536 (Fla. D. C. of Appeals, 1963).

As defined by the court in *Commonwealth* v. *Holmes,* 183 N. E. (2nd) 279, 280 (Mass. 1962) "(t)o constitute an arrest there must be either a physical seizure of the person by the arresting officer, or a submission to his authority and control."

There is no dispute that after the officers entered the room and before there was an arrest of anyone, a new Admiral watch was observed on Albert's wrist. The watch was recognized as of a type stolen, the observation of its presence was made and upon inquiry Albert handed the watch to one of the officers. There was no search involved. It is clear that at this point Albert was placed under arrest, by the application of handcuffs, and the arrest without warrant was lawful, a felony having been committed, if the officer had "reasonable grounds of suspicion," *Palmer* v. *Maine Central Railroad Company,* 92 Me. 399, 408, 42 A. 800, that the person arrested was guilty of the felony. *Therriault, et al.* v. *Breton, et al.,* 114 Me. 137, 142, 95 A. 699.

"Reasonable grounds" and, as more often expressed, "probable cause" to justify an arrest are synonymous. See *Brinegar* v. *United States,* 69 S. Ct. 1302, [8-9] 1310 (1949) rehearing denied 70 S. Ct. 31 (1949); *Draper* v. *United States,* 79 S. Ct. 329, [5-7] 333 (1959); *United States* v. *Smith,* 308 F. (2nd) 657, [2] 661 (2 CCA, 1962).

The trial justice was without error in holding that Albert's arrest was lawful.

Whether or not MacKenzie was placed under arrest at the same time is not clear. The fact that MacKenzie "took it (remark by officer) to mean" that he was arrested is not

controlling. No physical restraint was placed upon him. Assuming that MacKenzie were arrested at the same time as Albert, the validity of the arrest would depend upon whether the officers, by the observation of the wrist watch, had probable cause to believe that MacKenzie, as well as Albert, had committed the break. This poses a narrow question and if the result of the case depended upon its solution, reasonable minds might well differ.

Assuming, but not deciding, that such an arrest of MacKenzie was without probable cause, the result is unchanged. At approximately the same time, bearing in mind that the scene was developing during all of the time that the officers were in Albert's room, MacKenzie had started to dress and after putting on one pair of trousers, he started to put on a second pair, which elicited comment from Officer Montgomery. At this comment, MacKenzie threw off the second pair of trousers, out of which fell one or more coins, one being gold, which, by its very composition, immediately impressed, and was recognized by, the officers as typical of a coin collection. There was no search involved in this observation. There is no search established between the observation of the watch, by reason of which Albert was arrested, and the observation of the gold coin, by reason of which MacKenzie was arrested. If MacKenzie had not theretofore been arrested, the trial court very properly found that "probable cause" or "reasonable grounds" existed for an arrest at that point in the proceedings. See *Carter* v. *State,* 204 A. (2nd) 322, [6, 7] 324 (Md. 1964). Each man by his inept conduct supplied the officers with reasonable grounds for his arrest. It is not known whether the second pair of trousers belonged to MacKenzie, whereby it could be argued that the gold coin was in his possession, but his purpose in donning this second pair of trousers suggested either that the trousers were his, or that he proposed to claim and possess them for some reason, to wit,

an awareness of the fact that the trousers contained something of value. There was no search prior to exceptant's lawful arrest.

There is no dispute that after both men had submitted to the control of the officers, and were about to be removed from the room to the police station, the officers did enter a wardrobe where more of Mr. Hikel's coins were found, the pockets of the trousers which MacKenzie had sought to put on were found to be filled with stolen coins and other coins from the Hikel collection were found in a shoe in a corner of the room. Such exploration of the wardrobe and the bureau or dresser, within the Albert room (the area within his control) subsequent to the valid arrests was incidental thereto and lawful. Varon, "Searches, Seizures and Immunities," Section 5, page 103, *United States* v. *Rabinowitz,* 70 S. Ct. 430, [3] and [4] 433 (1950), *Ker, supra* at IV 1634, *Robinson* v. *United States,* 327 F. (2nd) 618, [1, 2] 622 (8 CCA 1964); and *State* v. *Doyle,* 200 A. (2nd) 606, [5-8] 611 (N. J. 1964), which last case seems to liberalize the federal rule.

In brief, the record of the hearing on the motion to suppress supports the conclusion of the fact finder that, as to MacKenzie, there was a lawful entry of the Albert room, that there was no unlawful search, that there was probable cause established by visible evidence for Albert's and MacKenzie's arrests, that search promptly subsequent to the arrest within the area under Albert's immediate control was incidental to the arrest and lawful, and that the motion to suppress all evidence which the visit yielded was properly denied. Exception (1) is overruled.

At trial, the admission of the evidence as to what was seen, heard and found at the Albert room was governed by the subsisting finding of competence theretofore made on the pre-trial motion to suppress and evidence, if any, which

had been admitted prior to the objection. When exceptant's counsel voiced objection at trial "to any evidence that was obtained as a result of the entrance into John Albert's apartment" no evidence additional to that recorded at the hearing on the motion to suppress was before the court. The trial court's overruling of the objection was correct. Exception (2) is overruled.

Exceptions overruled.

Judgment for the State.

IN RE: WILL OF SUSAN G. EDWARDS

Oxford. Opinion, May 10, 1965.

Wills. Inheritance. Jurisdiction. Appeals. Adoption. Class Gifts. Individual Gifts.

Appellant's appeal rests on their being heirs or at least presumptive heirs of testatrix.

Jurisdiction rests on whether the appellants are "aggrieved."

Jurisdiction of the Probate Court to decree the adoption must appear affirmatively in the petition and the decree.

It is not duty of law court to seek out faults not alleged and proven to destroy the validity of decrees of the Probate Court.

Notice to parents is required when custody is taken from them.

When case is heard on an agreed statement of facts with no oral testimony, the "Clearly erroneous" test is not applied and court is free to find the facts without reference thereto.

A gift to named individuals is a gift to individuals and not a class gift.

When legatees are designated by name and the character of the estate bequeathed is indicated by the words "in equal parts, share and share alike" there is a strong presumption of testamentary intent that the legatees shall take as individuals and not as a class.

ON APPEAL.

On appeal from decree of Probate Court construing will of Susan G. Edwards comes directly to Law Court by agreement of the parties on an agreed statement of facts. Issues raised in this case are whether the residue of the will is a class gift or a gift to individuals and whether children of the predeceased adopted daughter of the testatrix were her heirs. Appeal sustained. The Probate Court to enter a decree in accordance herewith. Costs and reasonable fees to counsel for the several parties to be fixed in the Probate Court, ordered paid by the executors and charged in their probate account.

David F. Aldrich, for Residuary Legatees.

William E. McCarthy, for Appellants.

Neil L. Dow, for Unknown Heirs.

Rupert F. Aldrich, for Executors.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, MARDEN, JJ. SIDDALL, J., sat, but retired before opinion was adopted.

WILLIAMSON, C. J. This appeal from the decree of the Oxford Probate Court construing the will of Susan G. Edwards comes directly to the Law Court by agreement of the parties on an agreed statement of facts. R. S., c. 153, § 32 (now 4 M.R.S.A. § 401).

The issues raised by the petition of the executors seeking instructions for the distribution of the residue are: first, whether the residue was a class gift or a gift to individuals;

and second, if the latter, whether the appellants, children of the predeceased adopted daughter of the testatrix, were her heirs.

The residuary clause reads:

> "Twenty-second: All the rest, residue and remainder of my estate, real, personal or mixed, wherever found and however and whenever acquired I give, devise and bequeath to my three nieces, Doris M. Frost, Marion Frost Hudson and Olive Wiley Hannaford, share and share alike."

The Probate Court found a class gift to the two surviving nieces.

The second issue does not touch the construction of the will. No finding was necessary in light of the Probate Court's decision, and no finding was made with reference to the status of the appellants.

The testatrix, Susan G. Edwards, a widow, died April 28, 1961. Her husband died in 1948. The residuary clause, executed on November 18, 1952, appears as the fourth codicil to her will of September 2, 1949. Dorothy E. StClair, the adopted daughter, died November 10, 1952. We assume, as did the Judge of Probate, that Marion Frost Hudson died without issue after the execution of the fifth and last codicil to the will on May 5, 1954, and before the testatrix.

The testatrix was survived by the two appellants, two grandchildren, Joan StClair and John StClair, Jr., children of Dorothy Edwards StClair, and by Doris M. Frost and Olive W. Hannaford, two nieces named in the residuary clause. There may be other surviving nieces and nephews through a half sister of the testatrix whose names and whereabouts are unknown to the executors.

The executors are prepared to make final distribution of the estate and brought these proceedings for the purpose of determining who may be entitled to the residue.

At the outset the appellants face a collateral attack upon the validity of the adoption of their mother by the testatrix. If the adoption was legal, the parties concede that the appellants are the "lineal descendants" and are entitled to take whatever may pass from the testatrix by intestacy. R. S., c. 170, § 1-II (now 18 M.R.S.A. § 1001-2); R. S., c. 158, § 40 (now 19 M.R.S.A. § 535). See also *New England Trust Co.* v. *Sanger, et al.*, 151 Me. 295, 118 A. (2nd) 760; *Warren* v. *Prescott*, 84 Me. 483, 24 A. 948.

The attack in substance, but not in form, is a motion to dismiss the appeal for lack of jurisdiction. The right of the grandchildren to appeal rests on their being heirs or at least presumptive heirs of the testatrix. "... any person aggrieved by any order ... may appeal ..." R. S., c. 153, § 32 (now 4 M.R.S.A. § 401). Unless the right to appeal is affirmatively established, the appeal will be dismissed. Jurisdiction here rests on whether the appellants are "aggrieved." *Wattrics, Applt.* v. *Blakney, Appellee*, 151 Me. 289, 293, 118 A. (2nd) 332; *Legault, Applt.* v. *Levesque, Appellee*, 150 Me. 192, 107 A. (2nd) 493; *Cummings, Applt.*, 127 Me. 418, 144 A. 397; *Cummings, Applt.*, 126 Me. 111, 136 A. 662; *Thompson, Applt.*, 116 Me. 473, 102 A. 303; *Thompson, Applt.*, 114 Me. 338, 96 A. 238; *Moore* v. *Phillips*, 94 Me. 421, 47 A. 913; *Briard* v. *Goodale*, 86 Me. 100, 29 A. 946; *Gray* v. *Gardner*, 81 Me. 554, 18 A. 286; *Pettingill* v. *Pettingill*, 60 Me. 411.

The agreed facts disclose that the appellants' mother Dorothy was adopted by decree of the Oxford Probate Court at the age of five in 1915 by Susan G. Edwards, the testatrix, and her husband.

A half century later and after the death of the adoptive mother and father and of the adopted child, two nieces and a representative of unknown heirs by a collateral attack deny and seek to destroy the filial status. Never so far as this record is concerned has the relationship of the grandchildren to their grandmother through the mother been questioned. This attack must be scrutinized with care.

We are satisfied from an examination of the records of the Probate Court submitted to us and from the agreed statement of facts that Dorothy was legally adopted by the testatrix and her late husband in 1915. We recognize the principle that the jurisdiction of the Probate Court to decree the adoption of Dorothy must appear affirmatively in the petition and the decree.

> "It is equally well settled in this State that jurisdiction of the subject matter alone is not sufficient to establish the validity of its decree. If the preliminary requisites and the course of proceedings prescribed by law are not complied with, jurisdiction does not attach and the decree will be, not voidable merely, but void. The petition to this court is the foundation upon which to base its jurisdiction and it must allege sufficient facts to show the authority and power of the court to make the decree prayed for. The record of its proceedings must show its jurisdiction." *Taber* v. *Douglass,* 101 Me. 363, 367, 64 A. 653 (adoption).

See also *Legault, Applt.* v. *Levesque, Appellee, supra* (guardian); *Blue, et al.* v. *Boisvert,* 143 Me. 173, 57 A. (2nd) 498 (guardian); *Cummings, Applt., supra* (adoption); *Cummings, Applt., supra,* (adoption); *Paine* v. *Folsom,* 107 Me. 337, 78 A. 378 (guardian); *Holman* v. *Holman,* 80 Me. 139, 142, 13 A. 576 (guardian); *Peacock* v. *Peacock,* 61 Me 211 (guardian); Wilson, Maine Probate Law, pp. 100, 117 (1896). On adoption see annot. 92 A. L. R. (2nd) 813, 826, 16 A. L. R. 1020, 1026; 2 C. J. S.

Adoption of Children, § 50, p. 440; 39 C. J. S. *Guardian and Ward,* § 38; 25 Am. Jur. *Guardian and Ward,* §§ 30, 49; 2 Am. Jur. (2nd) *Adoption,* § 69, *et seq.*

We need not, and do not, go beyond consideration of the error urged by those who would disinherit the appellants. It is not our duty to seek out faults not alleged and proven to destroy the validity of decrees of the Probate Court. Cf. *Legault, Applt.* v. *Levesque, Appellee, supra,* and *Peacock* v. *Peacock, supra.*

The flaws charged are that in the adoption and guardianship cases no notice was ordered or given to the parents of Dorothy.

The adoption statute then read:

R. S., 1903, c. 69, § 33 provided "or if the parents have abandoned the child and ceased to provide for its support, consent may be given by the legal guardian; . . " Cf. 19 M.R.S.A., § 532.

The petition for adoption reads:

> "To the Honorable, the Judge of the Probate Court in and for the County of Oxford:
>
> "RESPECTFULLY REPRESENTS, Fred L. Edwards and Susan F. Edwards both - - - - of Bethel - - - - in said County, husband and wife, that they desire to adopt Dorothy Alma Byers minor - - - child - - - - of parents whose names and residences are unknown to said petitioners which child was born in a place unknown to said petitioners on the thirtieth - - - day of - - - December - - - A.D. 1910, that they are of sufficient ability to bring up and educate said child properly, having reference to the degree and condition of her parents. They further represent that the parents of said child have both abandoned said child - - -
> "Wherefore your petitioners pray that leave be granted them to adopt said child with all the

rights of inheritance, as provided by law, and that the name of said child - - - be changed to Dorothy Edwards."

Consent was given thereto by Isaac H. Wight, stated to be the legal guardian. The decree reads:

"State of Maine

"Oxford, ss.

"At a Probate Court held at Paris, in and for said County, on the third Tuesday of May----, in the year of our Lord one thousand nine hundred and fifteen.

"On the foregoing petition of Fred L. Edwards and Susan F. Edwards for leave to adopt Dorothy Alma Byers, a minor child not their own by birth, and to change her name; being satisfied of the identity and relationship of the parties, and of the petitioner's ability to bring up and educate said child properly, having reference to the degree and condition of her parents, and of the fitness and propriety of such adoption, and the written consent required by law having been given thereto;

"It is Decreed that the prayer of said petition be granted, that from the date of this decree said child----is the child----of said petitioners, Fred L. Edwards and Susan Edwards and I do further decree that the name of said child be changed, and that from and after the date hereof, she shall be known and called by the name of Dorothy Edwards. s/ Addison E. Herrick Judge of Probate"

No notice of the adoption proceeding was given to the parents of Dorothy and none was required. Under the express terms of the statute consent of the guardian was sufficient. The question then becomes whether the guardian was duly appointed and authorized.

The guardian who gave his consent for adoption was appointed without notice to the parents on a petition representing that the child Dorothy was born "of parents the names of whom are unknown to your petitioner, and whose residences now * * * are unknown." The decree recites that the allegations of the petition are true.

The pertinent statute relating to appointment of a guardian of a minor read:

> "Such guardian shall have the care and management of all his ward's estate, and continue in office until the ward is twenty-one years of age, unless sooner lawfully discharged; but the care of the person, and the education of the minor, shall be jointly with the father and mother, if competent, or if one has deceased, with the survivor, if competent; otherwise these duties devolve on the guardian; and in any case, the judge may decree them to him, if he deems it for the welfare of the minor, until his further order." R. S., 1903, c. 69, § 3 (now 18 M.R.S.A., § 3553).

Notice, however, to parents is required when custody is taken from them. Cf. *Paine* v. *Folsom, supra* (guardian-insane-notice required).

In *Coltman* v. *Hall,* 31 Me. 196, where the child had neither father nor mother, the guardian was entitled to custody. Cf. *Peacock* v. *Peacock, supra,* in which notice was required not for appointment of a guardian, but for custody in the guardian. *Holman* v. *Holman, supra; Dorr* v. *Davis,* 76 Me. 301.

In the case before us, the names and residences of the parents of the five year old Dorothy were unknown. Surely this is an instance of where the guardian gained the custody of his ward; and acquired authority to consent to the adoption. In the words of *Coltman* v. *Hall, supra,* "there was then no person entitled to the custody, above the guardian."

We hold that Joan and John StClair, the grandchildren, are the statutory heirs of the testatrix; are aggrieved by the decision of the Probate Court; and are entitled to prosecute this appeal.

The case was heard on an agreed statement of facts with no oral testimony. Accordingly we do not apply the "clearly erroneous" test to the findings below, but are free to find the facts without reference thereto. *Murray* v. *Sullivan, et al.*, 158 Me. 98, 179 A. (2nd) 307; *Pappas* v. *Stacey & Winslow*, 151 Me. 36, 38, 116 A. (2nd) 497; *Mellen, Jr., et al., Tr.* v. *Mellen, Jr., et al.*, 148 Me. 153, 157, 90 A. (2nd) 818; Maine Rules Civil Procedure, Rule 52; Field & McKusick, §§ 52.7, 52.8.

> "The controlling rule in the construction of a will is that the intention of the testator *expressed in the will,* if consistent with rules of law, governs. . .
>
> "Intention is to be ascertained from examination of the whole instrument. It is the intention of the maker of the will at the time of its execution. . .
>
> "In case of doubt the intention is to be ascertained in the light of the existing conditions, which may be supposed to have been in testator's mind. . ." *New England Trust Co.* v. *Sanger, et al., supra,* at p. 301. (Citations of cases omitted.)

The rule generally applicable is that a gift to named individuals is a gift to individuals and not a class gift. The words "share and share alike" strengthen this view. "When legatees are designated by name and the character of the estate bequeathed is indicated by the words used in Mrs. Morgan's will, 'in equal parts share and share alike,' there is a strong presumption of testamentary intent that the legatees shall take as individuals and not as a class." *Strout* v. *Chesley,* 125 Me. 171, 174, 132 A. 211; *Hay* v. *Dole,* 119 Me. 421, 111 A. 713.

In *Strout, supra,* the individuals named were "not connected with the testatrix or with one another by common kinship. Apparently they had nothing in common except the good fortune of being legatees in the same will." The court found a gift to individuals. In the instant case common kinship to the testatrix and with one another on the part of the legatees is present. Such relationship does not, however, destroy in itself the force of the gift to individuals by name. *Berman* v. *Frendel,* 154 Me. 337, 148 A. (2nd) 93; *Hay* v. *Dole, supra;* 5 American Law of Property, § 22.6; 4 Bowe-Parker; Page on Wills, § 35.4.

The presumption against intestacy is also to be considered. *Hay* v. *Dole, supra.* "The presumption against [partial intestacy] is always strong, . . ." *Merrill* v. *Winchester,* 120 Me. 203, 219, 113 A. 261. It is, however, "merely a presumption." *Spear* v. *Stanley,* 129 Me. 55, 59, 149 A. 603; *Swan* v. *Swan,* 154 Me. 276, 147 A. (2nd) 140. See also on gifts to class or individuals *Blaine* v. *Dow,* 111 Me. 480, 89 A. 1126; *Morse* v. *Hayden,* 82 Me. 227, 19 A. 443; *Stetson* v. *Eastman,* 84 Me. 366, 24 A. 868; 5 American Law of Property, § 22.4 *et seq;* 4 Bowe-Parker: Page on Wills, § 35.1 *et seq;* annot. 75 A. L. R. 773—*Gift to a Class;* and *What Constitutes a Gift to a Class,* 49 Harv. L. Rev. 903.

Casting the rules of construction solely in terms of presumptions serves, in our view, to hinder rather than aid in our search for the intention of the testatrix. With competing rules applicable to the agreed facts, the presumptions lost their force in establishing the burden of going forward. The weight of the several facts, e.g., named persons related, "share and share alike," resulting intestacy and the like, remains for the court to determine in reaching the ultimate finding of intention. We may properly consider that facts which create "a strong presumption of testamentary intent," to use the words of *Strout, supra,*

at p. 174, are facts from which a strong inference of such intent may be drawn.

Did the testatrix within the language of the will in light of the surrounding circumstances look upon the three sisters as a group or class, or as individuals? We are interested in her intentions, so found, with reference to the residuary clause. Plainly she did not intend that the grandchildren should take any part of the residue by will. They take, if at all, from the failure of the testatrix to provide a beneficiary for a lapsed legacy.

The testatrix made important changes in her will by codicil on November 18, 1952, eight days after the death of her adopted daughter Dorothy. A bequest of $100 to Dorothy, reduced from $10,000 by a prior codicil, and a gift of the homestead with contents to trustees to be disposed of under instructions not stated in the will, were revoked. Gifts to the niece Doris, and if not living at her decease to the niece Marion, and to Marion if not living at her decease to Doris, each of $5,000, were increased to $10,000.

Gifts in trust for "my granddaughter, Joan Edwards StClair" and for "my grandson, John Oliver StClair, Jr." of $5,000, and to her niece Olive of $11,000 "if said niece survives me; if not, to her issue in equal shares" remained unchanged.

The residuary clause was revoked. Under the will as then written "my said daughter Dorothy" received the income of the residue for life, with remainder to "my two grandchildren," and if the line should end to "my said nieces and nephews and to the said Beatrice V. Brown in equal shares." The precise details of the remainder are of no moment.

The testatrix in the November 1952 codicil, gave the homestead to Beatrice V. Brown, whose relationship if any

to the testatrix is not stated, and certain contents to "my three nieces [naming Doris, Marion, and Olive] share and share alike."

The residue was then given, as quoted above, "to my three nieces, Doris M. Frost, Marion Frost Hudson and Olive Wiley Hannaford, share and share alike."

In May 1954, by her codicil the testatrix gave her Packard automobile to Beatrice V. Brown, her Plymouth automobile to Olive Hannaford, and "wearing apparel and paintings" in four boxes to "Doris M. Frost, Marion H. Hudson, . . Beatrice V. Brown . . and Olive Hannaford, . . to be divided equally between them, . . "

In passing, we note that Olive Hannaford was substituted for Dorothy as a coexecutor by a codicil five days before the death of Dorothy.

Thus the $5,000 gift in trust for each grandchild remained unchanged from the will executed in 1949; all other provisions for Dorothy and the grandchildren were stricken; and the three named nieces became the residuary legatees.

Throughout the will and the codicils are gifts to each niece, to three nieces and Beatrice V. Brown, and in the very codicil establishing the residue, a gift of certain contents of a house "to my nieces (naming the three) share and share alike."

In our opinion the testatrix in her will, setting aside for the moment the residuary clause, made gifts to her nieces as individuals and not as a group. The gift of the contents, for example, is clearly not a class gift under the applicable rules of construction.

We are satisfied that the testatrix did not intend a different distribution of the residue. Like language, except

that "my nieces" became "my three nieces" was used in both the gift of contents and the residue.

Granted that the testatrix preferred the three nieces to take the residue to the exclusion of the grandchildren, it does not follow that she preferred any one niece to take more than a one-third share.

We conclude that the testatrix intended each niece to take a one-third share, and no more. Accordingly, the share of the residue of the niece Marion having lapsed, goes by intestacy and not under the will.

The entry will be

Appeal sustained.

The Probate Court to enter a decree in accordance herewith.

Costs and reasonable fees to counsel for the several parties, to be fixed in the Probate Court, ordered paid by the executors, and charged in their probate account.

BEST FOODS DIVISION OF CORN PRODUCTS COMPANY

vs.

MALCOLM J. FORTIER

Kennebec. Opinion, May 10, 1965.

Evidence.

Evidence on counterclaim for breach of oral mutual distributorship agreement was insufficient to permit jury to find terms of agreement or to find on issues of termination of damages.

ON APPEAL.

On counterclaim, the defendant appeals from a jury verdict of $420.04 in his favor. Held, that evidence of counterclaim was insufficient to permit jury to find terms of agreement or to find on issues of termination of damages. Appeal denied.

Albert L. Bernier, for Plaintiff.

Jerome G. Daviau, for Defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, MARDEN, JJ. SIDDALL, J., sat at argument, but retired before opinion was adopted.

WILLIAMSON, C. J. The defendant appeals from a jury verdict of $420.04 in his favor on a counterclaim for breach of a mutual distributing agreement covering the sale of plaintiff's products to the defendant for resale on the latter's routes in central Maine.

In the points of appeal the defendant urges error by the presiding justice in his instructions to the jury: first, in refusing to charge that damages should be measured by loss of net profits and without consideration of employment or nonemployment of the defendant in mitigation of damages; and second, in limiting damages for a 30-day period

in face of his contention that the contract was not legally terminated.

On the plaintiff's complaint the defendant admittedly owed for goods sold and delivered. A verdict for the plaintiff in the amount of $913.41 was directed without objection.

The jury could have found as follows:

In October 1957 the plaintiff seller and the defendant distributor agreed in writing as follows:

> "In Consideration of the various benefits accruing to us (me) because of our mutual distributing agreement, and in lieu of any other written contract for such distributing agreement, we (I) agree to the cancellation of such agreement at any time at the sole option of yourselves or ourselves (myself) by giving notice in writing to the other at least thirty days prior to the date specified in such ontice (sic) as the effective date for such cancellation of the said mutual distributing agreement. All obligations and liabilities, of both parties hereto, created or incurred in connection therewith, shall cease as of, and none shall survive, the ffective (sic) date of any such termination or cancellation of the said mutual distributing arrangement except the obligation and liability of (ourselves) (myself) for payment of the price for goods delivered to us (me) pursuant to the mutual distributing arrangement, and to return to (you) (seller) all other property which you may have furnished free of charge to us (me) for use in connection with the said mutual distributing arrangement.
>
> Yours very truly,
>
> Accepted: s/ Malcolm J. Fortier
>
> THE BEST FOODS, INC. By Owner
> By s/ E. P. Kenny (Title)
> (Title)
>
> Date October 17, 1957"

The entire contract between the parties consisted of the "mutual distributing agreement," which was not in writing, and the written termination agreement. The terms of the "arrangement" thus must be found in the evidence. There was no writing to which the parties or the court may turn.

At the outset the defendant acquired a truck and other equipment from a distributor who had sold plaintiff's products in the same area and apparently under a like arrangement. Until 1961 the parties carried out the agreement to their mutual satisfaction.

In June 1961 the defendant sought to sell his business and so informed the plaintiff. Objections were made by the plaintiff to a substantial increase in the unpaid balance on defendant's account. On August 2 the plaintiff's New England district manager, who died before the trial, orally gave notice of the intention of the plaintiff to end the contract without, however, mentioning the precise termination date.

Under date of August 7 the plaintiff gave written notice by mail to the defendant as follows:

> "Dear Mr. Fortier:
>
> We refer to our Mutual Distributing Agreement with you, and in accordance with the terms thereof, and also confirming the advice of our Mr. F. A. Dole when he contacted you on Wednesday, August 2nd, 1961, we hereby exercise our option to cancel our Mutual Distributing arrangement.
> "The effective date for such cancellation shall be September 1st, 1961."

Mr. Kenny, who signed both the written agreement and the notice, was the eastern regional vice president of the plaintiff in New York City. The local representative had no authority to make or alter contracts such as that existing with the defendant.

During August there was a substantial reduction over past periods in the amount of goods supplied by the plaintiff. The evidence did not disclose the orders for goods placed by the defendant with the plaintiff in detail. Further, from June 1961 there was a reduction in substantial amount on the defendant's outstanding account with the plaintiff.

The defendant contended that through inability to obtain goods from the plaintiff, the plaintiff breached the agreement and effectively destroyed his ability to maintain his route. He denied that the failure to obtain goods was reasonably caused by the precariousness of his credit.

In late August the defendant and the plaintiff's representative agreed that an inventory should be taken in September. This was done and approved by the parties on September first.

The written notice in its terms was given less than thirty days prior to the stated effective date of September 1, 1961. No objection, except as noted above, was made by the defendant to the termination of the contract by the plaintiff on September 1, or at any time until the filing of the counterclaim in October 1962.

The jury was instructed in substance that the contract was terminated by the written notice either on September 1 through waiver of the insufficiency in the notice, or thirty days from the receipt of the notice by the defendant, that is, about September 7. On either alternative, damages were limited by the instructions to the 30-day period prior to an effective termination of the contract under the written notice.

The defendant contends that thereby he was erroneously deprived of damages covering a longer period. He also asserts error in the method of computing damages.

The difficulty in reaching the issues presented by the defendant is that the *terms of the oral agreement* cannot be

satisfactorily established from the evidence. Why the parties should have so loosely created a "mutual distributing agreement" and so carefully provided in writing for its termination, we do not know; but such is the case.

From the evidence the jury knew no more than that the parties entered into an agreement with unknown terms under which they amicably carried on their business relationship for some years. We find no evidence of terms relating to stated or minimum purchases from the plaintiff, to the prices to be charged, or to the credit open to the defendant, all of vital consequence to the parties.

There is to be sure in the record evidence suggesting, but no more, a limit on the credit to be extended the defendant. The Assistant Credit Manager testified that a notation on the record of defendant's account reading "credit limit $2,000," was "stricken after the account was closed. The credit limit is for order passing purposes for anyone other than myself."

Such evidence discloses guides and directions within the operation of the plaintiff's business. It does not warrant a finding of the credit terms, if any, of the agreement.

The presiding justice instructed the jury that the plaintiff "would not be required under the agreement to extend credit beyond the amount agreed upon." He continued, "It will be for you to say what was that amount. If there was no amount specified, it would be for the Counter-Defendant [the plaintiff], Best Foods in this case, to extend such credit as it saw fit." Later he said, "Now, in this case it will be for you to say whether or not the Defendant [meaning the plaintiff], Best Foods, did breach the contract by its failure, first, to provide merchandise or products, or whatever the goods were, to the Plaintiff Fortier so that he might sell and distribute the same. And if you find that they breached the contract, that at the time the orders were placed his indebtedness was less than the amount of credit

to be extended, and that Best Foods were not justified in failing to fill the orders, if they failed to fill the orders, then you determine as to just what damages did Mr. Fortier suffer in that respect, bearing in mind that he does have a legal obligation of doing everything that he reasonably can to mitigate those damages."

The parties were in accord that there was a "mutual distributing agreement." What, however, were the terms of the agreement which the jury has said were broken by the plaintiff with consequent damage to the defendant? We are satisfied from our study of the record that the jury in finding the terms of the contract must have based their conclusions on guess, conjecture, or surmise. The same uncertainty obviously affected the assessment of damages. No citations of authority are necessary to buttress the principle that such a shaky foundation will not support the findings inherent in the verdict.

The stated issues relating to termination of the agreement and the assessment of damages were not properly reached on the record before us, and so need not be, and are not, considered.

The plaintiff moved for a directed verdict at the close of the evidence on the ground, among others, that there was no showing of any obligation "on the part of the Plaintiff to make any minimum amount of deliveries as a contractual obligation." Decision on the motion was reserved and the case submitted to the jury. The plaintiff did not choose to seek a judgment notwithstanding the verdict or otherwise to object to the jury's decision.

The net result is that we deny the defendant's appeal. He has the good fortune of retaining the judgment for $420.04.

The entry will be

Appeal denied.

ROSE WARREN

vs.

WATERVILLE URBAN RENEWAL AUTHORITY

Kennebec. Opinion, May 12, 1965.

Eminent Domain. Urban Renewal.

Property owner seeking to enjoin municipal urban authority from asserting title to her property on ground of alleged illegality of condemnation procedure had burden of proving that the authority failed to comply with all applicable statutory provisions governing such appropriation.

Where municipal officers were provided with ample and abundant information to warrant finding of blight in area where plaintiff's real estate was located, their finding that such blight existed was final.

Municipal officers of Waterville were the mayor and aldermen; a majority of the municipal officers had the authority to act with committal of that body.

Preamble to urban renewal resolution adopted by municipal officers and approving urban renewal plans sufficiently recited manifestations of blight necessary to validate subsequent establishment of urban renewal authority.

ON REPORT.

This is an action to enjoin municipal urban renewal authority from asserting title to or exercising dominion over plaintiff's property on ground of alleged illegality of condemnation procedure under which property was appropriated. Held, that plaintiff failed to sustain burden of proving that authority failed to comply with all applicable statutory provisions governing such appropriation. Injunction denied; final judgment for defendant.

Richard J. Dubord,
Lester T. Jolovitz, for Defendant.

Jerome G. Daviau, for Plaintiff.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, JJ. SIDDALL, J., sat but retired before opinion was rendered. MARDEN, J., did not sit.

SULLIVAN, J. Defendant is a body corporate and politic created in Waterville, R. S., 1954, c. 90-B, where on November 26, 1963 the plaintiff was the owner of real estate which the defendant in the furtherance of an urban renewal project expropriated and appropriated by process of eminent domain. R. S., 1954, c. 90-B, § 6. By her complaint in this case the plaintiff seeks to have the defendant enjoined from asserting title or exercising dominion over such real estate for imputed illegalities in the condemnation procedure, averred to be of voiding effect.

The complaint, defendant's answer, interrogatories and responses, a deposition, affidavits, exhibits, pre-trial memoranda and orders and plaintiff's motion for a summary judgment present this case by report to this court for determination. The parties stipulate that no material facts are in dispute and that the only issues are of law.

To quote from the pre-trial record:

> "- - - - The primary issue of law for determination is whether or not the purported taking of plaintiff's property by eminent domain is lawful and valid and is legally sufficient to divest the plaintiff of her legal title - - - - They, (the parties), further agree that if the plaintiff prevails the Court may cause the defendant to be permanently enjoined from asserting title to plaintiff's property by reason of the purported taking by eminent domain on November 26, 1963; and that if the defendant prevails it may have judgment and the plaintiff may hereafter have her damages for the taking assessed in a separate proceeding now pending."

All of the events procreative of the controversy in the case at bar occurred during a period of time when R. S., 1954, c. 90-B was in controlling effect.

A municipality was privileged to create an urban renewal authority when and if its municipal officers adopted a resolution finding that:

> "A. One or more slums or blighted areas exist in such municipality; and
>
> "B. The rehabilitation, conservation, redevelopment, or a combination thereof, of such area or areas is necessary in the interest of public health, safety, morals or welfare of the residents of such municipality."

Subsequent to any such resolution and finding the municipal officers were directed to submit to the voters at a regular or special election the question whether the municipality willed to authorize the establishment of an Urban Renewal Authority.

R. S., 1954, c. 90-B, § 1

On November 3, 1959 six of the seven aldermen attended a programmed regular meeting of the municipal officers of the City of Waterville. The mayor and one alderman were absent.

The municipal officers of Waterville were the mayor and aldermen. R. S., 1954, c. 10, § 22, XXVI; c. 90-A, § 1, II.

A majority of the municipal officers had authority to act with committal of that body. R. S., 1954, c. 10 § 22, III.

There were 8 "municipal officers" in Waterville. Such officers did not consist of a mayor counterpoised against, vis-à-vis 7 aldermen or vice versa, but constituted a composite body to act by a numerical majority. Were it otherwise a mayor by his absence or by his single vote might have vetoed or made unattainable any decision of the municipal officers.

> "- - - - The municipal officers, of whom the mayor is one - - - -"
> *Howard* v. *Harrington,* 114 Me. 443, 448.

At the meeting of November 3, 1959 an alderman was elected President.

> "- - - - of this Regular Meeting in the absence of the Mayor and Permanent Chairman."

As Municipal Officers the 6 Aldermen in attendance adopted a resolution finding as follows:

> "RESOLUTION
>
> It is hereby resolved by the Municipal Officers of the City of Waterville that:
>
> It is hereby found and declared that there exist in the City of Waterville one or more slum and blighted areas and the rehabilitation, conservation, redevelopment, or a combination thereof, of such area or areas is necessary in the interest of the public health, safety, morals or welfare of the residents of the City of Waterville."

The parties to this case have stipulated that at the meeting of the municipal officers "no evidence or statistics of any kind were presented or received" concerning the presence or absence in the area where plaintiff's real estate was situated, of many social deficiencies which occasion urban renewal efforts.

The resolution and finding of the Municipal Officers, it will be noted, were a mere truism and a generality predicated upon Waterville as a comprehensive territory without designation as to the specific location of any of the prevalent slum or blighted districts. The resolution and finding were expressed in copied statutory language as an inchoate measure. The pronouncement as given was obvious and self evident without necessity for statistics. In 1959 the observation would without doubt have been apt for most American cities. Furthermore, at least 4 of the 6 Alder-

men present and voting at the meeting of November 3, 1959 were familiar with the various areas of Waterville, had been resident in that City respectively for 10, 34, 38 and 50 years, were well acquainted with the general area comprising

> "- - - - the Urban Renewal project in Waterville, and particularly Temple Court where properties of Rose Warren (plaintiff) are located, and knew that this area, as well as various other areas in the City with which I was (they were) acquainted, contained buildings which were old, deteriorating, and dilapidated; and Temple Court is a narrow street and is densely populated."

The record of the meeting of November 3, 1959 contains the following:

> "IN BOARD OF ALDERMEN Order #88
>
> ORDERED, That the following question be submitted to the voters of the City of Waterville at the next regular or special municipal election:
>
> 'Shall the City of Waterville adopt the provision of the urban renewal law, Revised Statutes, Chapter 90 - B, and Authorize the establishment of an Urban Renewal Authority?'
>
> Passed in Concurrence."

At the same time on November 3, A. D., 1959 the 6 attending and functioning Aldermen as signatories executed a warrant for a plebiscite upon the questions recited above, to be conducted by vote at the regular municipal election on December 7, 1959. The referendum was accordingly held and the popular will answered by ballot the quoted questions in the affirmative. The record discloses that all provisions of R. S., 1954, c. 90-b, § 1, subsections II, III and IV were fulfilled.

On February 2, 1960 another programmed regular meeting of the municipal officers occurred. It was attended by

the Mayor and all 7 of the Aldermen. The Mayor "nominated" five citizens to serve staggered terms as the "Urban Renewal Authority" of Waterville and "It was so voted." Such action constituted an appointment in compliance with R. S., 1954, c. 90-B, § 2, subsection I which ordains that:

> "The municipal officers shall appoint a board of trustees of the urban renewal authority which shall consist of 5 trustees."

At the same meeting the Mayor appointed 15 persons as a Citizens' Committee of the Urban Renewal Authority. The Mayor and Chairman of the Planning Board were commissioned to contract with the Maine Department of Economic Development pursuant to the Federal Government's 701 Program administered by the U. S. Housing and Home Finance Agency "for the second phase of the comprehensive planning study of the City of Waterville, at a cost to the City" not to exceed $2500 and the withdrawal of that amount was authorized from the Planning Reserve Account.

During the 3 years to follow the Municipal Officers and the Urban Renewal Authority were continuously operative in the urban renewal enterprise. The Renewal Authority enlisted expert counsel and professional assistance. Its meetings were declared by it to be public. The Federal and State governments supplied cooperative guidance. Financial aids were obtained. The City had an adopted master plan for the development of the municipality and by July of 1962 the Waterville Urban Renewal Authority had prepared and recommended to the Waterville Planning Board an urban renewal plan which the latter body approved. R. S., 1954, c. 90-B, § 5.

Meanwhile the Municipal Officers met in many formal and informal sessions.

On January 21, A. D., 1963, pursuant to R. S., 1954, c. 90-B, § 5, subsec. VI, the Municipal Officers conducted in

the Opera House at the City Building a public hearing after statutory notice. Some 600 people were in attendance. The proposed "Maine R-6" Plan involving plaintiff's real estate was explained to the convened public by an expert. Specialists addressed the gathering. A considerable number of citizens proponents and opponents of the project spoke their opinions.

On February 5, 1963 the Municipal Officers met and by a 5 to 2 vote passed an Urban Renewal Resolution concerning "The Charles Street Project" "No. Maine R-6" where plaintiff's real estate was located. The Resolution which was read to the body by the Mayor stated inter alia that the Renewal Authority had made detailed studies of the project area in respect to conditions relating to physical, social, economic, safety, health and welfare factors, elements and circumstances and that the Municipal Officers had general knowledge of the conditions prevailing in the project area. The Municipal Officers in the Resolution averred that they found the project area to be blighted and eligible for correction under R. S., 1954, c. 90-B, §§ 1 and 4 and that the urban renewal plan for the project area had been duly reviewed, considered and approved by the Municipal Officers. R. S., 1954, c. 90-B, § 5, subsec. VII.

The Renewal Authority in its recommendations to the Municipal Officers had included the statements required by R. S., 1954, c. 90-B, § 5, subsec. V.

On November 26, 1963 at a regular meeting of the Waterville Urban Renewal Authority that body adopted a resolution declaring that the real estate of this plaintiff constituting a portion of the Charles Street Urban Renewal Project, Me. R-6 must be acquired in the public interest as necessary for the public use. The resolution proclaimed that plaintiff's property was included in an approved urban renewal project under R. S., 1954, c. 90-B and authorized the Chair-

man of the Authority to prepare, execute and file a Statement of Taking of plaintiff's real estate. On January 13, 1964 a copy of that Resolution with a plat of the real property of the plaintiff and a statement signed by Bradford L. Wall, Chairman of the Authority, communicating that such realty was taken pursuant to R. S., 1954, c. 90-B was filed in the Registry of Deeds for Kennebec County. The Authority filed in the Superior Court for Kennebec County a statement of the sum of money estimated by the Authority to be just compensation for the real estate taken from the plaintiff. The Authority deposited in such Superior Court to the use of the plaintiff bonds in the statutory amount. Notice of the taking of her real estate was served upon the plaintiff. R. S., 1954, c. 90-B, § 6.

Plaintiff contends that the defendant did not comply with all applicable provisions of R. S., 1954, c. 90-B and consequently the purported taking of plaintiff's realty by eminent domain was unlawful, null, void, without effect and violative of plaintiff's constitutional rights. Plaintiff who must sustain the burden of proof here protests multiple particularized acts and omissions as vitiative of the condemnation procedure.

Plaintiff mistakenly charges that on November 3, 1959 there was no authoritative or valid action by the Municipal Officers of Waterville. See R. S., 1954, c. 10, § 22, III and *Howard* v. *Harrington,* 114 Me. 443, 448, *supra.*

Plaintiff asserts that some or all of the persons acting as trustees of the Urban Renewal Authority were not valid, *de jure* office holders during much of the period from November 3, 1959 until November 26, 1963. The record discredits plaintiff's conclusions. On February 2, 1960 the Mayor and 7 Aldermen functioning as Municipal Officers chose 5 trustees for the Authority. R. S., 1954, c. 90-B, § 2, I. On October 4, 1960 at a regular meeting of the City

Government the Mayor read to the Joint Convention the resignation of trustee Weeks. The minutes of the meeting then record that the Board of Aldermen unanimously elected Bradford Wall as successor to trustee Weeks. The minutes then contain the words, "As Municipal Officers." On December 5, 1961 2 trustees resigned and the Mayor and City Council essayed to elect 2 successors. On January 31, 1962, 57 days later, all of the Municipal Officers at a special meeting appointed the same 2 persons as successor trustees and clarified or ratified the appointment of the other 3 trustees who had been serving as *de jure* trustees, 2 since February 2, 1960 and 1 since October 4, 1960. On February 5, 1963 at a regular meeting the record informs us that trustee Lander, Jr., was "reappointed as a member of the Urban Renewal Authority for a further term of five years, by Mayor Cyril M. Joly, Jr. The Aldermen consented to this reappointment."

R. S., 1954, c. 90-B, § 1, I, A and B require that the Municipal Officers in order to create for a municipality an urban renewal authority must preliminarily adopt

> "- - - - a resolution finding that,
>
> A. One or more slums or blighted areas exist in such municipality; and
>
> B. The rehabilitation, conservation, redevelopment, or a combination thereof, of such area or areas is necessary in the interest of the public health, safety, morals or welfare of the residents of such municipality."

R. S., 1954, c. 90-B, § 20, II and XI, respectively, define the meaning of "Blighted area" and the meaning of "Slum area."

This court said in *Crommett* v. *Portland* (1954), 150 Me. 217, 235:

> "The determination of whether an area is 'blighted' or 'slum' under the statute must rest upon facts

> directly bearing upon the public health, safety, morals or welfare. Consideration of other facts not so grounded, however, does not affect the validity of the finding, if the pertinent facts are in themselves sufficient to show the 'blighted' or 'slum' condition."

On February 5, 1963 at a meeting of the Municipal Officers the Mayor read an Urban Renewal Resolution. It was moved and seconded that the resolution be acted upon. "All voted in favor of this motion." The Mayor "explained about the many meetings which had been held relative to Urban Renewal and also the two hearings." The Mayor "called for remarks from the citizens present." There was some discussion. 5 Aldermen voted to adopt and 2 Aldermen voted not to accept the: —

> "Resolution of Municipal Officers of Waterville, Maine approving the Urban Renewal Plan and the feasibility of relocation for project No. Maine R-6."

The Resolution in part read as follows:

> "1. That it is hereby found and determined that the Project is a blighted area and qualifies as an eligible Project area under State Statute Chapter 90-B, Sections 1 and 4, 1954, Revised Statutes of Maine."

As a preamble to the Resolution adopted the following is of record:

> "Whereas the Local Public Agency has made detailed studies of the location, physical condition of structures, land use, environmental influences, and social, cultural and economic conditions of the Project area and has determined that the area is a blighted area and that it is detrimental and a menace to the safety, health and welfare of the inhabitants and users thereof and of the Locality at large, because of dilapidation, deterioration, age or obsolescence; or inadequate provision for venti-

> lation, light, air, sanitation or open spaces; or the existence of conditions which endanger life or property by fire and other causes, and the members of this Governing Body have been fully apprised by the Local Public Agency and are aware of these facts and conditions;"
> See R. S., 1954, c. 90-B, § 20, II, A.

The foregoing preamble, as does the statute cited, recites the manifestations of the blight in the alternative and not in the conjunctive. The preamble as a pleading would be technically objectionable. However, the preamble is intelligible, certain as to common intent and sufficient for all practical purposes.

Soper v. *Livermore,* 28 Me. 193, 203.
State v. *Williams,* 25 Me. 561, 565.

The deposition of the Executive Director of the Urban Renewal Authority represents that at a public hearing prior to February 5, attended by the Municipal Officers and at the public hearing on January 21, 1963 also attended by the Municipal Officers formal evidence was offered as to the constitution by the project area of a menace to public health and safety. The Director states that subsequent to December 6, 1960 blight factors were discussed by the Urban Renewal Authority with the Municipal Officers at different times and "certainly the visual view of the area in question, several times before the meeting was held where they voted on it."

The record in the case at bar contains an affidavit of Morton R. Braun a professional consultant for urban renewal projects. Braun whose services were engaged in the Waterville project recites that his employment was for the purpose of developing information as to the existing critical conditions of various areas of Waterville with a view to determine if such areas could be established as eligible for Federal planning and survey funds and if the areas were

found to be so qualified, ultimately to make specific plans for the urban renewal of such municipal areas. As a result of studies he asserts that he formed an opinion that the Charles Street area was one in which there was a predominance of buildings which were in fact dilapidated, deteriorated, aged and obsolete. In the residential area he listed instances to prove that there was a high density of population and overcrowding. He made or supervised a careful inspection of structures from the outside. He and his staff collected information in the field and made a detailed analysis of the areas involved. All such information so gained was interpreted and analyzed and resulted in various reports made to the Municipal Officers. He relates the nature and objects of his observations and those of his co-workers in their house to house survey as to structural conditions and envoronmental factors. He concluded that of 83 structures in the Charles Street Area Project 36 or 43% were substandard, warranting clearance, 29 or 35% were deficient but economic of repair and 18 or 22% were standard buildings. He found a number of environmental deficiencies. These facts concerning the Charles Street Area Project were made available by Braun to the Municipal Officers and to all present at the public hearing conducted by the Municipal Officers. During the course of preparing plans for the project Braun met on several occasions with the Municipal Officers to present progress reports, results of surveys and proposed plans. Braun with or without his working staff met with the Municipal Officers on January 28, 1960 and on several specific dates through the ensuing period inclusive of January 21, 1963 when he spoke at the public statutory hearing provided by the Municipal Officers. At all such meetings he represents that the entire results of the studies, surveys and plans which he had developed were given and explained to the people present.

The plaintiff in the instant case protests that:

> "- - - - the finding of blight in the area designated was purely arbitrary and without factual foundation for adequate legal procedure."

Plaintiff in support of such contention cites from the text of this court's opinion in *Crommett* v. *Portland,* 150 Me. 217, 235, as follows:

> "The determination of whether an area is 'blighted' or 'slum' under the statute must rest upon facts directly bearing upon the public health, safety, morals or welfare."

As we have previously noted herein the Municipal Officers supplied such findings as the statute required. R. S., 1954, c. 90-B, § 1, A and B. Plaintiff impugns those findings as "purely arbitrary and without factual foundation."

Plaintiff's attack upon the findings is in the nature of the erstwhile extraordinary and now regulated certiorari process which had been happily simplified and lightened by Rule 80 B, M. R. C. P. The serviceful utility and the evolved rationale of certiorari without its technical formularies have been conserved.

> "- - - - It (certiorari) lies only to correct errors of law, not to review the decision of a subordinate tribunal of a question of fact submitted to its judgment. *Frankfort v. County Commissioners,* 40 Maine 389; *Hayford v. Bangor,* 102 Maine, 340; *Farmington River Water Co. v. County Commissioners,* 112 Mass. 206. In the last named case Gray, C. J., said: 'A writ of certiorari lies only to correct errors in law, and not to revise a decision of a question of fact upon the evidence introduced at the hearing in the inferior court, or to examine the sufficiency of the evidence to support the finding, unless objection was taken to the evidence for incompetency, so as to raise a legal question'." *Nelson* v. *Portland Fire Department* (1909), 105 Me. 551, 555.

> "- - - - In a proceeding of this nature (certiorari) this court does not act as a Court of Appeal upon the merits of the cause. It cannot retry the facts nor review the evidence taken out before the municipal officers, nor reverse any decision within their discretion. It has power to examine the course of procedure and to determine whether the municipal officers kept within their jurisdiction, and proceeded according to law - - - -"
> *State* v. *McLellan* (1918), 117 Me. 73, 79.

The Superior Court would not try *de novo* as a Court of Appeal the issue decided by the Municipal Officers as to whether the controversial area of Waterville was objectively "blighted." The Municipal Officers were a governmental or administrative body within the purview of R. S., 1954, c. 90-B. The function of this court upon agreed report is to examine the record, as it is afforded us here, of the proceedings before the Municipal Officers and to verify what information was presented to the Municipal Officers from November 3, 1959 and through February 5, 1963 when the Municipal Officers adopted the resolution finding and deciding that the area of Project No. Maine R-6 was blighted and qualified as an eligible urban renewal project area. This court thereby is to conclude whether upon the information possessed by them the Municipal Officers in finding a state or condition of statutory "blight" acted within the bounds of vindicable discretion or arbitrarily, capriciously and without justification.

> "- - - - Trial de novo, in effect, could relegate the commission hearing to a meaningless, formal preliminary and place upon the courts the full administrative burden of factual determination."
> *Nevada Tax Commission* v. *Hicks,* 73 Nev. 115, 123, 310 P. (2nd) 852, 856.

To the Municipal Officers the Legislature delegated the authority to make findings of "blight" under permissive circumstances.

Earlier in this opinion we demonstrated from the record in the case at bar that the Municipal Officers were provided with ample and abundant information to warrant a finding of "blight" in the milieu where plaintiff's real estate was located. They pronounced such a finding which is therefore final.

> "Nor is it required - - - that independent proof of detriment to public health, safety or morals be made. Once it is found that an area of slum and blight exists, and such finding rests upon evidence of substance, the consequent menace to public, health, safety and morals, follows as a matter of legislative determination - - - -"
>
> *Urban Renewal Agency of City of Reno* v. *Iacometti* (1963), (Nevada), 379 P. (2nd) 466, 473.

It is the conclusion of this court that the plaintiff has failed to sustain her burden of proof in this case and that the taking of plaintiff's property was lawful, valid and legally sufficient to divest the plaintiff of her title.

In accordance with this opinion and with the applicable alternative contained in the agreement of the parties the mandate shall be:

Injunction denied.

Final judgment for the defendant.

Plaintiff to have her damages for the taking of her property, assessed in a separate proceeding now pending.

PAUL E. WIGGIN

vs.

CLARABELL SANBORN

Kennebec. Opinion, May 13, 1965.

Settlements. Accord and Satisfaction. Juries. Evidence. Damages. Automobiles. Insurance.

Settlements are favored by the law.

When an amount is tendered on a clear and unambiguous written condition that it be accepted in full settlement of all claims pending between parties, one who accepts amount offered is bound to condition as a matter of law.

Accord and satisfaction is a question of fact to be submitted to jury unless testimony is such that only one inference or finding can be made.

A written condition will present a jury question only when language employed is ambiguous or there is either an exchange of correspondence or an oral conversation of such a nature as to create doubt as to what was intended or should reasonably have been understood.

Plaintiff who was not entitled to a jury determination on issue of accord and satisfaction could not complain of alleged errors in instructions given by presiding justice.

Issues in civil cases need only to be proved by preponderance or greater weight of evidence but as to certain issues the quality of evidence essential to proof must be of a high degree, else it will not preponderate.

Proof to establish an accord and satisfaction must be clear, convincing, and satisfactory to create a preponderance of evidence.

Where facts as to an alleged accord and satisfaction were not in dispute, there was no occasion for submission of issue to jury, but no prejudice resulted to defendant since the jury resolved issue in defendant's favor and returned only verdict which could be sustained on facts.

ON APPEAL.

Plaintiff on appeal assigns as error failure of the presiding justice to direct a verdict in his behalf as well as giving certain instructions to the jury and the failure to instruct as requested. Held, that where plaintiff indorsed and received payment of insurance company draft for amount of automobile damage after plaintiff had knowledge that he had received some injury in the collision and the draft referred to the date of accident and stated that it was in satisfaction of all claims, giving and acceptance of the draft constituted an accord and satisfaction and a final settlement between the plaintiff and the defendant whose negligence caused the collision. Appeal denied.

George A. Wathen,
William M. Finn, for Plaintiff.

Joseph Campbell, for Defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, MARDEN, JJ. SIDDALL, J., sat at argument, but retired before opinion was adopted.

WEBBER, J. The plaintiff brought his complaint for damages alleged to have been caused by the negligent acts of defendant in an automobile collision. The defendant denied liability and pleaded specially an accord and satisfaction. By agreement the issue with respect to accord and satisfaction was tried separately, jury verdict thereon being for the defendant. By his statement of points on appeal, plaintiff assigns as error the failure of the presiding justice to direct a verdict in his behalf as well as the giving of certain instructions to the jury and the failure to instruct as requested.

The facts are not in dispute and need not have been submitted to the jury. On December 8, 1960, the day the plaintiff's and defendant's automobiles were in collision, the de-

fendant referred the plaintiff to her insurance company. The plaintiff knew that his automobile had been slightly damaged but was not aware that he had any personal injury. Plaintiff went immediately to the office of an agent for defendant's insurance company, and using a form supplied by them, signed a report of the accident. In this report he described the damage to the vehicle and stated that no one was injured. His car was promptly repaired and the bill in the amount of $16.52 paid by the plaintiff. Information as to the cost of repair was given the insurance carrier. On the evening of the day of the accident the plaintiff suffered a stiffening of the back but did not immediately relate these symptoms of injury to the accident. His condition worsened, however, and within a few days he was forced to seek medical assistance. He suffered pain and continued under medical care for many weeks. On December 27, 1960 the insurance carrier issued its draft to the plaintiff in the amount of $16.52. On the face of the draft appeared the name and address of the assured, a reference to the date of the accident and the following language: "In satisfaction of all claims." In addition an "X" was typed in a box opposite the word "Final." On January 13, 1961, more than a month after the accident, the plaintiff endorsed this check at a commercial bank and received payment. The jury concluded that the giving and acceptance of this draft under the circumstances then existing constituted an accord and satisfaction and a final settlement as between the parties.

14 M. R. S. A., Sec. 155 (R. S., 1954, Chap. 113, Sec. 64) provides: "No action shall be maintained on a demand settled by a creditor or his attorney entrusted to collect it, in full discharge thereof, by the receipt of money or other valuable consideration, however small." We have frequently asserted that settlements are favored by the law. *Valley* v. *B. & M. Railroad,* 103 Me. 106, 68 A. 635; *Borden* v.

Sandy River & Rangeley Lakes R. R. Co., 110 Me. 327, 86 A. 242. A review of the cases makes it clear that when an amount is tendered on a clear and unambiguous written condition that it be accepted in full settlement of all claims pending between the parties, one who accepts the amount offered is bound by the condition as a matter of law. In *Larsen* v. *Zimmerman*, 153 Me. 116, 135 A. (2nd) 270, the parties were involved in a dispute over labor and materials. The buyer sent a check on which appeared "By endorsement this check is accepted in full payment of the following account" and the word "final." The check was accepted even though it was in an amount less than that claimed by the seller. We held that this transaction constituted an accord and satisfaction *as a matter of law* and the seller was bound by the condition stated. To the same effect, *Anderson* v. *Standard Granite Co.*, 92 Me. 429, 43 A. 21; *Viles* v. *Realty Company*, 124 Me. 149, 126 A. 818; *Horigan* v. *Chalmers Motor Co.*, 111 Me. 111, 88 A. 357. The material facts in the instant case are indistinguishable from those in *Larsen*. Plaintiff had a single unliquidated claim for damages arising out of an alleged tort on the part of defendant. Although there may be a number of provable elements of such damages as for example injury to property, pain and suffering, permanent impairment, loss of earning capacity, medical expense and the like, there is but one claim and one cause of action and the whole damage will reduce to a single sum of money.

We distinguish cases in which an issue of fact as to the intention of the parties has been raised and properly submitted to the jury. In *Bell* v. *Doyle*, 119 Me. 383, 111 A. 513, the buyer sent a check accompanied by the statement, "Herewith check to balance" together with a statement of his claims. Although the check was cashed, the seller immediately stated his contrary position and made demand for the balance asserted to be due. The court held that on

these facts the debtor's intention and what the creditor understood or should have understood were properly submitted to the jury. The language employed by the buyer, standing alone, was deemed by the court to leave an area of doubt requiring further clarification. In *Wass* v. *Canadian Realty Co.*, 121 Me. 516, 518, 118 A. 375, 376, the opinion does not inform us as to what words were written on the check but the court attached importance to the fact that the word "settlement" was erased by the defendant before final acceptance of the check by the plaintiff. Although the court held that the facts in *Wass* raised an issue of fact, it accurately restated the governing principle in these terms: "Accord and satisfaction is a question of fact to be submitted to the jury, unless the testimony is such *that only one inference or finding can be made.*" (Emphasis ours.) In *Fuller* v. *Smith,* 107 Me. 161, 77 A. 706, the facts were not unlike those later decided in *Bell* v. *Doyle, supra.* Although the debtor used the phrase "all my indebtedness," he also spelled out in detail how he arrived at the sum tendered leaving open the possible inference that those were the only items intended to be settled. The court held that enough doubt was created to raise a jury question but suggested that if the debtor had made it clear that he intended to include any possible damage arising out of a separate cause of action for breach of contract, the creditor might have been bound by such condition and his acceptance. In the more recent case of *Farina* v. *Sheridan* (1959), 155 Me. 234, 153 A. (2nd) 607, the check was marked "in full" but there was an exchange of correspondence between the parties bearing on their mutual understanding. A divided court felt that the covering letter left room for doubt as to whether the check was intended to be "in full" under any and all conditions. In *Price* v. *McEachern,* 111 Me. 573, 90 A. 486, there was no condition stated in writing on the check or otherwise and a jury verdict for the plaintiff was upheld. Distinguishing cases in which accord and satis-

faction had been deemed demonstrated as a matter of law, the court said at page 578: "The cases cited by the defendants contain *written* proof that the check or money, if accepted, was in full payment. The contract of acceptance was made clear. But in the case at bar no such evidence appears. The testimony does not show that the defendants presented any new contract or prescribed any conditions, upon the offer of the check to the plaintiff." (Emphasis ours.) In *Chapin* v. *Little Blue School,* 110 Me. 415, 86 A. 838, the debtor merely expressed a hope that his payment might be accepted as a just settlement. Held a jury question.

We do not intimate or suggest that accord and satisfaction will be found as a matter of law only when the condition is clearly set forth *in writing.* In an appropriate case there might be no dispute in the testimony as to words used orally in stating a condition in which case only a question of law would arise. There is usually, however, an opportunity for disagreement as to what was spoken which is ordinarily eliminated when the condition is reduced to writing in plain and unmistakable terms. A written condition will present a jury question only when the language employed is ambiguous or there is either an exchange of correspondence or an oral conversation of such a nature as to create doubt as to what was intended or should reasonably have been understood.

In our view the facts of the instant case most closely resemble those in *Larsen.* It would be difficult to imagine how an attendant condition could be more fully or clearly stated. The words "in satisfaction of all claims" and "final" leave no room for doubt as to the intention of the debtor and could not reasonably be misunderstood by the creditor. There was no occasion for submission of the issue to a jury, but no prejudice resulted to the defendant

since the jury resolved the issue in her favor and returned the only verdict which could be sustained on these facts.

Since the plaintiff was not entitled as of right to a jury determination, he cannot be heard to complain of alleged errors in the instructions given by the presiding justice. In essence the complaint relates to the burden of proof imposed on one who raises the issue of accord and satisfaction. Issues in civil cases need only be proved by the preponderance or greater weight of the evidence. Yet as to certain issues the *quality* of evidence essential to the proof must be of a high degree, else it will not preponderate. The rule was clearly stated in *Liberty* v. *Haines,* 103 Me. 182, 192; 68 A. 738, 742: "It would appear from these citations that in this class of cases, the rule which obtains in the ordinary case is so modified in every common law jurisdiction, at least, *that although all the while it only requires a preponderance of the evidence, yet to establish a preponderance, the proof must become 'clear, convincing and satisfactory.'*" (Emphasis ours.) This requirement with respect to the quality of evidence to create a preponderance obtains when the issue is accord and satisfaction. *Wass* v. *Canadian Realty Co. (supra).*

The entry will be

Appeal denied.

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

* * * * * *

QUESTIONS PROPOUNDED BY THE SENATE IN AN ORDER DATED MAY 11, 1965

ANSWERED MAY 26, 1965

SENATE ORDER PROPOUNDING QUESTIONS

STATE OF MAINE

In Senate, May 11, 1965

WHEREAS, it appears to the Senate of the 102nd Legislature that the following are important questions of law, and that the occasion is a solemn one; and

WHEREAS, there is pending before the Senate a Bill entitled "AN ACT to Authorize Municipalities to Finance Industrial and Recreational Projects," H. P. 1091, L. D. No. 1487; and

WHEREAS, the constitutionality of said Bill has been questioned; and

WHEREAS, it is important that the Legislature be informed as to the constitutionality of said Bill:

NOW THEREFORE BE IT ORDERED, that the Justices of the Supreme Judicial Court are hereby respectfully requested to give to the Senate, according to the provisions of the Constitution on its behalf, their opinion on the following questions, to wit:

Question 1:

WILL REVENUE OBLIGATION SECURITIES ISSUED UNDER THE PROVISIONS OF SAID BILL CONSTITUTE THE CREATION OF A DEBT OR LIABILITY OF A CITY OR TOWN WITHIN THE MEANING OF ARTICLE IX, SECTION 15, OF THE MAINE CONSTITUTION WHICH WILL HAVE TO BE TAKEN INTO ACCOUNT IN COMPUTING THE MAXIMUM AGGREGATE OF DEBTS AND LIABILITIES WHICH MAY BE CREATED BY A CITY OR TOWN AS THEREIN PROVIDED FOR?

Question 2:

DOES SUBSECTION 1 OF SECTION 5331 OF SAID BILL, WHICH PROVIDES THAT NO SECURITIES SHALL BE ISSUED THEREUNDER UNTIL THE GENERAL PURPOSES FOR WHICH THE SECURITIES ARE TO BE ISSUED AND THE MAXIMUM PRINCIPAL AMOUNT OF SUCH SECURITIES "HAVE BEEN APPROVED BY A MAJORITY OF THE VOTES CAST ON THE QUESTION AND THE NUMBER OF VOTES CAST IS AT LEAST 20% OF THE TOTAL VOTE FOR ALL CANDIDATES FOR GOVERNOR CAST IN THE MUNICIPALITY AT THE LAST GUBERNATORIAL ELECTION," VIOLATE ARTICLE IX, SECTION 8-A, OF THE MAINE CONSTITUTION WHICH PROVIDES THAT THE "REGISTERED VOTERS" OF A MUNICIPALITY MAY, "BY MAJORITY VOTE" AUTHORIZE THE ISSUANCE OF NOTES OR BONDS?

Question 3:

DO SECTIONS 5339, 5340 and 5341 OF SAID BILL, WHICH PROVIDE THAT PROJECTS FINANCED UNDER THE BILL SHALL BE EXEMPT FROM TAXATION SO LONG AS TITLE THERETO RE-

MAINS IN THE NAME OF THE MUNICIPALITY, THAT THE LEASEHOLD INTEREST OF THE LESSEE OF ANY PROJECT IS SUBJECT TO TAXATION AND THAT, AS AN ALTERNATIVE TO TAXATION, A MUNICIPALITY MAY PROVIDE IN THE LEASE OR CONTRACT FOR PAYMENTS IN LIEU OF TAXATION, VIOLATE THE PROVISIONS OF ARTICLE IX, SECTION 8, OF THE MAINE CONSTITUTION?

Question 4:

WILL REVENUE OBLIGATION SECURITIES ISSUED UNDER THE PROVISIONS OF SAID BILL FOR THE PURPOSE OF PAYING THE COST OF ACQUIRING, CONSTRUCTING, RECONSTRUCTING, RENEWING OR REPLACING REVENUE PRODUCING RECREATIONAL FACILITIES, BE ISSUED FOR A PROPER MUNICIPAL PURPOSE?

In Senate Chamber

May 11, 1965

Name: Violette

Read and Passed

County: Aroostook

EDWIN H. PERT,

Secretary

A true copy

Attest: EDWIN H. PERT

Secretary of the Senate

NEW DRAFT OF: H. P. 822, L. D. 1113

ONE HUNDRED AND SECOND LEGISLATURE

Legislative Document **No. 1487**

H. P. 1091 House of Representatives, April 22, 1965

Reported by Mr. Richardson, from Committee on Judiciary. Printed under Joint Rules No. 10.

JEROME G. PLANTE, Clerk

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED SIXTY-FIVE

AN ACT to Authorize Municipalities to Finance Industrial and Recreational Projects.

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

Sec. 1. R. S., T. 30, c. 242, additional. Title 30 of the Revised Statutes is amended by adding a new chapter 242 to read as follows:

'CHAPTER 242

MUNICIPAL INDUSTRIAL AND RECREATIONAL OBLIGATIONS ACT

§ 5325. General grant of powers

A municipality is authorized and empowered:

1. Revenue-producing industrial or recreational facilities. To acquire, construct, reconstruct, renew and replace industrial and recreational projects within or partly within the corporate limits of the municipality;

2. Securities. To issue revenue obligation securities of the municipality as provided to pay the cost of such acquisition, construction, reconstruction, renewal or replacement;

3. Refunding securities. To issue revenue refunding obligation securities of the municipality as provided to refund any revenue obligation securities then outstanding which shall have been issued under this chapter;

4. Acquisition of property. The municipal officers are authorized and empowered to acquire from funds provided under the authority of this chapter, such lands, structures, property, rights, rights-of-way, franchises, easements and other interests in lands, including lands lying under water and riparian rights, which are located within the State as it may deem necessary or convenient for the construction or operation of any industrial or recreational project, upon such terms and conditions as they shall deem reasonable and proper, and to dispose of any of the foregoing in the exercise of its powers and the performance of its duties hereunder;

5. Contracts; employment of specialists. To make and enter into all leases, contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this chapter, including a trust agreement or trust agreements securing any revenue obligation securities issued hereunder, and to employ such consulting and other engineers, attorneys, accountants, construction and financial experts, superintendents, managers and such other employees and agents as deemed necessary, and to fix their compensation; provided all such expenses shall be payable solely from funds made available under this chapter;

6. Federal contracts. To enter into contracts with the Government of the United States or any agency or instrumentality thereof, or with any other municipality providing for or relating to the revenue-producing industrial or recreational facility;

7. Federal aid. To accept from any authorized agency of the Federal Government loans or grants for the planning, construction or acquisition of any revenue-producing industrial or recreational facility and to enter into agreements with such agency respecting any such loans or grants, and to receive and accept aid and contributions from any source of either money, property, labor or other things of value, to be held, used and applied only for the purposes for which such loans, grants and contributions may be made; and

8. General powers. To do all acts and things necessary or convenient to carry out the powers expressly granted in this chapter.

§ 5326. Definitions

The listed terms as used in this chapter are defined as follows, unless a different meaning is plainly required by the context:

1. Revenue obligation security. "Revenue obligation security" means a note, bond or other evidence of indebtedness to the payment of which is pledged the revenues as provided in section 5334.

2. Industrial project. "Industrial project" means any building, structure, machinery, equipment or facilities which may be deemed necessary for manufacturing, processing, or assembling raw materials or manufactured products, or research, together with all lands, property, rights, rights-of-way, franchises, easements and interests in lands which may be acquired by the municipality for the construction or operation of the industrial project.

3. Recreational project. "Recreational project" means any building or other real estate improvement and, if a part thereof, the land upon which the same may be located, or any interest in land by lease or otherwise, or any equipment used or usable in connection with recreational facilities of

whatever kind and nature, including but not limited to marinas, swimming pools, golf courses, camp grounds, picnic areas, lodges, ski resorts, arenas and any other recreational facilities which in the judgment of the municipal officers are necessary or convenient to the exercise of the powers conferred by this chapter.

4. Project. "Project" means industrial project or recreational project as the context may permit or require.

5. Cost. "Cost" as applied to a revenue-producing industrial or recreational facility shall include the purchase price of any such facility, the cost of construction, the cost of all labor, materials, machinery and equipment, the cost of improvements, the cost of all lands, property, rights, easements and franchises acquired, financing charges, interest prior to and during construction and, if deemed advisable by the municipal officers, for one year after completion of construction, cost of plans and specifications, surveys and estimates of cost and of revenues, cost of engineering and legal services, and all other expenses necessary or incident to determining the feasibility or practicability of such construction, administrative expense and such other expenses as may be necessary or incident to the financing herein authorized. Any obligation or expenses incurred by the State or the municipality in connection with any of the foregoing items of cost may be regarded as a part of such cost and reimbursed to the State or municipality out of the proceeds of revenue obligation securities issued under this chapter.

§ 5327. Industrial and Recreational Finance Approval Board

The Industrial and Recreational Finance Approval Board, hereinafter in this chapter called the "board," shall consist of 7 members, including the Treasurer of State and 6 members at large appointed by the Governor with the advice and consent of the Council for a period of 3 years, provided that,

of the members first appointed, 2 shall be appointed for a term of one year, 2 for a term of 2 years and 2 for a term of 3 years, and in each case until their respective successors shall be appointed and qualified. A vacancy in the office of an appointive member, other than by expiration, shall be filled in like manner as an original appointment, but only for the remainder of the term of the retiring member. Appointive members may be removed by the Governor with the advice and consent of the Council for cause. The board shall elect one of its members as chairman, one as vice-chairman and shall employ a manager, who shall be secretary. Four members of the board shall constitute a quorum. The affirmative vote of 4 members, present and voting, shall be necessary for any action taken by the board. No vacancy in the membership of the board shall impair the right of the quorum to exercise all rights and perform all the duties of the board. The board is hereby constituted a public instrumentality and exercise by the board of the powers conferred by this chapter shall be deemed to be the performance of an essential governmental function.

§ 5328. Powers

The board is authorized and empowered to:

1. Rules. Adopt rules for the regulation of its affairs and the conduct of its business.

2. Assistance to municipalities. Assist municipalities in negotiations with prospects, drafting of contracts, arranging for financing and negotiations for sale of securities to be issued under this chapter.

3. Certificates of approval. To approve or disapprove projects and issue certificates of approval upon application of municipalities proposing to issue revenue obligation securities under this chapter.

4. Policy. It shall be the policy of the board in considering the propriety of issuing a certificate of approval to determine to its satisfaction that:

A. The project will make a significant contribution to the economic growth of the State;

B. The project will not create a competitive advantage to any party to a contract entered into by any municipality under this chapter or substantial detriment to existing industry;

C. Adequate provision is being made to meet any increased demand upon public facilities that might result from such project; and

D. In cases where it is proposed to relocate an industrial or recreational facility existing in the State, there is a clear economic justification for such relocation.

E. The provisions of any agreement for payments in lieu of taxation are in accordance with the provisions of this chapter.

5. Effect of certificate. A certificate of approval issued hereunder shall be conclusive proof that the board has made the determinations required by this section.

6. Express powers. To do all acts and things necessary or convenient to carry out the powers expressly granted in this chapter.

§ 5329. Duties of manager

The manager shall be the chief administrative officer for the board and as such shall direct and supervise the administrative affairs and technical activities of the board in accordance with rules, regulations and policies as set forth by the board and he shall receive such compensation as shall be fixed by the board with the approval of the Governor and

Council. It shall be the duty of the manager among other things to:

1. Attend all meetings of the board and to act as its secretary and keep minutes of all its proceedings;

2. Approve all accounts for salaries, per diems, allowable expenses of the board or of any employee or consultant thereof, and expenses incidental to the operation of the board;

3. Appoint, under the provisions of the Personnel Law, such employees as the board may require, and such assistants, agents or consultants as may be necessary for carrying out the purposes of this chapter;

4. Make to the board an annual report documenting the actions of the board and such other reports as the board may request;

5. Maintain a close liaison with the Maine Industrial Building Authority and the Department of Economic Development and to provide assistance to municipalities to facilitate the planning and financing of industrial and recreational projects;

6. Make recommendations and reports in cooperation with the Maine Industrial Building Authority and the Department of Economic Development to the board on the merits of any proposed project and on meritorious locations; and

7. Perform such other duties as may be directed by the board in the carrying out of the purposes of this chapter.

§ 5330. Conflicts of interest

No member of the board shall participate in any decision on any contract entered into by any municipality under this chapter if he has any interest, direct or indirect, in any

firm, partnership, corporation or association which may be a party to such contract, or if he has any interest, direct or indirect, in any firm, partnership, corporation or association which may rent, lease or otherwise occupy any premises constructed by such municipality.

§ 5331. Issuance of revenue obligation securities

1. Balloting for securities; actions to contest validity. Upon receipt of the certificate of approval from the board as provided in section 5328, the municipal officers of any municipality are authorized to provide by resolution, at one time or from time to time, for the issuance of revenue obligation securities of the municipality for the purpose of paying the cost of acquiring, constructing, reconstructing, renewing or replacing any revenue-producing industrial or recreational facility, provided no revenue obligation securities of a municipality shall be issued until the general purpose for which the securities are to be issued and the maximum principal amount of such securities to be authorized have been approved by ballot by a majority of the votes cast on the question and the number of votes cast is at least 20% of the total vote for all candidates for Governor cast in the municipality at the last gubernatorial election. The ballot submitted to the voters of a municipality to authorize the issuance of revenue obligation securities shall state the general purpose for which the proposed securities are to be issued and the maximum principal amount of the proposed securities authorized to be issued. The voting at meetings held in municipalities shall be held and conducted in accordance with sections 2061 to 2064, even though the municipality has not accepted the provisions of sections 2061. The result of such vote shall be declared by the municipal officers and due certificate thereof shall be filed by the clerk of the municipality with the board. Any action or proceeding in any court to set aside a resolution authorizing the issuance of revenue obligation securities under this chapter or to ob-

tain any relief upon the ground that such resolution is invalid must be commenced within 30 days after the holding of the election to approve such securities. After the expiration of such period of limitation, no right of action or defense founded upon the invalidity of such resolution or any of its provisions shall be asserted nor shall the validity of such resolution or any of its provisions be open to question in any court upon any ground whatever.

2. Maturity; interest; form; use of proceeds. The securities of each issue of revenue obligation securities shall be dated, shall mature at such time or times not exceeding 25 years from their date or dates, and shall bear interest at such rate or rates not exceeding 6% per year, as may be determined by the municipal officers, and may be made redeemable before maturity, at the option of the municipality, at such price or prices and under such terms and conditions as may be fixed by the municipal officers prior to the issuance of the securities. The municipal officers shall determine the form of the securities, including any interest coupons to be attached thereto, and the manner of execution of the securities, and shall fix the denomination or denominations of the securities and the place or places of payment of principal and interest, which may be at any bank or trust company within or without the State. Revenue obligation securities shall be executed in the name of the municipality by the manual or facsimile signature of such official or officials as may be authorized in said resolution to execute such securities but at least one signature on each security shall be a manual signature. Coupons, if any, attached to securities, shall be executed with the facsimile signature of the officer or officers of the municipality, designated in said resolution. In case any officer whose signature or a facsimile of whose signature shall appear on any securities or coupons shall cease to be such officer before the delivery of such securities, such signature or such facsimile shall nevertheless be valid

and sufficient for all purposes the same as if he had remained in office until such delivery. Notwithstanding any of the other provisions of this chapter or any recitals in any securities issued under this chapter, all such securities shall be deemed to be negotiable instruments issued under the laws of this State. The securities may be issued in coupon or registered form or both, as the municipal officers may determine, and provision may be made for the registration of any coupon securities as to principal alone and as to both principal and interest, and for the reconversion into coupon securities of any securities registered as to both principal and interest. The municipal officers may sell such securities in such manner, either at public or private sale, and for such price, as they may determine to be for the best interests of the municipality, but no such sale shall be made at a price so low as to require the payment of interest on the money received therefor at more than 6% per year, computed with relation to the absolute maturity or maturities of the bonds in accordance with standard tables of bond values, excluding from such computation the amount of any premium to be paid on redemption of any securities prior to maturity. The municipal officers shall not sell such securities to any firm, partnership, corporation or association which is a party to any contract pertaining to the project being financed by such securities or which is to rent, lease or otherwise occupy any premises constituting part of such project, or to any affiliate or subsidiary thereof. The proceeds of the securities of each issue shall be used solely for the purpose for which such securities shall have been authorized, and shall be disbursed in such manner and under such restrictions, if any, as the municipal officers may provide in the resolution authorizing the issuance of such securities or in the trust agreement hereinafter mentioned securing the same. If the proceeds of such securities, by error of estimates or otherwise, shall be less than such cost,

additional securities may in like manner be issued to provide the amount of such deficit and, unless otherwise provided in the authorizing resolution or in the trust agreement securing such securities, shall be deemed to be of the same issue and shall be entitled to payment from the same fund without preference or priority of the securities first issued for the same purpose, provided the aggregate principal amount of revenue obligation securities of a municipality may not exceed the amount approved by the voters as provided. The resolution providing for the issuance of revenue obligation securities, and any trust agreement securing such securities, may contain such limitations upon the issuance of additional revenue obligation securities as the municipal officers may deem proper, and such additional securities shall be issued under such restrictions and limitations as may be prescribed by such resolution or trust agreement. The municipal officers may provide for the replacement of any securities which shall become mutilated or be destroyed or lost. Revenue obligation securities may be issued under this chapter without obtaining the consent of any department, division, commission, board, bureau or agency of the State and without any other proceedings or the happening of any other condition or things than those proceedings, conditions or things which are specifically required by this chapter.

3. Credit of State or municipalities not pledged. Securities issued under this chapter shall not constitute any debt or liability of the State or of any municipality therein or any political subdivision thereof or a pledge of the faith and credit of the State or of any such municipality or political subdivision, but shall be payable solely from revenues of the project for which they are issued and all such securities shall contain on their face a statement to that effect. The issuance of securities under this chapter shall not directly or indirectly or contingently obligate the State or any municipality or political subdivision to levy or to pledge any

form of taxation whatever therefor or to make any appropriation for their payment.

4. Anticipatory borrowing. The municipal officers authorized to issue securities may borrow money in anticipation of their sale by issuing temporary notes and renewal notes, the total face amount of which does not exceed at any one time outstanding the authorized amount of the securities, but the period of such anticipatory borrowing shall not exceed one year and the time within which such securities are to become due shall not be extended by such anticipatory borrowing beyond the time fixed in the vote authorizing their issue or, if no term is there specified, beyond the term permitted by law.

§ 5332. Pledges and covenants; trust agreement

In the discretion of the municipal officers any revenue obligation securities issued under this chapter may be secured by a trust agreement by and between the municipality and a corporate trustee, which may be any trust company or bank having the powers of a trust company within or without the State. Such trust agreement or the resolution providing for the issuance of such securities may pledge or assign the revenues of the industrial or recreational project, and may contain such provisions for protecting and enforcing the rights and remedies of the security holders as may be reasonable and proper and not in violation of law, including covenants setting forth the duties of the municipal officers in relation to the acquisition of property and the construction, reconstruction, renewal, replacement and insurance of the project in connection with which such securities shall have been authorized, the rents to be charged, and the custody, safeguarding and application of all moneys. It shall be lawful for any bank or trust company incorporated under the laws of the State which may act as depositary of the proceeds of securities or of revenues to furnish such

indemnifying bonds or to pledge such securities as may be required by the municipal officers. Any such trust agreement may set forth the rights and remedies of the security holders and of the trustee, and may restrict the individual right of action by security holders.

In addition to the foregoing, any such trust agreement may, to secure the payment of the revenue obligation securities, mortgage the project or any part thereof and create a lien upon any or all of the real or personal property constituting a part of the project. Such trust agreement or resolution may contain such other provisions as the municipal officers may deem reasonable and proper for the security of the security holders.

All expenses incurred in carrying out the provisions of such trust agreement or resolution may be treated as a part of the cost of the operation of the project. All pledges of revenue under this chapter shall be valid and binding from the time when such pledge is made; all such revenues so pledged and thereafter received by the municipality shall immediately be subject to the lien of such pledges without any physical delivery thereof or further action under the Uniform Commercial Code or otherwise, and the lien of such pledges shall be valid and binding as against all parties having claims of any kind in tort, contract or otherwise against the municipality, irrespective of whether such parties have notice thereof.

§ 5333. Rentals

Before the issuance of revenue obligation securities for paying the cost of any industrial or recreational project provision shall be made by leases or contracts which in the judgment of the board will be adequate to assure that the municipality will at all times have revenues sufficient:

1. Principal and interest. To pay the principal of and the interest of such securities as the same shall become due

and payable and to create and maintain reserves for such purposes; and

2. Cost of project. To pay the cost of maintaining, repairing and operating the project unless provision shall be made in such lease or contract for such maintenance, repair and operation.

§ 5334. Sinking fund

All rentals and other revenues derived from any project for which a single issue of revenue obligation securities shall have been issued, except such part thereof, if any, as may be required to pay the cost of maintenance, repair and operation and to provide reserves therefor as may be provided in the resolution authorizing the issuance of the securities or in the trust agreement, shall be set aside at such regular intervals as may be provided in such resolution or trust agreement and deposited to the credit of a sinking fund which is hereby pledged to and charged with, the payment of the interest on such securities as such interest shall fall due, the principal of such securities as the same shall fall due, the necessary charges of paying agents for paying principal and interest, and the redemption price or the purchase price of securities retired by call or purchase. The use and disposition of moneys to the credit of such sinking fund shall be subject to such regulations as may be prescribed in the resolution authorizing the issuance of the securities or in the trust agreement and, except as may otherwise be provided in such resolution or trust agreement, such sinking fund shall be a fund for the benefit of all securities without distinction or priority of one over another.

§ 5335. Trust funds

All moneys received pursuant to the authority of this chapter shall be deemed to be trust funds, to be held and

applied solely as provided in this chapter. Any officer to whom, or any bank, trust company or other fiscal agent or trustee to which such moneys shall be paid shall act as trustee of such moneys and shall hold and apply the same for the purposes hereof, subject to such regulations as this chapter and such resolution or trust agreement may provide.

§ 5336. Remedies

Any holder of revenue obligation securities issued under this chapter or of any of the coupons appertaining thereto, and the trustee under any trust agreement, except to the extent the rights given may be restricted by the resolution authorizing the issuance of such securities or such trust agreement, may, either by action, mandamus or other proceeding, protect and enforce any and all rights under the laws of the State or granted hereunder or under such resolution or trust agreement, including the appointment of a receiver, and may enforce and compel the performance of all duties required by this chapter or by such resolution or trust agreement to be performed by the municipality, the municipal officers or by any officer thereof, including the collecting of rates, fees and charges for the use of the industrial or recreational project, and any such suit, action or proceeding shall be brought for the benefit of all the holders of such securities and coupons.

§ 5337. Revenue refunding securities

The municipal officers are authorized to provide by resolution for the issuance of revenue refunding securities of the municipality for the purpose of refunding any revenue securities then outstanding which shall have been issued under this chapter, including the payment of any redemption premium thereon and any interest accrued or to accrue to the date of redemption of such securities, and, if deemed advisable by the municipal officers, for the additional purpose of constructing improvements, extensions, enlargements or

additions of the revenue-producing industrial or recreational project in connection with which the securities to be refunded shall have been issued. The municipal officers are authorized to provide by resolution for the issuance of revenue obligation securities of the municipality for the combined purpose of refunding any revenue securities or revenue refunding securities then outstanding which shall have been issued under this chapter, including the payment of any redemption premium thereon and any interest accrued or to accrue to the date of redemption of such securities, and paying all or any part of the cost of acquiring or constructing any additional revenue-producing industrial or recreational project or part thereof, or any improvements, extensions, enlargements or additions of any revenue-producing industrial or recreational project. The issuance of such securities, the maturities and other details thereof, the rights and remedies of the holders thereof, and the rights, powers, privileges, duties and obligations of the municipality and the municipal officers with respect to the same, shall be governed by the foregoing provisions of sections of this chapter insofar as the same may be applicable.

§ 5338. Authorizing resolution

Notwithstanding any other law, either general, special or local, or any charter or charter amendments theretofore adopted by such municipality, or any ordinance, resolution, bylaw, rule or regulation of such municipality, it shall not be necessary to publish any resolution adopted under this chapter, either before or after its final passage.

§ 5339. Tax exemptions

The exercise of the powers conferred by this chapter shall be deemed to constitute the performance of governmental functions.

1. Revenue-producing industrial and recreational projects financed under this chapter shall be deemed to be used

for public purposes and shall be exempt from taxation so long as title to the project shall remain in the name of the municipality.

2. Revenue obligation securities issued under this chapter, their transfer and the income therefrom, including any profits made on the sale thereof, shall at all times be exempt from taxation within the State.

§ 5340. Leasehold interest taxable

The leasehold interest of the lessee of any industrial or recreational project is subject to taxation in the manner provided for similar interests in Title 36, Section 551.

§ 5341. Alternative method; payment in lieu of taxation

Subject to ratification by the board, the municipal officers of a municipality may, as an alternative to taxation, provide in the lease or contract a proposal for payments in lieu of taxation in accordance with the following terms and conditions:

1. A provision for payments in lieu of taxation may run for a term of up to 5 years with an option to negotiate for renewal for a term of up to 5 years and no longer.

2. The amount of the payment in lieu of taxation shall be the product of 80% of the initial value of the fee interest at the time of completion of construction times the municipal tax rate of the year of completion. Each year thereafter during the period of the agreement for payments in lieu of taxation or the renewal thereof the amount shall be increased by 3%.

A. In the case of an existing building, the initial value shall be 80% of the purchase price.

B. In the case of equipment with a useful life of 10 years or less, the initial value shall be 50% of the purchase price.

C. Payments in lieu of taxation under renewal agreements shall be the product of the initial value times the tax rate of the year in which the option is exercised.

3. Any agreement for payment in lieu of taxation in any lease or contract approved by the board as provided in Section 5328 shall be deemed to be a fair and equitable method of computing the tax liability of the lessee.

4. Provisions for payments in lieu of taxation shall not apply to subsequent additions of real estate or equipment.

§ 5342. Purpose

It is declared that there is a state-wide need for industrial and recreational projects to provide enlarged opportunities for gainful employment by the people and thus to insure the preservation and betterment of the economy of the State and the living standards and health of its inhabitants.

§ 5343. Liberal construction

This chapter, being necessary for the welfare of the municipalities and their inhabitants, shall be liberally construed to effect the purposes thereof.

§ 5344. Severability

The provisions of this chapter are severable and if any provisions thereof shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions or sections.

§ 5345. Title

This chapter may be cited as the "Municipal Industrial and Recreational Obligations Act."'

Sec. 2. **Appropriation.** There is appropriated from the General Fund to the Industrial and Recreational Finance

Approval Board to carry out the purposes of this Act the sum of $13,000 for the fiscal year ending June 30, 1966 and the sum of $15,500 for the fiscal year ending June 30, 1967. The breakdown shall be as follows:

INDUSTRIAL AND RECREATIONAL FINANCE APPROVAL BOARD

	1965-66	1966-67
Personal Services	$10,000	$12,500
All Other	2,000	2,500
Capital Expenditures	1,000	500
	$13,000	$15,500

ANSWERS OF THE JUSTICES

To the Honorable Senate of the State of Maine:

In compliance with the provisions of Section 3 of Article VI of the Constitution of Maine, we, the undersigned Justices of the Supreme Judicial Court, have the honor to submit the following answers to the questions propounded on May 11, 1965.

QUESTION (1): Will revenue obligation securities issued under the provisions of said bill constitute the creation of a debt or liability of a city or town within the meaning of Article IX, Section 15, of the Maine Constitution which will have to be taken into account in computing the maximum aggregate of debts and liabilities which may be created by a city or town as therein provided for?

ANSWER: This question is answered in the negative.

Section 5331, subsection 3, constricts the characteristics of the securities which H. P. 1091, L. D. No. 1487 as enacted is designed to sanction. Such securities are redeemable only to the extent of and from revenues produced by the very project for which they may be issued.

> " * * * a city does not create an indebtedness within the contemplation of the constitutional proviso by obtaining or purchasing property which is to be paid for solely and exclusively from a special fund derived from the income of the property with no liability on the part of the city to pay such purchase price or any part thereof directly or indirectly with funds raised by taxation or from a fund which must be replenished by funds raised by taxation. * * *." *Sager, et al.* v. *Stanberry,* 336 Mo. 213, 78 S. W. (2nd) 431, 438.

The revenue obligation securities contemplated by the Bill would not constitute municipal debts or liabilities within the purview of Article IX, § 15 of the Maine Constitution.

See *People* v. *Chicago Transit Authority,* 392 Ill. 77, 64 N. E. (2nd) 4, 12; *Branigar* v. *Village of Riverdale,* 396 Ill. 534, 72 N. E. (2nd) 201, 206; McQuillin, Municipal Corporation, 3rd ed. § 41.34; and 64 C. J. S., Municipal Corporations, § 1853.

This answer does not pertain to the "Anticipatory borrowing" provided for in § 5331, subsection 4.

QUESTION (2): Does subsection 1 of Section 5331 of said bill, which provides that no securities shall be issued thereunder until the general purposes for which the securities are to be issued and the maximum principal amount of such securities "have been approved by a majority of the votes cast on the question and the number of votes cast is at least 20% of the total vote for all candidates for Governor cast in the municipality at the last gubernatorial election," violate Article IX, Section 8-A, of the Maine Constitution which provides that the "registered voters" of a municipality may, "by majority vote" authorize the issuance of notes or bonds?

ANSWER: This question is answered in the negative.

Article IX, § 8-A permits the issue of notes or bonds by a municipality for the purpose of constructing industrial buildings for lease or for sale by the municipality when the issuance of such notes or bonds has been authorized by a majority vote of the registered voters of that municipality. Such a majority is to be computed as one or more in excess of one half of the registered voters who voice their wills or cast their ballots.

See *Chamberlain* v. *Dover,* 13 Me. 466, 472; and *Foy, et al.* v. *Gardiner Water District,* 98 Me. 82, 84, 56 A. 201.

The constitutional requirement can be satisfied by the casting of a single affirmative vote or by two such votes out of a total of three votes cast at a municipal meeting duly called and notified. A number of votes equal to "20% of the total vote for all candidates for Governor cast in the municipality at the last gubernatorial election" probably would be in excess of the minimum fixed by the Constitution.

It (the constitution) fixes a minimum limit of restriction below which the legislature may not go, but it does not prescribe the maximum limitation which the legislature may adopt. *Union High School District No. 1, Skagit County* v. *Taxpayers of Union High School District No. 1, Skagit County,* 172 P. (2nd) 591, 595 (Wash. 1946) as quoted and affirmed in *Henderson* v. *Town of Tumwater,* 285 P. (2nd) 119 (Wash. 1955) which case expresses the weight of authority.

See *Robb* v. *City of Tacoma, et al.,* 28 P. (2nd) 327 (Wash. 1933) and Annot. 91 A. L. R. 1010, 1021; also *Varney* v. *City of Albuquerque,* 55 P. (2nd) 40 (N. M. 1936).

Article IX, § 8-A does not pertain to revenue obligation securities issued by municipalities for the acquisition of recreational projects.

QUESTION (3): Do Sections 5339, 5340 and 5341 of said bill, which provide that projects financed under the bill shall be exempt from taxation so long as title thereto remains in the name of the municipality, that the leasehold interest of the lessee of any project is subject to taxation and that, as an alternative to taxation, a municipality may provide in the lease or contract for payments in lieu of taxation, violate the provisions of Article IX, Section 8, of the Maine Constitution?

ANSWER: With respect to Section 5339, we answer in the affirmative.

The language of this section is in some respects obscure and not free from doubt as to legislative intention. The section read as a whole, however, indicates to us that the fee is to be exempted from taxation to the municipality because and only if the holding of title by the municipality is deemed a governmental function and for a public purpose. The Legislature cannot by mere appellation or designation transform what are in reality mere corporate powers conferred by it upon municipalities into governmental functions. No more can it change private purposes into public purposes whenever the facts are otherwise. *Brown* v. *Gerald,* 100 Me. 351, 360, 61 A. 785. Writing of the dual corporate and governmental capacity of a municipality, our Supreme Judicial Court said in *Libby* v. *Portland,* 105 Me. 370, 372:

> "To the former belongs the performance of acts done in what may be called their private character, in the management of property or rights held voluntarily for their own immediate profit and advantage as a corporation, although ultimately inuring to the benefit of the public, such as the ownership and management of real estate, the making of contracts and the right to sue and be sued; to the latter belongs the discharge of duties imposed upon them by the Legislature for the pub-

> lic benefit, such as the support of the poor, the maintenance of schools, the construction and maintenance of highways and bridges, and the assessment and collection of taxes. This distinction is sharply defined in a long line of decisions * * *. The Revised Statutes, recognize this two fold character, ch. 4, sec. 1, making the inhabitants of each town a body corporate, and ch. 1, sec. 1, making towns a subdivision of the State."

The industrial and recreational projects envisioned by the proposed legislation are inescapably designed to serve private purposes in spite of legislative fiat to the contrary and a tax exemption obviously intended to be predicated upon the existence of a public purpose would, where no such purpose exists, violate constitutional prohibitions.

With respect to Section 5340 we answer in the negative.

This section reiterates the provisions of 36 M. R. S. A., § 551 and is valid.

With respect to Section 5341 we answer in the affirmative.

This section violates Article IX, § 8 of the Constitution as it proposes to establish a mathematical formula for assessment for tax purposes of new structures upon a portion of 80% only of "the initial value of the fee interest at the time of completion of construction." Eighty percent of such initial value is not an equivalent of the "just value" prescribed by Article IX, § 8 of the Constitution. Furthermore 80% of the initial value for assessment and the tax rate in effect for the year of completion is fixed for the life of the lease or contract. This objectionable characteristic is carried forward to equipment and renewal agreements.

Section 5341 ostensibly provides for payments in lieu of taxation. For privately owned property and for property owned by a municipality in its corporate capacity, and not

appropriated to public uses, there can be no substitute for the tax approach required by Article IX, § 8 of the Constitution.

Section 5341 ignores the existence of State and County taxes. It attempts to provide discriminating tax treatment and would result in the necessity of other taxpayers, even competitors, paying the deficit. The so styled payment in lieu of taxation would in reality be equivalent to a gift. *Brewer Brick Co.* v. *Brewer,* 62 Me. 62.

Additionally it is to be noted that granted taxation under § 5340, it is unconstitutional to provide by contract payments in lieu thereof. *Brewer, supra.*

QUESTION (4): Will revenue obligation securities issued under the provisions of said bill for the purpose of paying the cost of acquiring, constructing, reconstructing, renewing or replacing revenue producing recreational facilities, be issued for a proper municipal purpose?

ANSWER: This question is answered in the affirmative.

All capacities, powers and duties of municipalities are derived from legislative enactments. *Hooper* v. *Emery,* 14 Me. 375; *Concord* v. *Delaney,* 58 Me. 309.

The Constitution contains no inhibitions against the authorization by the Legislature of the municipal issue of revenue obligation securities such as those described in the bill for the acquisition of recreational projects and the sale and lease of such recreational facilities.

> " * * * The power is manifestly legislative in character, and hence must be upheld unless clearly prohibited to the legislature by some section or clause of the State or Federal Constitution. No exercise of the legislative power is to be held thus prohibited unless the prohibition is manifest, beyond a reasonable doubt, as has often been iterated in

prior opinions of this court * * *." *Bangor* v. *Peirce*, 106 Me. 527, 532, 76 A. 945.

Dated at Augusta, Maine, this twenty-sixth day of May, 1965.

Respectfully submitted:

ROBERT B. WILLIAMSON

DONALD W. WEBBER

WALTER M. TAPLEY, JR.

FRANCIS W. SULLIVAN

HAROLD C. MARDEN

ABRAHAM M. RUDMAN

STATE
vs.
PETER F. CARLL

Kennebec. Opinion, June 7, 1965.

Counsel. Criminal Law. Evidence. Attorney.

Whether or not a case is to be continued from term to term is within the sound discretion of the court and in a given case the appellate court will look only to see if there has been a clear abuse of that discretion. The test is whether the granting or denying of a continuance is in furtherance of justice.

A criminal defendant is ordinarily entitled to employ counsel of his own choice but that does not mean that the operation of the court must be adjusted to conform to his whim or preference. The attorney is available to meet the calendar of the court.

Where defendant has been given reasonable opportunity to obtain counsel and failed for approximately a month to take reasonable and adequate steps to prepare for a trial which he knew to be imminent, the court did not abuse its sound judicial discretion in appointing a lawyer as defendant's counsel and in denying a further continuance.

Photographs and fingerprints of accomplice were properly admitted in evidence in a larceny prosecution of defendant who had admitted that at all material times he was with accomplice.

Exceptions to questions asked by the State failing to allege how the questions were answered or how the defendant claims to have been prejudiced thereby, will be dismissed for insufficiency.

ON EXCEPTIONS

This comes upon exceptions to the denial of various motions by the defendant in the Court below. Exceptions 1 to 7 inclusive, 10 and 11 overruled. Exceptions 8 and 9 dismissed. Judgment for the State.

Bernard R. Cratty, County Attorney for Kennebec County, for the State.

Philip Bird, Esq., for Defendant.

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

WEBBER, J. The respondent, having been found guilty by a jury of the crime of breaking, entering and larceny in the nighttime, brings this case forward for review on exceptions.

The first four exceptions deal with the appointment of counsel for respondent, the denial of respondent's request for continuance and with related matters which may all be considered together. A review of the material facts is required in order to determine whether or not there was any abuse of discretion on the part of the justice below. In the early part of June, 1964 the grand jury returned an indictment against the respondent who was then in Massachusetts. On June 11, 1964 a Massachusetts attorney entered a special appearance for the respondent in the Kennebec County Superior Court. On June 30, 1964 the respondent was arraigned and was admitted to bail pending trial. On this occasion his Massachusetts counsel was present in court and requested a continuance of the case to the term of court to be held in the following October. This attorney represented to the court that local counsel would be employed. After further discussion with the court it was stipulated and agreed that the request for continuance to the next term was withdrawn, that the Massachusetts counsel would not be representing the respondent at trial, and that the latter "was obtaining local counsel." The respondent did in fact employ and consult with a Waterville attorney within ten days subsequent to July 1, 1964. On July 23, 1964 this attorney informed the court that he had advised the respondent of his "rights and opportunities" but the respondent "apparently feels he would be more satisfied if he were represented by other counsel, so he has informed me that he would like to have me disassociate myself from the case." The court then interrogated the

respondent and elicited from him the information that he had requested that the attorney move for a continuance of the case to the "fall term", and upon being informed by him that such a request would not be granted was no longer interested in retaining him as counsel. The court then inquired directly why the respondent felt that the case should be continued. The respondent replied only that he lacked confidence in himself, that he did not feel able at this time to go to trial, that he had not had the proper amount of time with his counsel, that he had not had a chance to consult with another attorney, and that he had financial problems. The court then reviewed the circumstances at length, reminding the respondent that he had already had more than three weeks to obtain counsel and prepare his defense and that he offered no proper justification for not having done so. The respondent then disclosed that on the previous day he had called Mr. Stanley Bird, also an attorney in Waterville. He stated, however, that Mr. Bird did not represent him "as yet." The court thereupon permitted the repondent's then counsel to withdraw and offered the respondent an additional period of six days in which to consult new counsel and prepare for trial. The court warned the respondent that no further delays would be granted. Respondent agreed to employ counsel that day and the court instructed him either to have his new counsel enter an appearance on the following day or to present himself in court in order that counsel might be appointed to represent him. On the following day, July 24, 1964, the respondent again appeared but without an attorney and filed with the court a formal written motion for continuance setting forth that the firm of Bird & Bird would not be able to represent the respondent at the pending trial because of prior commitments and lack of time for adequate preparation. Mr. Philip Bird of that firm was present in the courtroom but took no part in the proceedings on the motion. The motion was then denied and the court proceeded to interrogate the

respondent as to his financial ability to pay counsel. The respondent disclosed that he had no funds available for that purpose and that he owned no property except an automobile of undisclosed value in Massachusetts. The court then stated that he would appoint counsel, to which the respondent objected on the ground that he "would like to have" his own attorney. At this point the following colloquy occurred which, since it reveals the unyielding attitude of the respondent, is reproduced in its entirety:

> "THE COURT: I have no reason for you not to have your own attorney but you were given an opportunity to retain counsel and you do not have any. This case is going to be tried Wednesday morning. The reason I came back here today was to make certain you did have counsel. Did you try to contact other counsel after you found that Mr. Bird was going to be unavailable for next Wednesday?
>
> MR. CARLL: Mr. Bird is the one I wanted for my attorney.
>
> THE COURT: Are you aware of the fact that Mr. Bird will not be available for trial of this case next Wednesday?
>
> MR. CARLL: Yes, I am.
>
> THE COURT: Do you have presently other counsel who is prepared to represent you in connection with the trial next Wednesday?
>
> MR. CARLL: Mr. Bird would be the only one I would want to represent me.
>
> THE COURT: You understand that Mr. Bird will not be available for trial next Wednesday morning?
>
> MR. CARLL: That is why I asked for the continuance.
>
> THE COURT: The continuance has been denied. Do you have anyone else who will be available who can represent you next Wednesday?
>
> MR. CARLL: No, I do not have anyone."

The court then appointed Mr. Richard J. Dubord to represent the respondent and arranged for the respondent to be transported to Mr. Dubord's office for consultation forthwith. Jury trial commenced five days later and an examination of the trial record makes it apparent that court appointed counsel conducted the defense with skill and competence. The exceptant, however, challenges the refusal to grant respondent's motion for continuance, the court's finding of indigency, his appointment of counsel not of respondent's own choice and his fixing of the 29th day of July as the date for commencement of trial.

The respondent seeks to raise constitutional issues related to the right to counsel but no such issues are presented on these facts. As already noted, he was at his trial represented by a reputable and experienced attorney who has since become the Attorney General of the State of Maine and who at no time claimed any disadvantage in preparing his case. A presiding justice must maintain control of his docket if there is to be an orderly disposition of litigation. Whether or not a case is to be continued from term to term is within the sound discretion of the court and in a given case we look only to see if there has been a clear abuse of that discretion. The test is whether the granting or denying of a continuance is "in furtherance of justice." *State* v. *Hume,* (1951) 146 Me. 129, 78 A. (2nd) 496. Under circumstances not unlike those presented in the instant case the Illinois court determined that there was no abuse of discretion. *People* v. *Bimbo,* (1938) 369 Ill. 618, 17 N.E. (2nd) 573. In that case the defendant had had four attorneys in succession appear for her but on the date set for trial was unrepresented. The court refused to continue the matter further but appointed the public defender to represent her even though technically she was not entitled to court appointed counsel.

In the instant case it is apparent that the respondent was determined from the outset that his case should not be tried until October, 1964 although he was never able to show adequate cause for such long delay. His stubborn insistence on this disposition of his case forced the withdrawal of the local attorney employed by him and clearly motivated his demand that he be defended by attorneys who were not then available to undertake his case. He failed for approximately a month to take reasonable and adequate steps to prepare for a trial which he knew to be imminent. A criminal respondent is ordinarily entitled to employ counsel of his own choice but that does not mean that the operation of the court must be adjusted to conform to his whim or preference. The attorney of his choice must be one who is available to meet the calendar of the court. We are satisfied that every reasonable consideration was afforded this respondent by the presiding justice and that his rights to counsel and a fair trial were fully protected. We see no abuse of discretion and the first four exceptions must be overruled.

The 5th, 6th and 7th exceptions may be considered together. They relate to the admission of photographs of fingerprints of the accomplice Osborne. The ground of objection was that these were not the prints of the respondent, no conspiracy being alleged. Respondent takes nothing by these exceptions. The exhibits were properly admitted as links in a chain of circumstantial evidence pointing to the guilt of the respondent. They were persuasive evidence that one Osborne forced a safe from which property was stolen. They are linked to the case against the respondent by his admission that at all material times he was with Osborne.

The 8th and 9th exceptions relate to questions asked by the State over objection. The exceptions fail to inform us whether or how the questions were answered or how the

respondent claims to have been prejudiced thereby. Our reading of the record satisfies us that no prejudice did result, nor was there error in permitting the questions to be asked. These exceptions are insufficient and must be dismissed.

The 10th exception arises from the denial of a motion to strike from the record all testimony with respect to the Osborne prints. For the reasons discussed above respondent shows no error in the ruling of the court.

The final exception stems from the denial of a motion made by respondent at the close of the evidence for a directed verdict. It is unnecessary to review here the chain of circumstantial evidence adduced by the State. It is enough to say that the jury could properly conclude that this evidence and reasonable inferences to be drawn therefrom, unexplained and uncontradicted, eliminated every reasonable hypothesis except that of the guilt of the respondent and his accomplice. The case was properly submitted to the jury for its verdict.

The entry will be:

Exceptions 1 to 7, inclusive, 10 and 11 overruled.

Exceptions 8 and 9 dismissed.

Judgment for the State.

JAMES E. HEATH, ET AL.
vs.
MAINE PUBLIC SERVICE COMPANY

Kennebec. Opinion, June 7, 1965

Electricity. Public Service Commissions. Public Utilities.

The authority of the Maine Public Utilities Commission can only be that authority that is granted to it by the Legislature. The Commission has authority and dominion over regulated public utilities.

Appellants have the burden of showing that electric cooperatives are regulated public utilities within Cooperative Enabling Act.

Legislature did not intend an electric cooperative to be a regulated utility, nor was it intended that a cooperative should invade the territory of a regulated utility without the approval of the Commission.

The Enabling Act (35 M.R.S.A. Ch. 221) authorizing the creation of electric cooperatives states that they shall not be deemed to be public utilities. It also places cooperatives in a limited and restrictive sense under the regulatory powers of the Commission.

The Commission has no authority over cooperative excepting that restricted and limited authority which is defined in Sec. 2809.

The consent of the public utility to the petition of the cooperative that it be permitted to serve part of the area serviced by the public utility was not an abandonment of its franchise.

Electric cooperatives are not public utility and, therefore, not subject to the provisions of 35 M.R.S.A. § 2303 requiring satisfactory proof of public convenience and necessity to allow two electric companies to serve the same area.

Electric cooperatives do not have a right of exclusive franchise as against a public utility.

Electric cooperative attack on sufficiency of complaint and notice is without merit in view of the fact that they were not challenged until the hearing had proceeded to an appreciable degree without complaint.

ON APPEAL.

This is an appeal by members of electric cooperative to have P.U.C. authorize a regulated public utility to extend electric service to members. Appeal denied.

Richard B. Sanborn and *Lynwood E. Hand,*
Attorneys for Plaintiffs.

Roger A. Putnam, Attorney for Defendants.

SITTING: WILLIAMSON, C.J., WEBBER, TAPLEY, SULLIVAN, MARDEN, JJ. SIDDALL, J., sat at argument but retired before the decision was rendered.

TAPLEY, J. On appeal from a decree of the Public Utilities Commission. Members of Farm Home Electric Cooperative, Inc. petitioned the Maine Public Utilities Commission (hereinafter referred to as the Commission) requesting it to authorize the Maine Public Service Company, a regulated public utility, to service them from one-half mile North of Silver Ridge Line, South to Silver Ridge South Line, with electric power. After notice to Farm Home Electric Cooperative, Inc., Maine Public Service Company and the petitioners, a public hearing was held at the Town Hall in Patten, Maine on July 28, 1964. After hearing, the Commission ordered and decreed that the Maine Public Service Company extend its lines to service the area of Silver Ridge to supply service to the petitioners.

Eastern Maine Electric Cooperative, Inc. and Farm Home Electric Cooperative, Inc. appealed from the order and final decision of the Commission.

Farm Home Electric Cooperative, Inc. came into existence in 1940. The Commission at that time authorized Farm Home Electric Cooperative, Inc. to serve the Inhabitants of Patten, Plantations of Mt. Chase and Staceyville, in Penobscot, and the Towns of Benedicta, Merrill, Dyer Brook,

Crystal, Island Falls, Sherman and Hersey, and Plantations of Moro, Silver Ridge and the unorganized Township #7, Range 5, in the County of Aroostook. In the Spring of 1964 Farm Home Electric Cooperative, Inc. and Kingman Electric Cooperative, merged into Eastern Maine Electric Cooperative, a larger cooperative, serving the Calais area and environs.

At the hearing on July 28, 1964 there was evidence adduced from which the Commission found that the petitioners suffered inadequate service from the operation conducted by Farm Home Electric Cooperative, Inc. There were evidenced, without contradiction, the facts that power was interrupted by power failures, loss of frozen food, loss of business, burned out motors and substantial periods of time without service at all. There were abnormal voltage variances and fluctuations which caused, among other things, an inability of the consumer to use and enjoy his electrical appliances. In addition to power failures and fluctuation of voltage there is testimony establishing the fact that service maintenance was poor and unsatisfactory. Resulting from this hearing came the decree of the Commission:

> "That as soon as practicable Maine Public Service Company extend its lines to service the area of Silver Ridge, which is described in the petition of the Petitioners."

The basic problem in this case concerns the authority of the Commission over the Farm Home Electric Cooperative, Inc. and other cooperatives of like nature. This requires a review and analysis of the statutory history of the cooperatives and the legislative intent as to their legal relationship with the Commission. In the result of the analysis and review rests the decision in this case. In 1941 the Legislature passed an act entitled "Cooperative Enabling Act." Chap. 51, Sec. 1, R. S. 1954 (35 M.R.S.A., Sec. 2801).

The purpose of the act is "Cooperative, nonprofit membership cooperations may be organized under Chapters 221 to 227 for the purpose of supplying electric energy and promoting and extending the use thereof." Chap. 51, Sec. 2, R. S. 1954 (35 M.R.S.A., Sec. 2802). It was the obvious purpose of the Legislature to legislate an Enabling Act authorizing the formation of rural electrification cooperatives and to grant them specific powers in order that there would be a uniformity of organization and operation among such cooperatives.

One of the most pertinent and controlling sections of the "Cooperative Enabling Act" is Sec. 24, Chap. 51, R. S. 1954 (35 M.R.S.A., Sec. 2809). This section is couched in the following language:

> "*Cooperatives shall not be deemed to be public utilities. Except with the consent of the Public Utilities Commission,* no premises shall receive service from any cooperative, if such premises were, on the date of the organization of such cooperative, receiving or prior thereto had been receiving electric service from a public utility, or which are situated on those portions of roads or ways along which the distribution lines of an existing utility are located, nor if such service from the cooperative is to be rendered in the territory in which an existing utility is authorized to render such service, unless and until such service has been requested of the existing utility by various persons whose premises are so located as to be fairly representative of the route or routes of the proposed distribution line or lines of the cooperative to be built in such territory and the utility has either refused or neglected for an unreasonable length of time to furnish such service. Any existing utility may give its consent to a cooperative to serve any portion of the territory which said utility is authorized to serve. Any person who has been refused membership in or service by a cooperative may complain of such refusal to the Public Utili-

> ties Commission which may, after hearing, upon finding that such service may reasonably be rendered, order such person to be served." (emphasis supplied.)

We point out that the authority of the Commission can only be that authority that is granted to it by the Legislature. The Commission, without question, has authority and dominion over so-called regulated public utilities. The appellants in this case have the burden of showing that electric cooperatives are regulated public utilities within the intent of the Legislature and the purposes prescribed in the "Cooperative Enabling Act."

In 1940 some residents of Silver Ridge and surrounding towns formed a rural electric cooperative to serve the territory. It was known as Farm Home Electric Cooperative. Following its incorporation in 1940 Farm Home Electric Cooperative, upon petition, was authorized by the Commission to provide electric service to Silver Ridge and other areas in the vicinity of Silver Ridge, in the County of Aroostook (U. #1605).

The question of the authority of the Commission over electric cooperatives arose in 1941, *In Re Sandy River Electric Cooperative, Incorporated, Maine Public Utilities Commission,* U. #1631, 37 P.U.R., (N.S.) 201, 210. The Commission found:

> "- - - Examine as much as it can the law and the evidence submitted in this case, and allowing full latitude to the considerations of public policy in the premises, this Commission finds it necessary to interpret Chap. 230 (P. L. Me. 1931) in such a manner that it is mandatory for a cooperative formed thereunder, whether a public utility or not, to apply to it for designation of territory in which the cooperative might serve.
>
> "So it must be ruled that the Public Utilities Commission has jurisdiction over cooperatives, in-

> cluding this petitioner formed under Chap. 230, Public Laws of 1931, especially in the matter of designation of territory. - - - We agree with the petitioner that under this chapter a corporation may be either a public utility or not a public utility."

Sandy River Electric Cooperative, Inc. apparently brought to light the question as to just what authority the Commission did have over electric cooperatives. The 1941 Legislature passed legislation in the form of amendments with intent to clarify the then existing statute so that there would be no question about the scope of authority of the Commission over electric cooperatives. The record of the 90th Legislature (1941) supplies strong evidence of the intent of the Legislature concerning the Commission's authority and power in respect to electric cooperatives.

> "- - - there was much discussion and opposition at the mere suggestion that these cooperatives were not subject to the regulation of the Public Utilities Commission.
>
> "- - - we are very definitely saying by this amendment that a cooperative cannot carry its service to any individual receiving service from a public utility, thereby preserving and protecting their rights under the law. - - -
>
> "The question has come up, and it will continue to crop up as to why a cooperative should not be controlled by exactly the same regulations as any public utility. I think the answer is obvious, because the Supreme Courts of at least two states have already gone on record—and their decision has not been questioned—wherein they state that a cooperative organized under the laws herein mentioned is not subject to the Public Utilities Commission.
>
> "- - - these cooperatives are organized simply and solely for the purpose of serving themselves." *Legislative Record* (1941), pages 836, 837.

It is obvious from a reading of the legislative record that the Legislature did not intend an electric cooperative to be a regulated utility. It is equally clear it was intended that no cooperative should invade the territory of a regulated utility without approval of the Commission.

The Legislature has conferred jurisdiction upon the Commission to regulate cooperatives under the following conditions: A cooperative must obtain the consent of the Public Utilities Commission (1) in order to supply service to those premises which were receiving electric service from a public utility on the date of the organization of the cooperative; (2) to supply service to those premises situated on those portions of roads or ways on which the distribution lines of an existing utility are located; (3) if such service from the cooperative is to be rendered in the territory in which an existing utility is authorized to render such service and such service has been requested of the existing utility by various persons whose premises are so located as to be fairly representative of the route or routes of the proposed distribution line or lines of the cooperative to be built in such territory and the utility has either refused or neglected for an unreasonable length of time to furnish such services; (4) when any person has been refused membership in or service by a cooperative the Commission may, after hearing, upon finding that such service may reasonably be rendered, order such person to be served.

The authority to organize an electric cooperative in Maine is through an Enabling Act entitled "Rural Electrification Cooperatives." 35 M.R.S.A., Chaps. 221 to 227 inclusive. The purpose of the Enabling Act is expressed in the following language:

> "Cooperative, nonprofit membership corporations may be organized under Chapters 221 to 227 for the purpose of supplying electric energy and promoting and extending the use thereof." 35 M.R.S.A., Sec. 2802.

The Enabling Act sets out in detail the prescribed procedures to create, operate and dissolve a cooperative by setting out (1) general provisions; (2) organization; (3) powers; and (4) dissolution. Within the frame work of this Enabling Act is contained all of the rights and power granted to a cooperative upon its organization. The *Enabling Act,* under Sec. 2809, in plain and unequivocal language, states:

> "Cooperatives shall not be deemed to be public utilities."

Then follows language which places cooperatives in a limited and restrictive sense under the regulatory powers of the Commission. By legislative pronouncement the Commission has no authority over a cooperative excepting that restricted and limited authority which is defined in Sec. 2809. Any orders of the Commission must be based on jurisdiction over utilities otherwise they would be meaningless and unenforceable. It naturally follows that if the Commission has no authority over cooperatives, its orders and decrees would be ineffective as to the cooperatives unless they related to the conditions specifically described in Sec. 2809.

Farm Home Electric Cooperative, Inc. urges that the Commission had no right to order Maine Public Service Co. to serve residents of the area served by the cooperative for the reason that in 1940 the Maine Public Service Co., which was then serving the area, consented to the cooperative serving portions of the area and they thereby abandoned its franchise. In February, 1940 Farm Home Electric Cooperative, by petition addressed to the Commission, requested authority to serve certain territory in the County of Aroostook, Silver Ridge being one of the towns. At the time of the hearing Maine Public Service Co., which was then serving the area, made no objection to the petition. The Commission, after hearing, found, by decree U. #1605,

that *public convenience and necessity* required the Farm Home Electric Cooperative, Inc. be given authority to furnish the area described in the petition. This hearing was had under provisions of Chap. 68, Sec. 4, R. S. 1930 (now 35 M.R.S.A., Sec. 2302):

> "No such consent and no license, permit, or franchise shall be granted to any person, association, or corporation to operate, manage or control any public utility of the kind named in the preceding section in any city or town where there is in operation a public utility engaged in similar service or authorized therefor until the public utilities commission has made a declaration after a public hearing of all parties interested that public convenience and necessity require such *second public utility.*" (emphasis supplied.)

This section applied to a corporation created under the general laws for the purpose of making, generating, selling, distributing and supplying electricity. This type of corporation was subject to the regulatory powers and control of the Commission. The Commission at that time considered the cooperative as a public utility and subject to provisions of Sec. 4 which required a showing of public convenience and necessity before the franchise of an existing public utility could be invaded. We take the position that the consent of the Maine Public Service Company to the petition of Farm Home Electric Cooperative, Inc. that it be permitted to serve part of that area serviced by Maine Public Service Company was not in any way an abandonment.

The appellants claim that the Commission was in error in ruling that the appellants have no franchise area and had no authority to allow the Maine Public Service Company to invade the territory now being served by the Eastern Maine Electric Cooperative, Inc. They further contend that this invasion could only be approved and sanctioned if it were shown, by satisfactory proof, that the

principles of public convenience and necessity required two electric companies to serve the community. In speaking of the necessity of showing public convenience and necessity, we are directed to the provisions of Secs. 3 and 4 of Chap. 50, R. S. 1954 (35 M.R.S.A., Secs. 2301 and 2302). These statutory provisions apply only to regulated public utilities, not to cooperatives. We have shown that the appellants are not public utilities within the meaning of the statute authorizing their creation.

Appellants have cited *Re Public Service Company of New Hampshire,* 87 P.U.R. (N.S.) 213. In this case an electric cooperative objected to the proposed extension of the lines of the Public Service Company of New Hampshire into the area served by the cooperative. The New Hampshire statute involved provided, in substance:

> "No public utility shall construct an electric service line to serve any customer where the property to be served is within 1,000 feet of existing central service station, electric line or lines of another public utility, without first having obtained the permission and approval of the Commission. Co-operative marketing associations, as defined in R. L., Chap. 273 (under which the New Hampshire Electric Cooperative, Inc. is incorporated) shall, for the purposes of the first sentence of this section, *be regarded as public utilities* and subject to the jurisdiction of the Commission." (emphasis supplied.)

The Court said, on page 214:

> "The subject matter of the instant application falls within the purview of this statute."

It is obvious that the New Hampshire Commission accepted jurisdiction on the basis that the cooperative was considered to be a public utility insofar as the invasion by another utility of the area served by the cooperative was concerned. This case is not pertinent or applicable be-

cause in the case at bar the appellants, by statute, are not public utilities.

The case of *Black River Electric Cooperative, Inc.* v. *Public Service Commission, et al,* 120 S. E. (2nd), 6 (S.C.), is pertinent, in its holdings, to the instant case. Black River Electric Cooperative, Inc. sought to prohibit a regulated electric utility from extending its power lines into an area adjacent to the area served by the cooperative. The crux of the case is that a cooperative under the provisions of the statutes was not a public utility and, therefore, had no standing before the Public Service Commission. Under provisions of Sec. 24 (Sec. 2809), which states that cooperatives are not public utilities, there is no language employed which gives the right of exclusive franchise to a cooperative as against a public utility. Conversely, the words used in the section demonstrate a plain and unmistakable legislative intent that a cooperative shall not encroach upon the territory of an existing public utility unless the utility has either refused or neglected, for an unreasonable length of time, to furnish service or has consented that a cooperative may serve any portion of the territory which the utility is authorized to serve. We conclude that the appellants have no franchise in the area.

We hold that the Eastern Maine Electric Cooperative, Inc. and Farm Home Electric Cooperative, Inc. are not public utilities and do not come under the jurisdiction of the Commission except in a limited and restricted sense as defined in Sec. 2809.

During the course of the hearing a motion was made by the appellants to dismiss the petition for pleading inadequacy and for improper notice. Other reasons for dismissal were that petitioners did not exhaust their remedies within the corporate setup; that the Commission does not have jurisdiction to allow invasion of its franchise area by a public utility and, finally, that the proceedings by the petitioners

were premature because no opportunity was given the Eastern Maine Electric Cooperative, then presently serving the Silver Ridge area, to remedy the poor service claimed by the petitioners. We find there is no merit in appellant's attack on sufficiency of complaint and notice, particularly in view of the fact that they were not challenged until the hearing had proceeded to an appreciable degree without complaint. Insofar as the other reasons for dismissal are concerned, they are without force as the appellants are not public utilities and have no jurisdictional standing with the Commission as to the subject matters of their complaints.

The order is:

Appeal denied.

WEBBER, J. (concurring) I concur in the opinion and the result. I would merely emphasize that the statute (35 M.R.S.A., Sec. 2809; R. S. 1954, Ch. 51, Sec. 24) gives only carefully restricted jurisdiction to the Public Utilities Commission with respect to the furnishing of service by cooperatives. The Commission is without any power to compel the cooperative to improve the quality of its service where some service is in fact being rendered to its members. A public utility is afforded an exclusive and monopolistic franchise in return for its submission to the control of the Commission with respect to rates, quality of service and the like. The position of the appellants here seems to me to be that of one who would have his cake and eat it too. They desire the competitive advantage offered to regulated public utilities without paying the price which such utilities have to pay to the public in order to secure such protection. The legislature has not seen fit to confer upon these cooperatives the preferred position which they now seek. I am in agreement with the concurring opinion of a member of the Public Utilities Commission in the instant case in which he stated:

"Thus in my view, the customer who is located in the franchised territory of a regulated public utility and receiving service from an unregulated cooperative may request service by the public utility, *and if it is economically feasible for the utility to render the service so requested, he is entitled as a matter of law to receive such service,* whether his reason be a desire for improved service, more equitable rates, or simply a desire to come under the protection of this Commission and the laws administered by it." (Emphasis mine)

J. & JAY, INC.

vs.

E. PERRY IRON & METAL CO., INC.

Cumberland. Opinion, June 8, 1965

Appeal and Error. Res Ipsa Loquitur. Negligence Controls.

Upon appeal from directed verdict at close of plaintiff case, the Supreme Judicial Court reviews the evidence including inferences seasonably to be drawn therefrom in the light most favorable to the plaintiff.

The doctrine of *res ipsa loquitur* is applicable in this case since damage does not ordinarily flow from the shifting or dropping of a load in the operation of a crane in the absence of negligence.

The evidence could warrant the inference and thus a finding of negligence on the part of someone between the placing of the machine on the truck and the accident in defendant's yard.

The negligence for which the defendant may be charged must be based on action within the defendant's control for *res ipsa loquitur* to be applicable. The plaintiff must eliminate the possibility of negligence on the part of others than the defendant by a preponderance of the evidence.

Evidence was sufficient to have permitted a jury to have excluded negligence of others than the defendant as cause of accident and,

therefore, was sufficient to preclude direction of verdict for defendant at close of plaintiff's case.

Plaintiff does not lose the benefit of *res ipsa loquitar* from his failure to inquire of the crane operator how the accident happened. In the absence of the crane operator's evidence on the cause of the accident, the applicability of *res ipsa loquitur* must rest on the record.

Plaintiff's failure to prove evidence at the trial, which he anticipated to prove in the pre-trial order, does not remove the doctrine of *res ipsa loguitur* from the case.

Res ipsa loguitur is not to be discarded, at least in the absence of surprise which would make reliance upon the doctrine unfair to the defendant.

ON APPEAL.

This is an appeal from the direction of a defendant's verdict at the conclusion of the plaintiff's case. The trial court was in error by its failure to give the jury the opportunity to infer negligence. Appeal sustained.

Alan J. Levenson, Esq., for Plaintiff.

Lawrence P. Mahoney, Esq., and
Richard D. Hewes, Esq., for Defendant.

SITTING: WILLIAMSON, C.J., WEBBER, TAPLEY, SULLIVAN, MARDEN, JJ. SIDDALL, J. sat at argument but retired before the opinion was adopted.

WILLIAMSON, C.J. This tort action is before us on appeal from the direction of a verdict for the defendant at the close of the plaintiff's case. The plaintiff charges that his truck was damaged through the negligent operation of a crane in unloading a heavy steel machine.

There are two controlling issues. First: Is *res ipsa loquitur* applicable? Second: If so, is *res ipsa loquitur* available to the plaintiff under the pretrial order?

Under the familiar rule we take the evidence including inferences reasonably to be drawn therefrom in the light most favorable to the appellant. *MacLean* v. *Jack*, 160 Me. 93, 100, 198 A. (2nd) 1. Due care on the part of the plaintiff is not in issue and points of appeal relating to evidence and the measure of damages are of no moment for our purposes.

The jury would have been warranted in finding in substance as follows:

The plaintiff, owner of the truck, was employed by Nicholas DiPietro to move scrap metal and machinery purchased by the latter from the Bancroft & Martin yard to the junk yard of the defendant. The duties of the plaintiff were limited solely to the transportation. The loading and unloading of the truck was carried out by or under the direction of DiPietro and others.

In loading the truck for the third trip, "Bud" Bridges, an employee of DiPietro, placed a sling about the machine, and attached the sling to hooks on the Bancroft & Martin crane. The crane operator then hoisted the machine from the ground and placed it in the truck. Chains were affixed to keep the machine in place. The trip of several miles was without incident.

At the defendant's yard Stephen Ham, the plaintiff's driver, placed the truck as instructed directly under the lifting cable of the defendant's crane. Bridges hooked the sling, which had remained about the machine, to the cable of the crane in the same manner as the sling had been attached to the Bancroft & Martin crane. The plan was that the defendant's crane operator would "take a strain on it," that is to say, would hoist the machine from the floor of the truck. The truck would then be driven from beneath the machine and the machine lowered to the ground.

The crane operator could see the truck, the load, and Bridges. The driver and the crane operator, however, could not see each other. Bridges stood by the truck to pass a signal from the crane operator to the truck driver to move the truck.

The plaintiff's truck was specially designed to carry heavy loads of scrap metal. The body of the truck was 16 feet in length, 7 feet 6 inches in width, and 8 feet 4 inches from the ground to the top of the body. The body, of reinforced steel, was about 4 feet 4 inches in height. The machine, weighing an estimated 8 to 8½ tons, was about 7 feet in height, placed upright on the truck, and thus reached 3 feet above the sides. The tailgate on the truck was down at the time of the accident.

The truck remained stationary at the point where the driver had been directed. The driver testified that no signal to move was given. As the machine was being hoisted, it struck the side of the truck, causing it to overturn with the resulting damage.

The machine lay with its base within the truck and roughly horizontal with the ground. The sling and the crane cables were unharmed, and the machine was shortly lifted and placed elsewhere by the crane.

The witnesses with direct testimony bearing on the unloading were Bridges and DiPietro. The truck driver saw nothing. In the words of Bridges, "[The crane operator], pulled in the slack first to hold the cable; then he started taking the strain on the cable after I was in front of the truck. . . Well, it happened so quick, it was rainy that day and it was steel against steel. She just slid and she started tipping. I just jumped back."

DiPietro, standing near the truck, saw the machine lifted from the floor of the truck, the "slipping," as it was termed, the truck overturn, and the end result of the accident.

The doctrine of *res ipsa loquitur* in our opinion is applicable. We are satisfied that damage does not ordinarily flow from the shifting or dropping of a load in the operation of a crane in the absence of negligence. It is not unreasonable, therefore, that the person charged with the operation of the crane should face an inference of negligence naturally drawn from the known facts, if he cannot explain his conduct.

We conclude that the evidence would warrant the inference and thus a finding of negligence on the part of someone between the placing of the machine on the truck at Bancroft & Martin and the accident in defendant's yard.

Res ipsa loquitur has been defined and applied repeatedly in our cases.

> "The doctrine of *res ipsa loquitur* is not substantive law. It does not need to be alleged in the declaration. It is a rule of evidence which warrants, but does not compel an inference of negligence. The doctrine does not affect the burden of proof. It merely shifts the burden of evidence. The defendant, who knows or should know, must explain. The rule applies where the accident is unexplained and the instrument causing the injury was under the management and control of the defendant, and the unexplained accident is one which does not ordinarily occur if due care is used. [Cases cited]
>
> "The doctrine of *res ipsa loquitur* is proper to be considered by the trier of facts where the circumstances are, as here, most uncommon, unusual, unexpected and extraordinary, and the damage is such that it would not ordinarily have occurred if the user of the dangerous instrumentality had the required knowledge, and proper care had been exercised in its use." *Cratty* v. *Aceto & Co.*, 151 Me. 126, 116 A. (2nd) 623.
>
> "*Res ipsa loquitur* is a rule of evidence which warrants, but does not compel, the inference of neg-

> ligence. It does not dispense with the rule that the person alleging negligence must prove it, but is simply a mode of proving the negligence of the defendant inferentially. *Edwards* v. *Cumberland County, etc., Co.*, 128 Me. 207, 146 A 700; *Chaisson* v. *Williams*. . . [cited below]. The inference, however, must be warranted. The rule does not apply unless the unexplained accident is of a kind which does not, according to the common experience of mankind, occur if due care has been exercised. The basis of the inference is the doctrine of probabilities. Facts proven must, in their very nature, indicate such an unusual occurrence as to carry a strong inherent probability of negligence. Mere conjecture and surmise will not suffice." *Winslow* v. *Tibbetts*, 131 Me. 318, 322, 162 A. 785.

See also *Stodder* v. *Coca-Cola, Inc.*, 142 Me. 139, 48 A. (2nd) 622; *Nichols* v. *Kobratz*, 139 Me. 258, 29 A. (2nd) 161; *Chaisson* v. *Williams*, 130 Me. 341, 156 A. 154; *Leighton* v. *Dean*, 117 Me. 40, 102 A. 565; Annot. 81 A.L.R. (2nd) 477; 2 Harper and James § 19.5 et seq.; Prosser on Torts § 42; 38 Am. Jur. *Negligence* § 295 et seq.

It is of course not sufficient for the plaintiff simply to say that in the operation of the crane someone was negligent. The negligence for which the defendant may be charged must be based on action within the defendant's control. The plaintiff must eliminate the possibility of negligence on the part of others than the defendant by a preponderance of the evidence.

The stripping or removal of the possibility of negligence of A in an action against B is not peculiar to the doctrine of *res ipsa loquitur*. In every case the area of responsibility of the defendant must be determined.

From the moment the defendant's crane operator put on the "strain," that is, hoisted the machine from the truck, the unloading was without question under his control. It

is within this limited area of action that the plaintiff charges liability on the part of the defendant.

A jury would have been warranted in finding that there was no negligence in affixing the sling to the machine and to the defendant's crane. We have seen that the sling was used without difficulty in loading at Bancroft & Martin's, and undamaged by the accident was again used in lifting the machine. The jury could properly infer that due care was used by DiPietro and Bridges under the circumstances.

With this limitation upon the responsibility of the defendant, an inference of negligence in the operation of the crane under the circumstances here disclosed would be permissible. *International Derrick & Equipment Co.* v *Buxbaum,* 210 F. (2nd) 384 (3rd Cir.) and *Taylor* v. *Crane Rental Co.,* 254 F. (2nd) 350 (C.A.D.C.) illustrate the elimination of the possibility of negligence by a third party in the application of *res ipsa loquitur.*

In *International,* a broadcasting mast fell while it was being raised to the top of a tower. The defendant had exclusive control as to the choice of equipment and its use, the timing and the details incident to the actual erection of the antenna. Entry of a judgment for the defendant was reversed for failure to consider *res ipsa loquitur.*

In *Taylor,* in a per curiam opinion the Court considered that it was plausible that the crane operator misapplied the controls or that the hook attached by the moving party himself slipped off the pipe which caused the accident. As the Court said, "it would be sheer speculation to conclude that the cause of the accident was one within defendant's exclusive control; the record does not present a case within the doctrine of *res ipsa loquitur.*"

The argument has been made that the right to control is sufficient to meet the test of exclusive control in the application of the doctrine. See for example *Giacalone* v.

Raytheon Manufacturing Co., 222 F. (2nd) 249 (1st Cir.). Without doubt, defendant's crane operator need not have hoisted a load which he deemed too heavy or improperly attached.

We are not of the view, however, that under the circumstances responsibility for negligence, if any, on the part of Bridges in attaching the sling to the crane would fall upon the defendant. We need not, and do not, determine the precise limits of "exclusive control" as a matter of law. It is sufficient here that the jury properly could have excluded negligence of others than the defendant from the cause of the accident.

The defendant further argues that the plaintiff lost the benefit of *res ipsa loquitur* from his failure to inquire of Alfred Raplee, the crane operator for the defendant, how the accident happened. Raplee was called to the stand by the plaintiff, testified only upon the method of operating the crane, and was asked no questions whatsoever about the accident. The defendant did not cross-examine. As the defendant states in its brief, "There was no attempt to learn, from the person (Raplee) with the best vantage point, how this accident happened."

Res ipsa loquitur remained open to the plaintiff. The record in the case, as we have seen, was sufficient to warrant the application of the doctrine.

On the defendant's theory, the same principle would be applicable whether the crane operator had been on the stand, or was in the courtroom, or was otherwise available to testify. In *Johnson* v. *U. S.*, 333 U. S. 46, 68 S. Ct. 391, in applying the doctrine of *res ipsa loquitur* to a situation involving an injury to a seaman on a tanker owned and operated by the United States, the Court said, at p. 392:

> "We have only a partial account of how the injury to petitioner occurred. Dudder was not called.

> The only testimony we have is from petitioner and his version of the episode is uncontradicted. The block which it was Dudder's duty to hold (and which weighed 25 or 30 pounds) was permitted to fall; it hit petitioner on the head and caused the injury for which this libel in personam. . . was filed under the Jones Act. . ."
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> * * * * * * * * * * *
>
> "But where, as here, the injured person is not implicated . . . the falling of the block is alone sufficient basis for an inference that the man who held the block was negligent. In short, Dudder alone remains implicated, since on the record either he or petitioner was the cause of the accident and it appears that petitioner was not responsible."

Mr. Justice Frankfurter, in dissenting, said at p. 395:

> "But I do not believe that *res ipsa loquitur* is applicable here. It is, after all, a 'rule of necessity to be invoked only when necessary evidence is absent and not readily available.' . . . Here the evidence as to the cause of petitioner's injuries was admittedly available, and it would seem to follow that since what actually happened could have been adjudicated, it should have been adjudicated."
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> * * * * * * * * * * *
>
> "Dudder's account of what happened surely could supplement Johnson's as a basis for recreating the events which led to Johnson's injury. Neither party saw fit to use his available testimony. Instead of entering judgment for the party who had the burden of proof and did not meet it, the trial judge should at least have called Dudder as the court's witness."

In our view it would place an unnecessary and unreasonable burden on a plaintiff to insist that he offer the evidence of a defendant, or of an employee under defendant's control, or else sacrifice *res ipsa loquitur*.

In the instant case, the conduct of the crane operator was directly in issue. He could have been examined as readily by the defendant as by the plaintiff. In the absence of his evidence on the cause of the accident, the applicability of *res ipsa loquitur* must rest on the record.

The second question is whether in light of the pretrial order, *res ipsa loquitur* was removed from the case, and hence not available to the plaintiff. The order reads in part:

> "The plaintiff will claim that the crane was under the exclusive control of the defendant Corporation.
>
> * * * * * * * * * * *
>
> "It is anticipated the evidence will show that a Mr. DiPietro and a Mr. Bridges had actually hooked the hooks of the crane on to the steel at such places as were specified by the crane operator."

Reality at the trial did not reach the plaintiff's anticipation. The evidence plainly disclosed that the crane operator did not specify where the hooks should be placed.

The lack of the anticipated evidence does not weaken the fair weight of the evidence in the record. The failure of proof benefited the defendant, it may be noted, and not the plaintiff. The difficulty of establishing the essential fact of exclusive control to warrant the application of *res ipsa loquitur* was obviously increased.

From the outset the plaintiff relied in large measure on *res ipsa loquitur*. Cf. *Miller* v. *Brazel*, 300 F. (2nd) 283 (10th Cir.). The plaintiff's theory is not to be discarded at least in the absence of surprise which would make reliance upon the doctrine unfair to the defendant.

In *Bickford* v. *Berry*, 160 Me. 9, 196 A. (2nd) 752, and also 160 Me. 132, at 134, 199 A. (2nd) 566, by pretrial order, "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."

Here the plaintiff anticipated certain evidence, but he did not deny reliance on *res ipsa loquitur* in the event the fact should be otherwise.

We conclude that the jury should have been given the opportunity to infer negligence in the operation of the crane by defendant's employee.

The entry will be:

Appeal sustained.

STUART E. HAYES
vs.
ERNEST H. JOHNSON, State Tax Assessor

Piscataquis. June 9, 1965.

Wills. Executors and Administrators. Inheritance Taxes. Trusts.

Although a will devised the real estate to Maine children in fee, such fee could, nevertheless, be subject to the exercise of a naked power of sale by the executor.

The presence of a grant of authority to the executor to sell the real estate rests upon an interpretation of the will and determination of the testatrix' intent at the time of its execution.

A will provision granting a power of sale of trust property to the executor of the will does not give the executor power to sell estate property devised in fee where the trust did not come into being and the sale was not necessary for the settlement of the estate.

ON REPORT.

For the determination of the validity of an inheritance tax assessment and for abatement. Assessment sustained.

John L. Easton, Jr., Esq., for the Plaintiff.

Ralph W. Farris and *John R. Doyle*, Assistant Attorneys General, for the Defendant.

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

MARDEN, J. On report, to determine the validity of an inheritance tax assessment challenged by petition for abatement.

The facts from which the issue arises are as follows:

The late Beatrice A. Cartwright executed a will which, after the usual provision for the payment of bills and a bequest of personal property, provided:

> "THIRD: I give, bequeath and devise all the rest, residue and remainder of my estate, real, personal and mixed and wherever and however the same may be situated, * * *, in equal shares unto so many of my children, the said Joseph William Cartwright, Edgar Calvin Cartwright, and Virginia Ann Cartwright Templet, as shall survive me; * * * and provided further, that any beneficiary hereunder who has not attained the age of twenty-one years at the time of my decease shall not receive his or her share outright, but such share shall be paid to the trustee of the trusts created under Paragraph FOURTH of this my Last Will and Testament, to be held and administered in accordance with the directions therein set forth."

The trust referred to in clause Third was established under clause Fourth, and declared that each child upon

attaining his majority was to receive his share outright and "free of all trust."

Clause Six set forth the powers of the trustee in subparagraphs A through O. Subparagraphs A and N read as follows:

> "A. To sell or exchange, at public or private sale, for cash or on credit, with or without security, without approval of any court, and without liability upon any person dealing with the trustees to see to the application of any money or other consideration rendered to them.
>
> "N. In addition to and not in limitation of his common law and statutory powers, I hereby authorize my executor, hereinafter named to exercise with respect to my estate, real or personal, all of the powers with all the discretions and immunities hereinbefore given to the trustee so far as said powers, discretions, and immunities are or might be applicable to executors in relation to my estate, to the same extent as if each of them were herein specifically set forth as given to my executor in relation to my estate."

Clause Seventh disposed of the testatrix' interest in a partnership known as Hardwood Products Company and provided that while the testatrix contemplated that this interest "will be transferred in kind in equal shares to my children * * *. However, without limiting any authority elsewhere in this will given him, my said executor is hereby expressly authorized to sell such interest" and distribute the proceeds.

Upon the death of the testatrix the children-beneficiaries named in clause Third survived her and were all over twenty-one years of age. The trust did not come into being.

The inventory of the estate reported (1) homestead property valued at $14,000.00, (2) summer property in Greenville valued at $16,500.00.

There was no occasion to sell real estate to satisfy creditors.

The executor sold the two parcels of real estate under what he then considered, and now urges, was his authority under the will to do so and reported to the inheritance tax office of the State Tax Assessor, as deductible expenses of administration, an amount representing the executor's commission based upon the real estate sold, an amount representing the expense of maintenance of the same real estate while held for sale, and the amount representing the cost of revenue stamps affixed to the deed of sale.

The inheritance tax office refused to allow these amounts as valid expenses of administration, contending that under the terms of the will the executor had no power of sale, with the result that no commission for sale was an appropriate expense of the estate and that expenses of maintenance were obligations of the devisees.

The executor paid the tax assessment under protest and thereafter petitioned for its abatement.

The parties stipulated that if it be determined that the executor were given power of sale of the Dover-Foxcroft residence and the Greenville cottage, the challenged assessment shall be abated to the extent of $48.58, but if it be determined that the executor was granted no power of sale over said real estate, the assessment shall be sustained.

The legal issues are raised by the State's contention that clause Third devised the real estate to the surviving adult children in fee, that the executor was given no power of sale, and that any power of sale, if indeed given, was invalid.

The executor-plaintiff contends that, granting that clause Third devises an estate in fee to the surviving adult children, such fee was subject to a power of sale validly granted him by the will.

The controlling question is whether the executor was, in fact, given a power of sale. If he were, the cases of *Bradt* v. *Hodgdon* 94 Me. 559, 563, 48 A. 179, and *Davis, et al.* v. *Scavone* 149 Me. 189, 192, 100 A. (2nd) 425 compel the holding that, although the Cartwright will devised the real estate to the children in fee, such fee could, nevertheless, be subject to the exercise of a naked power of sale by her executor.

The presence of a grant of authority to the executor to sell the real estate rests upon an interpretation of the will and determination of the testatrix' intent at the time of its execution. *Swasey, et al.* v. *Chapman Co-Executor, et al.* 155 Me. 408, 411, 156 A. (2nd) 395.

There was no power of sale expressly directed toward the real estate involved. There was in clause Seventh express authorization to sell part or all of the decedent's interest in Hardwood Products Company. The phrasing which the executor contends empowered him to sell other real estate is found in the 14th subparagraph of the terms of the *trust* (subparagraph N of clause Sixth) which subparagraph is quoted above. If the testatrix intended by this provision to grant the authority under discussion it was most obliquely done as distinguished from the direct expression in clause Seventh. There is no reason apparent for such indirection. There is no reason apparent for this alleged authority to be buried among the trust clauses, if the decedent intended it to be non-trust related. The construction urged by plaintiff is not consistent with the direct expression elsewhere in her will.

The grant in subparagraph N to the executor is not as broad as plaintiff urges. The grant extends literally only "so far as said powers * * * are or might be applicable to executors in relation to my (trust) estate." There are no powers applicable to the executor in relation to the non-existent trust estate.

If the decedent did not intend subparagraph N as "trust related" another possible construction would warrant a conclusion that inasmuch as a trustee under subparagraph A was authorized to sell estate assets "without approval of any court," the testatrix intended by subparagraph N to authorize the executor, without previously obtaining license from the Probate Court, to sell estate assets, if such sale were necessary to the settlement of the estate. In this sense the power of sale without license of court given the trustee "might be applicable" to the executor, but in this case is not.

Under neither interpretation was the executor granted power of sale over the properties here sold.

We are unable to read into the "authority elsewhere given" phrase of clause Seventh the significance attributed to it by the executor.

In accordance with the stipulation, the assessment is sustained.

So Ordered.

CROSBY MILLING COMPANY
vs.
SUNRISE EGGS, INC.

Washington. June 15, 1965.

Assignments. *Contracts.*

By a statute governing the transaction here in controversy, subsequently repealed in connection with the adoption of the uniform commercial code, all assignments, both full and partial, are enforceable.

ON APPEAL.

This is on appeal from a ruling by a single Justice, involving an assignment of an account and a partial assignment of another. Appeal denied.

Irving Isaacson, Esq., for the Plaintiff.

Herbert T. Silsby and *William S. Silsby, Esqs.*, for the Defendant.

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

WEBBER, J. The defendant prosecutes this appeal from the decree of a single justice below. On the basis of supportive evidence the justice found that one Newman entered into a contract with the defendant for the sale of eggs to be produced by an identified flock owned by Newman. Newman gave the plaintiff a written assignment of the net proceeds of this contract, the plaintiff being engaged in supplying feed for Newman's poultry. Newman was an officer of defendant corporation and the latter had knowledge of the assignment from its inception. Under the arrangement among the parties the defendant was justly entitled to pay to Newman 5¢ per dozen, to a prior assignee

2¢ per dozen, and to retain for trucking 2½¢ per dozen. The balance of the purchase price, however, was payable to the plaintiff but the defendant admits that it ignored the assignment and made payments to the plaintiff only as instructed from time to time by Newman. The amount thus paid to the plaintiff is short by $17,955.56 and judgment for the plaintiff in this amount was ordered.

Whatever may have been the law with respect to partial assignments prior to 1945 need not concern us here. In that year the legislature enacted a statute captioned "Assignment of Accounts" which became R. S. 1954, Ch. 113, Sec. 171 (P. L. 1945, Ch. 100). This statute remained in force and governed the transactions here in controversy but was later repealed by P. L. 1963, Ch. 362, Sec. 26. This repeal was enacted in connection with the adoption of the Uniform Commercial Code and by the terms of P. L. 1963, Ch. 362, Sec. 43 was made effective December 31, 1964. The statute while it remained in force provided as follows:

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

> to the assignor, or to such creditor, subsequent purchaser or other assignee or transferee, such payment or satisfaction shall be acquittance to the debtor to the extent thereof, and such assignor, creditor, subsequent purchaser or other assignee or transferee shall be a trustee of any sums so paid and shall be accountable and liable to the original assignee therefor."

After contrasting the rules which obtained at law and in equity prior to 1945 with respect to partial assignments, the justice below concluded his findings with the following language:

> "However, I am also convinced that with the adoption in Maine of the provisions of Ch. 113, Sec. 171 of the Revised Statutes, *all* assignments, both full and partial, became enforceable under the provisions of that statute."

We concur with his interpretation of the statute and its controlling applicability in the instant case.

Appeal denied.

RAYMOND D. BEAULIEU
vs.
STATE OF MAINE, ET AL.

Cumberland. June 23, 1965.

Habeas Corpus. Criminal Law. Detention. Escape.

Signature of petitioner for writ of habeas corpus to and made part of proper form of verification under oath satisfied statutory and jurisdictional requirements and effectively raised issues to be considered by court notwithstanding that amended petition was signed only by counsel.

An appeal from the dismissal of an amended petition for writ of habeas corpus must be dismissed for failure of the petitioner to file a designation of contents of the Record on Appeal and a statement of points of appeal within thirty days after his appeal to the Law Court.

An appeal in a post-conviction habeas corpus is taken in the same mode and scope of review as any civil action.

Although the decision is placed upon a procedural but nonetheless decisive point, the result would be the same on the merits of the case.

Petitioner is not entitled in his attack upon the escape conviction to raise the alleged violations of his constitutional rights in the first conviction for larceny.

Convictions of larceny stands until held void, and the conviction and the consequential detention in the reformatory are in effective force at the moment of escape.

The right of a sheriff or custodian to prevent a prisoner from escaping, does not rest on whether at some later date the unlawfulness of detention is established. The lawfully detained of the statute speaks of the moment of the escape.

On deprivation of constitutional rights, court thereby loses jurisdiction of the cause, but detention under the judgment issued by such court is not unlawful until the judgment itself has been determined to be void.

ON APPEAL.

On appeal from the dismissal of an amended petition for a writ of habeas corpus. Appeal dismissed.

Joseph E. Brennan, Esq., for the Plaintiff.

Richard J. Dubord, Attorney General and
John W. Benoit, Assistant Attorney General
for the Defendant.

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

WILLIAMSON, C. J. This is an appeal from the dismissal of an amended petition for writ of habeas corpus under the post-conviction habeas corpus Act, R. S. 1954, c. 126, §§ 1-A - 1-G (now 14 M.R.S.A. §§ 5502-5508), entered on respondents' motion.

In September 1959 in the Superior Court the petitioner was indicted for the offense of escape while "undergoing lawful imprisonment in the Reformatory for Men . . . in pursuance of the sentence of the . . . Judge of the Augusta Municipal Court, . . . for the offense of Larceny . . ." On arraignment the petitioner, represented by court appointed counsel, pleaded guilty, was adjudged guilty, and was sentenced and committed to the state prison for a term of from two to seven years.

Objection that the amended petition was not properly signed and verified was withdrawn at argument in light of *Holbrook* v. *State,* 161 Me. 102, 208 A. (2nd) 313, decided March 25, 1965, after the filing of respondents' brief.

The appeal must be dismissed for failure of the petitioner to file a designation of contents of the record on appeal and a statement of points of appeal within thirty days after his appeal to the Law Court. Maine Rules Civil Procedure,

Rule 75(a) and (d). The appeal was duly taken on December 9, 1964, but not until March 1965 were the designation of contents and statement of points filed without indication of service on the respondents.

An appeal in a post conviction habeas corpus is taken "in the same mode and scope of review as any civil action." 14 M.R.S.A. § 5508. Rule 75(a) and (d) therefore govern the procedure.

The time limits for action in bringing forward an appeal are plainly set forth in the Rules. See Field & McKusick, Maine Civil Practice § 75.1 et seq. In *Sawyer* v. *Congress Square Hotel Co.*, 157 Me. 111, 170 A. (2nd) 645, in 1961 we said at p. 112: "Appeals are, however, to be processed within the time limits or such enlargements as are fixed by the court rules. Dismissal may be expected to attend failure to comply."

The orderly dispatch of judicial business requires that the Rules be followed. The appeal is dismissed for failure to comply with Rule 75(a) and (d). See *Lopata* v. *Handler*, 121 F. (2nd) 938 (10th Cir.).

Although the decision is placed upon a procedural but nonetheless decisive point, we are satisfied that the result would be unchanged were the merits before us. We will discuss the case as though the appeal were properly here.

The issue is whether the petitioner was "lawfully detained" in the reformatory for larceny at the time of the escape for which he is now imprisoned.

He reasons that he was deprived of his constitutional rights in the petty larceny case in the municipal court as stated in the points of appeal; that the conviction of larceny was thereby void and the detention in the reformatory unlawful; and that accordingly the conviction of escape and his present imprisonment are unlawful.

The pertinent escape statute reads in part:

> "Whoever, being lawfully detained in any jail or other place of confinement, except the state prison, breaks or escapes therefrom, or attempts to do so, shall be punished by imprisonment for not more than 7 years." R. S. 1954, c. 135, § 28 (now 17 M.R.S.A. § 1405).

The points of appeal read:

> "The Court erred in dismissing Petitioner-Appellant's Petition for a Writ of Habeas Corpus.
>
> "Specifically, in ruling that Petitioner-Appellant, by virtue of his failure to inform the Superior Court Judge at his arraignment for the crime of Escape of these following facts, has now waived the right to urge them in this Petition:
>
> "That, at his hearing in Augusta Municipal Court upon a charge of Larceny, he was
>
> A. Not represented by Counsel, nor
>
> B. Apprised of his right to counsel, nor
>
> C. Advised of his right to jury trial, nor
>
> D. Apprised of his right to appeal from said Municipal Court in order to obtain a jury trial, nor
>
> E. Apprised of the necessity to make timely appeal to the next Superior Court Term in order to preserve his right to jury trial.
>
> "So that Petitioner-Appellant as a result lost his right to said jury trial guaranteed by both Federal and State Constitutions."

For our purposes in testing the judgment for the respondents on their motion to dismiss, the facts stated in the points of appeal are taken to be true.

The only error complained of in the appeal is in substance that the alleged deprivation of petitioner's rights

in the larceny case was held waived by the single justice in the escape case. The escape indictment was found sufficient in form and substance. The petitioner rightly does not object to the findings and rulings in this respect. The case does not come within the three cases discussed below.

In *Smith, Petr.* v. *State,* 145 Me. 313, 75 A. (2nd) 538, the petitioner held for lack of bail to appear in court was charged with escape from jail. The statute then read: "Whoever, being lawfully detained for any criminal offense. . ." (R. S. 1944, c. 122, § 28.) The Court said at p. 328: "However, as the indictment does not sufficiently set forth the commission of any offense either under the statutes of this state or at common law, the sentence imposed is entirely without legal justification and is void. The writ of error should have been sustained, the conviction reversed and the sentence vacated." Exceptions to the dismissal of the writ were sustained.

The respondent, in *State* v. *Couture,* 156 Me. 231, 163 A. (2nd) 646, while awaiting transfer to the Reformatory for Men, was charged with escape from the county jail. The issue of reasonableness of detention pending transfer was held a matter for the Court and not for the jury. The issue arose not with reference to the validity of the conviction and sentence upon which the charge of escape was predicated, as in the instant case.

The Court, in *Duncan, Petr.* v. *State,* 158 Me. 265, 183 A. (2nd) 209, in overruling exceptions to the denial of a writ of error relative to a conviction of escape from the state prison, said at p. 273:

> "The cases of escape pending transfer [Couture] and while committed for lack of bail [Smith] are distinguishable from the case at bar. Here we have the plain unmistakable designation of the court sentencing the petitioner for a felony punishable at state prison and of imprisonment pursuant to

> the sentence. Such imprisonment is lawful imprisonment, and the lack of a mittimus if such be the fact does not alter its lawful character."

In our view the petitioner is not entitled in his attack upon the escape conviction to raise the alleged violations of his constitutional rights in the larceny case. In brief, he says that conviction for escape is bad because he was deprived of constitutional rights in the earlier larceny case.

The error in the reasoning of the petitioner lies in his failure to recognize that the conviction of larceny stands until held void, and that the larceny conviction and the detention in the reformatory were in effective force at the moment of escape. If the rule were otherwise, then a sheriff or custodian, armed with a record of conviction and commitment fair and complete, would at his own risk prevent the departure of his prisoner from jail, reformatory or other place of detention.

We expect and demand that the sheriff or custodian keep and maintain custody of his prisoner, and for this purpose to use force.

The right of a sheriff or custodian to prevent a prisoner from escaping, does not rest on whether at some later date the unlawfulness of detention is established. The "lawfully detained" of the statute speaks of the moment of the escape.

We recognize that on the deprivation of constitutional rights, the Court thereby loses jurisdiction of the cause. *Gideon* v. *Wainwright*, 372 U.S. 335, 83 S. Ct. 792. It does not follow, however, that detention under the judgment issued by such Court is unlawful until the judgment itself has been determined to be void.

Whether the rights of the petitioner were violated, and hence whether the larceny conviction should be upset, with a new trial thereon, are questions not for a jailer or prisoner to decide, but for the Court in a proceeding directed to the larceny, and not to the escape. In an attack on the escape

conviction, the petitioner seeks to raise a collateral attack on the larceny conviction. This he may not do.

In summary, the issue is not whether the larceny conviction and commitment to the reformatory should be held unlawful, but whether they were in force at the moment of the alleged escape. The answer is plain. The petitioner was then "lawfully detained," and hence was subject to the escape statute.

For this reason the respondents were entitled to a dismissal of the petition. For illustrative material see *Copeland* v. *Manning* (S.C.) 109 S.E. (2nd) 361; *People* v. *Hinze,* 97 Cal. App. (2nd) 1, 217 P (2nd) 35; *U. S.* v. *Jerome,* 130 F. (2nd) 514 (2nd Cir.); *Stinehagen* v. *Olson* (Neb.) 17 N.W. (2nd) 674; 3 Wharton, Criminal Law and Procedure § 1374 (12th ed. 1957); Annot. 70 A.L.R. (2nd) 1430; 30 C.J.S., *Escape* § 5(2); 19 Am. Jur. 1964 Supp., *Escape, Prison Breaking, and Rescue* § 27.

The single justice, in dismissing the petition, said in part:

> "Under the circumstances petitioner's failure during the Superior Court arraignment to inform the presiding Justice of petitioner's lack of counsel during the previous arraignment or trial in Augusta Municipal Court must be now deemed to constitute a waiver by the petitioner of his right to urge such want of counsel in this present proceeding as an unjust determinant invalidating his guilty plea, his conviction, sentence and commitment for escape. R. S. c. 126, § 1-A, additional."

We reach a like result for reasons which seem to us more compelling. Briefly, the issues stated in the appeal were not available to the petitioner by collateral attack upon the larceny conviction at the escape trial, and hence waiver was not material.

The entry will be:

Appeal dismissed.

STATE OF MAINE
vs.
CLYDE MAYNARD HATHAWAY, JR.

Franklin. June 25, 1965.

Durham Rule. Murder. Criminal Law. Confession. Admission. Insanity. Mental Disease or Defect. Minor. Infants.

The State must prove the necessary elements of the crime of murder beyond a reasonable doubt. The defendant, however, must prove the affirmative defense of not guilty by reason of mental disease or defect by a fair preponderance of the evidence.

Instructions that the defendant must prove preponderantly that he could not at the time of the imputed crime distinguish beween right and wrong and that his alleged malefaction was the product of such disease or defect constitute reversible error because such instructions deprived the defendant of jury consideration and estimation of the medical testimony presented upon the issue of defendant's inability because of some mental disease or defect to refrain from the imputed homicide irrespective of defendant's knowledge of right and wrong at the time of the tragic incident.

The jury must decide whether upon all the evidence the defendant had proved by a preponderance that at the occurrence of the fatal event the defendant's mental or emotional processes were substantially affected and his behavior controls were substantially impaired.

The court where injustice must otherwise inevitably result will sustain an appeal because of an erroneous charge although no exception to the charge was taken.

It is not unreasonable to require that the State be able to prove guilt beyond a reasonable doubt without resort to the use of admissions or confessions made as a part of a court ordered mental examination.

Introduction of admissions made during a court ordered mental examination as a part of the State's main case on the issue of guilt or innocence violated the purpose and intent of the examination statute, deprived the respondent of due process of law and constitute reversible error.

ON EXCEPTIONS AND APPEAL.

This is on appeal and exceptions after a conviction for murder. Appeal sustained. New trial granted.

Phillip M. Kilmister and *Jerome S. Matus,*
Assistant Attorneys General, for the Plaintiff.

John A. Platz and *Thomas E. Day, Esqs.,*
for the Defendant.

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

SULLIVAN, J. Respondent a boy 12 years of age was indicted for murder. He pleaded not guilty, not guilty by reason of insanity and not guilty by reason of mental disease or mental defect. He was tried by a jury and was found guilty. During trial respondent noted and reserved 12 exceptions. Respondent after verdict seasonably moved for a new trial and has appealed from the Court's denial of such motion. Respondent here prosecutes his exceptions and appeal.

In his motion respondent *inter alia* protested that the instructions of the trial Court to the jury were erroneous as a matter of law.

Some of the presiding Justice's jury instructions were as follows:

> "What is the rule if the Respondent says 'I am not guilty by reason of insanity,' or 'I am not guilty by reason of mental disease or mental defect?' The burden is then upon the Respondent to prove these allegations or contentions by a fair preponderance of the evidence. You will there note there is a distinction. The State must prove the necessary elements, which are required by law for the State to prove, by a degree beyond a reasonable doubt. In the affirmative defense—and a plea of

not guilty by reason of insanity, and so forth, would be termed an affirmative defense—there the burden is upon the Respondent, not to prove it beyond a reasonable doubt, but by a fair preponderance of the evidence."

* * * * * * * * * * *

"To establish the proposition that he was insane, or was suffering from some mental disease or mental defect, in the legal sense in this State, and, therefore, not criminally responsible at the time of the commission of the act, this Respondent must, as I have previously indicated to you, establish by a fair preponderance of the evidence that he was afflicted with mental disease or mental defect of such character that he would not have at the time of the commission of the act the mental capacity to distinguish between right and wrong as to that particular act, and that he had no knowledge or consciousness enough to know that the act was wrong and criminal. Then he has established that he was either insane or suffering from a mental disease or mental defect, and not otherwise.

"On the other hand, whatever the character or extent of the mental disease, if any he had, if at the time of the doing of the act he had sufficient mental capacity to understand the situation, and know the nature and quality of his act, that it was unlawful, that it was morally wrong, then he was not legally insane or legally suffering from any mental disease or mental defect. In other words, he must show by a fair preponderance of the evidence the existence of some mental disease or mental defect at the time of the act, and also that the disease was of such character or extent that it deprived him at that time, for the time being at least, of the mental capacity to understand the nature or quality of the act he was doing, its character and consequences or, in other words, the mental capacity to distinguish between right and wrong and to know that the act was wrong. He must not only show that he could not in some respect be

able to know the difference between right and wrong, but show a connection between the mental disease, if any there was—and that is for you to say—and the acts in question, that those acts flow from the mental disease that existed, and that the act was the product of a diseased or defective mind. If he establishes the mental disease, and its extent to the point I have described, then he was insane in the legal sense, and the act he did —if you find he did the act—is the unfortunate result of disease. Otherwise, the act must be held to be the result of a vicious disposition for which he is legally responsible.

"For your further enlightenment, I will read a recent statute enacted by our Legislature, which reads as follows: 'An accused is not criminally responsible if his unlawful act was the product of a mental disease or mental defect.' The terms 'mental disease' and 'mental defect' do not include an abnormality manifested only by repeated criminal conduct or by excessive use of drugs or alcohol.

* * * * * * * * * * *

The statute so quoted by the presiding Justice is R. S. 1954, c. 149, § 17-B (P. L. 1963, c. 311, § 3) (15 M. R. S. A., § 102) and reads as follows:

"An accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.

"The terms 'mental disease' or 'mental defect' do not include an abnormality manifested only by repeated criminal conduct or excessive use of drugs or alcohol."

This statute by its first sentence adopts the *"Durham Rule,"* so-called, the *"disease-defect-product test."* The second sentence adds a stated modification to the *"Rule."*

The *Durham Rule* is not statutory but was enunciated as a court decision in *Durham* v. *U. S.*, 214 F. (2nd) 862, 874, 875 (D. C. Cir., 1954), as follows:

> "The rule we now hold must be applied on the retrial of this case and in future cases is not unlike that followed by the New Hampshire court in 1870. It is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." See *State* v. *Pike,* 49, N. H. 399 (1870).

Previous to 1961 (P. L. 1961, c. 310) this jurisdiction was said to observe the *"M'Naghten Rule."* In *M'Naghten's Case,* House of Lords, 1843, 10 Clark & Finnelly's Reports, 200, 210, it was said in part by the judges in response to theoretical questions:

> "- - - - to establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong - - - -"

In *State* v. *Lawrence,* 1870, 57 Me. 574, 576, this Court assented to a "right-wrong test" by acquiescing upon appeal with the subjoined instruction given in the trial court:

> "To excuse a man from responsibility on the ground of insanity, it must appear, that at the time of doing the act he had not capacity and reason sufficient to enable him to distinguish between right and wrong, as to the particular act he was doing. That he had not knowledge, consciousness, or conscience enough to know, that the act he was doing is a wrong act, and a criminal act, and one that he will be subject or liable to punishment for doing - - - - In other words, a man may be a monomaniac, his mind may be disordered, and, to a certain extent, it may be proved that he is of unsound mind, and yet, if he has mind and understanding enough, and is not carried away so but that he understands the difference between right and wrong, as to the act he is doing,—that is to

> say, if the man knew that what he was doing is wrong, and he was liable to be punished for it, and that the act would not be excused, then he is subject to punishment, although there might be some partial derangement."
>
> See, *State* v. *Knight,* 95 Me. 467.

Our modified *Durham Rule* statute was enacted by P. L. 1961, c. 310 as R. S. 1954, c. 149, § 38-A. It was repealed by P. L. 1963, c. 311, § 2 and reenacted by P. L. 1963, c. 311, § 3 as R. S. 1954, c. 149, § 17-B.

In *State* v. *Park,* 1963, 159 Me. 328, 334, 193 A. (2nd) 1 this Court said:

> "The line between criminal responsibility and lack of responsibility is drawn by our 1961 statutes. We then discarded the McNaghten Rule and adopted the Durham Rule with modifications."

The *M'Naghten Rule* had long become a subject of controversy when in 1954 the *Durham Rule* was formulated judicially by the District of Columbia Circuit Court as the test of criminal responsibility.

> "- - - - The science of psychiatry now recognizes that a man is an integrated personality and that reason, which is only one element in that personality, is not the sole determinant of his conduct. The right-wrong test, which considers knowledge or reason alone, is therefore an inadequate guide to mental responsibility for criminal behavior. As Professor Sheldon Glueck of the Harvard Law School points out in discussing the right-wrong tests, which he calls the knowledge tests:
>
> 'It is evident that the knowledge tests unscientifically abstract out of the mental make-up but one phase or element of mental life, the cognitive, which, in this era of dynamic psychology, is beginning to be regarded as not the most important factor in conduct and its disorders. In brief, these tests proceed upon the following questionable assumptions of an outworn era in psychiatry;

> (1) that lack of knowledge of the 'nature or quality' of an act (assuming the meaning of such terms to be clear), or incapacity to know right from wrong, is the sole or even the most important symptom of mental disorder; (2) that such knowledge is the sole instigator and guide of conduct, or at least the most important element therein, and consequently should be the sole criterion of responsibility when insanity is involved; and (3) that the capacity of knowing right from wrong can be completely intact and functioning perfectly even though a defendant is otherwise demonstrably of disordered mind.' "
>
> *Durham* v. *U. S., supra,* @ 871.

The *Durham* case did not completely abandon the right-wrong factor.

> "- - - - The jury's range of inquiry will not be limited to, but may include, for example, whether an accused, who suffered from a mental disorder or defect did not know the difference between right and wrong, - - - -"
>
> *Durham* v. *U. S., supra,* @ 876.

The *Durham* decision affirms the legal tradition of free will and individual responsibility:

> "The legal and moral traditions of the western world require that those who, of their own free will and with evil intent (sometimes called *mens rea*), commit acts which violate the law, shall be criminally responsible for those acts. Our traditions also require that where such acts stem from and are the product of a mental disease or defect as those terms are used herein, moral blame shall not attach, and hence there will not be criminal responsibility - - - -"
>
> *Durham* v. *U. S., supra,* @ 876.

This Court is here construing and interpreting an act of the Legislature. In *Durham* the Court was by inherent judicial authority formulating a test. (*Durham* v. *U. S., supra.* § 874.)

On October 8, 1962 the Circuit Court for the District of Columbia rendered its decision of *McDonald* v. *U. S.*, 312 F. (2nd) 847, reexamining and implementing the *Durham Rule*:

> "Our eight-year experience under *Durham* suggests a *judicial* definition, however, broad and general of what is included in the terms 'disease' and 'defect'. In *Durham,* rather than define either term, we simply sought to distinguish disease from defect. Our purpose now is to make it very clear that neither the court nor the jury is bound by *ad hoc* definitions or conclusions as to what experts state is a disease or defect. What psychiatrists may consider a 'mental disease or defect' for clinical purposes, where their concern is treatment, may or may not be the same as mental disease or defect for the jury's purpose in determining criminal responsibility. Consequently, for that purpose the jury should be told that a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional process and substantially impairs behavior controls. Thus the jury would consider testimony concerning the development, adaptation and function of these processes and controls.
>
> "We emphasize that, since the question of whether the defendant has a disease or defect is ultimately for the triers of fact, obviously its resolution cannot be controlled by expert opinion. The jury must determine for itself, from all the testimony, lay and expert, whether the nature and degree of the disability are sufficient to establish a mental disease or defect as we have now defined those terms. What we have said, however, should in no way be construed to limit the latitude of expert testimony - - - - -
>
> "- - - - We think the jury may be instructed, provided there is testimony on the point, that capacity, or lack thereof, to distinguish right from wrong and ability to refrain from doing a wrong or unlawful act may be considered in determining

> whether there is a relationship between the mental disease and the act charged. It should be remembered, however, that these considerations are not to be regarded in themselves as independently controlling or alternative tests of mental responsibility in this Circuit. They are factors which a jury may take into account in deciding whether the act charged was a product of mental disease or mental defect. - - - - -"
>
> *McDonald* v. *U. S.*, (1962), 312 F. (2nd) 847, 850, 851.

It must be noted that R. S. 1954, c. 149, § 17-B, 15 M. R. S. A., § 102 contains this modification of the *Durham Rule*:

> "The terms 'mental disease' or 'mental defect' do not include an abnormality manifested only by repeated criminal conduct or excessive use of drugs or alcohol."

In this jurisdiction a defendant pleading not guilty to crime by reason of insanity has the burden of satisfying the jury by a preponderance of the evidence of the truth of such affirmative defense.

State v. *Lawrence*, 57 Me. @ 583.

In the case at bar the presiding Justice instructed the jury that it was incumbent upon the defendant to prove by a preponderance of evidence - - -

> "- - - - that he was afflicted with mental disease or mental defect of such character that he would not have at the time of the commission of the act the mental capacity to distinguish between right and wrong as to that particular act, and that he had no knowledge or consciousness enough to know that the act was wrong and criminal - - - -"

The Justice continued:

> "Then he has established that he was either insane or suffering from a mental disease or mental defect, and not otherwise."

"- - - - whatever the character or extent of the mental disease, if any he had, if at the time of the doing of the act he had sufficient mental capacity to understand the situation, and know the nature and quality of his act, that it was unlawful, that it was morally wrong, then he was not legally insane or legally suffering from any mental disease or mental defect.

"- - - - he must show by a fair preponderance of the evidence the existence of some mental disease or mental defect at the time of the act, and also that the disease was of such character or extent that it deprived him at that time, for the time being at least, of the mental capacity to understand the nature or quality of the act he was doing, its character and consequences or, in other words, the mental capacity to distinguish between right and wrong and to know that the act was wrong. He must not only show that he could not in some respect be able to know the difference between right and wrong, but show a connection between the mental disease, if any there was—and that is for you to say—and the acts in question, that those acts flow from the mental disease that existed, and that the act was the product of a diseased or defective mind. If he establishes the mental disease, and its extent to the point I have described, then he was insane in the legal sense, and the act he did—if you find he did the act—is the unfortunate result of disease. Otherwise, the act must be held to be the result of a vicious disposition for which he is legally responsible."

The foregoing instructions made it incumbent upon the defendant to prove preponderantly that he could not at the time of the imputed crime distinguish between right and wrong and that his alleged malefaction was the product of such disease or defect. Such instructions constituted a reversion to the restrictive and superseded *M'Naghten Rule* of *State* v. *Lawrence,* 57 Me. @ 576. The instructions rendered deprived the defendant of jury consideration and

estimation of the medical testimony presented upon the grave issue of defendant's inability because of some mental disease or defect to refrain from the imputed homicide irrespective of defendant's knowledge of right and wrong at the time of the tragic incident. The charge was therefore elliptical and insufficient. The jury were not informed that they could and must decide whether upon all the evidence the defendant had proved by a preponderance that at the occurrence of the fatal event the defendant's mental or emotional processes were substantially affected and his behavior controls were substantially impaired. There was prejudicial error. Defendant's appeal must be sustained and a new trial must be granted to him.

No exceptions to the judicial instructions were noted or reserved. Nevertheless this Court where injustice must otherwise inevitably result will sustain an appeal because of an erroneous charge although no exception was taken.

State v. *Papalos,* 150 Me. 370, 390, 113 A (2nd) 624
Thompson v. *Franckus,* 150 Me. 196, 203

The mandate shall be:

Appeal sustained,
New trial granted.

SULLIVAN, J.
TAPLEY, J.

Upon his arraignment the defendant pleaded not guilty, not guilty by reason of insanity and not guilty by reason of mental defect or mental disease. Defendant's attorneys petitioned the presiding Justice in accordance with the provisions of R. S., 1954, c. 149, § 17-A, (15 M. R. S. A. § 101), to commit the defendant to the custody of the Commissioner of Mental Health and Corrections, to be placed in an appropriate institution for the mentally ill or mentally re-

tarded, to be there detained and observed by the superintendent or his delegate and the professional staff until further order of court, for the purpose of ascertaining the condition of the defendant. That petition was granted and the defendant was resultantly placed in the State Hospital in the maximum security area for the period from October 23, 1963 to February 19th, 1964 and was observed by the professional staff.

At defendant's jury trial and over the objections of his counsel a psychiatrist of the hospital staff was permitted to recite to the jury in evidence quite complete admissions of the defendant's commission of the alleged homicide, made to the witnessing doctor and the hospital staff by the defendant. Such testimony had been offered by the State as the product of conversations between the defendant and the psychiatrist and as a necessary basis for the psychiatric findings of the testifying doctor in his judgment of the defendant's knowledge of right and of wrong at the time of the imputed homicide. The defendant excepted to the reception in evidence of the doctor's recital of defendant's admissions and assigned the following reasons:

> "- - - - That the admissions allowed by the Court were made by the Respondent when he was in police custody and not free to communicate privately with his parents or counsel; that the Respondent was neither seasonably nor properly advised of his constitutional rights, nor did he understand them nor appreciate the manner in which to exercise such rights; that the Respondent was not provided with the benefit of counsel; that the Respondent was denied the due process of law; that the Respondent at the time of the admissions by him alleged to have been made was legally presumed incapable of committing the crime with which he was charged."

At the making of the controversial admissions the defendant was not in police custody but by order of court

and by the obedient order of the Commissioner of Mental Health and Corrections the defendant was at the State Hospital under detention and observation by the Superintendent and the professional staff of that institution pending further order of court. The rationale of the observation was that of scientific impartiality.

Upon the record the defendant's parents visited him at the Hospital and there is no evidence that the defendant was not free to communicate with his counsel or parents. Defendant's counsel had presented to the trial court the petition for defendant's hospital custody and observation. There is no evidence that such counsel voiced any reservation of rights for the defendant or made any unrequited requests to visit or to attend him. Before any interviewing of the defendant he had been admonished at least 3 times of his constitutional rights to counsel, of his privilege against self-incrimination and of the foreseeable exercise against him of his answers. 2 such admonitions had been given by the prosecuting attorney; 1 had been imparted by the testifying doctor. In the judgment of that doctor a qualified psychiatrist the defendant had understood the instruction as to his rights and immunities. The defendant was a lad of some 13 years of age. The witnessing doctor saw the defendant several times weekly throughout a period of some 4 months. The doctor told the defendant why the latter was at the hospital. The defendant was confined but interviews with him were conducted in a calm manner and atmosphere. Inquiry and questioning as to alleged homicide were required for a professional opinion and report to the court. The boy was described by the doctor as bored by a long confinement and as being desirous of being alone. The witness stated that the defendant possessed "the mentality of a normal 12-year old" - - - - "knew the things that the average 12-year old knows" - - - "On the children's test he got a full scale I. Q. of 77 according to them. We got a 93 on ours."

The psychiatrist testified:

"I told him that he had been sent to us by orders of the Superior Court for examination, and that nothing that passed between us was confidential, that it could be used either for or against him in Court. And I said 'Do you understand this?' He said 'Yes.' "

* * * * * * * * * * *

"Q. And it was based upon the fact that he said 'Yes' that you concluded he understood them, isn't that right?

"A. Yes.

"Q. And that was the only basis?

"A. No."

* * * * * * * * * * *

"As we went on he indicated that he understood this because he told me that he had not answered some questions previously because his lawyer had told him not to. So, he understood exactly the position we were in. There was no question in his mind or mine that he understood he was there for observation."

This defendant was not an indigent respondent but upon the record was served by 3 competent counsel provided from his own or parental resources.

The statute in conformity with which the defendant was committed and observed at the State Hospital, R. S. 1954, c. 149, § 17-A (15 M. R. S. A. § 101), is not unconstitutional as violative of the inhibitions against self incrimination and due process. 32 A L R (2nd) 430, 444, 450.

At the time of the alleged and imputed crime the defendant was 12 years of age.

"- - - - An infant - - - - cannot commit a crime under seven; is presumed, *prima facie,* not to be capable of crime under fourteen, though he may be; - - -" *Knight* v. *Fairfield,* 70 Me. 500, 501.

Whether this defendant at the time of the homicide referred to in this indictment was capable of criminal commission was one of the subjects of inquiry at the State Hospital observation.

Defendant had no obligation to answer the doctor's questions concerning any participation by the defendant in any crime. Defendant enjoyed an immunity from so doing. The defendant could have remained mute. He had been so advised by a lawyer, by the County Attorney and by the doctor. He had been warned of the possibility of his answers, if any, being used against him. At the State Hospital there is no proof of the exercise upon the defendant of abuse, guile, intimidation, compulsion, "brain washing" or extortion. Defendant through his twofold counsel and with the sanction of the court had sought medical findings and conclusions as to his mentality and the expert who functioned in observing the defendant testified that interrogation of the defendant concerning any participation by the latter in the commission of the crime imputed was indispensable to a professional determination of defendant's mental condition at the time of the offense charged. In the opinion of the psychiatrist the early age of the defendant did not of itself vitiate the probative efficacy of defendant's admissions nor their propriety.

In the instant case apart from the challenged testimony of the examining doctor as to defendant's incriminating admissions there is contained in the record evidence of an additional asserted admission of his guilt made by the defendant to another witness and certain circumstantial evidence which, if believed, would implicate the defendant in the charged offense.

In *State* v. *Aaron,* (1818), 4 N. J. L. 263, a defendant under the age of 11 years had been tried for the murder of a 2 year old child. An issue was whether a boy under

eleven years of age could be convicted upon his own confession. The Court had the following to say of cases wherein the capacity of a minor to commit a crime has been established.

> P. 279. "This capacity to commit a crime, it appears to the court, necessarily supposes the capacity to confess it. He who is a rational and moral agent and can merit the infliction of legal sanctions, must be able to detail his motives and acts; and must be judged by them. If therefore the defendant was of an age to be punished, he was of an age to confess his guilt. - - - -"

In *State* v. *Guild,* (1828), 10 N. J. L. 163 @ 189, the New Jersey court quoted with approval the passage from *State* v. *Aaron* set forth above and said:

> "The age of the prisoner was earnestly pressed on our consideration by his counsel, who strenuously insisted he was too young to be exposed on such evidence. At the perpetration of the offence he was aged twelve years and somewhat more than five months. The sound, sensible and legal rule on this head is, in our opinion, judiciously, as well as lucidly, stated by Justice Sutherland in the case of *Aaron.* (quotation as above) These principles are conformable to the most approved and respected authorities - - - -"

A 14 year old girl was indicted and tried for burning a dwelling house. Her confession was admitted in evidence. The Court in *Commonwealth* v. *Smith,* (1876), 119 Mass. 305, 311, said:

> "There was evidence that the dwelling house had been set on fire by some one, and there were facts and circumstances pointing to the defendant as the probable incendiary. After her arrest and while in custody, she confessed that she set the fire, and stated how she did it. This evidence was objected to, but as it did not appear that any threats or promises were made on the part of the officers, it

> was properly admitted, and the fact, that the defendant was but fourteen years of age, and under arrest, and made the confession to officers, does not render it incompetent. - - - -"

In *State* v. *Watson,* (1946), 114 Vt. 543, 549, 49 A (2nd) 174, there is this statement:

> "Finally the mere fact that a person is an infant and of low mentality does not render his confession inadmissible as being involuntary, providing he has the mental capacity to commit the crime with which he is charged. The reason for this rule being that if a child has such mental capacity as to render him amenable to the law for the commission of a crime he has sufficient mental capacity to make a confession of guilt. (authorities cited) - - - -"

It becomes difficult to say with confident discrimination whether in the case at bar we are concerned with an alleged confession or with admissions.

> "- - - - A confession is the voluntary acknowledgment of the criminal act charged, or of participation in its commission. Incriminating admissions may be made without any intention of confession." *State* v. *O'Donnell,* 131 Me. 294, 301.

See authorities cited in *State* v. *Merrow,* (1965), (Me.), 208 A (2nd) 659, 660, 661; *State* v. *Robbins,* 135 Me. 121, 122, as to submission to the court and entertainment and resolution by it of ostensible extrajudicial confessions.

In *Hall* v. *State,* (1945), 209 Ark. 180, 189 S. W. (2nd) 917, the defendant, an adult, upon his own petition had been committed for observation as to his mentality. The Court held:

> P. 921. "It is finally urged that it was error to permit Dr. Kolb to testify over his objections, that appellant confessed to him that he killed his wife. As we understand the contention, it is not based on the existence of the relation of physician

> and patient, - - - but that he was sent to the State Hospital to be examined and his mental condition determined - - - and not to obtain a confession or other statement against his interest from him, and then to so testify in court. Said act provides - - - - that the judge shall in certain cases order the superintendent to direct some competent physician employed by the State Hospital 'to conduct observations and investigations of the mental condition of the defendant, and to prepare a written report thereof.' This was done by Dr. Kolb. By section 12, the physician who prepared the report shall be called to testify by either party and may be examined by either party. The Act does not prohibit the use of a confession, if one is obtained by the physician, and we see no valid objection to its use in this case, for in the first place, it is merely cumulative to his confession to many others; and in the second place, the doctor asked him if he killed his wife, which he admitted, for the purpose of asking him the further question, whether he had any remorse of conscience for having killed her. These and many other questions and answers, stenographic report of which was made at the time, were asked for the purpose of determining his sanity."

In *State* v. *Myers,* (1951), 220 S. C. 309, 67 S. E. (2nd) 506, 508, defendant over the objections of his counsel was committed by the Court to the State Hospital for examination as to sanity. The appellate Court held:

> "We are not advised as to the methods used at the State Hospital in examining a person for sanity but may assume that such an examination is made in a manner consistent with the constitutional rights of the accused. We do not undertake now to define the limits of such rights except to say that the authorities of that institution will not be permitted, over the protest of the accused, to reveal any confession made by him in the course of such examination, or any declarations implicating him in the crime charged."

If the foregoing language is to be interpreted to assert that a defendant in the course of such a mental examination or observation can never advisedly and voluntarily waive his constitutional rights, the decision is manifestly ultra protective.

The age of the defendant above is not sufficient to void a confession validly made. *Olivera* v. *State,* (Okla.), 354 P. (2nd) 792, 794; *Com.* v. *Smith,* 119 Mass. 305, 311, nor by the same reasoning should age alone nullify an admission.

There are essential standards of fairness and the probity and integrity of extrajudicial confessions and admissions apart from an accused's age will additionally for their competency depend upon a defendant's intelligence, mental condition, disposition, treatment, existing circumstances and other conditions. 87 A L R (2nd) 624, ANNO.

> "But the question whether a particular confession offered in evidence was voluntary or was obtained by constraint or coercion - - - - is not a question of law. It is to be determined by evidence. The evidence upon this issue may be conflicting and confused. Even when the evidence is uncontradicted, different inferences may often be drawn from it by different men and each inference be logically possible. Hence, the question must be determined by the presiding justice as a question of fact. In 1 Greenl. Ev. 219. it is stated that the matter rests wholly in the discretion of the judge. Upon exceptions to his opinion on this question the law court should not reverse his decision merely because it would itself have come to a different conclusion, but only when the circumstances are such that it can say as matter of law, that the confession was not voluntary in the legal sense. It will regard the findings of the presiding justice upon this question of fact, as it does the findings of a jury upon questions of negligence, as entitled to stand unless the contrary inference is the only reasonable one. - - - -"
>
> *State* v. *Grover,* 96 Me. 363, 365.

This defendant in the case at bar had pleaded not guilty by reason of mental disease or mental defect and thereby undertook the burden of proof by preponderance, of the truth of such defense. *State* v. *Lawrence, supra,* 57 Me. @ 583. The State presented the psychiatric witness. Whether the defense would have called that witness we cannot know. Both parties doubtlessly knew before trial of the Doctor's data, findings and conclusions as to the defendant's indicative mental condition. The prosecution in its elective judgment had to consult its public duty and if the defendant's admissions (or confession) seemed competent the State's counsel had an obligation to his office to make certain of their submission to the Court at sometime during the trial.

The controversial testimony of the examining psychiatrist and the propriety of its acceptance for consideration by the court or by the court and jury as admissions or confessions upon the issue of the defendant's perpetration of the confirmed homicide presented only questions of fact. *State* v. *Grover, supra.* Such testimonial evidence was competent to be received by the court and the court or jury for determination as to whether such asserted admissions or confessions had been made and if so whether they were made voluntarily in the legal sense and with constitutional conformity and satisfaction.

WEBBER, J. (concurring). In the course of the State's presentation of its main case on the issue of guilt or innocence, there were introduced into evidence over respondent's objection damaging admissions made by him to the State's alienist during an examination ordered by the court. While I concur in the result and in the opinion of the court, I consider the issue raised by respondent's exception to the admission of this evidence of such importance as to require our determination.

The machinery for investigation of mental responsibility in criminal cases is provided by statute, 15 M.R.S.A., Sec. 101:

> "When a finding of probable cause has been made, or an indictment has been returned against a person, or a person has taken an appeal to the Superior Court, a Justice of the Superior Court upon petition, if a plea of insanity is made in court or the justice is notified that it will be made upon arraignment, may order such person committed to the custody of the Commissioner of Mental Health and Corrections to be placed in an appropriate institution for the mentally ill or the mentally retarded, to be there detained and observed by the superintendent, or his delegate, and professional staff until further order of court, *for the purpose of ascertaining the condition of the person.*" (Emphasis mine)

It is my view that the public, acting through the legislature, is as much concerned with relieving the mentally ill from criminal responsibility as the respondent may be to establish his defense. Legislative intention will be completely frustrated if the patient may not with safety fully and candidly communicate with the examining physician. The question is of novel impression in Maine and no doubt arises at this time largely because of the particular wording of the so-called Durham Rule statute, 15 M.R.S.A. Sec. 102. "An accused is not criminally responsible if his unlawful act was the *product* of mental disease or mental defect. * * *." (Emphasis mine). This direct causative relationship between the mental disease or defect and the specific unlawful acts of the respondent creates the necessity, at least in the mind of the alienist, of a full disclosure by the respondent as part of the examination. Without this narration of the criminal acts, no appraisal of the relationship between mental condition and unlawful act is possible. Dr. Saunders, the State psychiatrist, made this abundantly clear in his testimony:

"Q. If an individual, Doctor, were committed to you for examination by you with respect to sanity or insanity, or mental disease or mental defect, and such person exercised the privilege of not answering your questions, or not speaking to you, would you still perform such examination?

A. No, sir. We would report back to the Court the fact as you outlined it. We would report back to the Court that the person had said he did not wish to answer any questions.

Q. Then I ask you as the next question, Doctor, if a person were committed to you for the purpose of your examination with respect to sanity or insanity, or mental disease or mental defect, and if such person refused to answer questions, or make statements, solely with respect to an alleged crime, and only that, would you still conduct an examination?

A. Yes, whatever he would let us do, we would do it, and report back whatever we did do.

Q. Now, whether or not, on the basis of an examination of an individual who answers questions directed to him by you, excluding any questions with respect to an alleged crime, could you come up with a finding of sanity or insanity?

A. Not in relation to the question which is asked of us. *We are asked to state whether the alleged unlawful act was the product of a mental disease or mental defect. In order to answer the question about the product we have to inquire into the circumstances.*" (Emphasis mine)

This necessity for disclosure virtually amounting to confession if the examination is to have any efficacy whatever creates an almost insoluble dilemma for counsel for a respondent. Does the law require him to make a choice between defending on the merits and defending by a showing of causative mental illness? I think not—and yet that is

the practical result if it be decided that the admissions requisite to an effective examination can become as in the instant case the State's most effective evidence of the guilt of the respondent. I would so construe Secs. 101 and 102 as to carry out what I believe reflects both legislative intent and the public interest.

The purpose, and in my view the only purpose, of the examination provided in Sec. 101 is clearly stated therein, i.e. "ascertaining the condition of the person." The statutory examination is not provided as a device by which the State may bolster its case on the issue of guilt or innocence. Moreover, if we permit the examination to be used improperly for the latter purpose, it will lose its entire effectiveness as a means of accomplishing its primary function, ascertaining whether unlawful acts were produced by mental disease or defect. It is not unreasonable to require that the State be able to prove guilt beyond a reasonable doubt without resort to the use of admissions or confessions made as a part of a court ordered mental examination. Otherwise, the statutory examination becomes unavailable to the vigilant and a trap for the unwary.

I am convinced, moreover, that the use of such evidence by the State to prove the guilt of the respondent amounts to a lack of governmental fair play. This is not to say that such evidence might not become admissible for a proper purpose during the course of a trial in which the respondent proffers evidence that the alleged unlawful acts were the product of mental disease or defect. One can, for example, readily envisage a situation in which the door might be opened by the nature of the cross-examination of a State psychiatrist by the respondent. It suffices to say that no such door was opened in this case.

There is little authority on the point. In *Hall* v. *State,* (1945) 209 Ark. 180, 189 S.W. (2nd) 917, the court permitted the confession obtained as part of the mental exam-

ination to be used against the respondent. The opinion noted that the confession to the examiner was "merely cumulative to his confession to many others." Whether or to what extent the court was influenced by this fact is nowhere apparent. The opinion does not consider the policy underlying legislative provision for court ordered examination and in my view is not persuasive.

State v. *Myers,* (1951) 220 S.C. 309, 67 S.E. (2nd) 506, 508, although decided on another point, contained the following pertinent dictum: "We are not advised as to the methods used at the State Hospital in examining a person for sanity but may assume that such an examination is made *in a manner consistent with the constitutional rights of the accused.* We do not undertake now to define the limits of such rights except to say that the authorities of that institution will not be permitted, over the protest of the accused, to reveal any confession made by him in the course of such examination, or any declarations implicating him in the crime charged." (Emphasis mine) I am satisfied that the "constitutional rights" which must not be abridged in such cases relate to due process of law and governmental fair play.

In *People* v. *Ditson,* (1962) 369 P. (2nd) (Cal.) 714, 732, the court recognized the dilemma facing a respondent under such circumstances but considered only whether there was an infringement of the right against self incrimination. The court noted that the respondent was not compelled to submit to examination and determined that he was not entitled to protection. The court gave no consideration to any public interest in having an effective examination made nor to any aspects of governmental fair play.

In *Killough* v. *U. S.,* (1964) (U. S. App., D.C.) 336 F. (2nd) 929, 932, the respondent was in jail awaiting trial. He was examined by a so-called Classification Intern for

the sole purpose of determining the proper classification and treatment of the prisoner during his detention. In the course of examination the respondent made a complete voluntary confession. The court found the purpose of the examination to be inherently confidential. Resting its decision entirely upon the concept of governmental fair play, the court reversed conviction because of admission of the confession thus obtained and ordered a new trial. At page 932 the court said:

> "The rule of fundamental fairness required by the due process clause in our view does not permit use of the incriminating statements made to the Classification Intern in a criminal prosecution under the circumstances present here.
>
> Indeed, in a somewhat comparable situation, that involving an examination pursuant to 18 U.S.C., Sec. 4244, into the sanity or mental competency of accused to stand trial, Congress has specifically provided that no statement made by the accused in the course of the examination 'shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding.' The wisdom of and need for such a rule in that situation are obvious, and the rule has been recognized even when a statute does not so provide. (Footnote citation of dictum in State v. Myers, supra). * * *
>
> Incriminating statements obtained from the accused in the exercise of the classification function for purposes of proper treatment and care should not, we think, be admitted as evidence of his guilt, any more than such statements obtained in the course of a mental examination. *Not only would it be grossly unfair in the constitutional sense to admit them, but the Jail authorities might well be handicapped in the future in seeking information needed for proper classification, treatment, and care of the inmates.*" (Emphasis mine)

It is true that where, as in the instant case, the respondent is a child of twelve, the State has the burden of

proving the capacity to commit a crime. But the State cannot justify its use of these admissions as necessitated by this requirement of proof. The capacity of such a respondent to commit a crime can be shown by competent and probative evidence entirely apart from highly prejudicial admissions obtained under the circumstances of the instant case. The admissions to the alienist come into play, if at all, only with relation to the causative link required by the so-called Durham Rule statute.

I conclude that the introduction of these admissions as a part of the State's main case on the issue of guilt or innocence violated the purpose and intent of the examination statute, deprived the respondent of due process of law and constituted reversible error.

WILLIAMSON, C.J. and MARDEN, J. concur.

EVA SOULE EMERY, ADMINISTRATRIX
ESTATE OF GUY T. EMERY
vs.
NELMO FRATESCHI, SR. AND EDWARD A. FRATESCHI

Androscoggin. Opinion, June 2, 1965.

Witnesses. Evidence. Parent and Child.

Where one motorist was killed in a head-on collision, the surviving motorist became incompetent to testify when administratrix suing for deceased's death and funeral expenses invoked the statute against the surviving motorist.

Father who furnished automobile to 15 year old son who was on wrong side when he collided in curve at bottom of grade with approaching motorist who was also on the wrong side could recover for the damage to his automobile but could not recover for the cost of medical and hospital services provided by father for son, and son could not recover for his personal injuries.

ON APPEAL.

This is on appeal from the denial of motions for judgment *n.o.v.* and the denial of the defendant's motions for directed verdict. Plaintiff's appeal partly denied and partly sustained. Defendants' appeal sustained and part of the case remanded.

Grover G. Alexander, for Plaintiff.

Marshall & Raymond,
Linnell, Choate & Webber,
by *G. Curtis Webber,* for Defendants.

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

SULLIVAN, J. Upon a very dark yet fair summer night on Route 11 between Webb's Mills and Poland in an easterly

direction Guy T. Emery the intestate companionless was driving his Plymouth automobile along a curve at the bottom of a grade. Simultaneously the defendant Edward Frateschi a minor aged 15 was operating a Pontiac car the property of his father, defendant Nelmo Frateschi, Sr., in an opposite and westerly course and into the same curve. The two vehicles collided. Emery was killed and death was apparently instantaneous. Edward Frateschi and his three youthful companions were severely injured.

The automobile of Emery left the highway turned onto its roof and pointed westerly in the direction from which it had come. The Frateschi car swung about upon the highway so as to face the east and came to a halt. Both vehicles had become immeasurably damaged.

Mrs. Emery as administratrix of the estate of her deceased husband instituted her action for the benefit of his children and of herself as his widow to recover pecuniary damages resulting from the death of Mr. Emery and to compensate the estate for funeral expenses. Her complaint alleges that such losses were caused by the negligence of the defendant and operator Edward Frateschi and that the father Nelmo Frateschi must share with his son a joint liability for having furnished the Pontiac car driven by the son. The parties in this case have stipulated that the father did so furnish the car. R. S., 1954, c. 22, § 156.

The defendant Edward Frateschi through his father as next friend has counterclaimed against the Emery Estate for personal injuries caused to Edward by the negligence of the intestate. The defendant Nelmo Frateschi counterclaimed for the negligent destruction of his automobile and for the cost of medical and hospital services provided by the father for his negligently injured son.

A jury trial was held. At the close of all the evidence the plaintiff moved for a directed verdict as to her complaint and as to the counterclaims of the defendants.

Each defendant filed a motion for a directed verdict.

All such motions were denied by the presiding justice.

The jury disagreed and a mistrial was declared.

All parties filed motions for judgment *n.o.v.* These motions were also denied by the justice and all parties have appealed.

During the trial the three passengers who had been riding with Edward Frateschi at the time of the collision and who had sustained grave injuries testified to total oblivion as to the happenings resulting in the accident. Guy Emery was deceased and Edward Frateschi became incompetent to testify when the plaintiff invoked against him the provisions of R. S., 1954, c. 113, § 119. (16 M. R. S. A., § 1.)

Secondary or circumstantial evidence was the sole medium of proof available to the parties in this case. Mute indicia of physical actions and reactions.

Route 11 as it affects this controversy traverses a countryside for several miles. At the place of collision the highway as improved and traveled is in width 20 feet, 8 inches or 21 feet, 1 inch according to the recorded testimony and has shoulders approximately 5 feet wide. There was no demarcated center line. The road sharply curves at 7 degrees with a 700 foot radius at the locus of the accident and has a slight bank of 2 feet in 20 feet to accommodate for the curve. To the west there rises a hill at the rate of 5 feet vertically to 100 feet of distance. The crest of the hill is some 480 feet westerly from the place of collision and the bottom of the hill is some 150 feet eastwardly. The road had a hard surface and was posted for a maximum speed of 55 miles per hour.

Just before the mishap the defendant Edward Frateschi was operating the Pontiac car westerly on Route 11. The late Guy Emery was driving his Plymouth car easterly.

After the collision each car was severely damaged in front from driver's right to left. The front license plate of the Emery car prior to the accident had been affixed to the middle of the front bumper. Following the collision that plate was found to be embedded between the left front tire and the front bumper of the Frateschi car. The Frateschi vehicle had turned almost 180° and was headed easterly. The Emery car was off the highway to the south.

There were fluid and debris from the crushed cars upon the road surface on both sides of the medial line and a gouge in the macadam by the left front wheel of the halted Pontiac. On the traveled road there were no tire marks attributable to the Emery car. The roadway was dry.

There were visible on the road's surface 2 "layover" or "scuff" marks, parallel, each of a tire's width and separated from each other by the space obtaining between two opposite automobile wheels. Those tire marks were 29 feet in length and the left mark terminated 8 inches southerly of the center of the highway.

There were two notable gouges. The longer was just to the right of or the north of the left "layover" mark, approximately in the center of the road. The slighter gouge led from the left "layover" mark to the Pontiac's left front wheel.

Through the 29 feet of their length the tire marks coursed very gradually to the left to the extent of one foot in the 29 feet. Those tire marks may be attributed to the Pontiac or Frateschi car. From "the right side of the left front tire (of the Pontiac car) to the outside of the left side of the left fender" was a distance of about "8 to 10 inches."

Each automobile was about 6 feet wide and the traveled road width of 20 feet, 8 inches or 21 feet, 1 inch would have afforded an unobstructed passage abreast for both cars.

For want of autoptic testimony as to the mishap there is an implacable inference for the fact finder that at the crisis of collision the Frateschi car in respect to its left front corner was protruding onto its left or "wrong" side of the center line of the highway a distance of 8 inches plus the additional inches to be measured from the left side of the left front tire to the outside of the left side of the left fender.

It is equally and insistently inferable that the Emery or Plymouth car was to some extent upon its left or "wrong" side of the way at the moment of impact. The front Emery license plate was found locked between the left front tire and bumper of the Frateschi car following the disaster. Obviously that number plate became wedged at the instant of contact of the vehicles. We must therefore deduce that the left front of the Frateschi car and the mid front of the Emery car were the initial surfaces of encounter. We are not obliged to assume. There is testimony that the front license plate hanger of the Emery car had been in the center of the front bumper, a fact verifiable by the photographic exhibits.

Thus upon the record for want of other contrary evidence the presumptive negligence of each of the two car operators must be deemed to persist and abide as a constant determinant. *Atherton* v. *Crandlemire,* 140 Me. 28, 30; *Bragdon* v. *Kellogg,* 118 Me. 42, 44; R. S., 1954, c. 22, § 83. Any other conclusion from the evidence presented would flow from conjectural premises.

Defendants upon the evidence have sustained their burden of establishing the truth and validity of their affirmative defense of contributory negligence on the part of the intestate Emery. M. R. C. P., Rule 80 (c).

The justice presiding in the trial court was correct in his denial of plaintiff's motion for a directed verdict and the latter's motion for judgment *n.o.v.* as to the principal action

of the plaintiff against the defendants. The justice erred, however, in denying the motions of the plaintiff for a directed verdict and for judgment *n.o.v.* in respect to the counterclaim on behalf of the defendant Edward Frateschi for personal injuries and the counterclaim of Nelmo Frateschi in so far as it sought reimbursement for medical and hospital services provided by the elder for the younger Frateschi. *Bonefant* v. *Chapdelaine,* 131 Me. 45, 51.

The justice below was in error upon the issue of liability when he denied the motions of Nelmo Frateschi for a directed verdict and for judgment *n.o.v.* in respect to the latter's counterclaim for the negligent destruction of his automobile by the intestate Emery.

The plaintiff filed no motion for a new trial and her failure to do so constituted a waiver. The trial below consumed several days and apart from the fact of waiver there is no perceptible reason to believe that an opportunity accorded to the plaintiff to augment her proof could avail her. Maine Civil Practice, Field & McKusick, § 50.4.

Nelmo Frateschi, Sr., is entitled to be heard as to the pecuniary damages to his Pontiac automobile as the result of the collision.

Plaintiff by her points of appeal claims grievance in the refusal of the presiding justice to submit to the jury the proffered testimony of Harold Williams related by Williams to the court in the absence of the jury. Williams narrated that at a point on Route 11, 2½ to 3 miles easterly of the place of collision, a car which Williams identified as the Frateschi Pontiac overtook and passed a car operated by Williams. Williams estimated that the Frateschi vehicle was then traveling at a high and excessive speed between 75 and 80 miles an hour. He said the Pontiac disappeared from view. Williams continued to drive, slowing down at the curves. He characterized the road as "hilly and curvy."

He stated that probably 2 or 3 minutes elapsed from the moment when the Pontiac passed him to the arrival of Williams at the scene of the accident.

The testimony of Williams was manifestly offered as the proof of the fact of the speed of the Pontiac car at one time to serve the jury as the basis of inference as to the speed of the Pontiac car a few minutes later when the Pontiac was out of Williams' view.

The trial justice acted within the bounds of his discretion in excluding the offered testimony. *State* v. *Hume,* 146 Me. 129, 140.

> "- - - - The probability of continuance depends much, of course, on the nature of the specific fact and circumstances of each case; and therefore, in setting a limit of time for the range of the evidence, the discretion of the trial Court should control - - - -"
>
> Wigmore on Evidence, 3rd ed., § 382, P. 322.

To quote further from Prof. Wigmore and the same citation the repudiation by the presiding justice of Williams' testimony of the speed of the Pontiac car at one moment as indicative of its continued speed 2 to 3 minutes later and 2½ to 3 miles out of sight upon a "hilly and curvy road" is only:

> "- - - - a determination that in the case in hand the contingencies of change were too many to allow the prior or the subsequent condition of things to be of probative value; or that no presumption of continuity - - - - in the strict sense, will be inferred."
>
> See *Ronning v. State,* 184 Wis. 651, 200 N. W. 394, 396; *Bilgore & Co. v. Ryder,* 211 Fed. 2d 855, 857 (5th Cir.)

The mandate shall be:

Appeal of plaintiff denied as to the refusal of the trial justice to grant plaintiff's motion for judgment *n.o.v.* in the

matter of the complaint of *Emery, Adm'x,* v. *Frateschi, et al.*

Appeal of plaintiff sustained and judgment for plaintiff ordered upon her motion for judgment *n.o.v.* as to the counterclaim on behalf of Edward A. Frateschi against the plaintiff administratrix for personal injuries and as to the counterclaim of Nelmo Frateschi, Sr., against plaintiff administratrix for reimbursement for medical and hospital services provided by Nelmo for Edward Frateschi.

Appeal of plaintiff denied upon her motion for judgment *n.o.v.* as to the counterclaim of Nelmo Frateschi, Sr., for the negligent destruction of his automobile only.

Appeal of defendants sustained as to the refusal of the trial justice to grant defendants' motion for judgment *n.o.v.* in the matter of the complaint of *Emery Adm'x,* v. *Frateschi et al.;* judgment to be entered for defendants notwithstanding the verdict.

Appeal of Nelmo Frateschi, Sr., sustained as to his motion for judgment *n.o.v.* in respect to his counterclaim against the plaintiff administratrix for damage to the former's Pontiac automobile. This division of this case is remanded to the Superior Court for a hearing on damages.

We have used "*n.o.v.*" as applied to the motion and judgment in the categorical sense in which it is used in the commentary by Field & McKusick on Rule 50, M. R. C. P. There having been a jury disagreement we have under Rule 50 (b) treated the motions for judgments *n.o.v.* as motions for judgments in accordance with the motions for directed verdicts. See Maine Civil Practice, § 50.4.

KAREN ANN GRUBER
vs.
HOWARD MICHAEL GRUBER

Cumberland. Opinion, July 1, 1965.

Divorce. Evidence.

Proof of cruelty alone is not sufficient upon which to base a judgment of divorce.

A plaintiff in a divorce action, relying upon the grounds of cruel and abusive treatment, must, by a preponderance of the evidence, prove two elements: (1) the cruel and abusive conduct of plaintiff's spouse, and (2) that such conduct caused the plaintiff physical or mental injury or that a continuation of the marriage relationship would jeopardize physical or mental health. Failure to prove either or both is fatal.

ON APPEAL.

This case is on appeal from the granting of a judgment of divorce by a Justice of the Superior Court. The plaintiff failed to meet the burden of proof that continued cohabitation would adversely effect her personal health and welfare. Appeal sustained.

Harry H. Marcus,
James R. Desmond, for Plaintiff.

Norman S. Reef,
Herbert H. Bennett, for Defendant.

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

TAPLEY, J. On appeal. The plaintiff, Karen Ann Gruber, instituted divorce proceedings against her husband, Howard Michael Gruber. The case was heard by a single justice, as a contested case, on November 9, 1964 in the

Superior Court, within and for the County of Cumberland. The justice filed a judgment of divorce on December 3, 1964, favoring the plaintiff, for the cause of cruel and abusive treatment. The judgment also gave care and custody of minor children to the plaintiff, with rights of visitation granted to the defendant and he, the defendant, was ordered to make weekly payments to the plaintiff for the support of the minor children. The defendant has appealed this judgment.

The justice made certain findings of fact, as well as conclusions of law. The pertinent findings of fact, in light of the issues before us, are as follows:

"III.

"That the Defendant, in Lewiston, Maine in May 1963, induced a 17 year old girl, who appeared as witness in these proceedings, to pose for indecent and improper photographs taken by him, the said Defendant.

IV.

"That prior to the commencement of the divorce proceedings the Defendant displayed nude photographs of his wife, the Plaintiff herein, to one Arnold Brynes.

V.

"At diverse times during the existence of the marriage relationship of the Defendant and Plaintiff, the Defendant maintained a surly, ugly, disagreeable attitude and conduct toward the Plaintiff so that it isolated her from the natural sociability and environment of her married life, and further that during this period due to all the above, she was forced to take tranquilizer pills, sleeping pills and other medication to enable her to take care of her children and home.

VI.

"That though the Plaintiff and Defendant continued to have sexual intercourse with each other until shortly before the separation on July 21, 1964, the Plaintiff did not condone the actions of the Defendant.

VII.

"That the action of the defendant in taking the indecent photographs of the 17 year old girl in Lewiston, Maine became known to the Plaintiff and such conduct did in fact have deleterious effect upon the health of the Plaintiff.

VIII.

"That the Plaintiff has established by the greater weight of evidence that she was faithful to her marriage obligations."

The points on appeal filed by the defendant present the issue as to whether or not the findings and rulings of the sitting justice are sustained by the evidence. The "clearly erroneous" test is applicable. *Harriman* v. *Spaulding*, 156 Me. 440. The justice below found the defendant, upon the evidence, guilty of cruel and abusive treatment.

The gist of the appellee's evidence before the presiding justice was (1) that in May of 1963 her husband took pictures of a 17-year old girl who posed for him indecently which she discovered in June of 1963; and (2) in May of 1964 they were at a lake with friends, at which time an argument occurred between them, resulting in a situation which Mrs. Gruber described as follows:

"A. - - - - - - He just wanted me to apologize to her and I said: 'I am not going to.' He followed me around, took his watch off, smashed it; he pulled a necklace off my neck and threw some sawdust down the front of my sweater. I told him to stay away from me. I said: 'Get

away, Howard.' He said: 'No, I will never leave you alone.' He said: 'Go over and apologize.' I said: 'I won't.' So he insisted on plaguing me.

Q. Did he throw any rocks at you?

A. Yes. I walked up to the parking lot; I wanted to get in the car and get out. He picked up a handful of rocks and started throwing them at me and chased me around the parking lot tossing rocks at me and repeatedly kicked me in the leg.

Mr. REEF: I move that be stricken. The question was: did he throw any rocks.

The COURT: The answer may stand.

Q. Were you afraid of your husband?

A. Yes."

The plaintiff testified further that her husband showed a special interest in the wife of a mutual friend.

It is well settled in this State, as well as in many other jurisdictions, that proof of cruelty alone is not sufficient upon which to base a judgment of divorce. It must be affirmatively shown by the plaintiff in a divorce action that the acts complained of caused a consequential effect of an impairment of physical or mental health or an apprehension of danger to life.

> "Divorce should not be a panacea for the infelicities of married life; if disappointment, suffering, and sorrow even be incident to that relation, they must be endured. The marriage yoke, by mutual forbearance, must be worn, even though it rides unevenly, and has become burdensome withal. Public policy requires that it should be so. Remove the allurements of divorce at pleasure, and husbands and wives, will the more zealously strive to even the burdens and vexations of life, and soften by mutual accommodation so as to enjoy their marriage relation.

> "Deplorable as it is, from the infirmities of human nature, cases occur where a wilful disregard of marital duty, by act or word, either works, or threatens injury, so serious, that a continuance of cohabitation in marriage cannot be permitted with safety to the personal welfare and health of the injured party. Both a sound body and a sound mind are required to constitute health. Whatever treatment is proved in each particular case to seriously impair, or to seriously threaten to impair, either, is like a withering blast, and endangers 'life, limb, or health,' and constitutes the (6) cause (cruel and abusive treatment) for divorce in the act of 1883. Such is the weight of authority." *Holyoke* v. *Holyoke,* 78 Me. 404, at 411.

See *Bond* v. *Bond,* 127 Me. 117; also 27A C.J.S. — Divorce —Sec. 25.

A plaintiff in a divorce action, relying upon the grounds of cruel and abusive treatment, must, by a preponderance of the evidence, prove two elements: (1) the cruel and abusive conduct of plaintiff's spouse, and (2) that such conduct caused the plaintiff physical or mental injury or that a continuation of the marriage relationship would jeopardize physical or mental health. Failure to prove either or both is fatal.

When questioned as to plaintiff's reactions upon seeing the nude pictures of a young girl taken by her husband, she answered that she was not shocked but was upset.

In her recital of the lake episode, she answered the question, "Were you afraid of your husband?"

A. "Yes."

Other than the two above cited incidents there was no other testimony relating to the effect upon her resulting from the claimed acts of cruelty. She produced no witnesses, either medical or otherwise, to prove she suffered

in mind or body as a consequence of any cruel and abusive treatment inflicted upon her by her husband. She has failed to meet the required burden of proving one of the essential elements "that a continuance of cohabitation in marriage cannot be permitted with safety to the personal welfare and health of the injured party."

A review of the record will show a lack of that quality of evidence having the necessary probative force to prove any *detrimental effect* upon the plaintiff.

> "Libellant's testimony indicated that she did not consider her life endangered by her husband's alleged cruelties. - - - - The complaint of cruelties will not be further considered." *Megoulas* v. *Megoulas,* 72 A. (2nd) 598, 599 (Pa.).

We find insufficient evidence in the record to sustain the presiding justice in his findings that the defendant was guilty of cruel and abusive treatment as alleged by the plaintiff.

The conclusion we have reached makes it unnecessary to consider the issue of condonation.

The order is:

Appeal sustained.

FRANK CRESSEY

vs.

STATE OF MAINE, ET AL.

Sagadahoc. Opinion, July 6, 1965.

Writ of Error Coram Nobis

A writ of error can challenge only errors of record.

An appellant may raise errors of fact, not of record, in a petition for writ of error *coram nobis.*

Denial of court appointed counsel on petition for post-conviction relief was not error where no facts were pleaded upon which lack of due process could be predicated.

The transcript of a presentence investigation can be considered on a petition for post-conviction relief.

ON APPEAL.

This is an appeal from the dismissal of a petition for post-conviction relief upon which the court ruled that denial of Court appointed counsel was not error or lack of due process. Petitioner was not entitled to pleading alleged erroneous sentence of record where the sentence had been previously declared valid on his application for writ of error.

Charles A. Lane, for Plaintiff.

Richard J. Dubord, Attorney General,
John W. Benoit, Asst. Atty. Gen., for the State.

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

MARDEN, J. On appeal from dismissal of petition for post-conviction relief.

The chronology, in pertinent detail, of the appellant's appearances before the Superior Court, out of which his current petition for post-conviction relief arises, is as follows:

October Term 1962, Criminal Docket No. 3420, Sagadahoc County, petitioner while on parole from sentence upon conviction for crime against nature was indicted for a similar offense. The court appointed counsel, and on October 16, 1962 after conviction by jury, he was sentenced to serve not less than three years and not more than eight years in the State Prison.

In the record of the interrogation and Mr. Cressey's responses, at time of sentence, appears this statement by the presiding justice:

> "The three years is the minimum that I justify my conscience to give you, considering the fact that when you were on parole that you violated your parole by going back and committing almost the identical offense you were serving the prison sentence for. Your sentence, this sentence is running concurrently to the one you are serving. It isn't consecutive, but I want * * * ."

The written sentence (judgment) imposed the three to eight year term without other statement.

Chapter 149, § 1, R. S., 1954, the statute in effect at the time of sentence, provided:

> " * * * . The court shall rule, and in appropriate cases shall endorse, on the mittimus, that the terms of imprisonment shall be served concurrently or consecutively; * * * . In the event the court fails to so rule or endorse, said sentences shall be served concurrently. * * * ."

Chapter 27-A, § 16, R. S., 1954, provided:

> " * * *. Any parolee who commits an offense while on parole who is sentenced to the state prison shall serve the second sentence beginning

> on the date of termination of the first sentence, unless the first sentence is otherwise terminated by the board." (Parole Board.)

On April 15, 1963, in Knox County Superior Court over which the same justice was presiding, petitioner pro se petitioned that justice by name for a writ of error (Docket No. 2822) complaining that he had been informed by prison officials that his Sagadahoc County sentence could not run concurrently with that which he was serving on parole and sought to have the Sagadahoc County sentence confirmed as concurrent, rather than consecutive. The request was appropriately addressed.

Upon the petition the justice reviewed the record which a writ of error would bring before him, considered the matter upon its merits and by decree of May 1, 1963 dismissed the petition. No exceptions were taken.

A writ of error reached only errors evident upon the face of the record. *Nissenbaum* v. *State,* 135 Me. 393, 396, 197 A. 915.

By Public Laws 1961, Chapter 131, a new Chapter, 126-A was added to R. S., 1954 providing for post-conviction *coram nobis* to reach errors of fact, not of record, with right to review as in civil actions. This statute became effective September 16, 1961.

By petition dated August 20, 1963 addressed to the October Term 1963 Superior Court, Sagadahoc County (Docket No. 3453), appellant pro se sought a writ of error *coram nobis,* again seeking relief from the consecutive sentence, complaining of incompetent counsel and deprivation of a fair trial. No indigency was alleged and no appointment of counsel was requested.

The State responded with a motion to dismiss challenging the adequacy of the facts pleaded and, without hearing, the

motion to dismiss was granted July 9, 1964. No appeal was taken.

Our present statute providing post-conviction relief (Habeas Corpus) had meantime been enacted (P. L., 1963, Chapter 310) and had become effective September 21, 1963. This statute amended R. S., 1954, Chapter 126, Habeas Corpus, and became Sections 1-A to 1-G, inclusive, of that chapter; and Chapter 126-A, R. S., 1954 (Coram Nobis) and §§ 11 and 12 of Chapter 129, R. S., 1954 (Writ of Error) were repealed.

By petition dated July 22, 1964, Sagadahoc County (Docket No. 3487), petitioner seeks post-conviction relief under R. S., 1954, Chapter 126, §§ 1-A to 1-G (now 14 M.R.S.A., § 5502 *et seq*) challenging the validity of the October 1962 sentence, and the jurisdiction of the court and asking that counsel be appointed. Affidavit of his indigency was filed.

The State responded with motion to dismiss, pleading 1) that the decree on the petition for writ of error had adjudicated the matter, 2) that having petitioned for writ of error no grounds for relief were here asserted which could not reasonably have been raised in that earlier petition, and 3) that the present petition includes complaints waived by the earlier petition for writ of error *coram nobis*.

The member of this court to which the matter was assigned held that the appellant's petition was without merit, denied appointment of counsel, and dismissed the petition, holding that the validity of the sentence had been adjudicated, that the present petition expressed no grounds for relief which could not reasonably have been raised in the previous petition for writ of error *coram nobis*.

To this dismissal, appeal pro se was claimed, and as reasons therefor, petitioner stated, in substance, that he had been denied constitutional rights, and that his sentence was

legal error. In his statement of points of appeal he alleged indigency and requested court appointed counsel. Indigency was determined and counsel for appeal was appointed.

Counsel for petitioner has briefed and argued two points. One, whether the presiding justice, to whom the post-conviction process was assigned, erred in dismissing the petition on the ground of *res judicata,* and in denying appointment of counsel, and two, whether the Justice of the Superior Court erred in his decision of May 1, 1963.

The original papers in the three proceedings mentioned have been brought before this court.

The complaint in which appellant has persisted throughout the three proceedings is that the sentence awarded in Sagadahoc County was erroneous in that while the presiding justice announced that the sentence then imposed was to be executed concurrently with the subsisting sentence which the respondent was serving while on parole (and to the unexecuted portion thereof facing him upon revocation of his parole), he is in fact being required to serve the two sentences consecutively. He urges that the sentencing court was in legal error in failing to enter as a term of the written sentence, which was the judgment in the case, *State* v. *Stickney,* 108 Me. 136, 79 A. 370; *Nissenbaum, supra,* at 396, that it should be served in concurrence with that which he was then executing.

To reach the constitutional points which appellant raises, it must be noted that inasmuch as a writ of error can challenge only errors of record, the first process by which he could raise errors of fact, not of record, was his petition for writ of error coram nobis. In this, by virtue of the statute, he could and did also plead the alleged erroneous sentence of record. This was filed pro se, no representation of indigency, no counsel requested and properly dismissed for

lack of merit upon its face. Denial of court appointed counsel was not error. *Brine* v. *State,* 160 Me. 401, 407, 205 A. (2nd) 12. Lest it be felt by appellant that this dismissal prejudiced him solely because of insufficient pleading we here record that his complaint of incompetent counsel and unfair trial in general terms reflect only the perennial criticism of court appointed counsel who are unable to secure acquittals for the persons they dutifully represent as an ethical obligation. (See *Nelson* v. *The People* (C.A. 9) as abstracted in 33 L W 2646). No facts were pleaded upon which lack of "due process" could be predicated.

In the current petition for post-conviction relief he was entitled to plead facts either of record or not of record, "provided that the alleged error has not been previously or finally adjudicated or waived in * * * any other proceeding that the petitioner" had taken to secure relief from his conviction. 14 M.R.S.A., § 5502.

He re-asserts his claim of erroneous sentence and that the sentencing court "was not a court of competent jurisdiction in that * * * the court was not authorized to impose the particular sentence imposed."

The abiding question is the validity of the Sagadahoc County sentence of October, 1962. The challenge to jurisdiction, as qualified, is but a part of the same issue.

While both the Superior Court (on the *coram nobis* proceeding) and the single justice of this court (on the present proceeding) held correctly that the validity of the sentence had been adjudicated on petitioner's application for writ of error, we amplify our affirmation.

It is unnecessary to decide whether the transcript of the pre-sentence interrogation is or is not a part of the record. Under our post-conviction law it can be and has been brought into consideration. It may be conceded that the court did rule that the proposed three to eight year sentence

was to be executed concurrently with the sentence the respondent was then serving, but the court did not include that ruling in the judgment and he could not have legally done so by reason of the statutory mandate requiring otherwise. It may be conceded that this case, upon its face, was an appropriate one for the court's ruling to have been endorsed on the mittimus, but such endorsement reflecting the court's ruling would have been contrary to the statute, of no benefit to appellant and therefore not an appropriate case for such endorsement. His cases holding that erroneous sentences must be reversed do not control. The sentence here was not erroneous. The mandate of Section 16, Chapter 27-A, R. S., 1954, quoted above is the distinction.

The judgment rendered by the court as to the manner in which petitioner be required to serve his time was prescribed by that statute. The presiding justice could exercise no discretion in that respect.

The judgment and sentence as so governed are affirmed.

Appeal denied.

EDWARD ST. PETER AND JOYCE ST. PETER
vs.
THOMAS DYER

Kennebec. Opinion, July 7, 1965.

Negligence. Evidence. Appeals. Pedestrians. Juries. Jury Instructions.

Plaintiff had burden of verifying by preponderance of evidence freedom of contributory negligence.

Pedestrian had violated statute requiring her to use left side of road.

Whether it was practicable for 15-year-old girl pedestrian to be walking on right side of road was a fact for the jury.

Requested instruction that overtaking motorist had burden of proof by a preponderance of evidence pedestrian had violated the law was properly refused, in view of evidence of due care on the part of the pedestrian.

ON APPEAL.

This case comes before us on appeal by the plaintiff from a defendant's verdict in a personal injury case. Appeal denied.

Jerome G. Daviau, for Plaintiffs.

Brown, Wathen & Choate,
by *George A. Wathen* and
William M. Finn, for Defendant.

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

SULLIVAN, J. On a winter's night during a storm of mixed snow and sleet the 15 year old daughter of the plaintiff walked on her right side of the snow covered highway. No sidewalks had been provided in the area. Defendant in

the same direction in the same travel lane and to the rear of the girl drove his automobile along the way. His car struck and injured the girl. Her father upon her behalf instituted this action to recover for his daughter compensation for her injuries and to obtain for himself reimbursement for consequential medical and hospital services which he had afforded for his daughter.

A consolidated jury trial was had and verdicts for the defendant were returned. Plaintiff has appealed.

We note that the record in the instant case is wanting as to some mandatory directions of M. R. C. P., Rule 75 (g).

Plaintiff's points of appeal appearing in a "supplemental record" are as follows:

> "The trial court erred in refusing to instruct the jury that the Defendant had the burden of proof, and must prove with a preponderance of the evidence that the Plaintiff, Joyce St. Peter, was in violation of law, as requested."

In the Trial Court following the presiding justice's instructions to the jury and prior to the jury's retirement for deliberation plaintiff's counsel had presented to the justice the following requested instruction:

> "- - - - that the jury be instructed that the alleged illegality of the plaintiff walking on the right-hand side of the highway required the defendant to go forward with the evidence, the burden of proof being upon him as to the illegality and causation thereof."

The record discloses that the court "denied" plaintiff's request but no objection to that ruling by the justice was noted by the plaintiff before the jury withdrew for deliberation. M. R. C. P., 51 (b).

Throughout the instant case with the plaintiff lay the burden of verifying by a preponderance of the evidence the

freedom from causally connected contributory negligence of the pedestrian daughter.

> "- - - - In accordance with familiar principles, which have been so frequently laid down by this court that reference to the authorities is unnecessary, it was incumbent upon the plaintiff, in order to entitle him to have the case submitted to the jury, to introduce testimony tending to affirmatively prove two propositions, the negligence of the defendant in some of the respects complained of, and that no failure upon his part to exercise due care contributed to the accident; *and it was as essential for him to affirmatively prove the exercise of due care upon his part as to show negligence upon the part of the defendant.*"
>
> *Blumenthal* v. *Railroad,* 97 Me. 255, 257. (Emphasis supplied.)

> " 'The negligence is the gist of the action, *but the absence of negligence contributing to the injury, on the part of the plaintiff, is equally important.*' " *Wormell* v. *Railroad Co.,* 79 Me. 397, 403. (Italics ours.)

R. S., 1954, c. 22, § 147 reads as follows: (29 M. R. S. A., § 904)

> "Where sidewalks are not provided, any pedestrian walking along and upon a highway shall, when practicable, walk only on the left side of the way or its shoulder facing traffic which may approach from the opposite direction."

The injured girl had been violative of that statute only if as a matter of fact it had been practicable at the time, at the place and under the attendant circumstances of the accident for her to have walked only on the *left* side of the way facing oppositely approaching traffic. The statute presented questions of fact for resolution by the jury. *Stearns* v. *Smith,* 149 Me. 127, 129.

The testimony of the girl in direct and cross examination and the testimony of other witnesses supplied evidence to

warrant the jury in finding either that the young lady had conducted herself with due care, had violated the statute and had incurred a disputable presumption of her contributory negligence (*Elliott* v. *Montgomery,* 135 Me. 372, 374; *Tibbetts* v. *Harbach,* 135 Me. 397, 403. See, *Hinds* v. *John Hancock Ins. Co.,* 155 Me. 349, 364) or had been affirmatively guilty of proximately contributory negligence. There may have been moments when it behooved the defendant to go forward with evidence, to observe the burden of persuasion, etc., but the burden of proof as to her own due care remained at all times with the girl.

The trial justice was correct in his denial of plaintiff's requested instruction.

The plaintiff by motion sought leave of this Law Court to amend his statement of points of appeal. Such motion was dismissed without prejudice. Leave was given to the plaintiff upon Appellate Court argument of the case to resubmit the motion if the record of the case were otherwise complete and should disclose that objections by the plaintiff were timely made to the refusal or failure of the Trial Court to instruct the jury as the plaintiff had requested by his requested instruction hereinbefore set forth. The conditions imposed for resubmission of the motion were not satisfied.

The mandate shall be:

Appeal denied.

TINA C. POULIN
vs.
ROBERT J. BILODEAU AND C. K. CLAUSON, INC.

Kennebec. Opinion, July 8, 1965.

Negligence. Evidence. Appeal and Error.

Unresponsive reply of expert witness to hypothetical question was not prejudicial error.

Ruling providing that a professor of civil engineering and specialist in structural engineering and in use of metallic materials could testify as an expert witness was well within the bounds of the justice's discretion.

Qualification of a witness as an expert is a preliminary question for the court and its determination is conclusive in the absence of error in law.

ON APPEAL.

This is an action against an oil company and its truck driver for alleged damage as a result of the spillage or leakage of oil on a home delivery customer's cellar floor. The plaintiff appeals verdicts for the defendants. Appeal denied.

Jerome G. Daviau, for Plaintiff.

Bradford H. Hutchins,
Roger A. Welch,
William P. Niehoff, for Defendants.

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

SULLIVAN, J. Plaintiff owns a residence which the defendant corporation had supplied with heating oil upon a "keep-full" or automatic oil service undertaking and under-

standing for some 8 or 10 years. Defendant Bilodeau is a delivery truck operator for the corporation.

On October 2, 1962 the plaintiff telephoned the corporate defendant and advised its manager that she was about to go away for some 6 weeks and requested that a man be sent to make sure that her oil tank was full. The corporate defendant on September 10th prior to the 'phoning had delivered 201 gallons but plaintiff desired assurance that the tank was completely filled during her absence against any incidence of cold weather. The tank had been in use for 22 years without leaking or malfunction.

On October 3, 1962 the defendant company responsively filled the tank by adding 172.9 gallons. The capacity of the tank was 275 gallons.

On October 29, 1962 the company professing to exercise its systematic vigilance for its customer's fuel supply sent its driver who just after noon pumped 128.2 additional gallons into plaintiff's tank. About 5 P.M. the defendant corporation was notified by plaintiff's sister that much of plaintiff's cellar floor about the tank was covered with oil.

Plaintiff filed a complaint against the defendants for damage to her residence and to some of her personal property because of oil spillage and for consequential physical sufferings of the plaintiff which she attributes to her exposure to oil fumes or odor after her return home.

A consolidated jury trial was had and verdicts were returned for the defendants. Plaintiff has appealed and has stated 11 points of appeal.

In her argument here the plaintiff has condensed her protestations to 8 issues.

> "1. *Whether or not the evidence showed, conclusively, a trespass by the Defendant.*"

At the trial there was a conflict of evidence. Plaintiff testified that on October 2, 1962 during her 'phone conver-

sation with Mr. Meader of the corporate defendant she advised him that in her absence from home she would not be needing any oil, that the house would be closed.

Bernadette DeRosby, plaintiff's witness, who had overheard the plaintiff conveying 'phoned instructions to Meader remembered only that the plaintiff had informed Meader that the former wished him to bring some oil as she was going abroad for 5 or 6 weeks.

Meader, manager of the oil company, testified that the plaintiff over the 'phone said that she wished to have her oil tank filled, that she was going away and wished to be sure that the tank was full.

It was for the jury to decide what had been the plaintiff's message to Meader.

Plaintiff testified that for 8 or 10 years she had purchased oil from the defendant company upon the automatic oil service plan:

> "- - - - as many people do. In other words, we never had to worry about oil being sent to the house because they would come at whatever time they thought."

There was evidence that the defendant company in filling the tank on October 2nd and on October 29, 1962 acted only as it had in the same service for years. Access to plaintiff's garage and to the intake pipe had been left unlocked so that oil service was physically unrestricted.

A recital in detail of the mathematical and scientific testimony is unnecessary. It will suffice to state that the jury had ample basis to infer that the greater portion of the oil which Mrs. Thompson discovered on the plaintiff's cellar floor at 5 P.M. ± on October 29, A. D. 1962, some 4 or 5 hours after the defendant dealer had deposited 128.2 additional gallons in the tank, had leaked from the tank prior to

October 29, 1962 when the dealer made that delivery. There was evidence to sustain a fact finding that on a side of the tank midway between top and bottom there was found on the late afternoon of October 29, a dent and near it a split in the weld-seam. Expert testimony founded upon significant and adapted experimental tests stated that of the brand of oil delivered leakage through the parted weld for a period of several hours in excess of 4 or 5 would have been necessitated to produce the amount of spillage which witnesses found upon the cellar floor on October 29th. There was credible evidence that the pumping of the oil into the tank did not rupture the tank in refutation of plaintiff's theory.

At the close of the charge to the jury by the presiding justice the plaintiff requested the following instruction:

> "In trespass, even though the tank crack resulted from metal fatigue, or from any other cause, still, if the oil delivery on October 29, 1962 was without permission of Plaintiff, express or implied, then all the damages that flow therefrom (sic) said delivery of oil may be recovered by the Plaintiff."

The request was denied. The presiding justice had comprehensively treated the topic of trespass so as to render unnecessary plaintiff's request.

> "2. *Whether or not as a matter of law Dr. Wadlin was qualified to testify as an expert.*"

Dr. Wadlin, professor of civil engineering and head of the civil engineering department of the University of Maine, qualified as a specialist in structural engineering, in the use of materials, steel and aluminum in the construction of buildings, bridges and other public structures. His specialty required the study of stresses and strains, the properties of various materials and the behavior of metals under stress.

The tank with attachments had been delivered to Dr. Wadlin. The tank with its attachments as it came to Dr. Wadlin, witnesses swore, was in the same condition as it had been on October 30, 1962 before the tank had been removed from its installation in the Poulin basement. The tank was filled for him with oil during an experiment by the same person in the same manner and under the same circumstances as it had been filled in the plaintiff's home on October 2nd and 29th, 1962. The oil used in the experiment was the same kind burned by the plaintiff. A static pressure test was also conducted by the doctor. The jury during the trial viewed the tank. The tank was 14 U. S. gauge.

The doctor in all made 3 tests by filling the tank with the oil once and with water twice. He testified that the water and the oil for the testing purposes were quite equivalent. He measured and reported leakage over an unbroken period of 22 hours. He utilized Ames dials to measure the movement of the end and the sides of the tank and the opening and closing of the slit or crack in the weld as the tank was filled and its contents seeped away down to the level of the crack or slit. His experiments supplied the observations and findings which he related in testimony as to the reactions of the tank. Upon these phenomena and in conjunction with the testimony as to the events and the facts observed by various witnesses at the Poulin residence the doctor gave reasoned conclusions as to the leakage of oil in the plaintiff's basement, the manner of the leaking, its cause, incipience, duration and extent.

When the doctor was asked for his opinion as to what had caused or effected the crack or slit in the welding strip of the tank the plaintiff objected that the doctor had not qualified as an expert in metallurgy. The doctor disclaimed any profession of being an expert metallurgist but he did affirm that he as a specialist in the science of metals under stress had formed an opinion.

The presiding justice was well within the bounds of sound discretion in recognizing the witness as an expert in his specialty.

> "Whether a witness called as an expert possesses the necessary qualifications is a preliminary question for the court. The decision is conclusive unless it clearly appears that the evidence was not justified, or that it was based upon some error in law - - - - -" *Hunter* v. *Totman,* 146 Me. 259, 268.

> 3. *Whether or not Dr. Wadlin's experiment was legally valid; whether it was 'substantially similar' to the original occurrence so as to render it admissible."*

The record contains credible testimony accounting for the disposition, custody and location of the oil tank after its detachment from the Poulin household heating system until and throughout the experiments. Mr. Bilodeau who had delivered the oil to the Poulin residence in October, 1962 participated in the oil pumping experiment at the University of Maine. He testified that circumstances and properties attendant at that experiment were fairly identical to those which had obtained at the Poulin residence with respect to the tank before the tank was removed on October 30, 1962. Bilodeau related that during such experiment he pumped the type of oil used by the plaintiff into the tank at the same pressure used in the pumping on October 2 and 29, 1962. The doctor conducted a static pressure test with water and an additional test with water as hereinbefore described in this opinion.

The experiments of Dr. Wadlin were competent and legally qualified evidence.

> "4. *Whether or not the hypothetical question asked of Dr. Wadlin was, under all the circumstances of the case, legally admissible."*

The hypothetical question propounded by the defendants was as follows:

> "If you assume that a tank has had a blow or dent on the side of the tank, that it has the type of weld that occurred on this tank, that it has been used and filled and unfilled, or emptied, over a period of years since 1940, that oil had been introduced into the tank at the rate it was introduced at the time it was tested by you, and having in mind the studies that you made of the expansion and contraction of the sides, ends and seams, what in your opinion would be the result?"

There was evidence in the record that oil had been introduced into the tank at the Poulin home from 1940 to October, 1962 but such evidence did not pretend to establish that the oil had always been introduced at the same rate at which it had been pumped at the time of the experiment of Dr. Wadlin and Bilodeau.

The plaintiff objected to the question. The presiding justice permitted the question over plaintiff's objection.

The doctor testified as follows:

> "From my examination of the tank, it is my opinion that it had received a blow on the side wall causing it to be indented about five-eighths of an inch. And at the same time, examining the end wall on the opposite side of the crack from the indentation, there was a bulging of the wall, which would be caused as you push in one side, and the corner being welded, it would transmit that force around to the other side, rotating it to an angle, such that when one side went in the other would come out. And at such time, it is my opinion that it weakened the weld, which is nothing more than a butt weld with two pieces of metal running parallel at that point. And I feel that during the course of years, when it was filled and emptied, that there was enough flexing in the tank to eventually open up the crack, which became worse as time went along."

It is manifest that the doctor's reply to the hypothetical inquiry was not responsive. Yet it was not actually evasive.

It was especially germane to the critical issue of what had caused the rupture or slit in the welded strip of the Poulin tank. The question posed sought an expert answer concerning a supposititious tank. The doctor's response concerned only the very tank which is so controversial in the case at bar. In fine the doctor did not answer the hypothetical question addressed to him.

The doctor's response assumed fillings and depletions of the tank "during the course of the years" but made no reference or assumption as to any rate at which the oil had been deposited in the tank or to any express number of fillings or drainings. The reply contained no conclusion based upon facts as to which no evidence exists in the record. Unobjectionable questioning would have readily elicited the substance of his answer. The reply was supported by the doctor's reported investigation and experimentations and his deductions from them. The answer was one which the doctor within his professed specialty would be competent to render and the information imparted by him was pertinent for jury consideration.

The doctor's statement did not assume an evidentially unsupported supposition at least arguably incorporated in the hypothetical question that oil had been introduced in the Poulin tank since 1940 at the same rate at which the defendants placed some oil there in October, 1962. The answer could not have been misleading to the jury. Rate of fill during the years was not an indispensable factor in the answer given.

The doctor had made experiments to establish the manner and extent of the opening of the slit in the tank's welding, the movements of the side walls and of an end of the tank and had testified as to his observations.

Plaintiff made no motion to have the answer stricken as unresponsive and was accorded full scope and latitude of cross examination.

There was no prejudicial error in the admission of the statement of the doctor made on the occasion of the hypothetical question.

In the case of *Mutual Benefit Health & Accident Association of Omaha* v. *Hickman* (1959), 110 Ga. App. 348, 111 S. E. (2nd) 380 a hypothetical question addressed to a physician had contained an assumption of the rate of speed of an automobile although no evidence existed in the case in support of such speed. The court at page 390 held:

> "The objection to the doctor's testimony was not valid for another reason. The doctor did not, according to his own answer, accept the statement as to the speed of the deceased's truck as the predicate for his opinion - - - - "

> "5. *Whether or not the court erred in excluding the pressure chart produced by Fred Haight and the regulations offered as Exhibit No.* ."

The "pressure chart for oil tank" by Fred R. Haight, an engineer and witness in the case at bar, was identified as plaintiff's exhibit number 9. The exhibit was not offered in evidence and was neither admitted nor excluded by the presiding justice.

Plaintiff offered in evidence her exhibit numbered 6 and her exhibit number 8, both duplicate booklets. These booklets contained copies of R. S., 1954, c. 82-A, (32 M. R. S. A., § 2301, ff.), relating to the licensing of oil burner installers and service men, and copies of standards issued by the Oil Burnermen's Licensing Board under authority of the above named statute. The standards regulated the installation of oil burning equipment.

Plaintiff's exhibit 6 was offered twice by the plaintiff but no ruling was made by the court. Plaintiff offered the exhibit a third time and it was excluded by the justice. Later plaintiff offered her exhibit 8, the certified or authenticated

duplicate of her exhibit 6, and the following colloquy was had between the presiding justice and plaintiff's counsel:

"Mr. DAVIAU: No, your Honor, but this is a regulation. I said yesterday that it had the force of law, and then I wasn't sure of it, so I looked at the statute again, and I think the regulation stands on its own feet. I don't understand that the Court has to take judicial notice of regulations, and I can't take a chance.

"The COURT: What part of this do you have in mind?

- - - - - - - -

"Mr. DAVIAU: Let me look at my copy here. Chapter 2, Section 1101, if that is the same one in the new volume.

"The COURT: Yes.

"Mr. DAVIAU: 'Design and construction of tanks.'

"The COURT: Do you refer to Section 1102 also?

"Mr. DAVIAU: Well, I suppose either party can, yes.

"The COURT: Do you?

"Mr. DAVIAU: I may. I don't know how things will turn out, your Honor. But it is there, and I won't shrink from any of it.

"The COURT: Well, I think this matter is properly before the Court. I don't think it is a matter of an exhibit before the jury, but it is properly called to the attention of the Court.

"Mr. DAVIAU: That is all I wanted to do, your Honor; not the jury"

Obviously the disposition of this matter by the court was made to the full satisfaction and accord of plaintiff's counsel. There was no error with respect to plaintiff's exhibit 6 or 8.

"6. *Whether or not the verdict was contrary to the evidence*

"7. - - - - - *contrary to the law applicable.*

"8. - - - - - *was against the weight of the evidence.*"

We have examined the record which reports the 3 day trial and is extensive. Without belaboring matters unnecessarily it will suffice to say that if we view the evidence in the light most favorable to the defendants there was sufficient credible evidence to justify the verdict which cannot be said to be manifestly wrong. *Bragdon* v. *Shapiro,* 146 Me. 83, 84.

It cannot be said that the verdict was contrary to the law which the presiding justice correctly and adequately communicated to the jury without objection by plaintiff's counsel save for the written request for an instruction which we have hereinbefore considered fully.

To support the verdict here there was credible evidence adequate to satisfy the minds of reasonable men. *Walker* v. *Norton,* 131 Me. 69, 70.

The mandate shall be:

Appeal denied.

JOSEPH S. LIBBY, JR.
vs.
STATE OF MAINE, ET AL.

Cumberland. Opinion, July 8, 1965.

Pardon and Parole. Habeas Corpus.

Serving of jail sentence by parolee, who took automobile without consent of owner while on parole from robbery conviction, did not operate as waiver of any obligation to serve remainder of prison sentence for robbery, nor was it an implied pardon or discharge therefrom.

Parolee is privileged to serve his sentence outside of prison walls, and is accountable with every other citizen for violation of law, and on his violation of law he suffers, or may suffer, loss of privilege state has extended to him.

ON APPEAL.

Defendant was convicted in the Superior Court, Cumberland County, of taking an automobile without consent of the owner, and he petitioned for writ of habeas corpus. The Supreme Judicial Court, Williamson, C. J., held that serving of jail sentence by petitioner who was on parole from robbery conviction did not operate as waiver of any obligation to serve remainder of prison sentence for robbery, nor was it an implied pardon or discharge therefrom. Appeal denied.

Theodore H. Kurtz, for Plaintiff.

Richard J. Dubord, Atty. Gen.,
John W. Benoit, Asst. Atty. Gen., for Defendants.

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

WILLIAMSON, C. J. This is a petition for writ of habeas corpus under the post-conviction habeas corpus act. 14

M. R. S. A., §§ 5502-5508. The respondents' motion to dismiss the petition was granted on the ground that it did not set forth valid facts. The petitioner appeals. He contends that he is illegally imprisoned in the State Prison under a sentence of not less than 3½ years and not more than 10 years on conviction of robbery in January 1959.

The petitioner alleges in substance as follows:

In December 1962 he was released on parole. On September 12, 1964 he was held at the Portland City Jail charged with violation of parole arising from the facts resulting in the conviction noted below. A parole violation arrest warrant was issued on September 14, 1964 and executed by a parole officer. Immediately thereafter the petitioner was arraigned in the Portland Municipal Court on a complaint charging him with taking an automobile without the consent of the owner, pleaded guilty, was sentenced to 30 days in the Cumberland County Jail, and committed in execution of sentence.

On the completion of the jail sentence he was again arrested by a parole officer and returned to the prison. The State Probation and Parole Board after hearing revoked the petitioner's parole, set the length of time he should serve of the unexpired portion of his sentence before he could again be eligible for hearing, and remanded him to the State Prison. 34 M. R. S. A., § 1675.

A parolee upon release from the State Prison continues to serve his sentence and remains under the custody of the warden "but under the immediate supervision of and subject to the rules and regulations of the board or any special conditions of parole imposed by the board." 34 M. R. S. A., §§ 1671, 1672.

The petitioner contends that service of the 30 day jail sentence operates as a waiver of any obligation to serve the remainder of the State Prison sentence, and also as an im-

plied pardon or discharge therefrom. We find no authority whatsoever in the parole officer or the warden which would permit such a startling result.

Our attention is drawn by the petitioner to cases in which extradition of a prisoner operates as a forfeiture or waiver of jurisdiction of the granting State over the person so extradited. See for example *Milburn* v. *Nierstheimer*, 401 I. 465, 82 N. E. (2nd) 438, 35 C. J. S., *Extradition*, § 21 (b), and 22 Am. Jur., *Extradition*, § 19. See Uniform Criminal Extradition Act, 15 M. R. S. A., §§ 201-227.

We are not here concerned with the extradition of a prisoner or with the principles governing extradition which might be applicable in the absence of a statute. The case at bar involves only the legality of punishment within Maine for two criminal offenses — robbery and taking an automobile without the consent of the owner.

The petitioner complains that he is being punished in effect twice for one offense, first with 30 days in jail and second by revocation of parole.

A parolee, privileged to serve his sentence outside the prison walls, is accountable with every other citizen for violation of the law. Furthermore, on violation of the law he suffers, or may suffer, the loss of the privilege the State has extended to him. He cannot escape either the 30 days in the county jail by service of his sentence in the State Prison, or the State Prison sentence by service of the 30 days in the county jail.

The entry will be

Appeal denied.

STATE OF MAINE
vs.
STINSON CANNING COMPANY

Kennebec. Opinion, July 12, 1965.

Taxation. Constitutional Law. Evidence. Licenses. Sardine Tax Law.

Protection and promotion of sardine industry in state was of public concern and legislature could determine within reasonable bounds, in enacting Sardine Tax Law, what was necessary for protection and expedient for promotion of industry.

Court would take judicial notice of fact that area in which sardine factories were located at time of passage of Sardine Tax Law was depressed.

Constitution does not prohibit imposition of privilege or excise tax.

Sardine Tax Law is valid as excise for public purpose.

Sardine Tax Law, being excise tax law within legislative power, did not violate either equal protection or due process clauses of Constitution.

ON REPORT.

This is reported on an agreed statement of facts in an action to recover taxes assessed against the defendant corporation under the Sardine Tax Law. Judgment for the State in the amount of the tax.

Ralph W. Farris,
Jon R. Doyle, Asst. Atty. Gen., for Plaintiff.

Richard B. Sanborn, for Defendant.

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

RUDMAN, J. On report on an agreed statement of facts. This is an action to recover the amount of a tax assessed

against the defendant corporation by virtue of the Sardine Tax Law, Title 36, M. R. S., Sections 4691-4700.

The Defendant is a licensed and certified packer of sardines in Prospect Harbor, Maine, and was engaged, and has continued to be so engaged since the enactment of the Sardine Tax Law. It is admitted that the Defendant packed 3,345 cases of sardines during the month of June 1964 and the tax is unpaid. The State Tax Assessor levied an assessment for the tax due against the Defendant in the amount of $836.25.

The Defendant contends that the Sardine Tax Law is unconstitutional for the following reasons:

"1. Tax is a property tax not equally apportioned and assessed rather than an excise tax.

"2. An advertising tax for non-agricultural products is illegal.

"3. An advertising tax for processed or manufactured products is illegal.

"4. The tax is for a private rather than a public purpose.

"5. It is illegal for the State to engage in the business of buying and selling sardines."

The Sardine Tax Law was first enacted by the Ninety-fifth Legislature. Public Laws 1951, Chapter 2.

The preamble reads as follows:

"Whereas, the packing and merchandising of sardines is one of the most important industries of the state and a benefit to the public generally; and

"Whereas, it is vitally necessary to furnish employment and enhance the livelihood of the coastal and other people of Maine; and

"Whereas, legislation is necessary to protect the public health and welfare and to promote and con-

> serve the prosperity and welfare of the people of the state by fostering and promoting better methods of production, packing, merchandising and advertising in the sardine industry of this state; 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 purposes of the Act are stated in Section 4691, as follows:

> "The packing of sardines is one of the most important industries of the State, and this chapter will protect the public health and welfare, stabilize the industry and conserve and promote the prosperity and welfare of the State by fostering and promoting better methods of production, packing, merchandising and advertising in the sardine industry of this State."

The declared purposes of the Act are to be accepted as true unless incompatible within its meaning and effect.

> "The court is bound to assume that, in the passage of any law, the Legislature acted with full knowledge of all constitutional restrictions and intelligently, honestly and discriminatingly decided that they were acting within their constitutional limits and powers. That determination is not to be lightly set aside. It is not enough that the court be of the opinion that had the question been originally submitted to it for decision it might have held the contrary view. The question has been submitted in the first instance to the tribunal designated by the Constitution, the Legislature, and its decision is not to be overturned by the court unless no room is left for rational doubt. All honest and reasonable doubts are to be solved in favor of the constitutionality of the act. This healthy doctrine is recognized as the settled policy of this court." *Laughlin* v. *City of Portland,* 111 Me. 486, 489.

> See *Morris* v. *Goss,* 147 Me. 89; *Crommett* v. *City of Portland,* 150 Me. 217; *State* v. *The Fantastic Fair, et al.,* 158 Me. 450.

Every intendment must be made in favor of the validity of the law, if it appears that the means adopted are suitable to the end in view, impartial in operation, not unduly oppressive upon the individuals, and has a real and substantial relation to their purpose.

It cannot be reasonably contended that the protection and promotion of the sardine industry in Maine is not of public concern or that the Legislature may not determine within reasonable bounds what is necessary for the protection and expedient for promotion of the industry.

We take judicial notice that the area where sardine factories are largely located was at the time of the passage of the Act and still is an economically depressed area. The opportunities for employment are limited and though the sardine industry is one of the lesser industries in the State, it does furnish employment to a substantial number, who otherwise would be unemployed.

The Defendant contends that the sardine tax was assessed as a property tax in violation of Article IX, Section 8, of the Constitution of Maine, which provides:

> "All taxes upon real and personal estate, assessed by authority of this State, shall be apportioned and assessed equally, according to the just value thereof; but the Legislature shall have power to levy a tax upon intangible personal property at such rate as it deems wise and equitable without regard to the rate applied to other classes of property."

It is clear that the tax is not upon the sardine itself as property but is an excise upon the privilege of packing sardines and is not prohibited by Article IX, Section 8. It is not measured by value and is not laid directly upon the property itself. The total amount of the tax paid is di-

rectly determined by the extent to which this privilege is exercised. The tax has none of the attributes of an ad valorem tax. It is not measured by value. The value of packed sardines may fluctuate as it will, but the amount per case of the tax remains constant.

Whenever it is apparent from the scope of the Act that its object is for the benefit of the public, and that the means by which the benefit is to be attained are of a public character, the Act will be upheld even though incidental advantage may accrue to individuals beyond those enjoyed by the general public.

It is for the Legislature to determine the manner and extent to which it will exercise this function of government and that its determination upon that point is limited by its own discretion.

In determining whether any particular measure is for the public advantage, it is not necessary to show that the entire body of the State is directly affected, but it is sufficient that a portion of the State shall be benefited thereby.

The State is made up of its parts, and those parts have such a reciprocal influence upon each other that any advantage which accrues to one of them is felt more or less by all of the others.

A Legislature that should refrain from all legislation that did not equally affect all industries of the State would signally fail in providing for the welfare of the public.

> "The principle that the imposition of both an excise tax on a privilege, activity, occupation, or calling and an ad valorem tax on property used in the exercise, conduct, or performance of such calling, privilege, or activity is not invalid as double taxation is generally recognized. The principle is bottomed on the theory that the subject of ad valorem taxation is property and that of excise taxation is a right or privilege, and that conse-

quently, the requirement frequently made essential to the existence of double taxation in the unconstitutional sense, namely, that both impositions must be against the same taxable subject, is lacking. The rule has received application in many diverse factual situations. Thus, it is well settled that a state may collect an ad valorem tax on property used in a calling and at the same time impose a license tax on the pursuit of that calling." 51 Am. Jur., page 345.

"It is to be presumed, however, that when the legislature levies a tax and appropriates the proceeds thereof for a purpose which is declared to be for the public welfare that it has acted in good faith and within its constitutional powers. Unless it has clearly exceeded its constitutional powers in so doing, its action must be sustained. All rational doubts as to the constitutionality of statutes must be resolved in favor of the constitutionality thereof. Although it is the duty of the court to declare acts which transcend the powers of the legislature void, this judicial duty is one of gravity and delicacy and it is only when there are no rational doubts which may be resolved in favor of the constitutionality of the statute that the inherent power of the court to declare statutes unconstitutional should be exercised." *State* v. *Vahlsing, Inc.*, 147 Me. 417, 430.

We are not here concerned with a tax upon real or personal estate, but with " 'a tax imposed upon the performance of an act, the engaging in an occupation or the enjoyment of a privilege. . . . . But our Constitution contains no provision limiting the legislative imposition of excise taxes or, to use the language of the Court: Our Constitution imposes no restrictions upon the Legislature in imposing taxes upon business. *State vs. Telegraph Co.*, 73 Me., 518, 531.' " See *Opinion of Justices,* 123 Me. 576, 577, 578; *State* v. *Vahlsing,* 147 Me. 417, and *Opinion of Justices,* 155 Me. 46.

"It is generally held that a constitutional provision requiring taxation to be equal and uniform applies

> only to taxes on polls and property and has no reference whatever to excises." 26 R. C. L., page 255, section 226.

The Defendant lays stress on the words "equality" and "uniformity" contained in Article IX, Section 8, of the Statutes, these are words of limitation not of prohibition. The Constitution does not prohibit the imposition of a privilege or excise tax.

Section 4695 provides:

> "The packing of sardines is declared to constitute the introduction of sardines into the channels of trade.
>
> "An excise tax of 25¢ per case, as defined in Section 4692, subsections 1 to 3, is levied and imposed upon the privilege of packing sardines."

This section of the Statute distinguishes Maine Sardine Law from legislation in other jurisdictions where the tax liability is not created until the product is placed into the channels of trade. The Statute by legislative fiat defines the packing of sardines as constituting "the introduction of sardines into the channels of trade." Section 4695.

Section 4699 of the Sardine Tax Law specifically sets forth the purposes for which the money received is to be expended "under the direction of the Maine Sardine Council with the advice and cooperation of the Commissioner of Economic Development."

It further provides for "the purchase of Maine sardines by the Maine Sardine Council through the State Purchasing Agent on a competitive sealed bid basis, and the distribution of such sardines by the Council for promotional purposes, to develop and expand foreign markets," thereby eliminating any preferential purchases and every packer being given the opportunity of bidding whenever purchases are made by the Maine Sardine Council.

It further provides for research in methods of propagating and conserving clupeoid fish. This and other activities to be under the joint direction of the Commissioner of Sea and Shore Fisheries and the Maine Sardine Council.

It goes on to provide for the "gathering, studying, classifying and distributing of information and data concerning quality, grades, standards and methods of packing and character of the manufactured sardine products, in order to determine and improve their quality and aid in merchandising and advertising them under the direction of the Maine Sardine Council with the advice and cooperation of the Commissioner of Economic Development."

The blueberry tax money is administered by the Blueberry Tax Committee of 7 members appointed by the President of the University of Maine and the money remaining, after payment of expenses incurred in collection and enforcement of the Act. Section 4311, for the purpose of conducting scientific research; extension work relating to the production, processing and marketing of blueberries through the Maine Agricultural Experiment Station and the Agricultural Extension Service of the University of Maine.

The milk tax money is administered by the Milk Tax Committee of 5 members, the Commissioner of Agriculture and 4 producers, appointed by the Commissioner of Agriculture, and the money remaining after payment of expenses incurred in collection and enforcement of the Act is, under the direction of the committee, expended as provided in Section 4501 "by the fostering of promotional, educational, advertising and research programs."

The potato tax money is administered by the Potato Tax Committee of 5 members appointed by the Commissioner of Agriculture and the money remaining, after payment of expenses incurred in collecting and enforcement of the Act. Section 4571 "by investigating and determining better

methods of production, shipment and merchandising of potatoes for advertising" and for the other purposes as enumerated in said section.

Merchandising, advertising, research, quality and quantity are all proper methods of promoting the sardine industry and in the interest of public welfare and therefore tax levied to provide funds for these purposes serve a public end.

In *State* v. *Laskey,* 156 Me. 419, 426, we said:

> "We take judicial notice of the great importance of the fishing industry in the life of our State. . . . . The wellbeing of large numbers of our citizens is directly dependent upon it. From colonial days we have drawn upon the sea and shore fisheries for a substantial part of our income and wealth.
>
> "The power of the Legislature 'to regulate and control such fisheries by legislation designed to secure the benefits of this public right in property to all its inhabitants' has long been unquestioned."

Equally important is the sardine industry, not only to the packer but to a large number of men and women employed in the sardine canning industry and to the number of men engaged in seining and delivering the product of their catch to the factories.

The power of the Legislature to adapt its laws to the peculiar needs of a substantial industry rests upon the same principal, viz. that is acting for the public good in its capacity as a representative of the entire State. Under this principle the Legislature has enacted the Milk Tax, Potato Tax, Quahog Tax and the Sardine Tax Law.

> "The burden being upon him who attacks a law for unconstitutionality, the courts need not be ingenious in searching for grounds of distinction to sustain a classification that may be subjected to criticism." *Middletown* v. *Texas Power & Light*

Co., 249 U. S. 152, 39 S. Ct. 227, 229, 63 L. Ed. 527, 531.

If the Legislature can create an office, in the absence of specific constitutional prohibition, it may specify the means and manner of appointment without making the statute unconstitutional.

> "In offices which are created by the Legislature, where the method of appointment is not prescribed by the Constitution, The Legislature, if no limitation is put upon its power by the Constitution, can take upon itself the responsibility of selecting the persons to be appointed, or can confer the power of appointment upon public officers or boards. . . ." *Brown* v. *Russell,* 166 Mass. 14, 25.

The tax being levied by the Legislature as an excise tax within the legislative taxing power it does not violate either the equal protection of the law, or the due process clause of the Constitution.

The entry will be

Judgment for the State in the sum of $836.25.

RUSSELL K. BUCKLEY
vs.
NORTHEASTERN PAVING CORP.

Androscoggin. Opinion, July 20, 1965.

Taxation.

Where defendant owned machinery which was used to prepare bituminous concrete hot mix and which could be moved from location to location as needed, defendant was a "manufacturing corporation" within personal property tax statute and defendant's machinery was subject to personal property taxation in town in which machinery was situated.

ON REPORT.

On report from the Superior Court, Androscoggin County, to determine whether the defendant's machinery which was used to prepare bituminous concrete hot mix and which could be moved from location to location as needed was subject to a personal property tax assessed by a town in which the machinery was situated. The Supreme Judicial Court, Marden, J., held that the defendant was a "manufacturing corporation" within the personal property tax statute and that the machinery was subject to taxation in the town. So ordered.

Frederick G. Taintor,
Charles H. Abbott, for Plaintiff.

Robert D. Schwarz, for Defendant.

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

MARDEN, J. On report, to determine the taxability of certain machinery owned by defendant, which machinery was situated at Leeds, Maine, on April 1, 1962 and upon

which the Town of Leeds assessed a personal property tax.

The defendant is a Maine corporation located at Westbrook engaged in the surfacing of highways. Among its items of equipment is a unit of machinery for the preparation of a "mix" commonly known as "hot top" and more technically as bituminous concrete. The "mix" is prepared according to specifications for the particular demand, the measure of the components being determined either by volume or weight, and in simple terms consists of the mixing under heat of the aggregate (rock, stone or sand) with bitumen or asphalt resulting in a cohesive plastic mass transported from the mixing plant to the highway and there spread and rolled to create a traffic bearing surface. This machinery is mobile, may be moved from location to location as access to the raw material, or delivery of the "mix" to job site, require. When on location the wheels to the unit are removed to achieve a firm bearing, and to minimize vibration under power.

The applicable statute (Section 8, Chapter 91-A, R. S., 1954) provided that:

> "All personal property within * * * the state, except in cases enumerated in the following section, shall be taxed (on the first day of each April) to the owner in the place where he resides."

The exceptions referred to in Section 8 appeared in Section 9, Chapter 91A, R. S., 1954, which provided that:

> "The excepted cases referred to in the preceding section are the following:
> * * * * * * * * * *
> "XI. The personal property of manufacturing, * * * corporations, * * * shall be taxed to the corporation * * * in the place where situated, * * * ."

The issue is whether the defendant is a manufacturing corporation within the meaning of the reference statute.

It is conceded that the term "manufacturing" has varied judicial interpretations, as reflected by its use under zoning

ordinances, taxing statutes, the Bankruptcy Act and administrative law. See 55 C. J. S., Manufacturers, § 3 a.

In general "in order to constitute manufacturing, the original material must undergo a transformation so that a new and different article or product emerges; but what constitutes a new and different article is a question which has caused considerable difficulty in the courts." 55 C. J. S., *supra,* § 3 d. (1).

Both parties urge to us the importance of *Leeds* v. *Maine Crushed Rock and Gravel Company,* 127 Me. 51, 141 A. 73 wherein the taxability of a machine for crushing rock was put in issue by the Town of Leeds under the then statute, which permitted taxation upon "machinery employed in any branch of manufacture" (Section 14, III, Chapter 10, R. S., 1916). The court there held that a machine for the crushing of rock, the changing of large rocks or pieces of rock to smaller rocks or pieces of rock did not fall within the taxable category, and said (p. 56):

> "The meaning of the word 'manufacture' has been before the courts in various applications including provisions of statutes for taxation. This line of distinction has been drawn which we think to be correct. Application of labor to an article either by hand or mechanism does not make the article necessarily a manufactured article. To make an article manufactured, the application of the labor must result in a new and different article with a distinctive name, character or use."
>
> * * * * * * * * *

But continued:

> "Had * * * an article * * been created by its labor or the addition of other substances producing an article having a different character and use, a very different question would be presented."

The dictum last quoted substantially controls the present case.

It is elemental that to manufacture is to make, create, produce by hand or machinery. Webster's Third New International Dictionary. One witness for the defendant states that "(t)he machine simply mixes aggregate and asphalt in measured amounts, *to produce* (emphasis added) the material that is used to pave roads." The other witness for the defendant states that "(i)t (the machine *produces* (emphasis added) bituminous mixtures."

The crushed rock, stone or sand, by itself, or the asphalt, as here used, by itself, is not "hot top" or bituminous concrete. Neither component, as here used, by itself, would constitute a traffic bearing surface with the characteristics of bituminous concrete. Blending the two materials in specified proportions under controlled heat produces a compound having a different name, character and use, than either of the two materials separately. The resulting substance for paving is a product of manufacture and the owner is a manufacturer within the meaning of the reference statute.

For tax cases reiterating this definition of manufacture see: *Comptroller of the Treasury of Maryland* v. *American Can Co.*, 117 A. (2nd) 559, 561 (Md. 1955); *East Texas Motor Freight Lines, Inc., et al.* v. *Frozen Food Express, et al.*, 76 S. Ct. 574, [2] 577 (1956).

For tax cases dealing with an activity such as we have here, see *State Tax Commission et al.* v. *Baltimore Asphalt Block & Tile Co.*, 26 A. (2nd) 371, [1] 373 (Md. Ct. of Appeals 1942 — tax on batching plant for asphalt paving mixture); *Commonwealth* v. *McCrady-Rodgers Co.*, 174 A. 395, [6, 7] 396 (Pa. 1934 — tax on capital employed in production of "ready mixed concrete"); *Commonwealth* v. *Filbert Paving & Construction Co.*, 78 A. 104, 105 (Pa. 1910 — tax on capital employed in production of asphalt pavements, etc.); *People ex rel Fruin Bambrick Pav. Co.* v. *Knight*, 90 N. Y. S. 537 (Sup. Ct., App. Div. 1904 — corporation tax

exemption on capital employed in manufacturing applied to production of asphalt paving material).

See also *City of Wauwatosa* v. *Strudell*, 95 N. W. (2nd) 257, [1] 260 (Wis. 1959) and *Appeal of Mignatti, et al.*, 168 A. (2nd) 567 (Pa. 1961) holding that production of bituminous concrete was manufacturing within zoning laws.

The subject machinery owned by defendant and situated in Leeds on April 1, 1962 was taxable.

So Ordered.

OXFORD COUNTY AGRICULTURAL SOCIETY
vs.
SCHOOL ADMINISTRATIVE DISTRICT NO. 17

Oxford. Opinion, July 23, 1965.

Eminent Domain. Schools. School Districts.

While activities of county agricultural society which conducted annual fair benefited public in some degree, they fell short of constituting such "public uses" as would exempt society's property from eminent domain process.

The distinction between "public use" and "private use" lies in character of use and must to large extent depend on facts of each case.

Mere benefit of public or permission by owner for use of property by public are not enough to constitute a public use.

It is essential to public use, for eminent domain purposes, that public must, to some extent, be entitled to use or enjoy property, not by favor, but as a matter of right.

ON APPEAL.

This is an appeal by an agricultural society from the taking by eminent domain of its real estate for use as a school

on the basis that the society was using the property for a "public use." Appeal denied.

Bernstein, Shur, Sawyer & Nelson,
by *Barnett I. Shur* and
C. Daniel Ward, for Appellant.

Verrill, Dana, Walker, Philbrick & Whitehouse,
by *Roger A. Putnam,* for Appellee.

SITTING: WILLIAMSON, C. J., WEBBER, MARDEN, RUDMAN, JJ. TAPLEY, J., did not sit. SULLIVAN, J., sat at argument but retired before the opinion was adopted.

WEBBER, J. On appeal. The defendant School Administrative District No. 17, a quasi-municipal corporation charged with the responsibility of providing public school education, seeks to take property of the plaintiff Oxford County Agricultural Society by eminent domain. The District requires the property for the location of a new high school. It has general statutory authority to take by eminent domain for its lawful purposes but it has never been given specific legislative authority to take the property of this plaintiff.

The first issue is whether or not the Society's property is devoted to public uses to such an extent and in such a manner as to provide it with an exemption from condemnation. The plaintiff conducts an annual fair on the property in question which has all the usual attributes of an agricultural fair with which Maine people have long been familiar. See *Hoyt* v. *Fair Association,* 121 Me. 461, 465, 118 A. 290, 292. The justice below correctly found that while the activities of the Society benefit the public in some degree, they fall short of constituting "public uses" in the technical sense which would exempt its property from eminent domain process. The promotion of agricultural products at a fair which lasts but a few days in each year, al-

though highly desirable, can hardly be said to lift any appreciable burden from the shoulders of the taxpayers. The plaintiff is a private voluntary corporation chartered by the Legislature. It is not a political subdivision of the state nor is it invested with any political or governmental function. It was not created to assist in the conduct of government nor was it created by the sovereign will of the Legislature without the consent of the persons who constitute it. These persons may decline or refuse to execute powers granted by legislative charter. They may at any time dissolve and abandon it and are under no legal obligation to conduct an annual fair or to carry on or continue any of the activities which are said to benefit the public. The principles governing exemption from condemnation were well stated in *Tuomey Hospital* v. *City of Sumter* (1964), 134 S. E. (2nd) (S. C.) 744, 747:

> "We recognize that it is difficult to give an accurate and comprehensive definition of the term 'public use.' The distinction between public and private use lies in the character of the use and must to a large extent depend upon the facts of each case. There are, however, certain essential characteristics which must be present if the use is to be deemed public and not private within the meaning of the law of eminent domain.
>
> This Court has rejected the view that public use and public benefit are synonymous. * * *
>
> The fact that the Tuomey Hospital is an eleemosynary corporation devoted to charitable purposes does not within itself constitute a public use within the meaning of the foregoing statute. Mere benefit to the public or permission by the owner for use of the property by the public are not enough to constitute a public use, but it must appear that the public has an enforceable right to a definite and fixed use of the property. * * * The rule was recognized in the Riley case (Riley v. Charleston Union Station Co., 71 S.C. 457, 51 S.E.

> 485) that to constitute a public use 'the public must have a definite and fixed use of the property to be condemned, independent of the will of the person or corporation taking title under condemnation, and that such use by the public is protected by law.'
>
> The general rule, to which we adhere, was thus stated in the case of the President and Fellows of Middlebury College v. Central Power Corporation of Vermont, 101 Vt. 325, 143 A. 384, 388: 'It is essential to a public use, as the term is used in proceedings involving the law of condemnation or eminent domain, that the public must, to some extent, be entitled to use or enjoy the property, not by favor, but as a matter of right. * * * The test whether a use is public or not is whether a public trust is imposed upon the property; whether the public has a legal right to the use, which cannot be gainsaid or denied, or withdrawn at the pleasure of the owner.' "

We are satisfied that the statement set forth in 18 Am. Jur. 720, Sec. 94, accurately summarizes the requirements for exemption:

> "To exempt property from condemnation under a general grant of the power of eminent domain, it is not enough that it has been voluntarily devoted by its owner to a public or semipublic use. If the use by the public is permissive and may be abandoned at any time, the property is not so held as to be exempt. The test of whether or not property has been devoted to public use is what the owner must do, not what he may choose to do. It is immaterial how the property was acquired; if its owner has devoted it to a public use which he is under a legal obligation to maintain, it comes within the protection of the rule exempting it from condemnation."

We conclude, as did the justice below, that the property of the Society is not immune from condemnation by the District.

The Society challenges the technical sufficiency of the taking in several particulars. It is first claimed that the laying out of the lot for schoolhouse purposes was not preceded by the filing of a petition. The provision for condemnation (20 M. R. S. A., Sec. 3562) contains a reference to the "laying out of town ways." Municipal officers of towns may lay out town ways only "on petition" by the terms of 23 M. R. S. A., Sec. 3001. The language quoted in *Cousens* v. *School-District* (1877), 67 Me. 280, 286, is applicable here: " 'When one law thus refers to another, we must take care not to follow it into its details beyond the line where the cases are analogous.' " It suffices to say that the location of a school is logically initiated by designation by the District directors and not by petition as in the case of town ways. There is no express requirement of a preliminary petition in 20 M. R. S. A., Sec. 3562. Applying the principles stated in *Cousens,* we hold that the petition requirement contained in 23 M. R. S. A., Sec. 3001 is not incorporated by reference and is not a requirement under 20 M. R. S. A., Sec. 3562.

The plaintiff contends that the posting of notice did not meet statutory requirements. The property in question lies partly in the town of Norway and partly in Paris. It is urged that there should have been four postings in each town. Here again the plaintiff depends upon the incorporation by reference into 20 M. R. S. A., Sec. 3562 of the requirements of 23 M. R. S. A., Sec. 3001. The pertinent language of the latter statute is, "They shall give written notice of their intentions, to be posted for 7 days in 2 public places in the town and in the vicinity of the way, describing it in such notice * * * ." In *School Administrative District No. 17* v. *Orre, et al.* (1964), 160 Me. 45, 49, 197 A. (2nd) 319, 321, we had under consideration somewhat related problems. We said in part: "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." Some interpretative changes are obviously required as we apply the language of one statute to the other. For example, the word "way" must be interpreted to mean "lot" in order that the incorporation by reference may accomplish its intended purpose. Likewise the word "town" must be interpreted to mean "district" whenever the taking is by a school administrative district. See *School Administrative District No. 17* v. *Orre, et al. (supra).* The language appropriate to town ways would then by incorporation into the statute dealing with schools require only that as a part of the process of appraising damages, the directors give written notice by posting in 2 public places in the district and in one place in the vicinity of the proposed lot or location. The plaintiff readily admits that if this be the notice requirement, it was met in this case.

Finally, the plaintiff contends that the statute required a final acceptance of the location by the voters of the District. This contention is valid only if the provisions of 23 M. R. S. A., Sec. 3003 are deemed to be incorporated by reference into 20 M. R. S. A., Sec. 3562. Sec. 3003 provides in part: "The way is not established until it has been accepted in a town meeting legally called, after the return has been filed, by a warrant containing an article for the purpose." Such incorporation, however, would create inconsistent requirements and defeat legislative intent. By its express terms Sec. 3562 provides that the location of schools begins with a vote at a town meeting in the case of a town and with a vote of the directors in the case of a district. Secs. 3001 and 3003 provide that the location of a way begins with a petition to the Municipal Officers followed by appropriate action by them which is later confirmed by vote at town meeting. We hold that in the case of a district no vote by the voters of the district designating or confirming the location is required.

Other suggestions as to possible technical deficiencies in the mechanics of taking by eminent domain have not been pressed and in any event are without merit.

The entry will be

Appeal denied.

BARRY M. POTTER AND SANDRA POTTER
vs.
SIDNEY R. SCHAFTER

Cumberland. Opinion, July 23, 1965.

Husband and Wife. Constitutional Law.

At common law, a plaintiff-wife had no cause of action for her loss of consortium occasioned by her husband's injuries.

As a common law court, the Supreme Judicial Court had power to grant a new cause of action for a wife's loss of consortium occasioned by her husband's injuries.

Proposed creation of a new cause of action for a wife's loss of consortium occasioned by her husband's injuries merited consideration by legislature, where upon notice the diverse interests affected by such proposition might be heard, but it was not up to the Supreme Judicial Court to usurp legislative authority and thereby judicially legislate a new cause of action.

ON APPEAL.

This is an appeal from the dismissal of the plaintiff's complaint seeking to recover for the wife's loss of consortium. The court refused to usurp legislative authority to change the common law plaintiff-wife rule. Appeal dismissed.

Theodore Kurtz, for Appellants.

Richard D. Hewes, for Appellee.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, MARDEN, RUDMAN, JJ. SULLIVAN, J., sat at argument but retired before the opinion was adopted.

MARDEN, J. On appeal. Plaintiff Barry M. Potter was injured in a motor vehicle accident due to alleged negligence of the defendant. In a complaint to recover for his injuries, his wife, Sandra Potter joins and in Count II of the complaint seeks to recover for her loss of consortium occasioned by her husband's injuries. Defendant's motion to dismiss Count II was granted. Plaintiffs appeal.

At common law, upon which basis our judicature rests, the plaintiff-wife has no such cause of action. 27 Am. Jur., Husband and Wife, §§ 513, 514; *Doe* v. *Roe,* 82 Me. 503, 20 A. 83; Restatement, Torts, § 695, to which no change has been indicated through the 1954 Supplement; 41 C. J. S., Husband and Wife, § 404; *Fuller* v. *American Telephone and Telegraph Co.,* 21 F. Supp. 741, [2] 742 (D. C. Mass. 1937).

We are urged to sustain the appeal, grant plaintiff-wife a right to recovery and thereby judicially legislate a new cause of action. Lead by *Hitaffer* v. *Argonne Co., Inc.,* 183 F. (2nd) 811 (D. C. Cir.) on which certiorari was denied in 340 U. S. 852, 71 S. Ct. 80 (1950), which granted the wife a cause of action for her loss of consortium of her husband resulting from negligent conduct of a third person, ten other states have followed by judicial decision[1] and one, Oregon[2], has done so by statute. Meantime nineteen jurisdictions, having considered the question, have denied recovery. See *Igneri* v. *Cie de Transports Oceaniques,* 323 F. (2nd) 257, 260, 261 (2 CCA 1963).

We are aware that as a common law court we have the power to grant this new cause of action, and we are reminded that in *Bedell* v. *Reagan,* 159 Me. 292, 192 A. (2nd) 24, we exercised this prerogative and held that a defendant

in a complaint brought by husband and wife for negligence resulting in wife's personal injury might implead the plaintiff-husband as a third party defendant, thereby allowing defendant equitable recourse for contribution toward the monetary damage which otherwise would compensate not only for his own fault, but also "the pecuniary equivalent of the husband's wrong," — but within the narrow limits prescribed.

The change in the common law declared by *Bedell* was not a result, however, of a collision between the principle of stare decisis and contemporary legal philosophy above, as is true in the present case. The adoption of our civil rules, effective December 1, 1959, introducing third party practice into Maine, which was a drastic departure from pre-rule procedure, was designed "to secure the just, speedy and inexpensive determination of every action." Rule 1, M. R. C. P. In *Bedell* the court dealt with a collision between Rule 14, M. R. C. P. and the common law "disability of reciprocal spouses" as cross litigants. *Bedell* at page 296. Under such circumstance we held that the integrity of the civil rules and their declared purpose, but within the narrow limits required equitably in the *Bedell* situation, overrode the pre-existing rule of marital disability of the common law. There is not only a distinction, but also a difference.

The proposed creation of a new cause of action in the wide field of torts merits consideration by the legislature,

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[1] *Cooney* v. *Moomaw*, 109 F. Supp., 448 (D. Neb. 1953); *Brown* v. *Georgia-Tennessee Coaches, Inc.*, 77 S. E. (2nd) 24 (Ga. 1953); *Acuff* v. *Schmit*, 78 N. W. (2nd) 480 (Iowa 1956); *Missouri Pacific Transportation Co.* v. *Miller*, 299 S. W. (2nd) 41 (Ark. 1957); *Hoekstra* v. *Helgeland*, 98 N. W. (2nd) 669 (S. D. 1959); *Montgomery* v. *Stephan*, 101 N. W. (2nd) 227 (Mich. 1960); *Dini* v. *Naiditch*, 170 N. E. (2nd) 881 (Ill. 1960); *Stenta* v. *Leblang*, 185 A. (2nd) 759 (Del. 1962); *Duffy* v. *Lipsman-Fulkerson & Co.*, 200 F. Supp. 71 (D. Mont. 1961); and *Novak* v. *Kansas City Transit, Inc.*, 365 S. W. (2nd) 539 (Mo. 1963).

[2] Oregon Revised Statutes, § 108.010 (1955).

— where upon notice the diverse interests affected by such proposition may be heard. If Maine is to join the minority, though a respectable minority, it must do so through our legislative branch. Under the facts here, it is not for us "to usurp legislative authority." *Sacknoff* v. *Sacknoff*, 131 Me. 280, 283, 161 A. 669. Representations for a change such as here urged should be directed to the legislature. See *Howard* v. *Howard*, 120 Me. 479, 482, 115 A. 259, and *Mendall* v. *Pleasant Mountain Ski Development, Inc., et al.*, 159 Me. 285, 290, 191 A. (2nd) 633.

Appeal dismissed.

THEOPHILUS A. FITANIDES, APPLT.

vs.

ESTATE OF LAURA B. STICKNEY

York. Opinion, July 28, 1965.

Wills.

Will which was executed by testatrix 80 years of age and hospitalized for shock, which effectively stripped daughter of share in her substantial property to benefit of her son, his wife and children, which destroyed balance between son and daughter maintained in prior wills, and which replaced bank as executor with attorney brother of her daughter-in-law was properly found to be product of influence and not testatrix's will. Rules of Civil Procedure, rule 52 (a).

ON APPEAL.

This is an appeal from the disallowance in the Superior Court of an instrument offered as will of testatrix. The case comes here on appeal by the purported administrator. The will was found to be the product of undue influence and not testatrix' will. Appeal denied.

William P. Donahue, for Plaintiff.

Charles W. Smith, for Defendant.

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

WILLIAMSON, C. J. This is an appeal from the judgment of the Supreme Court of Probate affirming the disallowance of an instrument as the will of Laura B. Stickney in the Probate Court. The appellant is the named executor. The decisive issue is whether the purported will was the product of undue influence.

We examine the record giving full weight to the principle that "The findings of fact of the Justice in the Supreme Court of Probate stand unless clearly erroneous." *Barton* v. *Beck Estate,* 159 Me. 446, 448, 195 A. (2nd) 63; *Casco Bk. & Tr. Co. and Tomuschat, Applts.,* 156 Me. 508, 167 A. (2nd) 571; *Harriman* v. *Spaulding,* 156 Me. 440, 165 A. (2nd) 47; Maine Rules Civil Procedure, Rule 52 (a).

> "By undue influence in this class of cases is meant influence, in connection with the execution of the will and operating at the time the will is made, amounting to moral coercion, destroying free agency, or importunity which could not be resisted, so that the testator, unable to withstand the influence, or too weak to resist it, was constrained to do that which was not his actual will but against it." *Rogers, Appellant,* 123 Me. 459, 461, 123 A. 634.

> "As has been often reiterated, the burden of proof is on the party alleging undue influence. The true test is the effect on the testator's volition. It must be sufficient to overcome free agency, so that what is done is not according to the wish and judgment of the testator." *In Re Will of Ruth M. Cox,* 139 Me. 261, 272, 29 A. (2nd) 281.

See also *Tomuschat* and *Barton, supra,* and cases cited therein.

Without reviewing the record and the findings in detail, the Justice of the Superior Court sitting in the Supreme Court of Probate was warranted in finding as follows:

Laura B. Stickney, a physician for approximately 50 years in Saco, died on May 4, 1961. On the morning of May 25, 1960, then 80 years of age, she suffered what was referred to as a "stroke" and her left side was paralyzed. Her attending physician was called, and she was immediately taken to the Trull Hospital, owned and operated by her.

On May 26 while she was a patient at the hospital she executed the purported will drafted by the appellant, an attorney and brother of her daughter-in-law Marion. The instrument was witnessed by the appellant, who was the named executor, and two nurses employed at the hospital. Her son Richard and daughter-in-law Marion were also present. Her family consisted of a son Richard and his wife Marion, with five Stickney grandchildren, and a daughter Joan Cleary and her husband, with six Cleary grandchildren. Both Richard and Joan were adopted in infancy by Dr. Stickney and her deceased husband Joseph.

On March 29, 1960 Dr. Stickney executed a will drafted by Miss Margaret Currie, who had been her attorney for many years. Between the March will and the May "will" there was no change in the relationship of Dr. Stickney with her son and daughter, or their families.

In the May "will" after the usual provisions for payment of debts, funeral charges and expenses of administration, the executor was directed to pay all inheritance, estate, gift or other death taxes, thus freeing the specific bequests and devises from the burden of such taxes. The Trull Hospital, with its contents, but not however the bills receivable, to-

gether with a house in the rear of the hospital, were bequeathed and devised to Richard and Marion.

The remaining provisions read:

"3. I give and bequeath to Theophilus A. Fitanides, of Saco, the following shares of stocks as follows, nine hundred shares of American Tel. & Tel. Company common stock; three hundred shares of General Electric Company common stock; one hundred forty-five shares of Central Maine Power Company common stock; one hundred twenty shares of Federated Department Stores, Inc. common stock; twenty-nine shares of Socony Mobile Oil Company, Inc. capital stock; one hundred thirteen shares of Socony Vacuum Oil, Capital stock; two hundred fifty-nine shares of Public Service Electric-Gas Company of New Hampshire, common stock; one hundred ten shares of Atchison, Topeka & Santa Fe common stock; one hundred thirty-four shares of Beach-Nut Life Savers, Inc. common stock, IN TRUST, nevertheless, for the following purposes, with the following purposes and subject to the following conditions:

"1. The Trustee shall have authority to retain the above securities or sell the whole or any part thereof, and invest the proceeds in such securities and in such manner as to the Trustee may seem advisable, said Trustee is to maintain and manage said fund for the support and education of the children of Richard Stickney and Marion Stickney. Only in case of failure for any cause of either parent to support said children is support from said fund to be given to said children, except when in judgment of Trustee he believes support payments are necessary. My main interest is in the education of said children. When any of said children shall reach the age of twenty-five, he may request his equal share of said fund and said Trustee shall pay said equal share. In case of death of any child before they reach the age of twenty-five, then the remaining children shall share equally. The Trus-

tee shall be the sole judge of necessity of payments at all times.

"4. I direct my executor to sell, without license from Probate Court, any other real estate I may own at the time of my death, as soon after my death as such sales advantageously can be made. I also direct my executor to pay my obligations to the Canal National Bank of Saco, from the above proceeds and from other securities I own so that my pledged collateral will be returned to my estate and my bequest in paragraph three be carried out in the will.

"5. All rest, residue and remainder of my estate, I give and bequeath to the following: I give and bequeath to Joan Cleary, my beloved daughter the sum of twenty-five thousand dollars. I give and bequeath to the children of Joan Cleary the sum of five thousand dollars each. I give and bequeath to my sister Nina M. Gevalt, the sum of five hundred dollars. I give and bequeath to my sister-in-law, Mabel C. Black, the sum of five hundred dollars. I give and bequeath to my niece, Ruth Glazer, the sum of three thousand dollars. I give and bequeath to my nephew Frederick C. Gevalt the sum of three thousand dollars. I give and bequeath to my nephew Verne Black, the sum of three thousand dollars.

"6. I nominate Theophilus A. Fitanides, of Saco, to be executor of this my last will and testament, requesting that he be not required to give bond for the faithful performance of the duties of said office.

"7. In the event that the assets of my estate are insufficient to pay all of the specific bequests enumerated in the Fifth paragraph hereof said bequests shall be paid in full in the order in which they are set forth in said paragraph, prior to any payment in full or in part *if* any subsequent bequest or legacy."

In March Richard was given the Trull Hospital, with the contents but not the accounts receivable. In May, the same gift with the house in the rear added was made to Richard and Marion. No significance is attached to the changes in the wills with reference to the hospital.

Bequests to the same persons, all relatives, and of the same amounts found in May within the residue were made in March in the usual manner payable ahead of the residue.

The March 1960 will was well summarized in the findings as follows:

> ". . . after making certain small bequests, she devised the property known as the Trull Hospital to her son Richard; the remainder to Canal National Bank of Portland in trust, one-half of the income to be divided equally between Richard and Joan, and if Marion survived, then the income was to be divided equally between Joan and Marion, with the right to invade the principal, if in the sole judgment of the trustee, it became necessary for proper support and maintenance of the beneficiaries. The remaining one-half of the income and principal was to be held for the benefit of her grandchildren and following the specific directions given to the trustee, she further specifies 'It being my intention that one-half of my estate shall be distributed to my son's children and one-half to my daughter's children.' In this will, Margaret Currie was named the executrix."

On May 26, when the purported will was executed, Dr. Stickney did not possess sufficient property to meet the bequests to Joan and her children. She then owned stocks and securities worth $175,000 and owed the Canal National Bank $43,000, using approximate figures. In addition she owned the Trull Hospital with a small house in the rear, a house on Cutts Avenue in Saco, the accounts receivable of the hospital, and other property of no significant value.

In his findings the presiding justice said:

> "The evidence clearly indicates that he [the appellant] was in possession of sufficient information to know that after payment of the funeral expenses, State and Federal taxes, the expense of administration, the debts of the testatrix, and satisfying the specific bequests to his sister and her family, there would be little, if anything, left for Joan and her children, to say nothing about the bequests to other relatives."

In a 1947 will, shortly after the death of her husband, Dr. Stickney, after small specific bequests, divided the remainder of her estate equally between Joan and Richard with certain trust provisions.

The presiding justice found with reference to the 1947 will an agreement between Dr. Stickney and her daughter, as follows:

> "When Joseph Stickney died, he left an estate valued at $75,000.00. Joan inherited one-third of this estate. Dr. Stickney requested Joan to convey her interest in her father's estate to her. This, Joan did, and in the presence of Miss Margaret Currie, a lawyer and long time friend, Dr. Stickney said to Joan, 'You are not giving up anything, of course, because you will get not only this, but a great deal more from my estate, but I need it in order to get along.' Joan acquiesced, and transferred her interest in her father's estate to her mother; and Dr. Stickney executed a will prepared by Miss Currie, . . ."

By a 1948 will drawn in Miss Currie's absence by a Portland attorney there were trusts for Joan and her children and for Richard and his children. In 1951 the will was destroyed by reason of certain conditions relating to Richard and Marion which were objectionable to Dr. Stickney. No other wills are known to have been made by her.

On May 25 at about noon Dr. Stickney executed an instrument acknowledging the gift of her household furnish-

ings to Richard, Marion, and their children, with whom she had lived since giving a house to her son in 1958. Later in the day she executed an authorization dated May 26 for Marion to enter her safe deposit box at the Canal National Bank in Saco. The appellant prepared the instruments and witnessed Dr. Stickney's signature on each.

On May 26 Marion entered the safe deposit box, removed all securities and the March will, and delivered them to the appellant before the purported will was signed. The March will was destroyed by the appellant.

The appellant testified in substance that between May 5 and May 8 Dr. Stickney asked him to explain the March will, that he did so explain the will, that he discussed the impact of taxes, that Dr. Stickney gave him a list of securities to be placed in the trust, and that they discussed her debts and the desired disposition of her estate.

He testified:

> "She told me that the prime purpose or the main reason that she wanted a new will was to care for their children, Marion and Dick's children. . . She told me that she had promised Joe [her eldest grandson] that she would provide or pay for his medical education.
>
> "Q When you say Joe, you refer to Joseph Stickney, the oldest child, and her eldest grandson?
> "A Yes. And at that time she said she thought it would cost between $25,000 and $30,000 for a medical education, and that she couldn't very well leave Joe that without leaving his brothers and sisters an equal share, or words to that effect. In sum and substance that is what she said. She told me that I had been like a father to the kids, and that she was going to make me the executor and also the trustee, and she wanted me to be sure that the children did not want for anything. . . She told me that she had some debts at the Canal Bank and she wanted me to sell some real estate or any

of her assets to get this stock that was pledged down there back into the trust fund."

There is no evidence of any further conversation between Dr. Stickney and the appellant until May 24, when he says she wished to see him on the next morning. On arriving at her home he found Dr. Stickney was about to be taken to the hospital. Later on the 25th he says he talked with her and on her instructions prepared the "will" of May 26.

Here then a widowed mother, 80 years of age, hospitalized for shock, executes in terms her will effectively stripping her daughter and the daughter's children of a share in her substantial property to the benefit of her son, his wife and children.

Setting aside the gift of the hospital with the adjacent house and specific bequests to relatives, the equal division of her estate between the son with his family and the daughter with her family in substance maintained in prior wills was destroyed.

The trust for the son's children as of the date of the "will" had a value of about $130,000, whereas the stated amounts of the gifts to the daughter of $25,000 and to each of her six children amounted to $55,000 (or $60,000 if we include a seventh child born after May 26). Furthermore, the gift to the son's branch was of specific stocks and the money gifts to the daughter's branch came from the residue. If this were not enough to establish inequality between the branches of Dr. Stickney's family, it appears that the estate at the time of the execution of the "will" was not sufficient to meet the residuary gifts to the daughter's branch. There was only the illusion of bequests for Joan and Joan's children.

The disposition of her estate so natural in March became unnatural in May. There was no change in the relationship of the mother and her children and grandchildren within

this period. The trusted adviser and lawyer of March and the Bank then named executor gave way to a new adviser, attorney and executor, namely, the brother of her daughter-in-law.

We find no error in the decision of the presiding justice that the instrument of May 26 was the product of undue influence and was therefore not the will of Dr. Stickney.

In this view of the case it is unnecessary to consider the finding of the presiding justice to the effect that the purported will was executed under a mistake on the part of Dr. Stickney. We have examined the points raised with reference to rulings on evidence and are satisfied that no prejudice resulted therefrom.

The entry will be

Appeal denied.

Costs and reasonable fees to counsel for the several parties, to be fixed in the Probate Court, and ordered paid from the Estate.

C. I. T. CORPORATION

vs.

HERBERT C. HAYNES

Penobscot. Opinion, August 5, 1965.

Sales. Conditional Sales. Contracts.

Provision in conditional sales contract granting seller power to repossess and sell chattel on buyer's default is valid and by itself does not impair contract.

Antecedent waiver by conditional vendee of statutory notice as to conditional vendor's resale was against public policy and sale by assignee of conditional vendor without notice to vendee was invalid.

Assignee which failed to comply with statute requiring written notice to conditional vendee before resale by conditional vendor in possession could not recover any deficiency due under terms of conditional sales contract despite contract provision waiving statutory notice.

ON APPEAL.

Action by assignee of conditional sales contract against conditional vendee to recover balance allegedly due. The Superior Court denied recovery and the assignee appealed. Held that assignee which failed to comply with statute requiring a written notice to conditional vendee before resale by conditional vendor in possession could not recover any deficiency due under the terms of the conditional sales contract despite vendee's waiver in contract of statutory notice. Appeal denied.

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

Richard H. Broderick, for Appellee.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, MARDEN, JJ. RUDMAN, J., did not sit. SULLIVAN, J., sat at argument but retired before the opinion was adopted.

MARDEN, J. On appeal from decree of a single justice on jury waived hearing.

On October 9, 1961 defendant purchased under conditional sales agreement from vendor in Lewiston, a mobile power crane. Among the terms of the conditional sales contract it was provided that "to the extent permitted by law" the vendor or its assigns might repossess the equipment, without notice or legal process, "retain all prior payments as partial compensation for its use, and equipment may be sold with or without notice at private sale or at public sale," the proceeds of such sale less expense of repossession, repair, etc., to be credited upon the unpaid balance, and that the vendee would pay the balance of the purchase price as liquidated damages. The conditional sales contract was assigned upon the same date to the plaintiff.

In July or August of 1962 defendant returned the equipment to the vendor's premises in Lewiston for the purpose of having it remounted for more mobility, but inasmuch as defendant did not prosecute this proposed change the equipment remained for some time at Lewiston. Payments upon the equipment became delinquent and on February 2, 1963 plaintiff repossessed it and moved it from Lewiston to Portland. While the crane was in Portland, defendant paid $1,000.00 on March 21, 1963, and another $1,000.00 on April 5, 1963 to his vendor, which money plaintiff received.

After the date of repossession, on at least one occasion, a representative of plaintiff told the defendant that if the payments could not be brought to date the equipment would be sold. No date of sale was fixed. Within Section 9 "Conditional Sales" of Chapter 119, R. S., 1954, then in effect[1] was this provision:

> "In all cases where a power of sale has been reserved in a conditional sales contract, the conditional sales vendee shall be given at least 10 days' written notice, mailed to him either at the address

> stated in such contract, or at his last known place of abode, of the intention of the holder of such contract to sell said property, which notice shall state the date, time and place of such sale."

No notice in compliance with this statute was given the defendant. The equipment was sold on October 1, 1963 and the plaintiff, after crediting the net proceeds of the sale toward the contract price, seeks to recover the balance.

The single justice held that compliance with the statutory notice was a condition precedent to the recovery of any deficiency against the conditional vendee, that lack of such notice was not waived by the vendee and denied recovery. Plaintiff appeals.

The appeal is confined to the question whether compliance with the statutory notice was a condition precedent to the recovery of any deficiency due under the terms of the conditional sales contract. The appeal as so expressed raises no issue on the competence of the single justice to have found that there was no factual waiver of the statutory provision after repossession. Whether our law permitted a waiver embodied in the sales contract is considered within the point of appeal.

The power given to the vendor to repossess and sell is not under attack and we have held in chattel mortgages that such a power is valid and by itself neither "impairs the mortgage nor clogs the equity of redemption." *Consolidated Rendering Co.* v. *Stewart, et al.,* 132 Me. 139, 142, 168 A. 100 and the court went on to say:

> "* * * we think it may be accepted as the law here, as elsewhere, that a valid power of sale may be inserted in a chattel mortgage and, if the power

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[1] When the Uniform Commercial Code was adopted by Public Laws, 1963, § 362, effective December 31, 1964, the reference Section 9 of Chapter 119, R. S., 1954, was repealed. The Uniform Commercial Code requires "reasonable notification" of the sale. 11 M. R. S. A., § 9-504.

> is exercised in accordance with its terms and *with fairness to the mortgagor, if no statute intervenes,* the equity of redemption is extinguished. * * * ." (Emphasis added.)

The principles of chattel mortgages and conditional sales are sufficiently alike to apply the *Stewart* holding to the latter. See *Westinghouse Electric & Manufacturing Company* v. *Auburn and Turner Railroad Company,* 106 Me. 349, 352, 76 A. 897; *Doylestown Agricultural Company* v. *Brackett, Shaw & Lunt Company,* 109 Me. 301, 309, 84 A. 146; and *Harvey* v. *Anacone,* 134 Me. 245, 246, 184 A. 889.

The issue is centered in the contradiction of the terms of the conditional sales contract and the reference statute. The defendant-vendee agreed at the time of purchase that upon vendor's repossessing the equipment, that "to the extent permitted by law" it could be sold "with or without notice." The statute requires that in such cases (where a power of sale has been reserved in the conditional sales contract) the vendee "shall be given at least 10 days' written notice, * * ."

No Maine case has been called to our attention nor have we found one where conflict between contract term and statute has been discussed, but the principle has been recognized in real estate mortgages, and it is settled that a mortgagor will not be permitted to "release, surrender or embarrass his right of redemption by any agreement made at the same time and as a part of the mortgage transaction." *Greenlaw, Executrix* v. *Eastport Savings Bank, et al.,* 106 Me. 205, 207, 76 A. 485. In *Desseau* v. *Holmes, et al.,* 73 N. E. 656, 657 (Mass. 1905) the exact point has been passed upon, in which the court held that a waiver in the conditional sales contract by the vendee of a provision imposing upon the conditional vendor certain duties before he could foreclose the vendee's right to redeem, was void as against public policy. The principle in *Desseau* has been followed

in Massachusetts down to and including *Quality Finance Company* v. *Hurley,* 148 N. E. (2nd) 385, [4] 389 (Mass. 1958)[2] which is the most recent case upon the point in Massachusetts as found in the reporter series.

In other jurisdictions having statutes pertaining to the subject, such as the Personal Property Law of New York and the Uniform Conditional Sales Act, the principle is reiterated. See Annotations on the general subject of rights and remedies as between parties to conditional sales as appear in 37 A. L. R. 91, III d. at 110; 83 A. L. R. 959, III c. at 970; 99 A. L. R. 1288, IIIc. at 1298; 49 A. L. R. (2nd) 15, II § 5 at 29, III § 11 at 45, and of which cases *Crowe* v. *Liquid Carbonic Co.,* 208 N. Y. 396, 102 N. E. 573 (1913), is illustrative and leading.

The single justice held that the antecedent waiver by the vendee of statutory notice supplied him by the statute, was against public policy and we agree. Such sale by the plaintiff was invalid.

Of what effect, if any, has the invalidity of this sale upon plaintiff's attempt to recover a deficiency judgment?

While at common law the terms of the contract controled and, absent appropriate provision for redemption upon default, the vendee was without remedy unless he performed as agreed, *Franklin Motor Car Company* v. *Hamilton,* 113 Me. 63, 65, 92 A. 1001, statutes soon were enacted to protect the improvident and impecunious vendee from unfair dealing and imposition. Our statute granting a right of redemption to a conditional vendee appeared first in Chapter 71, P. L., 1872[3], and similar statutes in other jurisdic-

[2] "* * because it deprives the conditional vendee of benefits afforded to a defendant in his position by * * (statute cited)" and "because of the very strong public policy of protecting conditional vendees against the 'imposition by conditional vendors and instalment houses' * *."

[3] It is to be noted that the clause in Chapter 71, P. L., 1872, reading "but the parties may lawfully stipulate in said notes, that no right of redempion shall exist after breach thereof by non-payment * *" was stricken by Chapter 273, P. L., 1889, and has not reappeared.

tions have long existed, some of which have been embodied within the Uniform Conditional Sales Act and now the Uniform Commercial Code (11 M. R. S. A., §§ 2-703, 2-706, and § 9-504).

As expressed in Annotation in 49 A. L. R. (2nd) *supra* in § 24, Page 82, "(u)nder the various statutes requiring a resale of repossessed property, it is generally held that such a sale, properly carried out, is a condition precedent to the recovery of the balance due under the conditional sales contract, and accordingly, where the seller defaults as to the sale he loses any claim to a recovery of the deficiency." While neither our statute nor the contract under discussion requires a resale, the rule that the provisions of a statute prescribing manner of resale must be observed as a condition precedent to holding the conditional vendee for a deficiency judgment, is by weight of authority enforced. *Massillon Engine & Thresher Co.* v. *Wilkes,* 82 S. W. 316, col. 2, 318 (Tenn. 1904); *Cranston* v. *Western Idaho Lumber & Bldg. Co., et al.,* 238 P. 528, [2] 529 (Idaho 1925); *Commercial Inv. Trust* v. *Browning, et al.,* 152 S. E. 10 (W. Va. 1930); *Mack International Motor Truck Corporation* v. *Thelen Trucking Co., et al.,* 237 N. W. 75 (Wis. 1931); *Commerce Union Bank* v. *Jackson,* 111 S. W. (2nd) 870, [6-8] 872 (Court of Appeals, Tenn. 1937, cert. den. by Supreme Court 1937); *Mott* v. *Moldenhauer,* 27 N. Y. S. (2nd) 563, [6, 7] 566 (Supreme Court, New York, 1941, appeal dismissed by Court of Appeals, 39 N. E. (2nd) 293); *Veterans Loan Authority* v. *Rozella, et ux.,* 90 A. (2nd) 505, [1, 2] 506 (Supr. Court, N. J. 1952, cert. den. Supreme Court, 91 A. (2nd) 448, 1952); and *Kolehouse* v. *Connecticut Fire Ins. Co.,* 65 N. W. (2nd) 28, [1-3] 30 (Wis. 1954).

We so hold. Our statute prescribing a written notice to the conditional vendee before resale by the conditional vendor in possession was mandatory. Compliance with this mandate was a condition precedent to the recovery of any

deficiency due under the terms of the conditional sales contract.

The cases of *Mercier* v. *Nashua Buick Co.*, 146 A. 165 (N. H. 1929) followed by *Randall* v. *Pingree,* 125 A. (2nd) 658 (N. H. 1956), with contrary result, are urged upon us. These cases rest upon the statute particular to that State and are not controlling.

Appeal denied.

PAUL G. WALTZ, APPELLANT
vs.
BOSTON & ROCKLAND TRANSPORTATION COMPANY
AND
TRAVELERS INSURANCE COMPANY

Knox. Opinion, August 5, 1965.

Workmen's Compensation. Industrial Accident Commission.

Evidence supported finding of Industrial Accident Commission of partial, and not total, incapacity of compensation claimant from date of suspension of compensation payments.

There may be no decrease or suspension of compensation payments prior to filing of petition for review of incapacity.

1961 Amendment to Workmen's Compensation Act relating to suspension of compensation pending hearing and final decision was designed to make certain and definitive limitations upon decrease or suspension of compensation payments prior to final decision on review of incapacity.

Basic purpose of Workmen's Compensation Act is to provide compensation for loss of earning capacity from actual or legally presumed incapacity to work arising from accidents in industry.

Legislature had authority to limit review of incapacity and to surround exercise of process by conditions designed to protect employee.

Employer and his compensation insurer, when review of incapacity of claimant is indicated, may, on meeting well-defined statutory conditions, gain benefits of decrease or suspension of compensation to protect against continuance of overpayment measured by incapacity later determined.

Commissioner had no authority to decrease compensation for period prior to final decision of Industrial Accident Commission on petition for review of incapacity, in absence of any agreement between employer and employee for reduction of compensation or statutory certificate filed by employer.

Issue not raised below would not be considered by Supreme Judicial Court on appeal in workmen's compensation proceeding.

Jurisdiction of workmen's compensation commissioner is always open for consideration by court.

Fact that issue relating to jurisdiction of workmen's compensation pending final hearing on employer's petition for review of incapacity was not raised before did not prevent Supreme Judicial Court from inquiry and decision on such issue.

Remedies in courts, including contempt proceedings, are open for recovery of overdue compensation payments.

Commissioner had authority to consider employer's petition to review incapacity notwithstanding fact that, prior thereto, employer discontinued payment of compensation established under approved agreement.

ON APPEAL.

On appeal by claimant from a Superior decision affirming a ruling of the Industrial Accident Commission. Appeal sustained. Remanded for further proceedings.

David A. Nichols, for Appellant.

Mitchell & Ballou, for Appellees.

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

WILLIAMSON, C. J. This Workmen's Compensation case is before us on appeal by the employee from a *pro forma* decree in the Superior Court affirming the decision of the Industrial Accident Commission reducing compensation.

In June, 1962, the employer and employee entered into an agreement approved by the Commissioner of Labor and Industry for weekly payments of compensation for total incapacity beginning in May, 1962. The employer and its insurance carrier (sometimes referred to as appellees) on March 27, 1964 filed with the Commission a petition dated March 26, 1964 for review of incapacity.

The appellees alleged "That since said Agreement was made the incapacity for which the employee is being compensated has ended. Pending hearing on this Petition, compensation was suspended on 9-5-63."

The petition was heard in October and on December 1, 1964 a final decision was entered that the employee was entitled to reduced compensation for partial incapacity to work for stated periods at differing rates from September 4, 1963 to the date of hearing on October 20, 1964, and thereafter. The evidence supports the finding of partial, and not total, incapacity from date of the suspension of compensation payments.

No agreement between the employer and employee for reduction of compensation has been reached and no certificate has been filed under the provisions of the Workmen's Compensation Act set forth below.

There are two issues of importance before us:

First — Did the Commissioner have jurisdiction to hear the petition for review?

Second — If so, did the Commissioner have authority to decrease compensation for periods prior to the final decision?

The pertinent provision of the Workmen's Compensation Act reads:

> "While compensation is being paid [or vocational rehabilitation is being provided] under any agreement, award or decree, the incapacity of the injured employee due to the injury, [the need or progress of the vocational rehabilitation] may from time to time be reviewed by a single commissioner upon the petition of either party upon the grounds that such incapacity has subsequently increased, diminished or ended [or that the need of the continuation of vocational rehabilitation has ended.] [*Pending a hearing and final decision upon such petition for review, and except in such cases as the employer and employee may reach a new agreement under section 32, the payment of compensation shall not be decreased or suspended unless and until a certificate of the employer or his insurance carrier is filed with the commission stating that the employee has left the State or that his present whereabouts are unknown, or that he has resumed work, or that he has refused to submit to a medical examination, or unless a certificate of a physician or surgeon is filed with the commission stating that in his opinion from a current examination the employee is able to resume work.*] Upon such review the commissioner may increase, diminish or discontinue such compensation [or vocational rehabilitation] in accordance with the facts, as the justice of the case may require."

R. S., 1954, c. 31, § 38; 1961, c. 290; c. 384, § 8; c. 417, § 91 (now 39 M. R. S. A., § 100; see also 1965, c. 408, § 10). The 1961 changes are enclosed in brackets with the parts with which we are directly concerned emphasized.

The words of the statute are plain. There shall be no decrease or suspension of compensation pending hearing and final decision unless within the exception or upon the conditions noted. It necessarily follows that there shall be no decrease or suspension of compensation prior to the fil-

ing of the petition for review. To permit suspension as here prior to filing for review, and to deny suspension thereafter would be patently absurd. There is no suggestion that the employer on a petition for review could recover payments previously made to the employee in accordance with an outstanding decree or agreement either directly or indirectly by charge against payments ordered for the future.

The 1961 amendment was designed to make certain and definite the limitations upon the decrease or suspension of compensation payments prior to a final decision on review of incapacity.

Under our construction of the statute, as the appellees assert, an employee may gain more than compensation for loss of earning power. The employee in the case at bar has had earnings from employment during the period for which he remains entitled to compensation for total incapacity.

The appellees argue that in light of the basic purpose of the Workmen's Compensation Act, such a result is unjust and inconceivable, and therefore was not intended by the Legislature.

> "The basic purpose of the Workmen's Compensation Act is to provide compensation for loss of earning capacity from actual or legally presumed incapacity to work arising from accidents in industry. *Fennessey's Case,* 120 Me. 251, 113 A. 302." *Cook* v. *Colby College, et al.,* 155 Me. 306, 310, 154 A. (2nd) 169.

The flat rejection of the 1961 amendment called for by the appellees — for that is where the argument leads — is not compelled by the result so graphically but not in our view accurately characterized by them. The Legislature had the authority without question to limit the review of incapacity and to surround the exercise of the process by conditions designed to protect the employee. *Conners Case,*

121 Me. 37, 115 A. 520. The Legislature may properly have weighed the harm to an injured employee from the decrease or suspension of weekly payments against the harm to an employer or insurance carrier from payments beyond the period of incapacity to the moment of decision.

The employer and insurance carrier when a review of incapacity is indicated may on meeting well-defined conditions gain the benefits of a decrease or suspension of compensation to protect against the continuance of overpayments measured by incapacity later determined.

In the instant case the employer in September, 1963, subsequently alleging incapacity had then ended, suspended the weekly compensation payments. Fourteen months later the Commissioner found the employer was in error and that the employee during the period was partially incapacitated.

If the employer had filed a petition for review with the proper certificate in September 1963, the Commissioner in his final decision would have been authorized under the statute to adjust compensation from the date of filing in accordance with the fact of incapacity. The failure of the employer to comply with the statute is not a sufficient ground to cry injustice in the result. The possibility of loss to the employer from inability to decrease or suspend compensation pending final decision on review is small indeed if the statute is followed.

The appellees cite *Fennessey's Case,* 120 Me. 251, 113 A. 302, and *Zooma's Case,* 123 Me. 36, 121 A. 232, to support their position that "the justice of the case" required the decision of the Commissioner. The cases were decided in 1921 and 1923 under a statute widely differing from that now under consideration, and are not here controlling.

In *Fennessey, supra,* compensation was terminated from the date of filing the petition for review rather than relating back to the date incapacity admittedly ceased, and in

Zooma, supra, the Commissioner excluded evidence of termination of incapacity prior to filing of the petition. In each instance the appeal was sustained.

The statute read in part:

> "**Sec. 36. Agreement, award, findings, or decree may from time to time be reviewed.** At any time before the expiration of two years from the date of the approval of an agreement by the commissioner, or the entry of a decree fixing compensation, but not afterwards, and before the expiration of the period for which compensation has been fixed by such agreement or decree, but not afterwards, any agreement, award, findings or decree may be from time to time reviewed by the chairman of said commission upon the application of either party, after due notice to the other party, upon the ground that the incapacity of the injured employee has subsequently ended, increased or diminished. Upon such review the said chairman may increase, diminish, or discontinue the compensation from the date of the application for review, in accordance with the facts, or make such other order as the justice of the case may require, but shall order no change of the status existing prior to the application for review." R. S., 1916, c. 50, § 36 (enacted in our first Workmen's Compensation Act, Laws 1915, c. 295, § 36).

The court in each case held that the clause "as the justice of the case may require" permitted the reduction of compensation prior to the application for review, and that the "status" clause did not operate to prohibit the result.

The present statute stems from the revision of the Workmen's Compensation Act in 1929.

> "**Sec. 37. Petition for review of incapacity; for further compensation.**
>
> "While compensation is being paid under any agreement, award or decree, the incapacity of the in-

> jured employee due to the injury may from time to time be reviewed by a single commissioner upon the petition of either party upon the grounds that such incapacity has subsequently increased, diminished or ended. Upon such review the commissioner may increase, diminish or discontinue such compensation in accordance with the facts, as the justice of the case may require. . . " Laws 1929, c. 300.

"While compensation is being paid" replaced the time limitations of the earlier statute and the "status" clause was dropped. The statute remained unchanged from 1929 to the 1961 amendment. During this long period issues relating to unilateral decrease or suspension of compensation and to reduced awards reflecting changes in incapacity prior to filing of a petition for review or to final decree did not come before our court for decision.

In *Gooldrup* v. *Scott Paper Co., et al.,* 154 Me. 1, 140 A. (2nd) 765, we upheld the decision that compensation was properly suspended on June 29, 1956. No point was made that the petition was dated July 6, filed July 9, 1956, and decision was made on June 17, 1957.

In *Brouillette* v. *Weymouth Shoe Co., et al.,* 157 Me. 143, 170 A. (2nd) 412, we find suspension of compensation September 10, 1959; petition dated September 28; filed September 29; heard November 19; with decision on January 12, 1960, allowing compensation to September 26, 1959. Again the issues before us were not suggested to the court.

The "while compensation is being paid" clause was referred to in *Rowe* v. *Keyes Fibre Co.,* 152 Me. 317, 320, 129 A. (2nd) 210, prior to the 1961 amendment. No change in the construction of Section 38 was brought about by the case. The statute was expressly stated not to be applicable; and the effectiveness of a retroactive decree on a petition for review was not in issue. See also *St. Pierre's Case,* 142 Me. 145, 48 A. (2nd) 635.

We mention the cases above to show the construction apparently given to the statute then existing. The 1961 Legislature had a purpose in amending the statute and expressed its purpose in plain language, as we have said. The law of *Fennessey* and *Zooma* and the practice in *Gooldrup* and *Brouillette* no longer govern the parties and the Commission.

For arguments to the contrary see *Kent General Hospital* v. *Blanco,* Del. 195 A. (2nd) 553. On review in general see Anno.: Workmen's Compensation — Review 165 A. L. R. 9, with comment on Maine cases at 64 and 447.

We deem it unnecessary to consider appellant's contention that he was deprived of a vested contractual right by the Commissioner in violation of the State and Federal Constitutions. The issue was not raised below and we do not consider it to be before us.

In the appellees' brief, while they expressly "do not rely upon the point," they nevertheless question whether the appellant, lacking designation of record and statement of points of appeal, is properly before us. See Rule 75, M. R. C. P. The record is complete; the issue hereinbefore discussed was clearly before the Commissioner; and the appellees did not object below. Under the circumstances we see no advantage in remanding the case for correction of the record.

Lastly, the appellant argues, to quote from his brief:

> "An employer cannot be heard on petition for review of incapacity if prior thereto, and contrary to statute, the employer discontinued payment of compensation under an approved agreement."

In other words he contends that under the circumstances the Commissioner was without authority to review incapacity and hence the decree thereon is a nullity.

Under familiar principles the jurisdiction of the Commissioner is always open for consideration of the court. *Girouard's Case,* 145 Me. 62, 71 A. (2nd) 682. That the point was not raised before does not bar us from inquiry and decision.

We do not find language in Section 38, to compel such a drastic result. The argument is appealing that compliance by the employer by meeting compensation payments before relief is available to him is a salutory means of enforcing the Act. See *Olbrys* v. *Chicago Bridge & Iron Co.,* 89 R. I. 187, 151 A. (2nd) 684, 687; *Carpenter* v. *Globe Indem. Co.,* 65 R. I. 194, 14 A. (2nd) 235, 129 A. L. R. 410; *Morisi* v. *Ansonia Mfg. Co.,* Conn., 142 A. 393; 101 *C. J. S. Workmen's Compensation,* pp. 857.

Under our statute remedies in the courts, including contempt proceedings, are open for recovery of overdue compensation payments. R. S., 1954, c. 31, § 42; 1961, c. 317, § 67 (now 39 M. R. S. A., § 104).

The construction which we have placed upon Section 38 foreshadows our view of the jurisdictional question. Until 1961 in good faith the employer may have suspended compensation. Since the amendment good faith requires payment until final decision unless the statutory conditions are met.

In the absence of a provision of statute spelling out the effect of suspension in whole or in part upon the right of the employer to seek review or the right of the Commissioner to consider and act on a petition, we are not prepared to say that the Legislature intended to deny an employer in arrears access to the Commission on a petition to review incapacity.

We conclude that the appellant is entitled to compensation under the 1962 approved agreement for total incapacity

until the final decision on December 1, 1964 and thereafter to the compensation ordered for the future.

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.

FIRST MANUFACTURERS NATIONAL BANK OF LEWISTON AND AUBURN, ET AL.

vs.

ERNEST H. JOHNSON, STATE TAX ASSESSOR

Androscoggin. Opinion, August 30, 1965.

Taxation. Mandamus. Constitutional Law.

Though tax assessor may be required under statute to endeavor to settle tax he cannot be required to agree to any particular settlement, at least in absence of abuse of discretion.

Principles governing mandamus were applicable to proceeding, under rule governing review of administrative action, to compel state tax assessor to effect compromise of inheritance tax.

Action of state tax assessor in refusing to effect compromise of inheritance tax with respect to estate of decedent who had died in 1948 other than on a new valuation which trustees under will refused to permit as of 1963 when it first became possible to compute value of remainder interests, was no abuse of discretion; and assessor's action was not reachable by proceeding under rule for review of administrative action as it would not have been previously reachable by mandamus.

State tax assessor's refusal to compromise inheritance taxes due on estate without evidence of present valuation rather than merely valuation as of date of testator's death could in no way constitute a denial of due process as trustees of estate were not required to compromise but could pay tax assessed on values determined at later date.

ON APPEAL.

Proceeding to review administrative action by the State Tax Assessor in refusing to compromise an inheritance tax without a new valuation of estate. On appeal this court held that action of State Tax Assessor in refusing to effect compromise of inheritance tax with respect to estate of decedent who had died in 1948 other than on a new valuation which trustees under will refused to permit as of 1963 when it first became possible to compute value of remainder interests, was no abuse of discretion; and assessor's action was not reachable by proceeding under rule for review of administrative action as it would have been previously reachable by mandamus. Appeal denied.

Skelton & Taintor,
by *Frederick G. Taintor* and
Charles H. Abbott, for Plaintiffs.

Jon R. Doyle, Asst. Atty. Gen., for Defendant.

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

WILLIAMSON, C. J. This is a complaint under Rule 80B M. R. C. P. by the plaintiff trustees under the will of John W. Wood to review administrative action of the defendant State Tax Assessor. The trustees allege that they were aggrieved by the refusal of the State Tax Assessor to effect a compromise of inheritance tax. On motion of the defendant, judgment dismissing the complaint on the pleadings was entered. The plaintiffs appeal.

The plaintiffs seek to have the decision set aside and the cause remanded with instructions that the State Tax Assessor shall enter into good faith negotiations for the settlement of the inheritance tax based on the value of the trust as of the date of the death of the decedent John W. Wood.

The statute under which the plaintiffs seek action reads:

> "In case it is impossible *either to determine the persons entitled to an interest or* to compute the present value of any interest, the state tax assessor may *and to promote the early settlement of taxes shall endeavor to,* with the approval of the attorney general, effect such settlement of the tax as he shall deem [*reasonable in the best interests*] of the state, and payment of the sum so agreed upon shall be full satisfaction of such tax. Executors, administrators and trustees are authorized and empowered to compromise the amount of tax with the state tax assessor." R. S., 1954, c. 155, § 12, as amended 1961, c. 187; now 36 M. R. S. A., § 3635. The 1961 amendment is emphasized; the clause in brackets prior to 1961 read "for the best interest."

We summarize the facts presented by the pleadings as follows:

The trust fund was created under the will of John W. Wood probated in 1948. On the death of the testator's widow, who had certain rights of invasion of the trust, it became possible to compute the value of the remainder interests. From at least May 1963 the trustees have raised the possibility of a settlement of the inheritance tax under Section 12 *supra,* based on a valuation as of the testator's death. The defendant indicated he would not compromise other than on a new valuation of existing assets. On the defendant's request for such a valuation, the plaintiffs refused to "disclose the present market value of the trust because of the fact that it changes from day to day and is irrelevant, for compromise purposes, to the determination of the Inheritance Tax." The defendant replied, "On the

basis of information presently available it does not appear that it would be in the best interests of the State to compromise inheritance taxes . . . as suggested [by the plaintiffs]." The present complaint followed.

The position of the parties may be briefly stated. The plaintiffs wish to compromise the tax under Section 12 *supra,* and insist that the controlling valuation is as of the date of testator's death. The defendant on his part refuses to enter into negotiations without information of the present market value of existing assets of the trust. The plaintiffs seek at the outset to compel the defendant to endeavor to effect a settlement of the tax under Section 12 *supra.* In short, they demand that the defendant come to the conference table on their terms.

The duty of the defendant under the statute to "endeavor to, with the approval of the attorney general, effect such settlement of the tax as he shall deem reasonable in the best interests of the state," is plainly set forth. The defendant may be required to endeavor to settle the tax, but he cannot be required to agree to any particular settlement at least in the absence of abuse of discretion.

> "The statute however further provides that the commissioner, if 'it is impossible to compute the present value,' may 'with the approval of the Attorney General' effect such settlement of the tax 'as he shall deem for the best interests of the commonwealth.' But from the very language of the statute whether such action shall be taken rests in his sound discretion and judgment, and his refusal to comply with the request or demand of the petitioner that a settlement be effected is not reviewable." *Mitton* v. *Burrill,* 229 Mass. 140, 118 N. E. 274.

The principles governing mandamus are equally applicable to this proceeding on complaint. "Mandamus is designed to compel action and not to control decision."

Chequinn Corp. v. *Mullen, et al.*, 159 Me. 375, 377, 193 A. (2nd) 432. See also *Webster* v. *Ballou*, 108 Me. 522, 81 A. 1009; *Nichols* v. *Dunton*, 113 Me. 282, 93 A. 746; *Rogers* v. *Selectmen of Brunswick*, 135 Me. 117, 190 A. 632; 34 Am. Jur., *Mandamus*, § 67.

The presiding justice, in holding that the action of the State Tax Assessor was not prior to Rule 80B reachable by the extraordinary writ of mandamus and hence not by complaint under Rule 80B, implicitly held that the pleadings showed no abuse of discretion by the defendant. See also Rule 81(b)(1). With this view we agree.

Turning to the inheritance tax statute, we find in the instant case property or interests therein not taxed at death are next subject to taxation "assessed on the value of the property or interest therein coming to the beneficiary at the time when he becomes entitled to the same in possession or enjoyment." 36 M. R. S. A., §§ 3634, 3636, (formerly R. S., 1954, c. 155, §§ 11, 13). See *Stetson* v. *Johnson*, 159 Me. 37, 187 A. (2nd) 740, holding valuation at time of testator's death under 1918 law with comment on change by 1933 law, now Section 3636.

By statute there may be a tax assessed on value at death of testator, or on value at date of possession or enjoyment. The compromise statute, Section 12, *supra* (now Section 3635), provides a further method of settling the tax, not by assessment or by court decree, but by agreement. The compromise statute enacted in 1913, c. 128, remained without change to the 1961 amendment (Section 12, *supra*).

In *Cassidy Estate*, 122 Me. 33, 37, 118 A. 725, the court said:

> "A compromise must find its source within the statute and without a court's decree."

See also *Estate of Annie E. Meier*, 144 Me. 358, 69 A. (2nd) 664.

The principle remains in force. In 1961 the Legislature expressed more firmly the desirability of endeavoring to effect a settlement, but left unchanged the broad sweep of discretion in settlement of taxes "in the best interests of the state." In reaching a judgment the State Tax Assessor may consider what tax the State is likely to receive in due course under Section 3636. It seems only reasonable that he should look to what tax might become payable without a settlement in determining to what extent it would be for the best interests of the State to effect a present settlement. Further, the State Tax Assessor may well consider that value at or near the time of compromise should be a factor of weight in effecting a settlement. If so, he is entitled to have the facts before him.

The plaintiffs take too narrow a view of a compromise. We assume that the value of the trust has increased substantially since the testator's death under the plaintiffs' management, and that it would be to their advantage acting for the beneficiaries to have the tax based on value as of date of death.

Let us suppose, however, the market value had depreciated and the trust property now in fact had a substantially less value than at date of death. The trustees would not seek a settlement on the higher value. The measuring rod for both parties to the compromise is an estimate of the tax to be assessed in the future on the falling in of the property interests under Section 3636.

We do not say that a settlement under Section 12 *supra* (now Section 3635), must be based by the State Tax Assessor on existing value. Our decision goes to this: That the State Tax Assessor does not abuse his discretion in making use of and relying upon the present market value of the existing trust property in reaching a settlement. A compromise is not effected by an insistence on an extreme position. Each must give up something of what he be-

lieves himself to be entitled. This is the everyday experience of the practicing attorney in adjusting and settling the affairs of his client.

It would be no more than a useless gesture to force the State Tax Assessor to discuss further a settlement of the inheritance tax in the Wood trust. There was no error in entering judgment for the defendant on the pleadings.

We are satisfied that the plaintiffs followed the proper procedure in presenting their case by a complaint to review administrative action under Rule 80B. See also Rule 81 (b) (1). Complaint in this situation serves precisely the purpose of mandamus before the adoption of the Maine Rules of Civil Procedure.

In *Young* v. *Johnson,* 161 Me. 64, 207 A. (2nd) 392 (1965), we held that mandamus was the proper vehicle in a situation not unlike that before us. The distinction between the cases procedurally is narrow. We might well have said in *Young* that a complaint under Rule 80B would have raised the issues there considered on mandamus. In *Chequinn Corp.* v. *Mullen, supra,* mandamus was followed without reference by party or court to the possible application of Rule 80B. In neither case did the outcome turn on the procedure. It is sufficient to say that insofar as administrative action is concerned, a complaint under Rule 80B fulfills the function of mandamus. *Hammond* v. *Hull,* 131 F. (2nd) 23 (D. C. Cir. 1942) ; 7 Moore's Fed. Practice, Par. 81.07.

The plaintiffs take nothing from the argument that due process prevents the settlement of inheritance taxes in the manner we have upheld. The trustees are under no compulsion to settle. They need not compromise but may pay a tax assessed on values determined at a later date. *Attorney General* v. *Stone,* 209 Mass. 186, 95 N. E. 395.

The State is entitled to have a tax settlement effective only when deemed by the State Tax Assessor "reasonable

in the best interests of the state" and approved by the Attorney General. The argument of the trustees would lead to the destruction of authority to settle taxes under the policy approved by the Legislature for over half a century. The complaint was properly dismissed.

The entry will be

Appeal denied.

GUY V. DRUMMOND
vs.
INHABITANTS OF TOWN OF MANCHESTER

Kennebec. Opinion, August 31, 1965.

Constitutional Law. Appeal and Error.
Automobile Junkyards.

It would be inappropriate for Supreme Judicial Court on appeal to give purely advisory opinion with respect to dead issue.

Where application of landowner in 1964 for permit to establish and maintain automobile junkyard or graveyard was denied, and landowner then brought suit for declaration of his rights under pertinent statutes, and in 1965 justice of Superior Court ordered summary judgment for landowner, Supreme Judicial Court would dismiss town's appeal in 1965 on ground that case was moot because judgment below came too late and was required to be set aside, in view of fact that statute provides that permit, if granted, shall be valid only until first day of year following.

ON APPEAL.

This is an appeal from an order of summary judgment for the landowner declaring that a permit should have been granted subject to and conditioned on reasonable rules and regulations. The court held that the appeal was required to be dismissed on the grounds that the case was moot be-

cause the judgment below came too late in view of a statutory change. Appeal dismissed.

Sanford L. Fogg, for Appellant.

Seward B. Brewster, for Appellee.

Barnett I. Shur, amicus curiae.

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

PER CURIAM

In 1964 plaintiff applied to the Municipal Officers of defendant town for a permit to establish and maintain upon his own property an automobile junkyard or graveyard so-called. After notice and hearing the permit was denied. Plaintiff then brought a complaint in the nature of a petition for declaratory judgment seeking a declaration of his rights under and an interpretation of the pertinent statutes. (Now 30 M. R. S. A., Secs. 2451 to 2458, inc.; formerly R. S., 1954, Chap. 100, Secs. 137 to 144, inc., as amended). As of February 8, 1965 the justice below ordered summary judgment for the plaintiff on his complaint declaring that the 1964 permit should have been granted subject to and conditioned upon reasonable rules and regulations affecting operation imposed by defendant. An appeal was taken thereto.

Sec. 2452 provides in part that a permit, if granted, "shall be valid only until the first day of the year following." It follows that the permit for 1964, in issue here, would not be affected by our decision. Conditions change from year to year under which such permits are granted or denied by municipal officers. Changes are also wrought by legislative amendment. We note with interest the enactment of P. L., 1965, Chap. 285 which amends the above-

cited statutes and adds a new section 2451-B which contains a definition of "automobile graveyard" not found in the original sections. It would be inappropriate for this court to give a purely advisory opinion with respect to a dead issue. The judgment below came too late and must be set aside. The case is moot.

Appeal dismissed.

EVA F. ANDERSON

vs.

HAROLD L. MARSTON

Cumberland. Opinion, September 16, 1965.

Landlord and Tenant. Trial. Appeal and Error. Damages.

Fact that landlord had control and possession of passageway in which tenant was injured imposed upon him, entirely apart from any contractual obligation, duty to exercise reasonable care and to maintain passageway reasonably safe for use by occupants of premises and by their invited guests.

Evidence was sufficient to support finding that landlord retained control of outside common passageway in which tenant was injured and, by allowing broken tile pipe to remain projecting under snow in proximity of passageway, was negligent in failing to exercise reasonable care to maintain the walk in a reasonably safe condition and to keep it free from objects which would tend to create hazard to tenant, member of tenant's family, and his invitees.

Where defendant landlord knew for some time prior to tenant's injury, and by reasonable diligence should have known, that there was broken tile pipe, concealed by covering of snow, projecting in proximity of common passageway, landlord's duty of ordinary care was not fulfilled when he failed to fix the pipe, remove it, or otherwise prevent it from creating hazardous condition.

The criterion of landlord's liability for injuries occurring in common stairways and passageways is the obligation to exercise due care to keep such common ways in reasonably safe repair with right of control for that purpose.

It was for jury to determine whether tenant's injury was caused by broken tile obscured and embedded in snow and ice near common way giving access to tenant's apartment and to that of her son.

Instructions were proper where rules of law applicable to evidence were fully and correctly stated by presiding judge, and all factual issues were properly left to jury.

Landlord, in action brought by tenant for injuries sustained through alleged negligence of landlord in maintaining safe walkway, was not prejudiced by evidence that tenant and witness for tenant had been previously convicted of lascivious cohabitation, where judge made it clear in instructions that admission of such evidence was for purpose of determining credibility of tenant and witness.

Complaint of tenant injured in tripping over broken tile concealed under snow on common walkway set forth cause of action against landlord.

Rule that all defenses and objections are waived which are not presented either by motion or in answer or reply made it impossible for defendant to raise for first time in appellate court that complaint did not set forth cause of action. Rules of Civil Procedure, Rule 12(h).

Extent of plaintiff's injuries and resulting damages are questions for jury, no less than the question of liability.

Award of $2,500 for leg laceration for which plaintiff was entitled to recover medical expenses of $49, loss of earnings of $154, and reasonable compensation for pain and suffering was excessive, and there was no warrant for award greater than $1,250.

ON APPEAL.

Action of tort for personal injuries sustained by tenant through alleged negligence of landlord in maintaining common walkway near apartment building. Verdict was for tenant, and landlord appealed from denial of motion for

new trial by Superior Court. Motion for new trial denied on condition of remittur.

Julian G. Hubbard, for Plaintiff.

Basil A. Latty, for Defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, MARDEN, RUDMAN, JJ. SULLIVAN, J., sat at argument but retired before the decision was adopted.

RUDMAN, J. This is an action of tort in which the plaintiff seeks to recover damages for personal injuries sustained by her through the alleged negligence of the defendant. The verdict was for plaintiff in the sum of twenty-five hundred dollars. The defendant brings the case here on appeal on points stated and on appeal from the denial of a motion for a new trial.

The defendant was the owner of a four unit apartment house. The plaintiff was a tenant of the defendant, occupying a second floor unit. Her son was a tenant in the same apartment house occupying a unit on the first floor. On March 1, 1963, at approximately 10:00 P.M. the plaintiff was returning from the defendant's place of business, which was located across the street from the apartment house. Her son was accompanying her and they were walking on a common way leading to the apartment house and maintained by the defendant. She was proceeding ahead of her son, and he a few feet to the rear, with the intention of visiting her son in his apartment. As they approached the northwesterly corner of the apartment house, and while she was walking at the edge of the common way, which was covered with snow and ice, she tripped over a broken tile which caused her to fall and sustain a severe laceration of her left leg. At the northwesterly corner of the apartment building there was attached to the exterior wall of the house

a metal drain extending down from the roof gutter, to which a twelve-inch piece of tile pipe had been attached for the purpose of diverting the water away from the building. The tile was dislodged and separated from the drain pipe on December 22, 1962, and at the time this accident occurred was broken and the pieces embedded in snow and ice and not visible above the surface.

The defendant's awareness of the condition is clear by his answer to the questions propounded by the presiding justice.

"BY THE COURT:

Q Did you know that pipe was broken?
A Yes.

Q When did you first learn it was broken?
A When it was broken?

Q That was how long before - - -
A December 22nd, the first snow storm.

Q You knew the pipe was broken all the time between December 22nd, 1962, and March 1st, 1963?
A Yes, and it was buried under that snow. It got buried up the first snow storm."

The defendant as landlord had control and possession of the passageway in question. Entirely apart from any contractual obligation, this fact imposed upon him the duty to exercise reasonable care and to maintain the passageway reasonably safe for use by the occupants of the premises and by the invited guests of a landlord's tenant.

There was sufficient evidence presented to the jury to support its finding that the defendant landlord retained control of the outside common passageway and was negligent in failing to exercise reasonable care to maintain the walk in a reasonably safe condition and to keep it free from ob-

jects, which would tend to create a hazard to a tenant, a member of a tenant's family and his invitees.

The duty of ordinary care was not fulfilled when the defendant failed to either affix the tile pipe to the drain or remove it from the proximity of the common passageway and prevent it from creating a hazardous condition.

There can be no doubt from all the evidence that there was at the time of this accident, and had been for sometime prior thereto, a broken tile pipe concealed by a covering of snow which was permitted to remain on the common way. This the defendant knew and by reasonable diligence should have known.

This court in *Clifton Thompson* v. *Mary C. Frankus,* 151 Me. 54, 55, said: "It is almost universally held that a landlord who has retained control of common stairways owes to his tenants and their invitees the duty of exercising ordinary care to keep such stairways reasonably safe for their intended use. 32 Am. Jur. 561, Sec. 688 (Note 9 and cases cited); *Sawyer* v. *McGillicuddy,* 81 Me. 318; *Austin* v. *Baker,* 112 Me. 267; *Toole* v. *Beckett,* 67 Me. 544; *Miller* v. *Hooper,* 119 Me. 527; *Robinson* v. *Leighton,* 122 Me. 309; and *Smith* v. *Preston,* 104 Me. 156. 'The opinion in *Smith* v. *Preston, supra,* states the rule of liability thus: in all cases the criterion of liability is the obligation to maintain and repair with the right of control for that purpose.' *Jackson* v. *Leventhal,* 128 Me. 424 at 426." This rule is equally applicable to common ways.

In the case of *Miller* v. *Hooper, et al.,* 119 Me. 527, 529, we said: "We conceive the true rule to be that the owner must exercise due care to keep in reasonably safe repair, stairways and passageways which remain under his own control." A like duty was of course owed by the landlord to the tenant's invitee.

It is fair to assume from the record that the common way in question was the means of access to the apartment occupied by plaintiff's son, where she intended to visit. It was also a means of access to the apartment of which she was a tenant. It was the duty of the defendant to exercise reasonable, ordinary or due care to keep the premises in a reasonably safe condition for plaintiff's use, whether she was there as a tenant of the defendant or as an invited guest of her son.

The jury could have found the injury which she sustained was caused by the broken tile. If the tile had not been obscured and embedded in the snow and ice she would not have sustained the injury complained of. It was for the jury to determine the details of her fall and the cause of her injury.

The defendant's objections to the instructions as given by the presiding justice and his objections to the refusal of the presiding justice to give the requested instructions must be overruled. It appears by the charge that the rules of law applicable to the evidence were fully and correctly stated by the presiding justice in his instructions to the jury. He explained accurately the legal duty owed by the defendant landlord, the effect of any contributory negligence on the part of the plaintiff and the significance of the terms "negligence," "contributory negligence" and "reasonable care." All factual issues were then properly left to the jury.

On cross-examination Roger Blais, a witness for the plaintiff, admitted having been convicted of lascivious cohabitation.

Upon redirect examination the following inquiry was made:

"Q I again ask you now, is it your intention to marry Mrs. Anderson?

Mr. Latty: I object.

The Court: Overrule the objection. You may answer the question.

A Yes, I do."

The foregoing question and answer became innocuous in view of the prior testimony of Eva L. Anderson, which was admitted without objection.

Q Mrs. Anderson, what are your intentions with Mr. Blais?

A After everything is all straightened out, we are going to get married, but not until everything - - - - -"

A further revealing aspect may be noted in the cross-examination of Eva L. Anderson.

"Q Are you the same individual, Eva Anderson, who was convicted on July 31st, 1962, in the Brunswick Municipal Court for lascivious cohabitation?

. . . . . .

Q Are you?

A I really don't know if I was convicted. I admitted to it, yes.

Q Didn't you plead guilty to it?

A I signed a paper to the effect. Yes."

Examining the testimony in the light of which party would be the most likely to benefit, it clearly indicates a friendly relationship between the plaintiff and the witness, Roger Blais. It seems to us instead of mitigating the odium of the conviction, it would cause the jury to more closely examine the testimony of the witness.

It suffices to say if there was error, the defendant was in no way prejudiced thereby.

The presiding justice in his instructions made clear the purpose for which the evidence of a criminal conviction was

admitted by saying "If you find in fact that one or both of the witnesses were convicted of the crime described, you may consider that fact, if you find it to be a fact only, and I repeat, only for the purpose of determining whether or not their testimony is credible. Would you give as much weight had they not been so convicted, if they were in fact convicted of the crime, as you would had they not. That is the sole use which can be made of such evidence."

We now consider the defendant's motion for a new trial stating the following grounds: "(1) The damages are excessive, (2) the plaintiff neither alleged nor proved a claim for which relief should be granted."

We find the complaint does set forth a cause of action, and further Maine Rules of Civil Procedure, Rule 12 (h) provides:

> "A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except etc."

The Reporter's Notes in Maine Civil Practice by Field & McKusick states:

> "Rule 12 (h) has been held to make it impossible to raise for the first time by motion after verdict or in the appellate court that the complaint is insufficient as a matter of law."

The Commentary, Section 12.6 of Rule 12 states:

> "If the pleader elects to file an answer as his first defense step, he should include every defense of law or of fact that is open to him. With the exception listed in Rule 12 (h) any defense or objections not made at this stage is waived."

While we recognize that the extent of the plaintiff's injuries and resulting damages are a question for the jury, no less than the question of liability, the damages in this

case assessed by the jury are clearly excessive. She sustained a laceration of her left leg five inches long and about one-half inch deep. She was treated at the Osteopathic Hospital of Maine in Portland on March 1, 1963, the date of the accident, and was further treated on March 4, 6, 8, 11, 13 and 15. The hospital bill was $39.00. No separate charge was made for the services of Dr. Hans F. Waecker who at the time was an interne at the hospital. She next visited Dr. Waecker on October 8, 1963, he then being in private practice, and incurred a charge of $10.00. The bill states: "10-8-63 Follow up check of well healed laceration. 10-9-63 Report to Mr. Hubbard, review of records." She was unable to follow her employment for three to four weeks and sustained a loss of earnings of $38.50 per week.

The plaintiff is entitled to recover her incidental medical expenses of $49.00, loss of earnings of $154.00, and reasonable compensation for her pain and suffering. From a review of the record, the jury's verdict was manifestly excessive. There is no warrant for an award greater than $1,250.00.

The entry will be,

Motion for new trial granted unless within 30 days from filing of mandate plaintiff remits all of the verdict in excess of $1,250. If remittitur is filed, appeal denied.

ELIZABETH L. EASTMAN
vs.
ERNEST H. JOHNSON, STATE TAX ASSESSOR

Cumberland. Opinion, October 1, 1965

Taxation. Decedents. Estates.

Taxability stems not from fact that the State has provided legal machinery by which succession occurs but rather that the State is justified by the duty of the decedent to contribute to its support in taxing a succession to his property within its jurisdiction.

Quoted words in statute providing for taxation of a decedent's property "within the jurisdiction" of the State cover all the property of persons domiciled in Maine at time of death including intangibles such as joint bank accounts or corpus of trusts located outside borders of Maine.

Where a trust is involved, doctrine of *mobilia sequuntur personam* treats intangibles as being owned by a settlor at death and as having their situs, for purposes of succession tax, in State of settlor's domicile.

Where decedent had opened bank account in Massachusetts designating decedent and plaintiff as payees with rights of survivorship, and plaintiff contributed no funds to such account, such account constituted intangible property required to be treated as property located for purposes of succession tax in Maine at moment of death, and hence succession to such account was taxable under Maine statute.

ON REPORT.

This is on report from the Probate Court seeking an abatement of a tax paid under protest involving a joint bank account with the plaintiff and the decedent to which account the plaintiff had contributed no funds. Although the bank account was in Massachusetts, the court held that the property was required to be treated as propery located for purposes of succession tax in Maine and hence such

bank account was taxable under Maine statute. Judgment for defendant.

Joseph A. Aldred, Sr.,
Arthur A. Peabody, for Plaintiff.

Ralph W. Farris,
Jon R. Doyle, Asst. Attys. Gen., for Defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, MARDEN, RUDMAN, JJ. SULLIVAN, J., sat at argument but retired before the decision was rendered.

WEBBER, J. On report. The plaintiff as administratrix of the estate of the late R. Sanger Leland seeks abatement of a tax paid under protest. The decedent was domiciled in Maine. During his lifetime he opened certain accounts in Massachusetts banks and provided that these accounts carry the names of the deceased and the plaintiff as payees with rights of survivorship. The plaintiff contributed no funds to these accounts but as survivor has taken title thereto. The defendant tax assessor imposed a succession tax on the estate pursuant to 36 M.R.S.A., Sec. 3461. Sec. 3461 provides in part:

> "The following property shall be subject to an inheritance tax for the use of the State:
>
> 1. Real and personal property; joint ownership. All property *within the jurisdiction* of this State and any interest therein belonging to inhabitants of this State * * * which shall pass:
>
> * * *
>
> C. By survivorship in any form of joint ownership including joint bank deposits in which the decedent joint owner contributed during his lifetime any part of the property held in such joint ownership * * * ." (Emphasis ours.)

The plaintiff contends that since it is the law of Massachusetts which alone provides and permits the succession of this joint bank account to the survivor, Massachusetts alone can tax that succession. It may be noted in passing that Massachusetts has displayed no intention to impose the tax. Our decision, however, does not rest on either the possibility of double taxation or the possibility of a complete escape from taxation.

Some aspects of the present controversy were present in *Estate of Annie E. Meier* (1949), 144 Me. 358, 69 A. (2nd) 664, which the defendant deems to be controlling here. In that case the decedent had established a revocable *inter vivos* trust executed in New York naming first a New York trustee and later by amendment a trustee resident of Missouri. The trust expressly provided that it was to be construed under the laws of New York. The paper evidences of intangibles in the trust were all physically located outside of Maine. The succession sought to be taxed occurred not by force of Maine law but by the terms of a trust agreement governed by New York law. Nevertheless our court had no hesitation in justifying the imposition of a succession tax in Maine. The opinion quoted with approval the statement of Mr. Justice Stone in *Curry, et al.* v. *McCanless* (1939), 307 U. S. 357, 59 S. Ct. 900, "From the beginning of our constitutional system control over the person at the place of his domicile and his duty there, common to all citizens, to contribute to the support of government have been deemed to afford an adequate constitutional basis for imposing on him a tax on the use and enjoyment of rights in intangibles measured by their value." The theory of Meier appears to be that taxability stems not from the fact that the State has provided the legal machinery by which the succession occurs but rather that the State is justified by the duty of the decedent to contribute to its support in taxing a succession to his property within its jurisdiction. The words "within the jurisdiction" as used in Sec. 3461

cover all the property of persons domiciled in Maine at the time of death including intangibles such as joint bank accounts or the corpus of trusts located outside the borders of Maine. As was said in *Bunting* v. *Sullivan* (1965), 206 A. (2nd) (Conn.) 471, 473: "Where a trust is involved, the doctrine of *mobilia sequuntur personam* treats intangibles as being owned by a settlor at death and as having their situs, for purposes of the succession tax, in the state of the settlor's domicile."

We have seen no case which more nearly embraces the situation here than does the case of *State* v. *Parmalee* (1949), 115 Vt. 429, 63 A. (2nd) 203. In that case the decedent, domiciled in Vermont, deposited funds in a New York bank in a joint custodian account with the provision that such funds should be the joint property of decedent and his wife and that upon the death of one the ownership of such funds should vest absolutely in the survivor. The account was subject to withdrawal by either payee. Upon the death of the decedent Vermont sought to tax the succession. In that case it was clearly the law of New York which permitted and provided for the succession to the account. Nevertheless the Vermont court after first declaring that "it is the law of this state and, it seems, of all jurisdictions that the right of succession to intangible property is taxable in the state wherein the owner was domiciled at the time of his death," went on to state: "We have here a situation where, beyond question, this state has the authority and power to levy a tax on the right of succession to intangibles owned by a deceased resident. The question of whether this power and authority can be exercised in a given case is to be determined by our law and none other." The court held the succession to the corpus of the custodian account to be taxable.

We conclude, as did the Vermont court, that this joint account comprising funds furnished by decedent in his life-

time is an intangible which must be treated as property located for purposes of taxation in Maine at the moment of death. The succession to property so situated is taxable under Section 3461.

Judgment for the defendant.

ASSOCIATED HOSPITAL SERVICE OF MAINE
vs.
GEORGE F. MAHONEY AND THE HEALTH INSURANCE ASSOCIATION OF AMERICA, ET AL., INTERVENORS

Cumberland. Opinion, October 13, 1965.

Insurance. Constitutional Law.

The Commissioner, by virtue of statutory powers, has supervision of AHS contracts.

The Public Law prevails over the legislatively-granted charter where the act sought to be performed is not specifically enumerated and no necessity of it for the successful operation of such corporation can be shown.

The AHS contract is a contract of insurance. The "extended benefit endorsement" continues to reflect conventional accident-health insurance.

The Commissioner raises the issue in the capacity of public officer as to controversial facts. The act is not ministerial (without discretion) but quasi judicial. His questioning of the constitutionality of the law falls within several recognized exceptions.

The competition between the plaintiff and intervenors shows the interests of the intervenors to be affected by the contract AHS proposes to sell. It is therefore obvious that the "equal protection" clause has direct application and the intervenors are competent to raise the question.

The plaintiff's charter, as it pertains to "extended benefit endorsement" denies equal protection of the laws to the intervenors and is therefore invalid.

ON REPORT.

Action by nonprofit hospital service organization for a declaratory judgment as to insurance commissioner's authority to disapprove its proposed extended benefits program, as to validity of its charter for such extended benefits contract, and for an injunction *pendente lite* against interference by the commissioner. On report from the Superior Court, Cumberland County, the Supreme Judicial Court, Marden, J., held that the organization's charter as it pertained to issue of extended benefits endorsement contracts beyond those explicitly authorized in public law, even though in accordance with special act, denied private insurance carriers equal protection of the laws and was invalid in that there was no longer reasonable basis for different classifications of it and private noncharitable health insurers. Injunction *pendente lite* discharged and charter declared invalid.

Verrill, Dana, Walker, Philbrick & Whitehouse,
by *John A. Mitchell,* for Plaintiff.

Frank E. Hancock, Attorney General,
Albert E. Guy and
Leon V. Walker, Asst. Attys. Gen., for Defendant.

Bernstein, Shur, Sawyer & Nelson,
by *Sumner T. Bernstein, and*
Kenneth Laurence, for Defendant.

SITTING: WEBBER, TAPLEY, MARDEN, RUDMAN, JJ. WILLIAMSON, C. J., did not sit. SULLIVAN, J., sat at argument but retired before the opinion was adopted.

MARDEN, J. On report. Associated Hospital Service of Maine (AHS) was incorporated by Chapter 24, Private and Special Laws, 1939 (Charter), for the purpose of establishing, maintaining and operating a nonprofit hospital service plan whereby hospital care might be provided by hospitals with which the corporation might have a contract to such of the public as might become subscribers under a contract with AHS.[1] The act provided that it could qualify for operation by submitting, among other things, copies of its proposed contracts and table of rates to be charged to the Insurance Commissioner (Commissioner) of the State and that the Commissioner should annually issue a license to AHS upon being satisfied, among other things, that the proposed program be a non-profit

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[1] *Blue-Cross Contract.* The contract between a participating hospital and AHS, provides that *inter alia*, upon the financial responsibility of AHS The Hospital will supply any member "with the allowances to which he is entitled" by virtue of the member's contract with AHS "and from THE HOSPITAL'S prevailing rates of charge * * * during the days of care authorized by AHS to grant an allowance to the patient to the full extent provided for" in the contract between the patient and AHS. The patient is responsible directly to the hospital for payment of any charges remaining after allowance by the hospital of the amount obligated by AHS.

Associated Hospital Service agrees "(t)o pay THE HOSPITAL for making the contractual allowances * * * which have been provided to the member,"—a stated fee for admission of the member-patient and subsequent per diem rate. Such payments "may be supplemented from time to time as permitted by the resources of AHS," which payments result in a "non-profit" operation.

The contract between AHS and its member, said contract being called a certificate, provides that the benefits under the Member-AHS contract "shall be in the form of allowances by Participating Hospitals against the regular charges for services rendered by such Participating Hospitals, except as otherwise * * * provided for in this Certificate." It is provided that the subscriber (member) "shall be primarily responsible to such hospital for * * * charges not included in the benefits of this Contract * * *."

The benefits provided by the member's contract with AHS do not include services of attending physician, services not regularly available in the participating hospital, private nurses, blood and blood plasma. ambulance service, appliances and supplies taken from the hospital upon discharge and certain other care and services not here pertinent.

program and that the rates charged and benefits provided be fair and reasonable. The Commissioner was authorized to examine the affairs of the corporation; was to serve as an arbiter in controversies arising between the corporation and any hospital, and was empowered to supervise dissolution as in cases involving insurance companies. The act declared AHS a charitable institution and exempted it from taxation. This service of the corporation has become known as "Blue Cross" service. This special act was approved March 2, 1939.

> At the same session of the Legislature Chapter 149, Public Laws 1939, an enabling act, with essential terms the same as Chapter 24 of the Private and Special Laws, permitted the organization of non-profit hospital service corporations under the general law. The supervisory responsibility of the Commissioner was expanded to the licensing of selling agents for the corporation. This general act was approved March 30, 1939.

By Chapter 21, Private and Special Laws 1943, permissible operation of AHS was extended to cover contracts for medical and surgical service.[2] This service of the corporation has become known as "Blue Shield" service.

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[2] *Blue-Shield Contract.* In the contract between a participating physician and AHS, the physician agrees to render professional services in accordance with the plan of AHS and that he will accept payment therefor according to the schedule of fees fixed by AHS with provisions for supplemental payments from earnings upon AHS investments.

In the contract between the member and AHS for physician's service benefits, AHS certifies that the subscriber is "entitled to benefits in accordance with the terms, conditions and provisions appearing hereinafter," followed by schedule of benefits, provided, however, that "A.H.S. shall not be responsible for payment of any difference between such amounts (of benefits) and the doctor's fee for his services, such difference being the personal responsibility of the * * * Member." The patient is also responsible to the doctor for payment of charges for services rendered during extra visits, except such charges paid under the contract for intensive care.

This contract provides, within stated limits, the benefits of an attending physician excluded under the Blue Cross contract (footnote 1).

By Chapter 47, Public Laws 1951, the permissible operation of non-profit hospital service corporations was likewise extended under the general law.

By Chapter 175, Private and Special Laws 1955, the permissible operation of AHS was extended to group contracts and reciprocal arrangements with similar corporations in other states.

The general law was not co-extended.

By Chapter 47, Private and Special Laws 1957, the authority of AHS was extended to issue non-profit contracts under which it assumed liability (responding by cash indemnity) on the whole or part of the expenses incurred by a subscriber as a result of injury or disease not covered by the corporation's regular contracts for hospital or medical service (hereinafter referred to as "extended benefits") provided, however, that such liability was reinsured and further, that, subject to the prior approval of the Commissioner, AHS might, on a non-profit basis, perform services for the State or United States Governments. The phase of the 1957 extension authorizing extended benefits not covered by AHS's regular contracts is in Section 3 C of the plaintiff's charter and is the source of the present controversy.

The general law was not co-extended.

By Chapter 135, Private and Special Laws 1963, Charter, Section 3 C was amended to authorize AHS to offer the extended benefits without reinsurance, provided that a deposit was made with the Treasurer of State as security for the payment of "said additional benefits," which shall be limited to health care services and supplies, but not include indemnity for loss of time, incapacity or death.[3]

[3] *Extended Benefits Endorsement.* This contract between the member and AHS provides that "in consideration of the additional charges for this Endorsement, the following extended benefits are

At this point, and after AHS had deposited the required security, it submitted to the Commissioner a copy of the proposed extended benefits contract (Extended Benefits Endorsement BC-BS-63) and offered the new contract to the public.

After some intervening negotiations, and an opinion rendered to the Commissioner by the office of the Attorney General, the Commissioner disapproved the proposed contract as being in conflict with R. S., 1954, Chapter 60, §§ 244-257, inclusive, "Non-profit Hospital or Medical Service Organizations" (now 24 M.R.S.A., §§ 2301-2315), which statute embodied the 1939 and 1951 public laws referred to above, with changes not here pertinent.

The conflict arises between Section 3 C of the AHS charter which authorizes the extended benefits contract and §§ 244 and 246, of Chapter 60, R. S., 1954 (now 24 M.R.S.A., §§ 2301 and 2303) which defines the scope of such organizations under the general law and which scope is confined to the Blue Cross and Blue Shield programs.

Associated Hospital Service sought a declaratory judgment as to the Commissioner's authority to so disapprove and as to the validity of Section 3 C of its charter, and sought an injunction *pendente lite* against interference by the Attorney General and the Commissioner. While the complaint was pending before the single justice, the Health Insurance Association of America, *et al.*, sought permission to intervene under Rule 24 M.R.C.P. and were per-

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added to those of the applicable basic certificates," (Blue Cross-Blue Shield certificates). For this consideration AHS contracts that "the benefits of this Endorsement will be paid as indemnities for Eligible Expenses incurred by the Subscriber" for expenses incurred as a result of injury or disease not covered by the basic certificates, with AHS reserving the right to make payment either to the subscriber or the provider of services. These extended benefits include, among other things, for care in a skilled nursing facility, private nursing, visiting nurse service, ambulance service, appliances and supplies needed after discharge, all with fixed maximum monetary limits.

mitted to do so. The complaint was discontinued as against the Attorney General. After hearing, introduction of exhibits and recording of stipulations, preliminary injunction was granted and by agreement the case was reported.

The following questions of law are stipulated:

1. The extent of the Insurance Commissioner's jurisdiction over issue of contracts by plaintiff.
2. Whether Chapter 135, Private and Special Laws 1963 (and Chapter 47, Private and Special Laws 1957), conflicts with Chapter 60, § 244, R. S., 1954, as amended (and if so with what effect), and
3. Whether (exercise of rights granted plaintiff under) Chapter 135, Private and Special Laws, 1963, denies the intervenors the equal protection of the law (constitutionally guaranteed).

Within the stipulated questions plaintiff contends:

1. That the Insurance Commissioner has no standing to question the constitutionality of Charter, Section 3 C, and
2. That the intervenors have no standing to question the constitutionality of Charter, Section 3 C.

Although not stipulated, it is established that AHS is the only non-profit hospital or medical service organization existing in Maine.

Standing of Commissioner and Intervenors.

The standing of the Insurance Commissioner and the intervenors is first considered.

Conceding that the weight of authority does not permit a ministerial public officer to challenge the constitutional validity of the law under which he is enjoined to act

through a writ of mandamus, *State ex rel. Atlantic Coast Line R. Co.* v. *State Board of Equalizers,* 94 So. 681, 689 (Fla. 1922); *Smyth* v. *Titcomb,* 31 Me. 272, 285, but with cases *contra* as in *Van Horn, et al. v. State ex rel. Abbott,* 64 N. W. 365, 372 (Neb. 1895), we are here involved neither with mandamus nor the ministerial act of a public officer. We are here concerned with a petition for declaratory judgment in which we are asked to review the legal position assumed by the Commissioner.

The very nature of this proceeding requires examination of all pertinent issues. 14 M.R.S.A., §§ 5953, and 5954.

The conduct of the Commissioner, here reviewed, is not ministerial. The Commissioner is not a party to the case by virtue only of the duty imposed upon him by Section 6 of the plaintiff's charter to annually issue a license to it upon being satisfied of the existence of uncontroversial facts. His decision as to license requires a finding as to controversial facts and involves exercise of discretionary power and judgment, and such act is quasi judicial.

> "A purely ministerial duty is one as to which nothing is left to discretion. Judicial acts involve the exercise of discretionary power or judgment. Judicial acts are not confined to the jurisdiction of judges." *City of Biddeford* v. *Yates,* 104 Me. 506, 511, 72 A. 335.

He is raising an issue as a public officer by virtue of what he considers a conflict between the private and public laws pertaining to an activity, both the private and public aspects of which are within his responsibility.

The operation by the plaintiff is not only sufficiently analogous to that of the insurance industry, which is a matter of public interest, *American Fidelity Co.* v. *Mahoney,* 157 Me. 507, 514, 520, 174 A. (2nd) 446, to be likewise of public concern, but the legislature has so recognized it by the terms of plaintiff's charter.

Analogically in cases where insurance companies disagree with the Commissioner's disapproval of a proposed contract, the statute provides an appeal to the court and that the court "shall determine whether or not the reasons assigned by the commissioner are valid and thereupon sustain or annul said ruling." 24 M.R.S.A., § 56. It is the failure of the Commissioner to approve the proposed "extended benefits" contract offered by plaintiff that prompts this litigation.

Even within the general rule preventing a ministerial officer from questioning the constitutionality of the law under which his performance is sought there is recognized an exception "when the rights of the state or the public interest are involved." *Port Authority of City of Saint Paul, et al.* v. *Fisher,* 132 N. W. (2nd) 183, [10] 194 (Minn. 1964); *Department of State Highways, et al.* v. *Baker,* 290 N. W. 257, [2] 260 (N. D. 1940); and *Loew* v. *Hagerle Bros., et al.,* 33 N. W. (2nd) 598, [1] 601 (Minn. 1948).

Within the same rule an exception is recognized when the performance by an officer in compliance with an invalid law may injuriously affect him personally, such as exposing him to a breach of his official bond, *City of Montpelier* v. *Gates, et al.,* 170 A. 473, [17, 18] 476 (Vt. 1934); and *State ex rel. Sullivan* v. *Boos,* 126 N. W. (2nd) 579, 582 (Wis. 1964), or when an officer acts under advice of the State's Attorney General. *Baker, supra; State ex rel. Equality Sav. & Bldg. Ass'n* v. *Brown,* 68 S. W. (2nd) 55, [1, 2] 58 (Mo. 1934); and followed in *State Board of Mediation* v. *Pigg,* 244 S. W. (2nd) 75, [1-4] 78 (Mo. 1951). The defendant Commissioner is bonded. 5 M.R.S.A., § 9.

Furthermore the question of constitutionality, as it affects the Commissioner, enters the case collaterally. Neither the plaintiff's charter nor the public law under consideration *per se* raises a constitutional question between AHS and the Commissioner. Constitutionality is

injected into the dispute by Article IV, Part Third, Section 14 of our Constitution, quoted later in this opinion.

The Commissioner is competent to question the compatibility of the plaintiff's charter and the general law.

The intervenors, allegedly representing a wide segment of the health insurance industry active in Maine, asked, and were permitted to join the case under Rule 24, M.R.C.P., as having interests which would be affected by the extended benefits contract which plaintiff proposes to sell. It cannot be contended seriously that if the plaintiff, as an organization, tax exempt and relatively free from statutory supervision, is permitted to issue contracts to indemnify the subscribers for expenses of health care service and supplies not identified with the hospital and medical service contracts, in competition with the health insurance contracts offered by the intervenors subject to taxation and statutory supervision, that such business cannot and may not injuriously affect them. "One who would strike down a statute as unconstitutional, must show that it affects him injuriously, and actually deprives him of a constitutional right," *Inhabitants of Town of Canton* v. *Livermore Falls Trust Company,* 136 Me. 103, 107, 3 A. (2nd) 429; and *State of Maine* v. *The Fantastic Fair, et al.,* 158 Me. 450, 472, 186 A. (2nd) 352, or threatens to do so, *Sleeper, Applt.,* 147 Me. 302, 308, 87 A. (2nd) 115 and *Bryan* v. *The Federal Open Market Committee, et al.,* 235 F. Supp. 877, [2] 880 (D. C. Mont. 1964). As between AHS and the intervenors the "equal protection" clause of the Constitution has direct application. The intervenors are competent to raise this constitutional question.

With "standing" determined, we are called upon to consider the legal interests of three "parties."

Commissioner's Supervisory Power.

While it is nowhere made explicit that the "service" sold by plaintiff under its special charter, and authorized for

sale by non-profit hospital service corporations under the general law, is "insurance,"[4] both plaintiff's charter and the general law grant the Commissioner supervisory powers as previously noted, — not because the service is insurance, but because the commissioner's office was considered a proper place for the responsibility to rest. Among these powers is the granting of the original and renewal licenses (Charter, Section 6, and 24 M.R.S.A., §§ 2301, 2304, and 371) qualification for which requires, *inter alia,* submission to and approval by the Commissioner of copies of the proposed contracts. The charter, Section 6 provides that the Commissioner "shall annually issue a * * * license upon being satisfied * * * (b) that the rates charged and benefits to be provided are fair and reasonable * * * ." The Public Law, 24 M.R.S.A., § 2305, provides that:

> "The commissioner shall issue a license on payment of a fee as provided in (24 M.R.S.A.) section 371, subsection 3, if the applicant meets the following requirements:
>
> * * * * * * * * *
>
> "2. **Contracts.** The contracts * * * obligate each participating party to render service to which each subscriber may be entitled under the terms of the contract issued to the subscribers."
>
> * * * * * * * * *

24 M.R.S.A., § 371, prescribes the fee "for issuing or renewing a license to a nonprofit hospital or medical service organization under section 2305 * * * ."

It is explicit that the license of plaintiff is renewable annually. It is implicit in public law, 24 M.R.S.A., §§ 371 and 2305, that licenses are issued annually.

For the Commissioner to determine annually that "benefits to be provided" by plaintiff and that contracts under

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[4] See 29 Am. Jur., Insurance, § 12, and cases pro and contra in Annot. 167 A.L.R. 322 *et seq.*

the general law "obligate each participating party, etc.," copies of proposed contracts must be submitted.

Charter Section 10 and public laws § 2306 require annual reports, authorize the Commissioner to prescribe the form and content thereof, by which he may demand disclosure of existing and proposed contracts.

Both charter Section 11 and public laws § 2307 in substantially identical language give the Commissioner investigatory powers into the affairs of the corporation. By this authority he may secure disclosure of existing and proposed contracts.

Additionally, § 2314 of the general law empowers Commissioner to revoke a license for cause.

Disclosing at this point that we conclude, post, that the public law governs, it is here held that the Commissioner through his power to license and revoke based upon the criteria expressed in the statute has supervision of the contracts of non-profit and medical service organizations.

Question of Conflict Between Charter and Statute.

The question of conflict between the Charter and the Statute is based upon the terms of Section 3 C of the Charter and 24 M.R.S.A., § 2303. Both the Charter and the Statute authorize the operation of the "Blue Cross-Blue Shield" programs. Sec. 3 C of the charter authorizes the extended benefits — the issuance of contracts under which plaintiff "assumes liability on the whole or part of expenses incurred by a subscriber as a result of injury or disease not covered by this corporation's regular contracts for hospital service or medical service * * * which shall be limited to health care services and supplies and shall not extend to and include indemnity for loss of time, incapacity or death benefits."

These "extended benefits" are not authorized under the general law.

The Commissioner and intervenors urge that this difference calls for the application of Article IV, Part Third, Section 14, Constitution of Maine:

> "Corporations shall be formed under general laws, and shall not be created by special Acts of the Legislature, except for municipal purposes, and in cases where the objects of the corporation cannot otherwise be attained; and, however formed, they shall forever be subject to the general laws of the State";

that the Constitution so applied requires plaintiff to be limited to the general law (24 M.R.S.A., § 2301, *et seq.*) and that its Extended Benefits Endorsement is invalid.

Plaintiff counters that the silence of § 2303 on the matter of benefits to be extended beyond the hospital and medical service explicitly authorized is not a prohibition, that there is no conflict, that the presumption of *Laughlin* v. *City of Portland,* 111 Me. 486, 90 A. 318 (1914) that the Charter is constitutional (does not conflict) is unrebutted, and that if the Charter or the Statute is susceptible of two interpretations, the one sustaining constitutionality (non-conflict) should be adopted. *Stubbs, Applt.,* 141 Me. 143, 39 A. (2nd) 853 (1944). We recognize the presumption.

It must be noted that the special law granting plaintiff's Charter was approved March 2, 1939. The public law authorizing Non-profit Hospital Service Corporations was approved March 30, 1939. "It is this approval which gives life to all legislative enactments," Opinion of the Justices, 120 Me. 566, 569.

Section 1 of Chapter 149, Public Laws 1939, reads:

> "Any corporation organized under special act of the legislature, or under the provisions of chapter

> 70 of the revised statutes (the then general law authorizing formation of corporations without capital stock) for the purpose of * * * operating a nonprofit hospital service plan * * * may be licensed by the insurance commissioner on the terms and conditions hereinafter provided."

Our present statute, 24 M.R.S.A., § 2301 (Non-profit Hospital or Medical Service Organizations), reads in pertinent details the same, — the then Chapter 70 (referred to above) R. S., 1930, now being Title 13, M.R.S.A., § 901.

The Public Law of 1939, approved March 30, 1939 specifically included within its terms the corporation organized 28 days earlier under the special act. In substance Chapter 24, Private and Special Laws 1939, was merged into and enveloped by Chapter 149, Public Laws 1939. Such legislative action was only consistent with Article IV, Part Third, Section 13 of the Maine Constitution which states:

> "The legislature shall, from time to time, provide, as far as practicable, by general laws, for all matters usually appertaining to special or private legislation."

The rationale of this constitutional mandate is quoted from the legislative record in Opinion of the Justices, 146 Me. 316, 322, 80 A. (2nd) 866, and fully applies here.

Plaintiff's present Charter and Public Law 24 M.R.S.A., § 2301, *et seq.* are in conflict as to the "extended benefits" phase of our question.

A corporation formed under the authority of the general law (24 M.R.S.A., § 2301) would be confined in its declaration of purpose to the scope therein allowed. The declaration of purpose would be its charter and the specific powers enumerated in its charter "excludes all others except such as are reasonable and necessary to carry into effect those expressly given." *Gardiner Trust Company* v. *Augusta*

Trust Co., 134 Me. 191, 198. The silence of 24 M.R.S.A., § 2303 on the subject of "extended benefits" cannot be authority for their issue without restriction. The authority of such a corporation to issue "extended benefits" contracts, would depend upon their reasonability and necessity in carrying into effect the hospital and medical service contracts. The Blue Cross and Blue Shield programs have been operated successfully without the proposed extension. The additional benefit contracts are neither reasonable nor necessary for carrying the Blue Cross-Blue Shield services into effect.

Under Section 14 of our Constitution quoted *supra*, the public law prevails.

This conflict between plaintiff's charter and the general law and the determination that as to Blue Cross-Blue Shield activities the public law prevails, does not, however, fully solve our problem.

Granting that the Blue Cross-Blue Shield services authorized by the special law are identical to those authorized by the public law and that the public law controls by virtue of the clause of the Maine Constitution cited, it might be urged that one phrase of the constitutional provision has been overlooked. This phrase reads that "in cases where the objects of the corporation cannot otherwise be attained" such corporation may be created by special act. Were it determined that the objects (extended benefits) [5] of AHS could not otherwise be attained, special legislation would be constitutionally allowable and arguendo power to establish must include power to extend. Upon this premise the extended benefits phase of plaintiff's operation could be valid as a special grant from the legislature.

Were it determined that the objects (extended benefits) [5] of AHS could be attained under the general law 13

[5] Sale of extended benefits contracts by a tax exempt and relatively supervision free organization.

M.R.S.A., §§ 901-936 (corporation without capital stock), 13 M.R.S.A., §§ 71 *et seq.* (stock corporation) or 24 M.R.S.A., § 502 *et seq.* (stock and mutual insurance companies) plaintiff's operation could not be valid as a special grant from the legislature.

We have neither to apply the "attainment" test nor decide the result of its application for if the extended benefits contract under the operation here proposed be authorized by either special or public law, it only brings us face to face with the ultimate question raised by the intervenors.

The answer to this question is found by a determination of the nature of the contract offering the extended benefits.

Nature of Challenged Contract.

Footnotes, *supra,* record certain charges and list certain suppliers of services excluded under the Blue Cross-Blue Shield plans (footnotes 1 and 2) and record certain charges and list certain suppliers of services included under the Extended Benefits Endorsement (footnote 3). It is demonstrated that the indemnity supplied by the Endorsement covers charges of and services supplied by non-participants in the basic Blue Cross and Blue Shield contracts as well as extending by cash indemnity certain of the "basic" benefits, — and unrelated to the presence of surplus funds after the discharge of AHS obligation under the Blue Cross and Blue Shield contracts.

Is this Extended Benefits Endorsement a contract of insurance?

> "The authorities are substantially agreed that insurance may be defined as an agreement by which one person for a consideration promises to pay money or its equivalent, * * * to another on the destruction, death, loss, or injury of someone or something by specified perils." 29 Am. Jur., Insurance § 3.

Our 24 M.R.S.A., § 1, defines a contract of insurance as:

> " * * * an agreement by which one party for a consideration promises to pay money or its equivalent or to do some act of value to the assured upon the destruction or injury of something in which the other party has an interest."

In simpler terms the court in *Re Hilpert,* 300 N. Y. S. 886 (1937), defined insurance as:

> "A simple contract whereby the insurer in return for a stated consideration agreed, upon the happening of a specified event, to pay the insured a fixed or ascertainable sum of money."

A reiterative definition, also in simple terms is given in *Epmeier* v. *United States,* 199 F. (2nd) 508, [1] 509 (7 CCA 1952) where the court said:

> "Insurance, * * * involves a contract, whereby, for an adequate consideration, one party undertakes to indemnify another against loss arising from certain specified contingencies or perils. Fundamentally and shortly, it is contractual security against possible anticipated loss. Risk is essential and, equally so, a shifting of its incidence from one to another."

Although it might be contended, that such definitions encompass the Blue Cross-Blue Shield plans as well as the extended benefits, the intervenors state that they challenge only the extended benefits phase of plaintiff's operation and we confine our consideration to that point. Plaintiff, in discussing its operations, assiduously refrains from speaking of its programs in insurance terms (membership or subscriber's fees, rather than premiums; service or benefits rather than insurance, operational cost, rather than underwriting expenses), but the program is properly to be categorized, not by what it is called, but by what it in fact does. 29 Am. Jur., Insurance § 5.

Plaintiff's contract for extended benefits falls within the definition of insurance. Associated Hospital Service "in consideration of the additional charges for this Endorsement" obligates itself to pay in dollars to either the subscriber or the "provider of service," as it may elect, as indemnities for eligible expenses, stated amounts, and within stated limits. The Extended Benefits contract is one whereby AHS in return for a charge (premium) agrees that not only where the subscriber's hospital and medical expenses, in stated categories, exceeds the charges covered by the basic Blue Cross-Blue Shield Plan, but where expenses are incurred with other than the participants in the basic contracts and for which the subscriber is directly responsible, AHS will indemnify him in dollars for stated expenses and within stated limits. The risk of the subscriber's (assured's) being exposed to certain expenses in excess and independent of the basic coverage is assumed by plaintiff, — shifted from the subscriber to AHS. The payments so promised are not contingent upon the existence of adequate surplus in AHS funds after the payment of the "basic charges." Associated Hospital Service had to "reinsure" under the 1957 special law[6] and deposit security under the 1963 special law. The "reinsurance" phase and the security deposit reflects legislative thinking that the extended benefits phase of plaintiff's operation is insurance. Neither the participating hospitals nor participating doctors assume these risks against which the subscriber is so protected. There is no discernable difference between this contract and the conventional health and accident insurance contract. The title "Extended Benefit Endorsement" does not change the nature of the obligation. It may properly be classified as insurance and as to this phase of plaintiff's operation it is engaged in the same

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[6] "Re-insurance": an insurance by another insurer of all or a part of a risk previously assumed by the direct-writing company. Webster's Third New International Dictionary (unabridged) 1961.

business as the intervenors, — which brings us to the constitutional question raised by them.

Intervenor's constitutional complaint.

Intervenor's urge that legislative permission for plaintiff to sell this insurance as a charitable tax exempt corporation with relative freedom from statutory supervision while intervenors may sell the same protection only as a non-charitable taxable corporation subject to statutory supervision denies them equal protection of the laws under both the Fourteenth Amendment to the Federal Constitution and Article I, Section 6-A of our State Constitution.

> "The phrase 'equal protection of the laws' has not been precisely defined. In fact, the phrase is not susceptible of exact delimitation, nor can the boundaries of the protection afforded thereby be automatically or rigidly fixed. In other words, no rule as to what may be regarded as a denial of the equal protection of the laws which will cover every case can be formulated, * * *. * * * (E)ach case must be decided as it arises." 16 Am. Jur., (2nd) Constitutional Law § 486.

Unquestionably the legislature is empowered to establish regulations of a business in which the interest of the public is involved.

> "The general rule that legislation which affects alike all persons pursuing the same business under the same conditions is not such class legislation as is prohibited by constitutional provisions is subject to limitation to the extent that it does not permit discriminations by which persons engaged in the same business are subjected to different restrictions or are held entitled to different privileges under the same conditions." 16 Am. Jur., Constitutional Law § 518.
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> "The discriminations which are open to objection are those where persons engaged in the same busi-

> ness are subject to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws." *Soon Hing* v. *Crowley,* 113 U. S., 703, 709 (1884), as quoted and followed in *Dirken* v. *Great Northern Paper Company,* 110 Me. 374, 386, 86 A. 320.
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> "* * * (D)iscrimination, to be constitutional, must be based upon some reasonable ground, — some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection. * * * It must be reasonable and based upon real differences in the situation, condition or tendencies of things." *State* v. *Leavitt,* 105 Me. 76, 84, 72 A. 875.

The problem is one of classification.

Consistently with the realization that each case must be decided upon its merits, a multivariety of decisions pro and con exist in the federal court system, citation of which will serve no purpose.

The same varieties of interpretation to a lesser degree are found within our own decisions. Illustrative are the cases of *State of Maine* v. *King,* 135 Me. 5, 188 A. 775 (1936) and *In Re Milo Water Company,* 128 Me. 531, 149 A. 299 (1930). In *King* at pages 17-18, classification by the legislature was expressed as valid "if any state of facts reasonably can be conceived to sustain it" and that such classification is not reviewable unless "palpably arbitrary." In *Milo* the court expressed the principle less rigorously and said at page 537:

> "The characteristics which can serve as a basis of a valid classification must be such as to show an inherent difference in the subjects placed in separate classes which peculiarly requires and necessitates different or exclusive legislation with re-

> spect to them. * * * (T)here must be some natural and substantial difference germaine to the subject and purposes of the legislation between those within the class included and those whom it leaves untouched."

Other Maine decisions expressing the *Milo* rationale are *Boothby, et al.* v. *City of Westbrook, et al.*, 138 Me. 117, 23 A. (2nd) 316 (1941); *State* v. *Mitchell,* 97 Me. 66, 53 A. 887 (1902); *State of Maine* v. *Latham,* 115 Me. 176, 98 A. 578 (1916); and *State of Maine* v. *Old Tavern Farm, Inc.*, 133 Me. 468, 180 A. 473 (1935). While *King* post dates *Milo, Boothby* post dates *King* and is our most recent reiteration of the principle.

In *Mitchell* at page 71 the court observes, pertinently to our present situation, that "(i)f there be no real difference between the localities, or business, or occupation, or property, the State cannot make one in order to favor some persons over others."

Conceding the integrity of the cases cited, plaintiff urges that there are real, inherent and substantial differences between the operation of the plaintiff and that of the intervenors and that these differences bear a just and proper relation to their respective classifications and, conversely, that the differences are not unreasonable, capricious or arbitrary.

The differences which plaintiff advances in justification of plaintiff's status are, briefly stated, as follows:

(1) A much higher percentage of the subscriber's dollar is applied to its corporate purpose for the public benefit by way of hospital maintenance.

(2) That surplus funds are distributed periodically to the member hospitals hence making plaintiff's activity a non-profit operation.

(3) In the event of dissolution, assets would be distributed to participating hospitals, not as dividends to subscribers.

(4) Plaintiff assumes no risk, the same being borne by the participating hospitals and physicians, and

(5) That the extended benefits phase of plaintiff's activity is only incidental to the plaintiff's business.

As indicated above we do not share plaintiff's view as to assumption of risk. The contention may be valid as to the Blue Cross-Blue Shield contracts, but it is not valid as to the Extended Benefits Endorsement.

The fact, if it be a fact, that the present involvement in the Extended Benefits Endorsement is only incidental to the Blue Cross-Blue Shield plan, is not controlling. As stated earlier in the opinion, the threat to intervenors is not what has happened or is now happening, but what the law permits to happen. *Sleeper, supra.* The extended benefits contract has been offered only since 1963, and subject to challenge from the start, so that the alleged "incidentality" on that phase of the operation is no criterion.

Contentions 2 and 3 that surplus, if any, and assets upon dissolution inure to the public good by way of health service support are only attributes of a charitable organization, which this corporation is, — by legislative fiat rather than by its nature. See *United Hospitals Service Ass'n* v. *Fulton County, et al.*, 114 S. E. (2nd) 524 (Ga. 1960). Its ostensibly charitable character does not, under the circumstances, free it from constitutional criticism.

The percentage of the subscriber's dollar supporting the health service as against the percentage of the assured's dollar in the commercial insurance field may well be persuasive with the legislature, but do not control our present consideration.

The tax free and relatively unsupervised competition which plaintiff purports to supply in the health and accident insurance field is inconsistent with our system of free enterprise, violates the principles established in Maine judicature and results in unequal protection of the laws.

In answer to the stipulated questions of law it is held:

(1) That through the licensing and revocation power expressly granted in the public law, the Insurance Commissioner has control over the issue of contracts by the plaintiff within the limits expressed in the public law.

(2) That plaintiff's charter as it relates to Extended Benefits Endorsement, conflicts with the public law.

But this conflict is not here controlling.

(3) That plaintiff's charter (as it pertains to issue of the "Extended Benefits Endorsement BC-BS-63" contract), denies the intervenors equal protection of the laws, and is hereby declared invalid.

(4) That the injunction *pendente lite* is discharged, and

(5) That the deposit made by plaintiff with the Treasurer of State in accordance with Escrow Agreement of October 29, 1963 as security for subscribers to the Extended Benefits coverage, or such of it as the Commissioner finds necessary, be retained by the Treasurer of State, subject to the Commissioner's order, pending the termination of outstanding Extended Benefit contracts.

So ordered.

STATE OF MAINE
vs.
DUANE S. LITTLEFIELD

STATE OF MAINE
vs.
LAWRENCE A. SINCLAIR

Cumberland. Opinion, October 13, 1965.

Search and Seizure. Criminal Law.

While probable cause for arrest must be based on more than mere suspicion, it does not require proof sufficient to establish guilt; the essence of "probable cause" is reasonable ground for belief of guilt.

The search of automobile was not an invasion of defendant's constitutional immunity to unreasonable search or seizure as such defendant was not the owner nor in possession of the automobile.

Evidence established consent by defendants to search of automobile.

Evidence established that defendants' admissions of breaking, entering and larceny in the nighttime were voluntary.

ON EXCEPTIONS.

The defendants were convicted of breaking, entering and larceny in the nighttime and prosecuted their exceptions from admission of evidence and to refusal to direct verdicts of not guilty, and appealed from denial of their motions for new trials. Held, *inter alia,* that evidence established that defendants' admissions of breaking, entering and larceny in the nighttime were voluntary. Exceptions overruled, appeals dismissed, motions for new trial denied and judgment for the State.

William K. Tyler, Asst. County Atty.,
Earl J. Wahl, County Atty., for the State.

Ronald L. Kellam, for Respondent Littlefield.
Joseph E. Brennan, for Respondent Sinclair.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, MARDEN, RUDMAN, JJ. SULLIVAN, J., sat at argument but retired before the opinion was adopted.

RUDMAN, J. By separate indictments each respondent was accused of breaking, entering and larceny in the nighttime. The same criminal incident was detailed in each accusation and the respondents were jointly tried by jury. Verdicts of guilty were returned.

The respondents here prosecute their exceptions to the admission of evidence and to the refusal of the presiding justice to direct verdicts of not guilty. Respondents appeal from the denial of their motions for new trials.

Briefly the facts are: In the early morning hours of July 2, 1964, a State Trooper learned that a laundromat located in Casco had been broken into. In the course of his investigation, he found where the entrance to the building had been made. The lock on the entrance door had been removed. Missing from the premises were a claw hammer, a packet of Allen wrenches and some bottled beverages. The investigation made by the State Trooper disclosed that the laundromat had been broken into and an attempt made to take the coin changers. In the rear of the laundromat there was a storeroom which had a door leading to it from the rear; the door had a hasp and locked with a padlock. There was evidence that the door had been jimmied and the lock was missing. In the front part of the laundromat there were two coin changers with jimmy marks between the coin changers and the wall, also smudged greasy palm and fingerprints on the walls.

The Trooper saw the respondents in the general area of Casco and Naples practically every day for a period of two or three weeks prior to the break at the laundromat. On July 1st about 11:00 p.m. he met a car owned by Littlefield at the junction of Route 11 and 302 in Naples. He, at the

time, did not know who was in the car. Later the respondents admitted they were in the car.

In the afternoon of July 3rd the Trooper met the respondents as they drove into the Naples Spa. There was grease all over the hood and trunk of the Littlefield car, as well as grease on the hands of the respondents. He inquired of both several times as to their whereabouts on the night of July 1st and the morning of July 2nd. He was given evasive answers to his questions.

The information which the officer had gathered of other breaks in the vicinity, the theft of a battery, similar to the battery offered for sale by the respondents, the theft of a case of bottles which Sinclair admitted taking, the greasy palm and fingerprints on the walls of the laundromat and the grease on the hands of the respondents, satisfied him that there was sufficient reasonable cause for the arrest of the respondents. He then placed them under arrest and they were taken to the Bridgton Police Department. Littlefield rode with the officer and Sinclair followed driving Littlefield's car.

In the absence of the jury the Trooper was interrogated as to his basis for determining the probable cause for the arrest without first obtaining a warrant. His testimony was:

"BY Mr. CASEY:

Q When you approached Sinclair and Littlefield on July 3, 1964, did you have something specific in mind you wished to talk to them about?

A Yes, I did.

Q What was that in regard to?

A The break at the Fickett's Coin Laundry.

Q After talking with him for a period of time, as I understand it, did you place them under arrest?

A I did.

BY THE COURT:

Q Mr. Officer, at that point, what information did you have that caused you to conclude you should talk with these two respondents about this particular crime? You have described what you saw in the laun*der*mat; you have described what Mr. Fickett said to you. Did you have any other information?

A Yes, I did.

Q What was it?

A It is several things and I combined them all into what I felt were reasonable grounds.

Q Tell us what they were?

A . . . Friday morning I received information that Sinclair and Littlefield tried to sell a battery at a gas station in Naples. The battery was described to me and was the same type and voltage as one stolen two nights previous. While investigating the theft of that battery two days previous, I made sketches of tire marks left at the scene, measured the width and the tread design. Also at that time I was taking into consideration the night I saw them, that Wednesday night at 11 P.M. When I saw the car at 5 P.M. on July 3rd, the tires on the Littlefield vehicle, with the exception of one of them, matched as near perfect as I could describe it. The reason the fourth one didn't match was because it was changed. There was grease all over the hood and trunk of the Littlefield vehicle as well as grease on Littlefield's and Sinclair's hands. Bearing in mind the grease that was left on the coin changers and walls in Fickett's laundry, taking everything into consideration, the tire treads matching, the grease, the fact they tried to sell a battery which was practically identical to what had been stolen, and also

Sinclair admitting to me taking a case of empty soda bottles, combining these several factors, it was then I felt I had reasonable grounds to arrest both of them for breaking into the laund*er*mat.

Q I am not asking you for any names, but your informant concerning the battery, whether or not it was a person who was in business?

A Yes.

Q Was the person known to you?

A Yes.

Q Was it a person in whose integrity you had some confidence?

A Yes, I did."

The presiding justice, following the preliminary hearing, ruled that there was reasonable grounds for the officer to make the arrest without a warrant.

While probable cause must be based on more than mere suspicion, *Henry* v. *United States,* 361 U. S. 98, 4 L. ed. (2nd) 134, 139, 80 S. Ct. 168, it does not require proof sufficient to establish guilt. *Draper* v. *United States,* 358 U. S. 307, 312, 3 L. ed. 327, 331, 79 S. Ct. 329.

The essence of probable cause is reasonable ground for belief of guilt.

Mr. Justice Frankfurter speaking for the court in *Jones* v. *United States,* 362 U. S. 257, 270, 4 L. ed. 697, 707, 80 S. Ct. 725, said:

> "We rejected the contention that an officer may act without a warrant only when his basis for acting would be competent evidence upon a trial to prove defendant's guilt. Quoting from Brinegar v. United States, 338 US 160, 172, 93 L ed 1879, 1889, 69 S Ct 1302, we said that such a contention 'goes much too far in confusing and disregarding the difference between what is required to prove

> guilt in a criminal case and what is required to show probable cause for arrest or search . . . . . There is a large difference between the two things to be proved (guilt and probable cause) . . . . . and therefore a like difference in the quanta and modes of proof required to establish them.' "

Upon arriving at the police station both respondents were left in the custody of Deputy Sheriff Cadman. Trooper Hansen inquired of the respondents: ". . . . . If he minded if I look around. Both were willing or he was willing to let me look around the car." They said: "Go ahead and look." The search of the automobile yielded a hammer of the same description as the one missing from the laundromat. Sinclair, in the absence of Littlefield, when shown the hammer said: "All right. That is the hammer, I was there, we went in." Later Littlefield stated to the Trooper: "I am sorry I gave you a rough time. What Sinclair says is true. We broke into that Laund*er*mat."

The search of the automobile was not an invasion of Sinclair's constitutional immunity to unreasonable search or seizure as he was not the owner nor in possession of the automobile. Littlefield's admissions were not made until he was informed by Sinclair of the admissions that he had made in Littlefield's absence.

We find the following in 79 C. J. S., page 810:

> "Since the immunity to unreasonable searches and seizures is a privilege personal to those whose rights thereunder have been infringed, they alone may invoke it against illegal searches and seizures. Thus one cannot complain of an illegal search and seizure of premises or property which he does not own, or lease, or of premises or property which he does not control, or lawfully, occupy, or rightfully possess, or in which he has no interest or makes no claims. It follows, therefor, that one may not object to an illegal or

> unreasonable search of the property, premises, or possessions of another, if his own privacy is not unlawfully invaded."
>
> ". . . . . a third party is not entitled to invoke the protection of the Fourth Amendment brings our decisions in line with the overwhelming weight of authority." *Zimmermann* v. *Wilson,* 105 Fed. (2nd) 583, 586. (3d Cir.)

In *Edwards* v. *State,* 228 P. (2nd) 672, 676 (Okl.) the court said:

> "This court has repeatedly held that the constitution provision guaranteeing immunity from unlawful search and seizure is personal to the occupant of the place or premises searched and cannot be availed of by one not the owner or in possession of the premises involved." See *Wilson* v. *United States,* 218 F. (2nd) 754, 756 (10th Cir.); also *State* v. *MacKenzie,* 210 A. (2nd) 24 (Me.).

The testimony of the officer clearly supports consent by respondents to the search of the automobile which was neither refuted nor denied. The respondents chose to exercise their constitutional prerogative not to testify, neither was there any testimony offered by respondents in defense, nor contradictory to the testimony of the officer.

The search of the automobile in this case is distinguishable from that made in *Preston* v. *United States,* 376 U. S. 364, 84 S. Ct. 881, 11 L. ed. 777 (cited by the respondents), where the automobile was searched without a warrant after it had been impounded in a garage where no one would be permitted to examine or move the automobile without the permission of the officers. Here we have an automobile which was parked on or near a highway. The respondents under arrest could not have moved the vehicle until and unless they were discharged on bail. Meanwhile, however, others may have had keys to the ignition switch,

or with or without keys could have removed articles from the automobile.

> "The guaranty of freedom from unreasonable searches and seizures is construed as recognizing a necessary difference between a search of a dwelling house or other structure in respect of which a search warrant may readily be obtained and a search of a ship, motorboat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." 47 Am. Jur. 513, Sec. 18.
>
> See *Carroll* v. *United States,* 267 U. S. 132, 154, 69 L. ed. 543, 551, 45 S. Ct. 280.
>
> *Husty* v. *United States,* 282 U. S. 694, 701, 75 L. ed. 629, 632, 51 S. Ct. 240.

In *State* v. *Hanna,* 191 A. (2nd) 124, 131 (Conn.) the court said:

> "Since the decision in Mapp v. Ohio, ... evidence obtained by an unreasonable search and seizure is inadmissible. State v. Fahy, 183 A. 2nd 261 (Conn.); State v. DelVecchio, 182 A. 2d 402 (Conn.); U. S. Const. amend. IV, XIV . . . . . But if one consents to a search of his person, possessions, or living quarters, he waives his constitutional protection and the evidence so obtained is admissible. State v. Griswold, 34 A. 1046 (Conn.). Although it is presumed, until the contrary is indicated, that a police officer has acted lawfully; State v. Reynolds, 101 Conn. 224, 231, 125 A. 636; this does not raise a concomitant presumption of consent to a search and seizure. When consent is claimed by the state to have rendered lawful an otherwise illegal search and seizure, the burden is on the state affirmatively to establish the consent. Villano v. United States, 310 F. 2d 680, 684 (10th Cir.); United States v. Smith, 308 F. 2d 657, 663 (2d Cir.)."

It cannot be said that the respondents were coerced or forced into making the admissions. The hammer was found in the automobile owned by Littlefield and he was not present when the officer confronted Sinclair with the hammer. The admissions by Sinclair were entirely voluntary and not obtained by force, threat or coercion. The admission by Littlefield of his participation in the crime was voluntarily made after he learned that Sinclair had admitted his own guilt. This is not a case where the facts concerning the circumstances surrounding the admissions are disputed. Here the facts are undisputed.

The search of the automobile was lawfully made with the consent of the respondents.

The entry will be,

Exceptions overruled.

Appeals dismissed.

Motions for new trial denied.

Judgment for the State.

JOHN FRANCIS HUGHES, JR.

vs.

STATE OF MAINE, ET AL.

York. Opinion, October 14, 1965.

Habeas Corpus. Criminal Law.

The office of writ of habeas corpus is to afford citizen a speedy and effective method of securing his release when illegally restrained of his liberty, and the cause of imprisonment extends to questions affecting jurisdiction of the court.

Where by virtue of statute establishing district court system municipal court ceased to exist because office of judge of municipal court was vacant when district court was established, associate judge of municipal court who continued in office until his term would expire was without jurisdiction of prosecution for assault and battery, and defendant was properly ordered discharged. Public Laws, 1961, c. 386, § 2.

ON APPEAL.

This is a habeas corpus proceeding attacking the legality of a sentence imposed by the associate judge of the Biddeford Municipal Court because the office of judge of that court was vacant by virtue of the establishment of the district court in that area. The court found the associate judge without jurisdiction and the defendant was ordered discharged. Appeal by the state dismissed.

Hilary F. Mahaney,
William F. Wilson, for Petitioner.

John W. Benoit, Asst. Atty. Gen., for the State.

SITTING: WEBBER, TAPLEY, MARDEN, RUDMAN, JJ. WILLIAMSON, C. J., did not sit. SULLIVAN, J., sat at argument but retired before the opinion was adopted.

RUDMAN, J. On appeal, by the Respondents-Appellants from the judgment and order issued from the York County Superior Court wherein the court decreed that John Francis Hughes, Jr., be discharged.

The petitioner on February 23, 1965, was convicted of the offense of assault and battery in the Biddeford Municipal Court and was sentenced to an indefinite term in the State Reformatory for Men. The judge who held the hearing and imposed the sentence was an Associate Judge of the Biddeford Municipal Court. He was duly appointed and qualified on July 6, 1961, for a term of four years to expire on July 5, 1965.

The District Court was established in the district in which the Biddeford Municipal Court was located on January 25, 1965. The office of Judge of the Biddeford Municipal Court was vacated on December 20, 1962, by expiration of the term for which the judge was appointed, and was vacant on January 25, 1965, when the District Court was established in the district in which the Biddeford Municipal Court was located.

The Legislature by its enactment established a District Court System in Maine.

In the Public Laws of Maine, 1961, Chapter 386, the pertinent provisions applicable to this case are as follows:

> "**Sec. 2. Effective date; transition to new system.** . . . The District Court shall be deemed to be established in a district, within the meaning of this section, on the date when the district judge appointed to such district assumes office.
>
> * * * * * * * * * *
>
> "If in a municipal court the office of judge becomes vacant prior to the establishment of the District Court in the district in which such municipal court is located, and there is an associate judge of such court, he shall thereafter, and until

the District Court is established in the said district, be paid the same salary as provided for the office of judge of such court. . . . Upon the establishment of the District Court in the said district such municipal court shall cease to exist, and all cases pending in such court and all of its records shall be transferred to the District Court for the division in which such court was located; . . .

* * * * * * * * *

"Upon the establishment of the District Court in a district, the judge of a municipal court located in the district whose term has not yet expired shall continue to exercise, concurrently with the District Court, the jurisdiction vested in such municipal court, until after the expiration of his term. Upon such expiration, or upon his office otherwise becoming vacant, after such establishment of the District Court, such municipal court shall cease to exist, and all cases pending in such court and all of its records shall be transferred to the District Court for the division in which such court was located; . . .

* * * * * * * * *

"Upon the establishment of the District Court in a district, the associate judge or the recorder of a municipal court located in said district, whose term of office as originally appointed shall have not yet expired, shall continue in office for the duration of said term and exercise all powers of his office so long as the judge of the municipal court with which such associate judge or recorder may be affiliated shall continue to exercise, concurrently with the District Court, the jurisdiction vested in such municipal court. Upon the cessation of existence of such municipal court, any recorder or associate judge of said court whose term has not then expired shall continue in office for the duration of said term."

The sole issue is whether the Biddeford Municipal Court was in existence on February 23, 1965.

The statute made provision for the continuation of municipal courts pending the establishment of a District Court and to continue to function concurrently with the District Court until the term of office of the municipal court judge expired, at which time the municipal court would cease to exist.

In this case there was no municipal court judge in office when the District Court was established and by virtue of the statute the Biddeford Municipal Court then ceased to exist.

The statute further provided for the continuation in office of the associate judge only "so long as the judge of the municipal court . . . shall continue to exercise, concurrently with the District Court the jurisdiction vested in such municipal court."

The Legislature made its intention clear in the last paragraph of Section 2, *supra,* in the first sentence of this paragraph:

> ". . . *the associate judge* . . . of a municipal court . . . whose term of office as originally appointed shall have not yet expired, *shall continue in office* for the duration of said term and exercise all of the powers of his office *so long as the judge of the municipal court* with which such associate judge . . . may be affiliated *shall continue* to exercise, *concurrently with the District Court,* the jurisdiction vested in such municipal court." (Emphasis ours.)

The second sentence in this paragraph stands out as a distinctive beacon of the legislative intention and distinction by the omission of "and exercise all the powers of his office," thereby continuing the office of the then Associate Judge for the duration of his term but without right to "exercise . . . the powers of his office."

The word "cease" is defined by Webster's New International Dictionary to mean "to come to an end; to stop, etc.," and moreover, this is its common use and acceptance. One cannot "cease" doing a thing and at the same time continue its performance.

The respondents contend that habeas corpus is not the proper vehicle to bring this case to the attention of the court; that the appropriate action should be in the nature of quo warranto and for authority cites the Opinion of the Justices, 135 Me. 519, at 522. The suggested proceeding would be appropriate against an associate judge to test the validity of his title to the office. Here the right of the Associate Judge to continue in office is not in issue. The Legislature specifically authorized his continuance in office but excluded his authority to perform any of the functions of the office of Associate Judge of the Biddeford Municipal Court, as by legislative fiat the Biddeford Municipal Court ceased to exist, when the District Court was established and the office of judge was vacated.

The office of the writ of habeas corpus is to afford the citizen a speedy and effective method of securing his release when illegally restrained of his liberty, and the cause of imprisonment extends to questions affecting the jurisdiction of the court.

The court that tried the petitioner had ceased to exist; it was not, therefore, a court of competent jurisdiction, or, in fact, of any jurisdiction, and had no power to try or sentence him.

The mere color of an office must not be permitted to stand between a citizen and his liberty.

> "Habeas corpus is the proper remedy, when the process upon which the convict is held, was issued by a court having no jurisdiction of the case or

> person at the time of its issue. In re Hans Nielsen, 131 U. S. 176"
> *Tuttle* v. *Lang*, 100 Me. 123, 127.

The serious question presented here rests upon the legal existence of the Biddeford Municipal Court when sentence was imposed upon the petitioner. If the Biddeford Municipal Court had ceased to exist, then there was no lawful court and the judgment was absolutely void. It would be idle to argue that a conviction under such circumstances, could not be inquired into upon habeas corpus.

In *Emmett R. Warring* v. *John P. Colpoys*, 122 F. (2nd) 642, (App. S. C.) the court said:

> "While habeas corpus is regarded more liberally than most forms of collateral attack, it is not to be used as an appeal or a writ of error. We believe that appellant would be entitled to discharge under the writ, if the District Court clearly did not have power to act."

In arriving at a proper conclusion in this case, the legislative reason for continuing the associate judge in office until his term had expired is not material. The controlling fact is that the office of Judge of the Biddeford Municipal Court was vacant when the District Court was established, and the Biddeford Municipal Court "ceased to exist."

The process under which the petitioner was incarcerated is illegal and void and the order discharging him from the commitment is upheld.

The entry will be,

Appeal dismissed.

DAVID B. LONGWAY

vs.

STATE OF MAINE, ET AL.

Cumberland. Opinion, October 19, 1965.

Habeas Corpus. Criminal Law.

Purpose of statute providing for institution of writ of habeas corpus by person convicted of crime and incarcerated thereunder who claims that he is illegally imprisoned is to inquire into legality of detention.

Where habeas corpus petitioner's present detention was not execution of sentence imposed for crime of larceny, but rather for escape which commenced at expiration of larceny sentence, there was nothing upon which writ of habeas corpus challenging legality of detention under larceny conviction could operate.

Habeas corpus petitioner, whose present confinement was on sentence for escape, and who had satisfied sentence imposed for larceny, was not "incarcerated" under larceny conviction nor "illegally imprisoned" thereunder within meaning of habeas corpus statute.

Petitioner's right to attack sentence exists only when he is "incarcerated" under sentence imposed and is not available to petitioner who is no longer restrained for that reason.

Where habeas corpus petitioner had satisfied sentence imposed upon him for larceny, any issue sought to be raised with respect to trial upon larceny indictment was moot.

ON APPEAL.

Proceeding on appeal from a decision of the Superior Court discharging writ of habeas corpus. Held that habeas corpus petitioner, whose present confinement was on sentence for escape, and who had satisfied sentence imposed for larceny, was not "incarcerated" under larceny conviction nor "illegally imprisoned" thereunder within meaning of habeas corpus statute. Appeal dismissed.

Frederick T. McGonagle, for Plaintiff.

Richard J. Dubord, Atty. Gen.,
John W. Benoit, Asst. Atty. Gen., for Defendant.

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

RUDMAN, J. On appeal, from a decision by the Superior Court, discharging the writ of habeas corpus.

The appellant was tried in January, 1962, before a jury on an indictment in which he was charged with the crime of larceny of a motor vehicle. He was represented by court appointed counsel, found guilty of a crime as charged and sentenced to State Prison for a term of not less than one year nor more than two years. He did not appeal and commenced serving his sentence on July 19, 1963, which was satisfied on February 12, 1965.

He is now serving a sentence of two and one-half to six years for escape, which commenced at the expiration of the larceny sentence.

The pertinent section of the statute governing post-conviction habeas corpus petitions, 14 M.R.S.A., Section 5502, provides:

> "Any person convicted of the crime and *incarcerated thereunder* . . . who claims that he is illegally imprisoned . . . *may institute a petition for a writ of habeas corpus* seeking a release from an illegal imprisonment . . . " (Emphasis supplied.)

The purpose of the statute was to inquire into the legality of the detention. The petitioner's present detention in State Prison is not in execution of the sentence imposed for the crime of larceny; that sentence has been served and the petitioner is no longer held thereunder. There is nothing upon which the writ of habeas corpus in this case can operate. *McNally* v. *Hill,* 293 U. S. 131, 55 S. Ct. 24, 79 L. ed. 238.

He is not "incarcerated" under the larceny conviction nor "illegally imprisoned" thereunder.

In *Good* v. *State,* 212 A. (2nd) 487, 494 (Md.), the court said:

> "We note that relief . . . is not available to appellant since she is not incarcerated or under probation or parole. If the truth of the allegations in the appellant's petition be assumed, it would appear that there is no adequate judicial remedy for the wrong of which the appellant complains, but, as was said in Keane v. State, 164 Md. 685, 166 A 410, (1933), 'this court cannot create a remedy where none exists, since its function is to discover and apply existing law and not to make new law.' "

In ex parte *Baez,* 177 U. S. 378, 390, 20 S. Ct. 673, the court said:

> "It is well settled that this court will not proceed to adjudication where there is no subject matter on which the judgment of the court can operate."

This principle was applied in *Weber* v. *Squier,* 315 U. S. 810, 62 S. Ct. 800; *Tornello* v. *Hudspeth,* 318 U. S. 792, 63 S. Ct. 990; *Zimmerman* v. *Walker,* 319 U. S. 744, 63 S. Ct. 1027.

A petitioner's right to attack his sentence under Section 5502, *supra,* exists, by the terms of the statute, only when he is "incarcerated" under the sentence imposed, and is not available to a petitioner who is no longer restrained for that reason.

The appellant is not now engaged in serving the sentence at which his petition under Section 5502, *supra,* is directed. His present confinement is on a sentence for escape. He has satisfied the sentence imposed for larceny and any issue sought to be raised with respect to the trial upon the larceny indictment is of course now moot. *United States* v.

Brest, 266 F. (2nd) 879, 881 (3rd Cir.); *Heflin* v. *United States,* 358 U. S. 415, 418, 79 S. Ct. 451, 3 L. ed. (2nd) 407; *Perry* v. *United States,* 314 F. (2nd) 52, 53 (8th Cir.); *Buckner* v. *Hudspeth,* 105 F. (2nd) 393, 395 (10th Cir.).

We have carefully reviewed the record of the jury trial and the post-conviction habeas corpus proceedings. We are satisfied that were this case before us on its merits the result would be the same. The petitioner was represented by competent counsel in both trials and the issues clearly presented and adjudicated. We find no error.

The entry will be

Appeal dismissed.

ASSOCIATED BOOKING CORPORATION

vs.

CHARLES LISTON, ET AL.

Androscoggin. Opinion, October 27, 1965.

Service of Process.

To extent that rule relating to service of process conflicts with statute providing that every sheriff and his deputy shall serve and execute all writs and precepts issued by lawful authority to him directed and committed, rule governs. Rules of Civil Procedure, Rule 4 (c); 14 M.R.S.A., § 702.

Special appointment by court of person to serve process does not per se exclude service of that process by sheriff or his deputy within his county or by constable or other person authorized by law. Rules of Civil Procedure, Rule 4 (c); 14 M. R. S. A., § 702; Public Laws, 1957, c. 159; Public Laws, 1959, c. 317.

Special appointment of person to serve process does not vitiate authority of others designated by rule governing service of process.

ON APPEAL.

Suit involving restraining order. The Superior Court granted defendant's motion to dismiss complaint for want of service, and the plaintiff appealed. The Supreme Judicial Court held that special appointment by court of person to serve process does not per se exclude service of that process by sheriff or his deputy within his county or by constable or other person authorized by law. Appeal sustained.

Verrill, Dana, Walker, Philbrick & Whitehouse, by *Roger A. Putnam,* for Plaintiff.

Marshall and Raymond, for Defendant.

SITTING: WILLIAMSON, C. J.; WEBBER, MARDEN, RUDMAN, DUFRESNE, JJ. TAPLEY, J. did not sit.

MARDEN, J. On appeal, to resolve the question whether, under Rule 4 M.R.C.P., the special appointment of a person to serve process excludes the service of that process by a sheriff or his deputy.

The "process" dealt with in Rule 4 and here involved is a summons.

On a complaint and summons, involving a restraining order, dated May 24, 1965 the plaintiff, anticipating difficulty in making service upon the defendant by the usual means, by oral motion requested a special appointment for the service of the process under the provisions of Rule 4 (c) M.R.C.P.[1] The court being satisfied that reason existed therefor specially appointed a person, not a sheriff or deputy, to serve the process.

[1] *Rule 4 (c). "By Whom Served.* Service of all process shall be made by a sheriff or his deputy within his county, by a constable or other person authorized by law, or by some person specially appointed by the court for that purpose, except that a subpoena may be served as provided in Rule 45. Special appointments to serve process shall be made freely when substantial savings in travel fees will result."

The appointee was unsuccessful in completing service of the process and it was then delivered to a deputy sheriff, who completed the service.

Defendant challenged the validity of the service made by the deputy sheriff contending that the special appointment for the service of the process specifically excluded all other methods of service and a motion by the defendant to dismiss the complaint for want of service was granted by the trial court. Plaintiff appealed.

Our Rule 4 (c) is taken from Federal Rules of Civil Procedure 4 (c), but no federal case on point has been called to our attention nor have we been able to find one.

The challenge is premised upon 14 M.R.S.A., § 702 (formerly Section 159, Chapter 89, R. S., 1954) which provides:

> "Every sheriff and each of his deputies shall serve and execute, within his county, all writs and precepts issued by lawful authority to him directed and committed, * * *."

and the factual situation in the present case wherein the precept was not "directed and committed" to the deputy sheriff, but to a third person specially appointed.

The resolution of the question is to be found in not only the intent, but the letter of our Rules of Civil Procedure.

> "The general statutes relating to method of service of process, R.S. 1954, Chap. 112, Sec. 17ff., have been repealed and service of process will in general be governed by Rule 4 (d) to (i), inclusive." Maine Civil Practice, Field and McKusick, Reporter's Notes at page 32.

Chapter 317 of the Public Laws of 1959 which repealed many provisions of the statutes conflicting with the Civil Rules, and adopted for the purpose of harmonizing the

statutes with the rules, did not strike Section 159 of Chapter 89, R. S., 1954 (now 14 M.R.S.A., § 702), but Chapter 159 of the Public Laws of 1957 empowering this court to prescribe civil rules provided that upon the promulgation of the civil rules "all laws and rules in conflict therewith shall be of no further force or effect." To the extent that Rule 4 (c) M.R.C.P. may conflict with 14 M.R.S.A., § 702, the rules govern.

Before the adoption of our Civil Rules all civil precepts issued by our courts were directed "to the Sheriff of our several counties or either of their Deputies," but this is no longer the practice. The only precept retaining a direction to the sheriff or his deputies is that calling for an attachment of real or personal property, and while a precept so reading requires a sheriff or his deputy to execute it under this subsisting statute and further dealt with in Rule 4A M.R.C.P., Rule 4 (c) M.R.C.P. expands the means of serving process within the declared intent of the rules "to secure the just, speedy and inexpensive determination of every action." Rule 1 M.R.C.P. The last sentence in Rule 4 (c) M.R.C.P. (Footnote 1) confirms this policy.

A special appointment by the court of a person to serve process under our current practice does not per se exclude the service of that process "by a sheriff or his deputy within his county, by a constable or other person authorized by law, * * *."

Graves v. *Smart*, 75 Me. 296 (1883) has been cited in support of the finding of invalidity of the current service but this decision does not affect the holding in that case. Plaintiff Graves was a deputy sheriff. The statutes with which *Graves* dealt provided that an attachment, such as there involved, issued against a sheriff or his deputy might "be directed to a coroner or any other person therein designated * * *." (R. S., 1871, Chapter 99, Section 27), and

that "any writ or precept in which the deputy of a sheriff is a party may be served by any other deputy of the same sheriff." (Public Laws, 1879, Chapter 82.) The writ was directed to a coroner. The sheriff of the county, although also a coroner, served the process as sheriff which service was held invalid inasmuch as the sheriff was not authorized to execute the process. The court said at page 297, that the service "was not in accordance with the mandate of the writ, nor by one authorized to serve." There is no implication that service by the alternative method would not have been valid, — rather the reverse.

Under our present rule service is authorized "by a sheriff or his deputy within his county, by a constable or other person authorized by law, or by some person specially appointed by the court for that purpose, * * *." A special appointment does not vitiate the authority of the others designated in the rule.

Appeal sustained.

DANIEL N. MILLER

vs.

LIBERTY INSURANCE COMPANY

Androscoggin. Opinion, October 27, 1965.

Insurance. Appeal and Error. Verdicts. Contracts.

General rule is that parol contracts of insurance are valid and enforceable.

Measure of damages for violation of executory contract to insure and failure to supply temporary insurance *in praesenti* is the same.

Insurance agent or broker who undertakes to provide insurance for another and fails to do so is liable in amount that would have been due under policy if it has been obtained.

On appeal from judgment for defendant notwithstanding jury verdict for plaintiff, question is whether there is evidence, viewed in light most favorable to plaintiff, to support verdict.

Evidence supported jury finding that oral contract between corporate insurance broker and automobile owner to insure owner's automobile came into existence and that such contract was broken by corporate broker.

ON APPEAL.

This is a suit by an automobile owner against an insurance broker for breach of an oral contract to provide temporary insurance coverage. The plaintiff appeals from the Superior Court entry of judgment *n.o.v.* Held, that evidence supported the jury finding of oral contract to insure and such contract was broken by the broker. Verdict reinstated and judgment thereon directed.

Carl O. Bradford, for Plaintiff.

Lawrence P. Mahoney, for Defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, MARDEN, RUDMAN, JJ. SULLIVAN, J., sat at argument, but retired before the opinion was adopted.

MARDEN, J. On appeal by the plaintiff to the entry of judgment for the defendant notwithstanding a jury verdict for the plaintiff.

The case arises out of the following facts:

The plaintiff and the defendant, a corporate insurance agent and broker, had business relations prior to March of 1963 in which the defendant had placed collision insurance for the plaintiff on a 1962 car for the period expiring March 8, 1963. In February of 1963 plaintiff advised Mr. Franklin P. Liberty, President and major stockholder of the defendant company, that he had a new car upon order, that he did not wish the existing insurance to be renewed and that he would notify defendant when the new car arrived. Plaintiff testified that at the same visit to defendant's office, Mr. Liberty executed an application for both collision and liability insurance on the new vehicle, which application embodied everything except the serial number, make, color and price of the new car. He testified that Mr. Liberty told him that when the new car came in it would be covered with collision and liability insurance upon the defendant's office receiving the data not then known.

At the time of this conversation plaintiff testified that he was advised upon delivery of the new car to contact either Mr. Liberty, or a Mr. Reny Marcotte, who was associated with the defendant company.

Plaintiff accepted delivery of his new car from Marcotte Chevrolet (Sales Agency) on March 28, 1963 and the purchase being financed, it was necessary for the car to be covered by collision insurance before it left the vendor's premises. Plaintiff testified, which testimony is confirmed

in some respect by other employees at the vendor's garage, that on that date he placed a telephone call for the Liberty Insurance office, a woman answered who stated that neither Mr. Liberty nor Mr. Marcotte was in, and to this woman the plaintiff related the reason for his call and gave her the data which he had been told to report on the new car.

It developed that the person answering the call, filed (dialed) for Liberty Insurance, was an operator at a phone answering service ("Anserphone") which served defendant during periods when the office phone was not attended.

Representatives of Anserphone service testified that they had recorded a phone call on March 28, 1963 from Marcotte Chevrolet for Reny Marcotte with a simple message "that said to have somebody call someone else." From information which Mr. Liberty procured from Anserphone when the claim involved in this litigation arose, Mr. Liberty told plaintiff that the message received by Anserphone for Mr. Reny Marcotte to call Marcotte Chevrolet was received by his office at 1:32 p.m. on the date in question.

Between the February 1963 conversation and March 28, 1963 Mr. Marcotte had severed his business connection with the defendant and had his own insurance accounts. Messages for Mr. Reny Marcotte, such as the reference message, were normally relayed to Mr. Reny Marcotte whose office was adjacent to defendant's.

The message recorded by Anserphone was not identified with plaintiff or data such as serial number, color and price of an automobile. From the date in February when the discussion about insurance occurred between plaintiff and Mr. Liberty to July 17, 1963, there was no communication between the parties. Plaintiff received neither written insurance policy nor demand for payment of premium.

On July 17, 1963 plaintiff was a party to a collision which damaged his vehicle and gave rise to liability claim against

him. Upon contacting Mr. Liberty of defendant company, he was informed that the car was not insured. Plaintiff, by his complaint, seeks to recover as damages for breach of defendant's alleged contract to insure $1,533.44 collision loss and $425.79 liability claim. The jury found for the plaintiff and assessed damages in the amount of $1,224.04. Upon motion properly premised, the presiding justice ordered judgment for the defendant notwithstanding this verdict. Plaintiff's appeal brings the case here.

The authority of defendant as both insurance agent and broker and the authority of Anserphone as agent of defendant is not questioned.

The content of the conversation between the plaintiff and defendant's representative in February, what was done relative to an application for insurance for the later-to-be-acquired car, the alleged arrangement for identifying data on the new car to be transmitted to defendant, the detail of the message allegedly left with Anserphone, and the extent to which the message was relayed to defendant, were subjects of controversy. They were jury questions. There was evidence to justify the jury in accepting the narration of the transaction as given by the plaintiff. They so found. This promised insurance was not provided, as a result of which plaintiff was exposed to claims which he paid and for which he now contends defendant is liable.

The defendant urges that assuming the facts as found by the jury, the defendant was not an insuring company, and the jury's factual conclusions created a legal situation wherein the plaintiff received only temporary insurance subject to defendant's, within a reasonable time, preparing, as agent, a written insurance contract with a company which it represented, or procuring, as broker, a written insurance contract from another company. It contends that the period from March 28, 1963 to July 17, 1963 so far exceeded this "reasonable time" that the plaintiff was

chargeable with notice that he had no insurance. It argues that what is a "reasonable time" from undisputed facts is a matter of law for the trial court and that the direction of judgment notwithstanding the verdict was correct.

Plaintiff replies that inasmuch as the question of reasonable time was submitted to the jury, with proper instructions, that the jury verdict should stand and that this court should reverse the judgment notwithstanding the verdict, reinstate the jury verdict, and direct entry of judgment thereon. Rule 50 M.R.C.P.

The case was impleaded, tried and submitted to the jury under the law of contracts and, more specifically, upon the issue of whether the business relationship between the parties created a parole contract for temporary insurance, and, if so, resulting questions of length of time that such temporary insurance would protect the plaintiff, and if such insurance protected for a "reasonable time," how the principle was to be applied to the facts at hand.

> "The general rule is that parol contracts of insurance are valid and enforceable, * * *." 12 Appleman, Insurance Law and Practice § 7191. So in *Hurd v. Maine Mutual Fire Insurance Company* 139 Me. 103, 106, 27 A. 2d. 918 (fire); *Elliott et al v. Standard Acc. Ins. Co. et al* 33 A. 2d. 562 (N.H. 1943 — auto liability); *Pfuehler v. General Casualty Ins. Co. et al* 300 N.W. 469 (Wis. 1941 — auto liability) and the point is not raised here.

While the record of the case indicates to us that the business relationship of the parties involved an executory contract to insure as distinct from a contract for temporary insurance, we consider the case upon the theory acceptable to counsel and court at trial. The measure of damages for violation of an executory contract to insure and the failure to supply temporary insurance *in praesenti* is the same.

> "It seems to be well settled that an insurance agent or broker who undertakes to provide insurance for another, and * * * fails to do so, is liable in the amount that would have been due under the policy of insurance if it had been obtained." *Jernigan v. New Amsterdam Casualty Company et al* 367 P. 2d. 519, [14] 525 (N.M. 1961).

See also *Everett* v. *O'Leary,* 95 N.W. 901, 902 (Minn. 1903); *Brown* v. *Cooley,* 247 P. (2nd) 868, [8] 873 (N.M. 1952); *American Life Ins. Co. of Alabama* v. *Carlton,* 184 So. 171, [1, 3] 172 (Ala. 1938); and *Mansfield* v. *Federal Services Finance Corporation,* 111 A. (2nd) 322, [8-11] 325 (N.H. 1954); Annot. 29 A.L.R. (2nd) 171, § 4 at page 175 and § 29 at page 208. For "agent" and "broker" distinction see *Travelers Fire Ins. Co.* v. *Bank of Louisville, et al.,* 243 S.W. (2nd) 996, [4-6] 998 (Ky. 1951).

The defense challenges only liability. In its motions and on appeal it raises no issue on the competence of the jury to assess the damage or the amount of damages assessed. In this light we confine our consideration to the propriety of the order for judgment *n.o.v.*

Our specific question is whether, excluding consideration of the nebulous evidence on proof of the terms of the contract by which damages could be measured, but existence of which contract the jury found, there is evidence, viewed in a light most favorable to the plaintiff, to support the verdict of liability. *Hultzen* v. *Witham,* 146 Me. 118, 122, 78 A. (2nd) 342; and *Cole* v. *Lord,* 160 Me. 223, 224, 202 A. (2nd) 560.

The theory that defendant's promise, if any, was to provide temporary insurance with its concomitant principle of "reasonable time" within which a written contract is to be produced or notice given to the applicant that his request has been denied, is negatived by defendant's testimony through the lips of Mr. Liberty.

In direct examination we have:

"Q. After this accident happened, on July 17, 1963, did you have many conversations with Mr. Miller?

"A. I had probably at least half a dozen, I would say.

"Q. What was said to him in those conversations.

"A. Well, I was endeavoring to check back to find out if at any time he had called our office because, if he had called our office, I would have considered him as being covered, and then my companies would have to assume the responsibility. And this is what I was digging into when I was checking back on Anserphone and every other possibility that I could."

In cross-examination we have:

"Q. Did you receive any word from Phoenix of London that Mr. Miller was not acceptable as a risk?

"A. I did not prior to July 17th. After the 17th of July I had checked for every possibility. If there was any possible way that we could have covered him, we would have. If we had knowledge that he had called in the numbers, we would have, as I previously said, covered him. * * *."

These statements say, as clearly as can be said, that if defendant had received the identifying data on the new car, that car would have been insured. The jury found, upon credible evidence, that defendant had received the necessary information for completion of the written contract of insurance. Admittedly no written contract was issued.

The jury were justified in finding that an oral contract to insure came into existence, which contract was broken. The direction of judgment *n.o.v* was error. The verdict is reinstated and judgment thereon is directed. Rule 50 (c) M.R.C.P.

So ordered.

RAYMOND R. COLLINS
vs.
STATE OF MAINE, ET AL.

Androscoggin. Opinion, October 27, 1965.

Pardon and Parole. Arrest. Statutes.

If municipal police made arrest at time of assault on one of its officers and before execution of parole warrant for person arrested, they assumed lawful and primary custody of person arrested, and such custody could be retained in face of subsequent parole warrant, and parole warrant would serve only as detainer to be executed when primary custody of municipal authority was relinquished.

If parole officer made arrest on parole warrant before execution of assault warrant by municipal police, act of parole officer in permitting municipal court to assume physical custody and to require parolee to answer to charge there pending against him did not constitute waiver by state of its right to retain or thereafter resume his physical custody under subsisting felony sentence.

Generally, when word "may" is used in conferring power on any officer, court, or tribunal, and public or third person has interest in execution of such power, exercise of power become imperative.

Statute is to be construed as intended by Legislature.

Resolution of conflict in construing statute must be in favor of legislative intent.

Release to parole is discretionary matter with parole board in light of inmate's conduct while confined and considered probability of his complying, out of confinement, with conditions of parole fixed by board.

Generally, arrest warrant must be executed with reasonable diligence and without unnecessary delay.

Ministerial officers assuming to execute process upon person of citizen shall execute it promptly, fully and precisely.

While on parole, parolee is executing, out of confinement, his original sentence.

ON APPEAL.

This is an appeal from the denial of post-conviction habeas corpus relief. Appeal denied. Petition dismissed.

William Cohen, for Plaintiff.

John W. Benoit, Asst. Atty. Gen., for Defendants.

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

MARDEN, J. On appeal from denial of relief under post-conviction habeas corpus proceeding.

On January 12, 1961 petitioner was sentenced to serve a term of from two and one-half to five years in the State Prison. On June 22, 1964 he was released to parole.

On June 25, 1964 an incident occurred in Lewiston, Maine, which incident became the basis of a criminal complaint heard by the Lewiston Municipal Court on June 30, 1964. However, on June 25, 1964, upon evidence classified as "satisfactory" that he had violated the terms and conditions of his parole, the State Probation and Parole Board (Board) authorized the Director of that Board to issue a warrant for his arrest and return to the institution from which he was released. By instrument of the same date, the Director issued such a warrant.

The record does not reveal whether petitioner was arrested on June 25, 1964 by the parole officer and held by virtue of the parole warrant pending action by the Lewiston authorities on June 30, 1964 or whether he was arrested on June 25, 1964 by the Lewiston police and held until action by the Lewiston Municipal Court on June 30, 1964. Petitioner implies that the former statement reflects the facts. Because the June 25, 1964 incident involved an assault upon an officer it is highly improbable that he was

not forthwith arrested and thereafter held by the Lewiston officers until court action on June 30, 1964.

On June 30, 1964 a complaint was filed with the Lewiston Municipal Court against the petitioner alleging an offense of assault on June 25, 1964. He was arraigned on the same date, entered a plea of guilty and was sentenced to serve 60 days in the county jail. On August 21, 1964 the Board resumed physical custody of petitioner and he was returned to the State Prison to continue, in confinement, execution of his original sentence. On September 10, 1964 petitioner appeared before the Board, meeting at the prison, to be heard as to the alleged violation of his parole. Violation of parole was found and on the date of the hearing, the Board issued an order revoking the parole "as of ..... day of ..... 19.. and further orders that he be REMANDED to confinement in Maine State Prison for a period of ....."

By petition dated January 1, 1965 Mr. Collins seeks relief under the post-conviction habeas corpus act alleging:

(1) That his release by the Parole Officer to the Lewiston Municipal Court to answer to the charge there against him was a waiver by the State of its jurisdiction over him to require resumption of execution in confinement of the original sentence, and

(2) That the revocation and remand order issued by the Board on September 10, 1964 is invalid in that (a) no date of the revocation of parole is recorded therein, (b) that no statement of the remaining term of confinement is entered therein, and (c) that no statement fixing the time at which he would again be eligible for consideration for parole was entered therein.

Petitioner urges that by virtue of his surrender to the Lewiston authorities, and the errors charged in the revocation and remand order, he is entitled to release.

Indigency of the petitioner was established and counsel was appointed for the prosecution of both the petition and subsequent appeal to this court.

Because the record does not establish the order in which the respective "arrests" were made we shall consider them in alternate terms.

If the Lewiston police made an arrest at the time of the assault, and before execution of the parole warrant, they assumed lawful and primary custody of the accused. This custody could be retained in the face of a subsequent parole warrant and the parole warrant would serve only as a detainer to be executed when the primary custody of the Lewiston authority was relinquished. See *Stewart* v. *United States,* 267 F. (2nd) 378 (CA 10, Utah 1959) cert. den. 361 U.S. 844, 80 S. Ct. 97.

If the parole officer made an arrest upon the parole warrant and before execution of the assault warrant, petitioner's contention that the act of the Parole Officer in permitting the Lewiston Municipal Court to assume physical custody and require him to answer to the charge there pending against him was a waiver by the State of its right to retain or thereafter resume his physical custody under the subsisting felony sentence, was reviewed and decided in *Joseph S. Libby, Jr.* v. *State of Maine, et al.,* Me. , 211 A. (2nd) 586, upon pertinently identical facts. There was no loss of State control.

The legal attack made by petitioner to force a conclusion of waiver by the State in the present case raises one issue not argued in *Libby* and founded upon 34 M.R.S.A. § 1675 which reads:

> "When a parolee violates a condition of his parole or violates the law, a member of the board may authorize the director in writing to issue a warrant for his arrest. A probation-parole officer,

> * * * may arrest the parolee on the warrant and return him to the institution from which he was paroled. * * *."

The normal interpretation of this statute would conform to the rule that:

> "In general, the word 'may,' used in statutes, will be given ordinary meaning, unless it would manifestly defeat the object of the statute, and when used in a statute is permissive, discretionary, and not mandatory." *Roy v. Bladen School District No. R-31 of Webster County* 84 N.W. 2d. 119, [4] 124 (Neb. 1957).

See also *Bradley, et al.* v. *Cleaver, et al.*, 95 P. (2nd) 295, [1] 297 (Kan. 1939).

It is urged that under this statute, legal principles require that the word "may" be read as "must." The principle of statutory construction to which reference is made is expressed briefly in *Low* v. *Dunham,* 61 Me. 566, 569, where the court said:

> "The word 'may' in a statute is to be construed 'must' or 'shall,' where the public interest or rights are concerned, and the public or third persons have a claim *de jure* that the power shall be exercised."

Expressed more fully:

> "The word 'may' in a statute will be construed to mean 'shall' or 'must' whenever the rights of the public or of third persons depend upon the exercise of the power to perform the duty to which it refers; and such is its meaning in all cases where the public interests and rights are concerned, or where a public duty is imposed upon public officers, and the public or third persons have a claim de jure that the power shall be exercised. Or, as the rule is sometimes expressed, whenever a statute directs the doing of a thing for the sake of

> justice or the public good, the word 'may' will be read 'shall.' " *Pierson* v. *People ex rel. Walter,* 68 N.E. 383, 386 (Ill. 1903).

As expressed in *Anthony A. Bianco, Inc.* v. *R. M. Hess, et al.,* 339 P. (2nd) 1038, [10, 11] 1045 (Ariz. 1959):

> " 'It is a general principle of statutory construction that, when the word "may" is used in conferring power upon any officer, court, or tribunal, and the public or a third person has an interest in the exercise of the power, then the exercise of the power becomes imperative, * * *' "

See also *Harless* v. *Carter,* 267 P. (2nd) 4, [3] 7 (Cal. 1954).

It is urged here that not only has the public an unquestionable interest in the efficient administration of the parole system, and in prompt action upon violation of parole, but a duty is imposed upon the parole officer whereby prompt arrest and return of the parolee upon violation is mandatory.

Our statute so read would require, it is argued, that upon violation of parole the Board *must* authorize the Director to issue a warrant for his arrest and that the violator *must* be arrested on the warrant and be forthwith returned to the institution from which he is paroled. Under this mandate, and assuming that other law enforcement authorities had not previously taken the violator into physical custody to answer to a current offense, the Board would be obliged to assume custody of the violator and forthwith return him to the institution from which he was paroled. Under such procedure, in our current situation, petitioner urges that the Board was chargeable with reducing the petitioner to custody before June 30, 1964, and would not be permitted to surrender the violator to face the current charge and by such surrender the right to later resume his custody was lost.

In conflict with this principle of statutory construction is the overriding principle that a statute is to be construed as intended by the legislature. For this principle no authority need be cited, and a resolution of the conflict must be in favor of legislative intent. *People* v. *Smith,* 97 N.E. 649, 650 (Ill. 1912); *Bradley, supra,* in [1] 297; *In re Estate of Cartmell,* 138 A. (2nd) 588, [6] 591 (Vt. 1958); *Harvey* v. *Board of Chosen Freeholders of Essex County, et al.,* 153 A. (2nd) 10, [10-12] 16 (N.J. 1959) and *City of Wauwatosa* v. *County of Milwaukee,* 125 N.W. (2nd) 386, [4] 389 (Wis. 1963).

The purpose of releasing an inmate of a penal institution to parole is to give him an opportunity to make good on the outside. The release to parole is a discretionary matter with the Board in the light of the inmate's conduct while confined and the considered probability of his complying, out of confinement, with the conditions of parole fixed by the Board. He remains under the custody of the institution from which he is released, and while on parole is executing the unexpired portion of his sentence. 34 M.R.S.A. § 1671. The parole officer to whom the inmate is assigned is charged with supervising "* * * the conduct and condition of each person placed under his supervision and to use suitable methods to encourage him to improve his conduct and condition; * * *." 34 M.R.S.A. § 1502.

The legislature's delegation to the Board of power to act upon violations of parole is intentionally permissive, by prescribing that the Board *may* authorize an arrest. Only as discretion is imposed in the Board in this matter can the Board treat each parolee as an individual and, if the personality involved warrants it, it may be decided to continue the parole in spite of minor violation.

Were the statutory word "may" read as "must" no parolee would be entitled to a second chance. The statute in this respect is to be read as written.

Once the Board orders a warrant for parole violation to issue, other considerations arise, — not by reason of the parole statute, but by reason of the law governing the execution of criminal process.

In general terms an arrest warrant must be executed "with reasonable diligence and without unnecessary delay." 5 Am. Jur. (2nd) Arrest § 77. We have reduced the leeway allowed in the general rule by stating "that ministerial officers assuming to execute a * * * process upon the * * * person of a citizen shall execute it promptly, fully and precisely." *State* v. *Guthrie,* 90 Me. 448, 450, 38 A. 368; *Hefler* v. *Hunt,* 120 Me. 10, 14, 112 A. 675; and *State* v. *Couture,* 156 Me. 231, 240, 163 A. (2nd) 646.

The process issued by the Board read:

> "IT IS ORDERED, that you execute this warrant by taking said RAYMOND COLLINS wherever found in your jurisdiction and, in accordance with P.L. of 1959 Ch. 312 Sec. 15, return him safely to the institution from which he was paroled therein to be detained until the State Probation and Parole Board, at the meeting next held at said institution, shall have an opportunity to determine if the parole of said Raymond Collins shall be revoked or otherwise dealt with as to law and justice."

It was the duty of the officer holding that process to execute it as "promptly, fully and precisely" as the situation permitted, which situation may have involved primary custody by the Lewiston police as discussed earlier in this opinion. If the parole officer were the first to arrest, his custody was primary and the mandate of his warrant applied.

The law dealing with the execution of criminal process requires that the word "may" in the second sentence of 34 M.R.S.A. § 1675 be interpreted "must."

Assuming, without finding, that the arrest for violation of parole resulted in primary custody, as we have used the term, it does not follow, however, that petitioner has remedy in this post-conviction proceeding. His incarceration is lawful.

It is obvious that the grievance which petitioner seeks to express is that the imposition and execution of sentence imposed while on parole *extends pro tanto* his original sentence. Upon the facts of this case such concern is groundless. While on parole the individual is executing, out of confinement, his original sentence. A sentence imposed without qualifying statement and executed while on parole is served concurrently with the subsisting sentence (15 M.R.S.A. § 1702) except in cases specifically covered by statute such as those involving parolees from the Men's Reformatory and from the State Prison newly sentenced to the State Prison. 34 M.R.S.A. §§ 1675, and 1676.

If the prosecuting authorities feel justified in asking that a new sentence, other than to the State Prison, imposable upon a parolee be served after the execution of the subsisting sentence, they may, after conviction for the new offense move the court to "state in the judgment" that the new sentence be executed at the expiration of the subsisting sentence. 15 M.R.S.A. § 1702 and see *State* v. *Jenness*, 116 Me. 196, 100 A. 933.

Petitioner's criticism of the unexecuted portions of the Revocation and Remand Order are without merit.

34 M.R.S.A. § 1675, part of which has been quoted, goes on to provide:

> "If the board, after hearing, finds that the parolee has violated his parole or the law, it shall revoke his parole, set the length of time he shall serve of the unexpired portion of his sentence before he can again be eligible for hearing by the board,

> and remand him to the institution from which he was released; * * *."

The statutory requirements have been met.

The statute does not require that the determination of the Board be recorded in the Order. The findings are recorded in the minutes of the Board Meeting and the inmate is entitled to be seasonably informed of the decisions affecting his confinement. The form of the order and its use is a matter of administration and if there were no such order, no statute or inherent rights of petitioner would be violated.

We must comment, however, that if the Board has found it administratively desirable to promulgate such form for the purpose of apprising the officials involved, it is equally desirable to execute it in conformity with the Board action. The date which the Board determines as the date of parole revocation, significant in the computation of the time allowed for good behavior (34 M.R.S.A. § 1675, 1.), the term of confinement remaining as affected by the time allowed for good behavior and the time fixed by the Board before the inmate can again be eligible for hearing for parole are properly matters of concern to him. The form in use when this petitioner appeared before the Board did not, in any event, contemplate the supply of the last item of information.

If the Order is to serve its ostensible purpose, it should bear pertinent information both for the efficient administration of the custodial institution and the enlightenment of the inmate.

There are here no legal errors to result in petitioner's release.

Appeal denied.
Petition dismissed.

NORTHLAND INDUSTRIES, INC.
vs.
KENNEBEC MILLS CORPORATION
(#6796)

NORTHLAND INDUSTRIES, INC.
vs.
KENNEBEC MILLS CORPORATION
(#6842)

DONALD R. MICHAUD
vs.
NORTHLAND INDUSTRIES, INC.
AND
KENNEBEC MILLS CORPORATION
(#7739)

Kennebec. Opinion, November 1, 1965.

Parties. Appeal and Error. Assignments. Judgment.

Defendant tenant, which had been sued by landlord for damages from leakage of oil allegedly caused by tenant's negligence, was entitled to ascertain whether or not purported assignee of landlord's claim was or was not real party in interest and in any event to have real party in interest established as plaintiff, and motion praying court to determine validity of such assignment was appropriate vehicle which tendered issue for determination by court.

Order determining that purported assignment of landlord's claims against tenant was immediately appealable as exception to final judgment rule and failure to grant landlord's motion for relief from order was not abusive discretion, in absence of showing that decision of court in any way depended on physical presence or absence of proxies.

Judgment of superior court, entered in actions by landlord against tenant for damages from leakage of oil allegedly caused by tenant's negligence, as to validity of purported assignment of landlord's claims against tenant, not appealed from, finally resolved such issue, and purported assignee was thus precluded, under doc-

trine of estoppel by judgment, from raising such issue in subsequent action naming both landlord and tenant as defendants and alleging that prior actions by landlord had been assigned to purported assignee.

ON APPEAL.

This is on appeal from the denial of plaintiff's motion for relief from order of Superior Court entering judgment against it. Without the benefit of a valid assignment of alleged claims, plaintiff had no standing to maintain an action against the defendants. Appeal denied.

Richard J. Dubord, for Northland Industries.
Jerome G. Daviau, for Michaud.

Bradford H. Hutchins, for Defendants.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, DUFRESNE, JJ. RUDMAN, AND MARDEN, JJ., did not sit.

WEBBER, J. On September 22, 1961 Northland Industries, Inc. brought an action (#6796) against its tenant, Kennebec Mills Corporation, claiming damage from the leakage of oil alleged to have been caused by defendant's negligence.

On October 2, 1961 Northland again sued Kennebec claiming damage subsequent to September 22, 1961 and alleging that defendant *wilfully* permitted the continuing flow and escape of oil from the premises controlled by it (#6842).

After answering both complaints Kennebec filed a motion dated April 2, 1962 setting forth that it had been notified by plaintiff's counsel that the claim which was the subject matter of the complaint in #6796 had been assigned to one Donald R. Michaud at some time subsequent to the commencement of that action. The motion prayed the

determination of the court as to the validity of such assignment and, if required, the addition or substitution of Michaud as plaintiff either as the real party in interest or as a necessary party. A like motion was filed as to #6842. After notice and hearing in which Michaud participated by counsel, the justice below determined that "the purported assignment from Northland * * * to Donald Michaud is * * * invalid and that Donald Michaud is not a party in interest." No appeal was taken. On June 13, 1962 Northland filed a motion for relief from this order of the court. This motion ws denied on September 30, 1964. On October 26, 1964 Michaud filed notice of appeal from the denial of the motion for relief from judgment.

We are satisfied that the defendant Kennebec was entitled to ascertain whether or not the purported assignee was or was not the real party in interest and in any event to have the real party in interest established as plaintiff. The motion employed for that purpose was an appropriate vehicle which tendered the issue for determination by the court. M.R.C.P. Rule 17; comment sec. 17.2; see *Barron & Holtzoff Federal Practice and Procedure,* Vol. 2, Chap. 8, Sec. 482, page 15 *et seq.*

On September 25, 1962 Donald R. Michaud brought a new action (#7739) naming both Northland and Kennebec as defendants and alleging that the two prior actions brought by Northland against Kennebec had been assigned to him on January 12, 1962 and asserting claims of negligent and wilful conduct on the part of Kennebec with respect to oil leakage and a failure on the part of Kennebec to pay either Northland or the plaintiff therefor.

The defendants seasonably filed motion for summary judgment basing the same upon the undisputed fact that the assignment relied upon by the plaintiff Michaud was the same previously adjudicated invalid in the prior proceeding. On August 20, 1964 the justice below granted the

defendants' motion for summary judgment. This order was appealed on August 28, 1964.

We turn first to the summary judgment ordered in #7739. The justice who made that order viewed the decision made in #6796 and #6842 adverse to Michaud on the issue of the validity of his assignment as binding upon him in subsequent actions involving the same issue and the same parties.

In this connection the justice below quoted the language of the court in *Providential Development Co.* v. *United States Steel Co.* (1956), 10th Cir., 236 F. (2nd) 277, 280:

> "It is the rule of long standing and frequent repetition that where a second suit between the same parties, or their privies, is on the same cause of action, the final judgment in the prior action is conclusive as to all matters which were actually litigated and as to every issue, claim, or defense which might have been presented; and that where the later suit is upon a different cause of action, the judgment in the former operates as an estoppel only in respect to the issues and questions which were actually litigated and determined."

The doctrine of "collateral estoppel by judgment" has been recognized and applied in numerous opinions in Maine. *Cianchette* v. *Verrier, et al.* (1959), 155 Me. 74, 88, 151 A. (2nd) 502; *Bray* v. *Spencer* (1951), 146 Me. 416, 419, 82 A (2nd) 794; *Burns* v. *Baldwin-Doherty Co.* (1934), 132 Me. 331, 333, 170 A. 511.

Michaud had been effectively drawn into the case by notice of the hearing in which he later participated. At the hearing his counsel presented such evidence as was available tending to support the validity of the assignment. The issue at this hearing was clear and unmistakable. If he had been able to show himself to be the owner by assignment of these claims he would have been substituted as

plaintiff in #6796 and #6842. The decision adverse to him on this issue effectively destroyed his claim as the real party in interest and prevented him from exercising control over the conduct of these cases. In this sense the order possessed the attributes of finality as to his claim of ownership and was immediately appealable as an exception to the "final judgment" rule. For all practical purposes this order of the court ended the case as to Michaud and a resolution of the issue did not admit of postponement if he was to receive any benefit from it. See *Stevens* v. *Shaw,* 77 Me. 566, 567, 1 A. 743, 744; *Munsey* v. *Groves,* 151 Me. 200, 117 A. (2nd) 64; *Socec* v. *Maine Turnpike Authority,* 152 Me. 326, 328, 129 A. (2nd) 212, 213. No appeal was ever taken from the order deciding this issue in #6796 and #6842. In fact no action of any kind was taken by Michaud to challenge or test the adjudication of the court with respect to the assignment. As already noted the only action taken was by Northland, the plaintiff of record in #6796 and #6842, which filed a motion for relief from this judgment under M.R.C.P. Rule 60(b). The commentary on this Rule, Sec. 60.1, accurately reflects its intended purpose and scope:

> "A motion under Rule 60(b) does not affect the *finality or operation* of a judgment. The relief thereby sought is *no alternative to appeal* and courts look askance at any motion where without reason the appellate remedy was not pursued. * * * The motion for relief from a final judgment is addressed to the sound discretion of the trial court; and its action is reviewable by the Law Court only for *abuse of discretion.*" (Emphasis ours.)

The motion recites as the first ground for relief that "at hearing by agreement of the parties, the proxies of Audrey Michaud and Donald Michaud to Jerome Daviau were to be submitted to the Court as part of the evidence in the case and this was inadvertently not done;" and that "the

Court would probably have taken a different view had this evidence been before it." We have examined the record and find no indication that the decision of the court below in any way depended upon the physical presence or absence of these proxies. Mr. Daviau testified under oath that he held such proxies and this testimony was never contradicted. The decision obviously rested on other grounds. We find no abuse of discretion in the failure to grant relief upon this ground.

The second ground for relief relied upon in the motion was "that the issue as to whether or not Donald R. Michaud is the real party (in) interest was not properly and legally raised." We have already expressed our view that the issue as to the validity of the assignment was "properly" and "legally" raised by defendant's motion to substitute. We are satisfied that such a holding better accords with the spirit and intention of the Maine Rules of Civil Procedure, thereby permitting a defendant to ascertain at a preliminary stage (save only in the case of an insurer) whether or not the plaintiff of record is the real party in interest in the pending action.

In view of the fact that Michaud may have other genuine claims against Northland not stated in #7739, it should be noted that such claims are not barred by the effect of the summary judgment for the defendants therein rendered. That judgment serves only to bar the recovery of the plaintiff as purported assignee of the tort claims set forth in his complaint.

We therefore conclude (1) that the judgment of the court in #6796 and #6842 as to the validity of the purported assignment to Michaud, never appealed from, finally resolved that issue; (2) that in these same cases no error is made to appear in the disposition of the motion for relief from judgment; (3) that the order of the court in #7739 granting summary judgment for the defendants was com-

pelled by the application of the doctrine of estoppel by judgment, the issue as to the validity of the assignment having been fully and finally adjudicated in #6796 and #6842. Without the benefit of a valid assignment of alleged claims, Michaud as plaintiff had no standing to maintain an action against the defendants. The entry in each case will be

Appeal denied.

WILMA NEWELL

vs.

NORTH ANSON REEL CO. AND/OR LIBERTY MUTUAL INSURANCE CO.

Somerset. Opinion, November 3, 1965.

Evidence. Workmen's Compensation. Attorneys.

Supreme Judicial Court took judicial notice that names of individuals in answer to petition for industrial accident compensation was firm name of attorneys.

Declared intent of both workmen's compensation statute and commission rule is that answers to petitions for compensation shall respond specifically to employees' claims to effect a speedy, efficient and inexpensive disposition of all proceedings.

If real issue in petition for industrial accident compensation be whether incident causing injury is "accident" within statute, claimant is not required to prove his status as an employee with a named employer on a stated date.

If real issue in petition for industrial accident compensation be extent of injury, employee is not required to present proof of his status, his employer, date of injury and proof of accident.

Request for further time for filing pleading responsive to petition for industrial accident compensation is to be made before expira-

tion of period originally prescribed or as previously extended not by virtue of but consistent with practice under civil rule.

Purported answer of a general denial to petition for industrial accident compensation was insufficient as a matter of law and motion to take the complaint as confessed was in order.

ON APPEAL.

This is an appeal from the dismissal of employee's petition against employer and insurance carrier for industrial accident compensation. Appeal sustained. Case remanded for rehearing, with an order for counsel fees to be paid by the employer to the employee.

Walter R. Harwood, for Plaintiff.

Clement F. Richardson, for Defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, MARDEN, DUFRESNE, JJ. RUDMAN, J., did not sit.

MARDEN, J. On appeal from *pro forma* decree of the Superior Court dismissing petition for industrial accident compensation, which decree involved both a finding on disputed facts and issues of pleading.

Plaintiff seeks compensation by petition dated January 5, 1965 alleging injury within the terms of the statute.

The defendants seasonably filed the following answer, caption omitted:

"Answer of the employer by the Insurance Carrier to the petition dated January 5, 1965 and received January 19, 1965.

"All the allegations of the employee's petition are denied.

"Wherefore: The petition should be dismissed.

"Dated: January 20, 1965.

NORTH ANSON REEL COMPANY
Employer

LIBERTY MUTUAL INSURANCE COMPANY
Insurance Carrier

BY: Robinson Richardson and Leddy
ROBINSON RICHARDSON AND LEDDY"

To this answer, petitioner filed a motion that the answer be quashed, that the petition for award of compensation be taken as confessed and that the petitioner be allowed to proceed ex parte upon the ground that no valid answer to the petition had been filed, that the defense was not specifically stated in the answer, and that the answer constituted "sham and false pleading."

The claim of invalidity of the answer is founded upon the contention (1) that if the answer be considered as having been prepared and filed by the Liberty Mutual Insurance Company, such preparation and filing by either employee or attorney-in-fact constituted the unauthorized practice of law and as such the answer was a nullity; (2) that the signatory "Robinson Richardson and Leddy" can be taken only as agent or attorney-in-fact and it must follow that the answer is a nullity, and (3) that inasmuch as the answer does not state specifically the defense to the claim in compliance with the statute and the rules of the Industrial Accident Commission it is insufficient as a matter of law.

Upon hearing of the case upon its merits April 5, 1965 before a single commissioner, the commissioner overruled the motion, granted plaintiff "exception" to his ruling and subsequently upon the merits dismissed the petition for lack of proof. On the appeal, issues of pleading and merits are before us.

The validity of the insurance carrier's filing answer over the name of unidentified individuals is challenged by the claimant, as constituting the unauthorized practice of law. The court takes judicial notice that "Robinson Richardson and Leddy" is the firm name of attorneys at law, long identified with Industrial Accident Commission matters, and counsel from that office states in his brief:

> "That the Answer was filed by the Liberty Mutual Insurance Company in the name of Robinson, Richardson & Leddy, who have general consent from Robinson, Richardson & Leddy to file answers to routine Petitions filed with the Industrial Accident Commission, using forms of answers for specific petitions supplied them by Robinson, Richardson & Leddy."

Counsel offers in justification of this procedure that it is intended to minimize the administrative work of the law office, to indicate an appearance in the case by that office without other formal entry of appearance, to assure such office of receiving notice of hearings and to recognize that of the many petitions filed, a substantial number are disposed of without hearing and without other actual participation by legal counsel.

We pass no judgment upon the professional aspects of such practice as seems to delegate the lawyer's function to others. The answer, supplemented by judicial notice, is, on its face, an answer by recognized members of the bar of Maine and for which those members are responsible. Procedurally the answer is valid.

We are not called upon to determine whether the employer and insurance carrier are engaged in the unauthorized practice of law.

The issue on the content of the answer is not touched by our Rules of Civil Procedure. Rules 1 and 81 M.R.C.P.

Title 39 M.R.S.A. § 97 (Workmen's Compensation) provides that:

> "Within 15 days after notice of the filing of such petition all the other parties interested in opposition shall file an answer thereto * * *, which answer shall state specifically the contentions of the opponents with reference to the claim as disclosed by the petition. * * * If any party opposing such petition does not file an answer within the time limited, the hearing shall proceed upon the petition."

Rule 13 k. of the Industrial Accident Commission, promulgated under the authority of 39 M.R.S.A. § 92 provides that:

> "Answers must be filed in duplicate and shall state specifically the contentions of the opponents with reference to the claim as disclosed by the Petition * * *."

The declared intent of both the statute and the commission rule is that answers shall respond specifically to the plaintiffs claim whereby "a speedy, efficient and inexpensive disposition of all proceedings," (39 M.R.S.A. § 92) may be made. If the real issue in a petition for compensation be whether or not the incident causing injury is an "accident" within the meaning of the statute, there is no just reason for requiring the claimant to prove his status as an employee with a named employer on a stated date. If the real issue be extent of injury, it is unjust for the employee to be required to present proof of his status, his employer, the date of injury and proof of the accident. It is not unjust to require a defending insurance carrier to seasonably investigate the case and cause responsive pleading to be filed.

The perfunctory answer here of general denial transgresses both the statute and the commission's own rule. If the 15 day period, fixed by statute as the time within which

responsive pleading is to be filed, is too short, the same statute authorizes the Commission or Commissioner to grant further time for filing, — the request for which, we add, is to be made before the expiration of the period originally prescribed or as previously extended, not by virtue of, but consistently with, the practice under Rule 6 (b) M.R.C.P.

The purported answer was insufficient as a matter of law and the motion to take the complaint as confessed was in order.

It being here determined that the complaint should be taken as confessed for want of valid answer, upon the merits, *Ross' Case,* 124 Me. 107, 108, 126 A. 484; *Brodin's Case,* 124 Me. 162, 163, 126 A. 829; and *Clark's Case,* 125 Me. 408, 410, 134 A. 450, we have no occasion to review the finding of the Commissioner as to liability.

The case is remanded to the Commission for the purpose of making such award as the facts, so admitted, will support. *Michaud's Case,* 122 Me. 276, 278, 119 A. 627.

Appeal sustained.

Case remanded for rehearing in accordance with this opinion.

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.

ELMER GENEAU

vs.

STATE OF MAINE

AND

ALLEN L. ROBBINS, WARDEN

Sagadahoc. Opinion, November 4, 1965.

Indictment and Information. Habeas Corpus.

"Imprisonment for any term of years" is not synonymous with "life imprisonment" so that robbery punishable by imprisonment for any term of years is offense properly within jurisdiction of information procedure with waiver of indictment as provided for offenses not punishable by life imprisonment.

Record established that habeas corpus petitioner convicted of robbery was fully informed of his rights while represented by counsel prior to his execution of waiver of prosecution by indictment and request for prompt arraignment and process by information.

ON APPEAL.

This is an appeal by the petitioner from the final judgment of dismissal with prejudice on petitioner's application for writ of habeas corpus. "Imprisonment for any term of years" is not synonymous with "life imprisonment," therefore the crime of robbery was an offense properly within the jurisdiction of information proceedings.

Arthur D. Dolloff, for Plaintiff.

Richard J. Dubord, Atty. Gen., and
John W. Benoit, Asst. Atty. Gen., for Defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, MARDEN, RUDMAN, JJ. SULLIVAN, J., sat at argument but retired before the opinion was adopted.

TAPLEY, J. On appeal. The petitioner-appellant, hereinafter called "appellant," Elmer Geneau, appealed from the final judgment of dismissal with prejudice rendered on appellant's application for writ of habeas corpus (post conviction). At appellant's request, and upon finding of indigency, the court below appointed counsel for him in the prosecution of his application.

The issues before us are presented by appellant's points on appeal. The points on which the appellant relies are:

> "1. The Court erred when it ruled that robbery was not an offense punishable by 'life imprisonment' within the meaning of that term as used in Section 33 of Chapter 147 of the Revised Statutes of 1954 as amended by the Public Laws of 1957 and the Public Laws of 1959.
>
> "2. The Court erred because it failed to rule that the Petitioner was not, prior to the time he allegedly waived prosecution by indictment, advised by the presiding justice nor by anyone while the Petitioner was in court before the presiding justice of the nature of the offense as required in said Section 33 in that the Petitioner was not advised in court by anyone of the possible penalty for the crime of robbery, and the Superior Court was therefore without jurisdiction to convict and sentence the Petitioner.
>
> "3. The Court erred because it failed to rule that the Petitioner was not, prior to the time he allegedly waived prosecution by indictment, advised by the presiding justice nor by anyone else while the Petitioner was in court before the presiding justice, of his rights as required by said Section 33 in that the Petitioner was not at all so advised as to his right to confrontation, to witnesses, to his privilege against self-incrimination, to the presumption of his innocence, to his right of counsel at trial, to his rights in the selection of a jury or to his right to a unanimous verdict of

> such jury, and the Superior Court was therefore without jurisdiction to convict and sentence the Petitioner."

On April 10, 1961 the appellant, by complaint, was charged with the crime of robbery and, upon hearing, probable cause was found to hold him for action of the Grand Jury. He was unable to furnish bail, whereupon he was committed to the Androscoggin County Jail at Auburn. On May 16, 1961 he took advantage of the provisions of 15 M.R.S.A., Sec. 811 by filing a petition requesting waiver of indictment and seeking prompt arraignment. The appellant, claiming indigency, requested court-appointed counsel. He was found to be indigent and was provided counsel to represent him. The petition was granted by the presiding justice after the appellant signed a waiver in open court. After appellant pleaded guilty he was sentenced to not less than 10 years nor more than 20 years in the State Prison. Warrant of commitment was issued May 23, 1961.

The justice below, who heard the application for issuance of the writ of habeas corpus, provided appointed counsel to represent the appellant. A number of pre-trial conferences were held between the court and counsel. Petitioner, in lieu of testimony and by consent of the respondents, presented an affidavit in evidence. The affidavit in its pertinent portion reads as follows:

> "I, Elmer Geneau, being the Petitioner in a petition for habeas corpus now on file in Sagadahoc Superior Court, Docket No. 3330, state under oath that were I to testify at the hearing under said petition as to my plea in the Superior Court to the information, I would testify as follows:
>
> "1. That I thought I was entering a plea of guilty to Felonious assault.
>
> "2. That I was under the impression I would receive a maximum sentence of not more than 5 years.

"3. That I was not informed by the court that I could be sentenced to 10 to 20 years because if I had of been so informed I would not have pleaded guilty."

The allegation in the information charging the crime is couched in the following language:

> "That Elmer Geneau of Bath, in the County of Sagadahoc and State of Maine, on the eighth day of April in the year of our Lord one thousand nine hundred and sixty-one at Bath, in the County of Sagadahoc and State of Maine, on one Flora M. Seman feloniously did make an assault, and by force and violence, one woman's handbag and billfold, of the value of five dollars, of the property of said Flora M. Seman, from the person of said Flora M. Seman, feloniously did steal, take and carry away, against the peace of said State and contrary to the form of the statute in such case made and provided."

The statute defining the crime of robbery states:

> "Whoever, by force and violence or by putting in fear, feloniously steals and takes from the person of another property that is the subject of larceny is guilty of robbery and shall be punished by imprisonment for any term of years." 17 M.R.S.A., Sec. 3401.

See *State* v. *Greenlaw,* 159 Me. 141.

The "imprisonment for any term of years" is not synonymous with "life imprisonment." *Wade* v. *Warden,* 145 Me. 120. Robbery is an offense which is properly within the jurisdiction of the information procedure.

The appellant, on his own volition, chose to take advantage of the information proceedings rather than to await the action of the Grand Jury. In open court he executed a waiver of prosecution by indictment and requested prompt arraignment and process by information rather

than by indictment. The execution of the waiver did not take place until after he had been advised by the presiding justice of the Superior Court of the nature of the offense and of his rights and especially, but without limitation thereto, of his rights by virtue of Article I, Section 7 of the Constitution of Maine and R. S., 1954, Chap. 147, Sec. 1, (now 15 M.R.S.A., Sec. 701 (1)).

The appellant now comes forward and, among other complaints, claims he was not advised by the presiding justice of the nature of the offense, of the possible penalty for the crime of robbery, or of "his right to confrontation, to witnesses, to his privilege against self-incrimination, to the presumption of his innocence, to his right of counsel at trial, to his rights in the selection of a jury or to a unanimous verdict of such jury."

The official record is most illuminating in describing actually what took place from the time appellant's petition for prompt arraignment by information instead of by indictment was acted upon by the presiding justice until sentence was imposed. The record discloses the following:

> "THE COURT: Elmer Geneau: Elmer, you filed a petition which I have before me. The petition makes it appear that you are in the County Jail awaiting action of the grand jury which meets in June. You are there as a result of a finding of probable cause found by the Municipal Court for the City of Bath on a complaint charging you with the crime of robbery.
>
> "You were present in court all morning, during which time I had William Condon before me and I also had Raymond Dow. I deliberately had you seated in the jury seat next to Mr. Dow so that you could hear everything I said to Dow and Condon. I explained Condon's rights very fully to him. What I said to him applies to you. My understanding is that your attorney Mr. Carlton

has told you what your rights are in much the same way I have.

MR. GENEAU: Yes.

THE COURT: He has talked to you before today, and today?

MR. GENEAU: Yes.

THE COURT: Did you hear everything I said to Condon?

MR. GENEAU: Yes.

THE COURT: Did you understand it and do you now understand that you don't have to do this, that your rights to have your case heard by the grand jury is an absolute guaranteed right, that no one can take it away from you?

MR. GENEAU: Yes.

THE COURT: Do you also understand that you can plead guilty or not guilty to an Information which will be filed against you if I allow the petition?

MR. GENEAU: Yes, sir.

THE COURT: You understand that you are entitled to a trial by jury if you want it?

MR. GENEAU: Yes.

THE COURT: You also understand that if I allow the petition and the County Attorney files an information it will have the same legal effect as if an indictment had been found?

MR. GENEAU: Yes, sir.

THE COURT: The crime of robbery, on which you are bound over and with which you will be charged by Information if I allow the petition, is a crime which actually consists of two crimes together, the first being assault, the second being a larceny; it becomes a larceny by assault. In

order to convict you, it will be necessary for the State to prove by evidence convincing beyond a reasonable doubt that on the 8th day of April or within six years of today, that being the period of limitation, you some place in this County — they allege it was in Bath but they don't have to prove it was in Bath so long as they prove it was in this County — you did make an assault, that is, in a threatening angry or lewd manner you did put in fear, in other words, by your conduct you put in fear one Flora Seman and as a result of putting her in fear did take from her person a handbag and billfold. It is sufficient if the evidence indicates it was taken from something which is closely related to a person such as a coat she was wearing, an umbrella she was carrying, or something actually closely related to her person. They must prove by evidence beyond a reasonable doubt that at the time you did the acts you had the intention to forever deprive her of the property. 'Intention,' of course, is a state of mind but may be proved circumstantially. Are there any questions you want to ask me about the nature of the crime? You do understand the nature of the crime?

MR. GENEAU: Yes, your Honor.

THE COURT: And your attorney has explained it all to you?

MR. GENEAU: Yes.

THE COURT: I find as fact that Elmer Geneau has an understanding and full knowledge of his rights to file the petition. The State having joined, I will allow it. Will you please, Brother Carlton, have your client execute a waiver in open court.

MR. CARLTON: Yes, your Honor.

* * * *

"THE COURT: The record may show Respondent has executed a waiver in open court.

The State has filed Information. The State moves for arraignment?

MR. SPEAR: The State moves for arraignment.

THE COURT: Let him be arraigned.

(The Respondent was thereupon arraigned.)

THE COURT: The plea of guilty may be entered. I will defer sentence until later, at which time I will talk with the County Attorney, counsel for the Respondent, investigating officer, Probation Officer, and anyone counsel wishes me to. (After recess, the following proceedings were held:)

THE COURT: The State moves for sentence, State vs. Geneau. Let the record show Respondent's counsel is present.

* * * * *

"A. Well, at the time I took that handbag I was drinking. I am sorry I did it. I never do anything like that sober.

Q. The record indicates, of course, that there were these rapes, of course there were several of them, and they always took place at a time when you had had something to drink; is that true?

A. Yes.

THE COURT: But of course, there are an awful lot of them. You realize that that is probably as bad a record of that type of offense as you will find, and of course you haven't been out very long.

In arriving at the conclusion which I have in this case, I have had the benefit of conference with Respondent's counsel, with the Probation-Parole Officer, investigating officer, with the County Attorney. I have been furnished a copy of his record as maintained by the State Bureau of Identification, Maine State Police; I also have before me

an abstract of his conduct record while a prisoner in the Maine State Prison, and also an abstract of his conduct record while a prisoner in the Men's Reformatory at South Windham.

(Sentence was then imposed.)"

We have quoted the record in order to demonstrate the fact that the presiding justice went to great length in order to inform the appellant of the information procedure, what his rights were under it, the nature of the offense with which he was charged and all other pertinent information that the law requires to be imparted to a defendant under the instant circumstances. In addition to all this, it is to be noted that the appellant was represented by competent and capable counsel.

The record evinces, beyond the shadow of a doubt, that the presiding justice, with great care and in every minute particular, accorded the appellant a full measure of all he, under the law, was entitled to receive, both constitutionally and otherwise.

Appeal denied.

HOLBROOK ISLAND SANCTUARY

vs.

THE INHABITANTS OF THE
TOWN OF BROOKSVILLE, ET AL.

Hancock. Opinion, November 16, 1965.

Appeal and Error. Taxation. Declaratory Judgment. Charities. Trusts. Game. Eminent Domain. Hunting.

Defendants, by agreeing to report of case, waived any claim of error in refusal to dismiss complaint.

If property is exempt, there is no necessity of filing list and seeking abatement, or of paying tax and then suing to recover.

Action for declaration that property was tax exempt came within principles governing declaratory judgments.

Motive of donor who gave property to allegedly benevolent and charitable or scientific institution was not material in determining whether property was tax exempt.

Tax exemption is special favor conferred, and party claiming it must bring his case unmistakably within spirit and intent of act creating exemption.

"Benevolent" within tax exemption statute relating to benevolent and charitable institutions, is synonymous with "charitable" and defines and limits nature of charity intended.

Nonstock corporation which used property as wildlife sanctuary, for purpose of benefiting wild animals, was not "charitable," within tax exemption statute, there being no benefit to community or public, since purposes were not limited to prevention of cruelty to animals or research or disease control, and particularly since prohibition on deer hunting was contrary to state game management policy.

Trust for promotion of purposes which are of character sufficiently beneficial to community to justify permitting property to be devoted forever to their accomplishment is "charitable"; trust to prevent or alleviate suffering of animals is charitable.

Trust for purpose accomplishment of which is contrary to public policy, although not forbidden by law, is invalid.

Control of wildlife rests with state.

Inclusion of one's land in game preserve is not a taking of property.

State may prohibit hunting on any land within state, when it will and where it will, and it is policy of state and not wish of individual which controls protection and preservation of wildlife.

Nonstock corporation which used property as wildlife sanctuary was not a "scientific institution" within tax exemption statute, where its purpose was to establish game preserve, even though area was available for nature study, observation and photography, there was small library on nature and conservation, and warden took census of animals.

ON REPORT.

This is reported by agreement from the Superior Court to the Supreme Court upon an action for declaratory judgment and other relief to establish whether plaintiff's real estate was tax exempt, which claim of tax exemption was predicated upon a nonstock corporation using property as Wild Life Sanctuary was not "charitable" within the tax exemption statute. Remanded with direction.

Hale & Hamlin, By: Atherton Fuller, for Plaintiff.

Eaton, Peabody, Bradford and Veague, By: Arnold L. Veague, for Defendants.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, MARDEN, RUDMAN, JJ. SULLIVAN, J., sat at argument but retired before the opinion was adopted.

WILLIAMSON, C. J. This is a complaint for a declaratory judgment and other relief designed to establish whether plaintiff's real estate used as a wildlife sanctuary is exempt from taxation by statute. R. S., 1954, c. 91-A, § 10-11 (now 36 M.R.S.A. § 652).[1] The plaintiff Holbrook Island Sanctuary is a corporation without capital stock organized under R. S., c. 54, § 1 (now 13 M.R.S.A. § 901) "or for any . . . scientific, . . . charitable, . . . or benevolent purpose; . . ."

[1] "**§ 652. Property of institutions and organizations**

The following property of institutions and organizations is exempt from taxation:

"**1. Property of institutions and organizations.**

"A. The real estate and personal property owned and occupied or used solely for their own purposes by benevolent and charitable institutions incorporated by this State, and none of these shall be deprived of the right of exemption by reason of the source from which its funds are derived or by reason of limitation in the classes of persons for whose benefit such funds are applied."

* * * * * * * * *

"B. The real estate and personal property owned and occupied or used solely for their own purposes by literary and scientific institutions.

"C. Further conditions to the right of exemption under paragraphs A and B are that:

"(1) Any corporation claiming exemption under paragraph A shall be organized and conducted exclusively for benevolent and charitable purposes; . . ."

The defendants are the Inhabitants of the Town of Brooksville, and the assessors and tax collector of the town for the year 1963. While the action in terms tests the assessment and taxation of the real estate in 1963, the purpose is to determine its taxable status as well for the future under like laws and like circumstances. In the Superior Court the defendants moved to dismiss the complaint on two grounds: First, that plaintiff had not filed a true and perfect list of all its assets, real and personal, not by law exempt from taxation on April 1, 1963; and secondly, that there is no allegation of a written request for abatement or denial of application for abatement. R. S., 1954, c. 91-A, §§ 34, 48 (now 36 M.R.S.A. §§ 706, 841).

The motion was dismissed and subsequently the parties joined in an agreed statement of facts and a request granted in the Superior Court that the case be reported to the Law Court for "such decision as the rights of the parties require." We consider that the defendants in agreeing to a report of the case waived any claim of error in the refusal of the court to dismiss the complaint.

The case is before us on the merits, not on appeal from adverse rulings below. No jurisdictional issue was raised by the motion, which indeed begs the very question whether the property was exempt from taxation. If exempt, there was no necessity of filing the list and seeking an abatement, or of paying the tax and then suing to recover, although such procedures have been followed. *Stockman* v. *South Portland,* 147 Me. 376, 87 A. (2nd) 679 (recovery of taxes paid); *Green Acre Baha'i Inst.* v. *Eliot,* 150 Me. 350, 110 A. (2nd) 581; 159 Me. 395, 193 A. (2nd) 564 (denial of abatement).

We need not consider what interest the assessors of 1963 and the tax collector of 1963 presently have in the case. It is sufficient that the defendant town has an interest. Counsel at oral argument agreed that the taxes for 1963, 1964,

and 1965 will be governed by our decision. The action comes within the principles governing declaratory judgments. R. S., 1954, c. 107, § 50 *et seq.* (now 14 M.R.S.A. § 5951 *et seq.*). See Borchard, Declaratory Judgments (2d ed. 1941) p. 844.

From the agreed statement of facts we find:

The corporate purposes of Holbrook Island Sanctuary, as amended in January 1963, are:

> "Charitable, educational and benevolent purposes, to wit: to acquire by gift, purchase, lease or otherwise real estate within the State of Maine and personal property; to set aside an area or areas to devote the same to the preservation and protection of and the prevention of cruelty to such wild birds and beasts as may come thereon; to maintain facilities for their feeding and shelter; to preserve the unspoiled natural beauty of said areas; to expend moneys for the prevention of cruelty to animals, for the furtherance of humane education and for any or all other purposes connected therewith which shall be conducive to the welfare of animals and wildlife, whether on land owned by the corporation or not; to accept gifts of personal property; to accept and receive donations of money, general legacies and devises of real estate to be used for the foregoing purposes; provided, however, that the corporation shall not be conducted for gain or profit, and that no part of the net earnings shall inure to the benefit of any member upon dissolution of the corporation or otherwise, but shall always be devoted to the aforesaid charitable purposes; to sell, mortgage, lease or convey any and all real and personal property acquired as aforesaid, and doing and performing all things in connection therewith or incidental thereto in carrying out the foregoing purposes."

The real estate in the plaintiff's sanctuary "comprises approximately eleven hundred acres of uninhabited wild-

lands in the Harborside section of Brooksville, heavily wooded and containing in excess of one mile of waterfront property bordering the waters of Penobscot Bay, . . . The only building on the land which is presently used for any purpose is a small single-story three room structure used as an office and housing a small library of books on nature and conservation belonging to the corporation."

* * * * * * * * * * *

"As of April 1, 1963, said real estate of Holbrook Island Sanctuary was used in the following manner: The entire area was left in its natural state for the protection and preservation of animal, bird, tree and plant life within its boundaries. Roads for the passage of vehicles were within the area but it is intended that existing roads (except for the *r*own road) be permitted to grow back to their natural state. Several old cemeteries exist within the area and the access roads to these are presently blocked by felled trees and fences. Present inhabitants of the town have relatives buried in these cemeteries. These roads have been used by the public for over 100 yrs. A minimum of footpaths were and will be maintained for the purposes of fire patrol and study and observation by persons admitted to the area accompanied by the warden. The area was posted with signs reading 'WILD LIFE SANCTUARY NO DOGS OR FIREARMS ALLOWED.' The corporation employed a full-time Warden (not a member of the Warden Service but a Constable appointed by the Town) with an additional helper during the summer months and the hunting season. All persons wishing to enter the sanctuary were and are asked to register at the office and to apply to the Warden for permission to enter the sanctuary. Persons and organizations engaged in nature study were permitted in the Sanctuary accompanied by the Warden for the purpose of nature study, observation and photography. The public was directed not to enter the sanctuary for any other purpose. The Warden and his assistant were instructed to prohibit

hunting in the area. The Warden kept a census of animal and plant life within the area and is instructed to make regular patrols of the area to prevent fire. The policy of the corporation was and is, in general, that there be no interference with the balance of nature. Therefore, even restricted hunting, of the game management type now favored by the Maine State Department of Inland Fisheries and Game, is prohibited. The corporation provided and will provide hay, salt and other foods for the animal population and grain for the birds. A number of bird-feeding stations have been established."

* * * * * * * * * * * *

"The valuation of the properties presently owned by the Holbrook Island Sanctuary amounts to $43,840.00, producing a tax of $920.64. The deletion of the Holbrook Island Sanctuary property from the tax rolls as tax exempt would result in approximately 30c per thousand increase in taxes to the residents of the Town."

The entire property was given to the plaintiff in 1963 by Miss Anita Harris of Brooksville who with her sister had acquired it between 1939 and 1963. On the death of her sister in 1962, Miss Harris decided to make plans for the wildlife sanctuary during her life. Her attorneys and financial advisers advised her (1) to create the plaintiff corporation; (2) that the gift of the real estate would be income tax deductible; (3) that the real estate would be exempt from local taxation, and (4) that additional property would be exempt from estate and inheritance tax. Miss Harris was in part motivated by the advice relating to tax exemption. Her motive, we point out, is not material in reaching our decision. *Camp Emoh Associates* v. *Inhabitants of Lyman,* 132 Me. 67, 166 A. 59.

The plaintiff has received no money or property from any sources other than Miss Harris and a trust created by her for its benefit. Except for certain cutting of wood in

1960-62, "the area has, in general, remained unchanged over the past twenty-five years." The plaintiff will receive the proceeds from wood cut since its organization in 1962.

"The funds of the corporation have been used for the following purposes relating to the land in Brooksville, namely: Payment of wages and travel expense to the Warden and assistants; surveying and blueprinting; constructing and painting signs; purchase of salt, hay, feed and bird seed; employment taxes on employees; construction of bird-feeding stations; office repairs; insurance premiums for liability and fire insurance; and legal fees in organizing the corporation and acquring the real estate."

* * * * * * * * * * *

"At or about the time that this property was transferred to the Sanctuary, Anita Harris, President of Holbrook Island Sanctuary, contacted the Maine Fish and Game Department seeking cooperation in the control of hunting in the area. Mr. J. William Peppard, Regional Game Biologist, of the Department, came to Brooksville and inspected the premises. He was and is familiar with the policies of the Department. He advised the officers of the Sanctuary that it was the policy of the State not to acquire or accept any properties to be operated as a game sanctuary or a game preserve; that the State prefers to operate game management areas in which the animals are protected but the deer population, from time to time, in the discretion of the Department, may be reduced by killing some of the animals; that the experience of the Department has been that, unless the deer herd in a given sanctuary or preserve is periodically reduced, the animals tend to increase to a point where the food supply is insufficient, resulting in the starvation of some animals; and that consequently the State prefers to be able to reduce the number of deer on a scheduled program which cannot be done in a sanctuary of this type."

The plaintiff contends that it is either a benevolent and charitable or a scientific institution, and is tax exempt in

whichever category it may belong. The burden of establishing tax exemption is upon the plaintiff. "Exemption is a special favor conferred. The party claiming it must bring his case unmistakably within the spirit and intent of the act creating the exemption." *Bangor* v. *Masonic Lodge,* 73 Me. 428. See also *Green Acre Baha'i Institute* v. *Eliot, supra; Camp Emoh Associates* v. *Inhabitants of Lyman, supra.*

The purpose in the plaintiff's charter in which we have a particular interest reads: ". . . to set aside an area or areas and to devote the same to the preservation and protection of and the prevention of cruelty to such wild birds and beasts as may come thereon; to maintain facilities for their feeding and shelter; . . ." The meaning of the charter provision may be gathered from the action of the corporation. It has acquired, as we have said, by gift eleven hundred acres of uninhabited wild land with a mile frontage on the Atlantic Ocean at Brooksville. It uses the land as a game preserve with restrictions more stringent in the protection of game than would be the case in a game preserve created by the Legislature. The public use of the area is limited to persons and organizations engaged in nature study.

We accept the contention of the plaintiff that the corporation purposes include the creation and maintenance of a game preserve with the conditions and limitations expressed in the agreed statement.

In determining whether the plaintiff is a benevolent or charitable institution under the tax exemption statute, we need give no consideration to the word "benevolent." In the leading case *Bangor* v. *Masonic Lodge, supra,* the court said, at p. 433:

> "The statute upon which the defendants rely, uses the word benevolent, but there is no question that this word, when used in connection with char-

> itable, is to be regarded as synonymous with it and as defining and limiting the nature of the charity intended."

We conclude that the purposes so stated are not "charitable" within the meaning of the word in the tax exemption statute. First, the interested parties here endeavor to place in the ownership of a tax exempt corporation nothing in substance more than a game preserve. The purpose is plainly to benefit wild animals. We find no benefit to the community or to the public in the proposed sanctuary within the principles relating to charitable trusts involving animals.

The general rule relating to charitable trusts other than those for the relief of poverty, advancement of education and religion, promotion of health, and governmental or municipal purposes is found in Restatement, Trusts (2nd) § 374, as follows:

> "Promotion of Other Purposes Beneficial to the Community. A trust for the promotion of purposes which are of a character sufficiently beneficial to the community to justify permitting property to be devoted forever to their accomplishment is charitable."
>
> * * * * * * * * *
>
> "c. **Relief of animals.** A trust to prevent or alleviate the suffering of animals is charitable. Thus, a trust for the prevention of cruelty to animals, or a trust to establish a home for animals, or a trust for the prevention or cure or treatment of diseases or of injuries to animals, is charitable."

In England the Court of Appeals in *Re Grove-Grady* (1929), 1 Ch. 557, 66 A.L.R. 448 with annotation, held, with one justice dissenting, that a bequest in trust for a sanctuary for animals and birds could not be sustained as a valid charitable trust. The court found lacking therein that benefit to mankind which must appear in a charitable trust. Lord Justice Russell said, at 66 A.L.R. 463:

> "Assuming that I have correctly interpreted object No. 1, it comes down to this, that the residuary estate may be applied in acquiring a tract of land, in turning it into an animal sanctuary, and keeping a staff of employees to ensure that no human being shall ever molest or destroy any of the animals there. Is that a good charitable trust within the authorities?
>
> "In my opinion it is not. It is merely a trust to secure that all animals within the area shall be free from molestation or destruction by man. It is not a trust directed to ensure absence or diminution of pain or cruelty in the destruction of animal life. If this trust is carried out according to its tenor, no animal within the area may be destroyed by man no matter how necessary that destruction may be in the interests of mankind or in the interests of the other denizens of the area or in the interests of the animal itself; and no matter how painlessly such destruction may be brought about. It seems to me impossible to say that the carrying out of such a trust necessarily involves benefit to the public."

In *R.S.P.C.A., New South Wales* v. *Benevolent Society of N.S.W., et al.*, 33 A.L.J.R. 436 (1960), the High Court of Australia held "(t)hat the requirement that a small area of suburban land near the sea coast should be made accessible to birds and that there should be food and water for them did not come with the principles on which trusts for the benefit of animals were held charitable, and was void."

For unfavorable comment on *Re Grove-Grady, supra,* see IV Scott on Trusts § 374.2 (2d ed.) and Bogert Trusts § 379, p. 188 (2d ed.).

The purposes of the Holbrook Island Sanctuary are not limited to the prevention of cruelty to animals. *Massachusetts S.P.C.A.* v. *City of Boston* (Mass.), 6 N.E. 840; *Pitney* v. *Bugbee* (N.J.), 118 A. 780 (S.P.C.A.); 15 Am. Jur. (2nd) *Charities* § 88.

The plaintiff is not engaged in research or disease control. In *The University of London* v. *Yarrow* (1857), 1 De Gex and Jones's Reports 57, 44 Eng. Reprint 649, the Court of Appeal in Chancery [to quote the headnote] held: "A bequest to a corporation for founding, establishing, and upholding an institution within a mile of Westminster, Southwark, or Dublin, for studying and endeavoring to cure maladies of any quadrupeds or birds useful to man, held a good charitable bequest. . ."

The purposes here are not those of the New Jersey Corporation, of which the court said:

> "We, therefore, hold that when, as here, the purposes of a non-profit corporation are to conserve game birds, to establish hatcheries, refuges and to teach vermin control, those purposes are charitable purposes."
> *More Game Birds in America, Inc.* v. *Boettger* (N.J.), 14 A. (2nd) 778, 780.

The instances we have mentioned in each of which the charitable purpose plainly appears, differ widely in our view from the case at bar. We conclude that the community, that is to say the public, does not benefit from the proposed game preserve within the requirements of the established law relating to charitable trusts.

Furthermore, the public policy of the State prohibits the classification of the declared purpose as charitable.

> **"Purpose contrary to public policy.** A trust for a purpose the accomplishment of which is contrary to public policy, although not forbidden by law, is invalid. Thus, a trust to establish a course of lectures in a medical school in which a theory of treatment of disease should be taught which has been proved to be dangerous, is invalid."
> Restatement, Trusts (2nd) § 377, comment c.

The control of wildlife rests with the State. "There can be no question of the right of the State to conserve, protect

and regulate its wild life. . . . The results of proper and efficient wild life conservation in large measure promote the economic welfare and well-being of the citizenry of the State. One of the most important and effective means of wild life conservation is the medium of the game preserve established and regulated by legislative enactment." *State of Maine* v. *McKinnon,* 153 Me. 15, 18, 133 A. (2nd) 885.

The State may establish game management areas and for this purpose may acquire or lease land.[2]

The Legislature has designated a long list of areas as sanctuaries and preserves, and has authorized for example temporary game preserves, state game farms, and cooperative action with the Federal Government in wildlife restoration projects.[3] The inclusion of one's land in a game preserve is not a taking of property. *State of Maine* v. *Mc-*

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[2] 12 M.R.S.A. § 1901

"**7. Game management.** 'Game management' is the art or science of producing wild animals and birds and of improving wildlife conditions in the State. It may specifically include the following:

"**A.** Regulation of hunting, fishing and trapping;

"**B.** Environmental controls (control of water, food or cover, special features and animal diseases);

"**C.** Research or investigations to provide a basis for sound management in Maine;

"**D.** Manipulation of hunting pressure;

"**E.** Establishment of game lands (parks, forests, refuges, game management areas, etc.);

"**F.** Predator control;

"**G.** Artificial replenishment (game farming and restocking);

"**H.** Introduction of exotic species of wild animals or birds where needed.

"**8. Game management area.** A 'game management area' is any tract of land or body of water owned or leased by the department of Inland Fisheries and Game for the purposes of game management as defined in subsection 7 or created by an Act of the Legislature."

[3] 12 M.R.S.A. § 2101 *et seq.* (Chap. 309 — entitled "Sanctuaries and Preserves").

"**§ 2101. Designation of preserves and sanctuaries**

"No person shall, except as provided, at any time, trap, hunt, pursue, shoot at or kill any wild animal or any game or other wild birds within the following described territories: . . ."

Kinnon, supra. The State may where it will and when it will prohibit hunting on any land within the State. We are satisfied, therefore, that it is the policy of the State and not the wish of the individual which controls the protection and preservation of the wildlife of our State.

Operating under its stated charter purposes, the plaintiff seeks to create a game preserve or at most a game management area with conditions deemed harmful by the regional game biologist of the Fish and Game Department. The Holbrook Island Sanctuary in face of this expert opinion adverse to its desires seeks an exemption from the normal support of government. Such a purpose may not be called a charitable purpose. It follows that the plaintiff is a corporation not "organized and conducted exclusively for benevolent and charitable purposes" within the meaning of the tax statute Section 652, note 1, *supra,* and accordingly is not entitled to tax exemption.

The plaintiff urges that it is a scientific institution and is thus entitled to tax exemption. We are fully satisfied that the purposes for which the plaintiff was organized and to which its property was exclusively devoted are not scientific within the meaning of Section 652, note 1, *supra.* The purpose of the corporation was to establish a game preserve, as we have stated above. The availability of the area for nature study, observation and photography, the small library of books on nature and conservation, and the census of animals by the warden, are uses too small on which to place the plaintiff in the ranks of scientific institutions. Such uses are only incidental to the main object of the plaintiff.

The property in question is subject to taxation by the town.

The entry will be

Remanded for entry of a decree in accordance with this opinion.

OTTO BENNETT

vs.

STATE OF MAINE, ET AL.

Knox. Opinion, November 18, 1965.

Habeas Corpus. Criminal Law. Jury.

Post-conviction habeas corpus, a successor to writ of error *coram nobis*, is not an appeal.

Verdicts in criminal as well as civil cases must be found by an impartial jury and must be the result of honest deliberations absolutely free from prejudice or bias.

Statute relating to challenges to jury for cause is declaratory of common law and sets up legal machinery whereby parties may safeguard their constitutional right to an impartial trial by an impartial jury.

Relationship by consanguinity or affinity within the 6th degree according to civil law or within the degree of 2nd cousins inclusive will disqualify person who is required to be disinterested in matter in which others are interested, and this statutory rule is applicable to jurors.

There is no waiver of objection to juror because of his relationship to a party where objecting party is not aware of any circumstances affecting competency of juror until after verdict, and the verdict must be set aside.

Claim in habeas corpus proceedings that prosecutor knowingly used perjured testimony was not borne out by evidence and was contrary to findings of single justice thereon, and thus legally insufficient on appeal.

Failure of counsel to request the recording of opening statements and arguments of counsel did not show incompetency of counsel which followed usual practice in state.

Accused who has been represented by counsel of his own selection cannot complain of counsel's incompetence, errors of judgment or mismanagement of defense unless representation was of such poor calibre as to reduce proceedings to a farce and a sham, as where

representation was so ineffective as to make conviction a mockery or manifest miscarriage of justice.

At habeas corpus proceeding the petitioner is not presumed innocent and must prove the truth of his allegations to satisfaction of presiding justice by preponderance of evidence.

ON APPEAL.

Habeas corpus proceeding in which the petitioner appealed from a discharge of writ of habeas corpus by a single justice in the Superior Court, held, that trial irregularities which had not been raised in trial court were not so highly prejudicial as to fall within exception to general rule forbidding their consideration, and defendant failed to show any alleged incompetency of counsel. Appeal denied.

Frank F. Harding, for Petitioner.

John W. Benoit, Asst. Atty. General, for Respondents.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, MARDEN, RUDMAN, DUFRESNE, JJ.

DUFRESNE, J. On appeal from discharge of the writ of habeas corpus by a single justice.

Otto Bennett was indicted, tried and convicted, at the October term, 1960, of the Superior Court for Knox County. His exceptions (1) to the denial of his motion for a directed verdict, (2) to 13 allegedly erroneous rulings on evidence and (3) to part of the charge, were overruled by this court. *State* v. *Bennett,* 158 Me. 109, 179 A. (2nd) 812 (1962).

Incarcerated in State prison in pursuance of sentence received in those proceedings, Bennett sought further relief from the federal courts on the grounds that his conviction was not supported by sufficient credible evidence. This

attack fizzled in the Circuit Court of Appeals. *Bennett* v. *Robbins,* 329 F. (2nd) 147 (March 16, 1964).

Bennett's subsequent extramural endeavor 3 months later sought the issuance of the writ of habeas corpus in our Superior Court. The writ issued, full hearing ensued and Bennett now appeals from the denial of relief and from the discharge of the writ by the single justice who found the petitioner's multiple lateral attacks on the court's original judgment without legal avail.

Bennett's present grievances are listed under 9 separate topics, the last of which, nomenclated incompetency of counsel, is subdivided into 11 accusations directed at his trial attorney's conduct.

These alleged trial errors noted in the bill of grievances and within the statement of points on appeal may be succinctly expressed as follows: (1) variance between the date of the offense as specified in the indictment and the date borne out by the evidence; (2) nonadmission into evidence of respondent's exhibit #1, a so-called employment chart, after court had deferred ruling on its admissibility, when in fact there was no further request for a ruling thereon or move for later admission; (3) alleged prejudicial remark of the presiding justice about testimony; (4) alleged prejudicial remark of the presiding justice to defense counsel; (5) alleged prejudicial argument by state counsel; (6) disqualification of 2 jurors, (a) Chester Leonard who was first cousin to Carlisle Leonard, the said Carlisle Leonard's wife being a sister to the prosecutrix's mother and (b) Simon Hamalainen, the other juror who was the son-in-law and employee of Rivers Emil, the owner of Rivers Emil Incorporated, with which corporation the prosecutrix's father had done business in the past; (7) inconsistency of prosecutrix's testimony with her prior statements under oath; (8) state counsel's knowing use of prosecutrix's alleged perjured testimony.

None of these alleged trial errors were objected to at the trial level, nor were they submitted for review on appeal. All were considered and found legally wanting by the single justice, either in law or in fact and law.

Such trial irregularities as consist of variance between the allegata and the probata, or have to do with the admissibility of evidence or may be prejudicial remarks by the trial judge or argument of the prosecutor, are all matters for consideration on appeal and not in post-conviction habeas corpus under M.R.S.A. Title 14, § 5502.

Post conviction habeas corpus is available under the statute *"provided that the alleged error has not been previously . . . . . waived in the proceeding resulting in the conviction"*. . . . . .

Where objections to these alleged trial irregularities were not raised in the trial court, they must be deemed waived, and will not be considered for the first time on appeal. *State* v. *Smith,* 140 Me. 255, 37 A. (2nd) 246. None can be classed as 'highly prejudicial' or 'well calculated to result in injustice' or otherwise so fundamentally unfair as to prevent an impartial trial or a true verdict based solely on the evidence and the law applicable thereto, where an exception to the above rule is permitted. *State* v. *Smith, supra.*

In *State* v. *Bennett,* 158 Me. 109, at page 111, 179 A. (2nd) 812, 814, this court said:

> "But real and spoken evidence and their advantage in observing the principals and witnesses completely vindicate the jurors in their verdict of guilt beyond a reasonable doubt."

This court's study of the record did not then, nor does it now, convince us that manifest errors exist and that injustice will result unless these alleged irregularities are examined.

Furthermore, post-conviction habeas corpus, a successor to the writ of error *coram nobis,* is not an appeal, *Dwyer* v. *State of Maine,* 151 Me. 382, 120 A. (2nd) 276, and M.R.S.A. T. 14, § 5502 expressly states that

> "the remedy of habeas corpus provided in sections 5502 to 5508 is not a substitute for nor does it affect any remedies which are incidental to the proceedings in the trial court."

Therefore, these alleged trial irregularities are not properly for our consideration as such.

Petitioner claims, however, amongst these stated trial errors, that 2 of the jurors at his trial were not disinterested and that he was thereby deprived of his constitutional right to be tried by an impartial jury.

Because "a fair trial is the implicit end, and the very essence of constitutional government," we will examine the petitioner's charge in this respect.

It is true that

> "(i)n all criminal prosecutions, the accused shall have a right . . . . . to have a(n) *impartial* trial, ... by a jury of the vicinity" (Emphasis supplied.) Article I, section 6, *Constitution of Maine.*

An impartial trial necessitates an impartial jury.

> "The administration of justice requires that verdicts, criminal as well as civil, shall be found by impartial juries, and shall be the result of honest deliberations absolutely free from prejudice or bias. The public as well as the accused have rights which must be safeguarded." *State v. Slorah,* 118 Me. 203 at 210; 106 A. 768.

A potentially partial jury will not do.

> "To render a verdict void in civil cases it need not appear that the jury was actually prejudiced, biased, or influenced by the occurrence. If it may

> have affected their ability to render an impartial verdict, it is sufficient . . . . . the same considerations should apply in criminal cases whether it might affect adversely the State or the respondent . . . . . Both are entitled to a fair trial." *State* v. *Slorah, supra,* at page 211.

M.R.S.A. Title 14, § 1301, is declaratory of the common law and has set up the legal machinery at trial whereby the parties may safeguard their constitutional right to an impartial trial by an impartial jury, a fundamental and basic concept of justice under our judicial system.

> "The court, on motion of either party in an action, may examine, on oath, any person called as a juror therein, whether he is related to either party, has given or formed an opinion or is sensible of any bias, prejudice or particular interest in the cause. If it appears from his answers or from any competent evidence that he does not stand indifferent in the cause, another juror shall be called and placed in his stead."

See, *Agricultural Corp.* v. *Willette,* 120 Me. 423 at pages 425, 426, 115 A. 170.

By statute a relationship by consanguinity or affinity with within the 6th degree according to the civil law, or within the degree of 2nd cousins inclusive, will disquality a person who is required to be disinterested or indifferent in a matter in which others are interested. M.R.S.A. Title 1, § 71 (6).

The rule has been applied to jurors, *Lane* v. *Goodwin,* 47 Me. 593 (1860) ; *Hardy* v. *Sprowle,* 32 Me. 310 (1850). In the latter case, our court has said at page 312:

> "The law is general, and prescribes the rule of disqualification rigidly, and regardless of the fact whether the juror might or might not be biased by the relationship, in a given case. Without doing injustice to any, it assumes that all, thus related,

> may be influenced by that consideration, and holds them incompetent to act and decide impartially."

The basis for the disqualification of a juror because of relationship to one of the parties is the fact that such relationship may influence the juror in his deliberations and decisions. The statute further recognizes that other interests, besides those of relationship, may just as readily subject a juror to possibility of influence establishing disqualification within the statutory concept of sensibility "of any bias, prejudice or particular interest in the cause;" such may arise of course because of business relations.

However, M.R.S.A., Title 14, § 1303, imposes upon the parties a duty to disclose any known objection under penalty of waiver of the objection.

> "If a party knows any objection to a juror in season to propose it before trial and omits to do so, he shall not afterwards make it, unless by leave of court for special reasons."

Our court has said that

> "in season" "before trial" must mean "before the termination of the trial." "The party cannot keep quiet and speculate upon the chances of a verdict in his favor. He should, at the first opportunity after the discovery is made, make an open disclosure of the fact for the benefit of all concerned." *Brown* v. *Reed,* 81 Me. 158 at page 161.

In cases where the objection to a juror is his relationship to a party, there is no waiver when the objecting party is not aware of any circumstance affecting the competency of the juror, until after verdict, and the verdict must be set aside. *Jewell* v. *Jewell,* 84 Me. 304, 24 A. 858 (1892); *Lane* v. *Goodwin,* 47 Me. 593 (1860); *Hardy* v. *Sprowle,* 32 Me. 310 (1850).

We have belabored this issue because of the great importance we attach to the constitutional entitlement of a

party accused of crime to an impartial jury trial. Therefore, let us assume for the purposes of this case, but we are not deciding the point, that relationship of a juror, within the statutorily designated degrees, to the State's principal witness, the accuser sometimes referred to as the prosecutrix, would similarily disqualify a juror, even though such relationship does not come within the literal dictates of the statute which refers to relationship to "either party," still this would not avail any legal relief to Otto Bennett.

Indeed, the alleged relationship between the juror, Chester Leonard, and the victim of the statutory rape of which Bennett was found guilty, consisted in the fact that the juror's first cousin was married to the sister of the victim's mother. The wife of the juror's first cousin would come within the statutory disqualifying degree of relationship by affinity, but not her relatives. *Chase* v. *Jennings*, 38 Me. 44, 45 (1854).

Furthermore, the single justice found on evidence properly sustaining such finding, that neither of the 2 jurors objected to were otherwise disqualified by reason of interest. Such findings of fact by a single justice in habeas corpus proceedings are not to be set aside unless clearly erroneous. Rule 52(a) of M.R.C.P.

Otto Bennett's charge that the State's prosecutor knowingly used perjured testimony at trial is not borne out by the evidence, is contrary to the findings of the single justice thereon, and thus is legally insufficient on appeal.

Bennett further seeks relief from sentence on the grounds that counsel of his choice at trial and on the previous appeal to this court, was incompetent.

Bennett indicts his attorney because of the following trial errors: (1) failure to move or press again the admission of the employment chart, so-called, after ruling thereon had been deferred by the court; (2) failure to move for

mistrial or directed verdict (a) for alleged prejudicial remarks of the court, (b) for insufficiency of prosecutrix's testimony and her coaching by the county attorney, (c) for prejudicial argument of the county attorney; (3) failure to request a record of opening statement of the county attorney and of arguments of counsel; (4) erroneously advising him that he was required by law to testify.

He further complains against his attorney for not perfecting his previous appeal on what he calls the constitutional errors at the trial, and for informing him erroneously as to any further legal redress in the federal courts.

The employment chart, so-called, which Bennett now says his attorney should have pressed for admission at trial, was not of substantial value so far as the evidence was concerned in this case, and the single justice accepted the attorney's recollection that the petitioner and himself had decided that it was not important. Such finding supported by evidence and not obviously erroneous is controlling. Counsel did no more than properly exercise his judgment on a matter of trial tactics. The petitioner was not thereby denied a fair trial or deprived of any constitutional right.

During direct examination, petitioner's counsel sought to elicit from his wife the reason for their failure to have relations after she had noticed on her husband some abnormal physical condition. Upon objection, the presiding justice remarked:

> "THE COURT: Now we are in an area where it might be that only the respondent could give the answer to that question, and I don't know what the answer might be, but this witness of course cannot testify to anything that her husband told her about his condition and whether it affected his ability to have relations. Can you rephrase the question in any way?
>
> MR. GROSSMAN: I will try to your Honor.

THE COURT: Or it may be that only the respondent can explain that." . . . . . .

"MR. PAYSON: I object again to the conclusion drawn by this witness as to her husband's condition. Only he and a qualified doctor can testify to that. I don't object if she attempts to describe it.

THE COURT: She should describe it.

MR. GROSSMAN: Would you describe your husband's condition in September 1959 as it appeared to you and tell us whether it appeared - - - tell us what the appearance was as it compared to the appearance that you saw it in August of 1959?

THE COURT: If the appearance changed for the worse or for the better she can describe it so long as she is testifying as to what she observed.

MR. GROSSMAN: Do you understand the question?

A I believe so.
Q Answer it, Mrs. Bennett."

The petitioner's wife thereafter fully testified to her husband's physical condition.

These remarks of the court at trial were misconstrued by the petitioner, were found to be innocuous by the single justice, and from the record of the evidence could not have prejudiced the petitioner with the jury. Counsel's failure to press the same as error on appeal was not incompetent conduct.

The record bespeaks the sufficiency of the prosecutrix's testimony to sustain conviction and the petitioner's further cry of coaching of the prosecutrix by the county attorney nowhere is substantiated in the record. There was no counsel error in not incorporating on appeal such unsupportable conclusions of petitioner's imagination.

The alleged prejudicial argument of the county attorney, not objected to at trial nor brought up for review on appeal, was not shown to be without the bounds of propriety, and cannot serve as legal basis for a shout of incompetency of counsel. A recital of the particulars would not benefit posterity.

Failure to request recording opening statements and arguments of counsel does not spell out incompetency of counsel since it has not been the usual practice in this State to record the same. Counsel followed the recognized practice deemed proper by the courts.

Petitioner's counsel denied advising Bennett that he was legally required to take the stand, but testified to the fact that Bennett "was very anxious to testify" in his behalf and "felt as though his testimony was of paramount importance." Such testimony, accredited by the single justice, disproves any counsel incompetency.

All the charges of incompetency of counsel made by Bennett in this case may appear substantial in the mind of a dissatisfied prisoner who looks for a scapegoat after the legal battle has been lost, but upon judicial analysis, they do not, singly or cumulatively, cast a sliver of doubt upon the fairness and adequacy of the original trial nor upon the sufficiency of the appellate proceedings.

Where accused was represented by counsel of his own selection, he cannot complain of counsel's incompetence, errors of judgment or mismanagement of his defense unless the representation was of such poor calibre as to reduce the proceedings to a farce and a sham, as where the representation was so ineffective as to make the conviction a mockery or manifest miscarriage of justice. *Burton* v. *U. S.*, U.S.C.A. 151 F. (2nd) 17 (D.C. 1945); *People* v. *Wein*, 326 P. (2nd) 457, 50 C. (2nd) 383 (1958); cert. denied 79 S. Ct. 98, 358 U.S. 866, 3 L. Ed. (2nd) 99; *People* v.

Robillard, 358 P. (2nd) 295, 300, 55 C. (2nd) 88 (1960), 83 A.L.R. (2nd) 1096, cert. den. 81 S. Ct. 1043, 365 U.S. 886, 6 L. Ed. (2nd) 199; *People* v. *Strader,* 177 N.E. (2nd) 126, 23 Ill. (2nd) 13 (1961); *State* v. *Benson,* 72 N.W. (2nd) 438, 247 Iowa 406 (1955); *Lotz* v. *Sacks,* U.S.C.A. 6th C. (Ohio), 292 F. (2nd) 657 (1961); *O'Malley* v. *United States,* U.S.C.A. 6th C. (Ohio), 285 F. (2nd) 733 (1961). See also 21 Am. Jur. (2nd) Criminal Law § 315; 74 A.L.R. (2nd) 1397; 23 C.J.S. Criminal Law § 982 (8).

As a prerequisite to relief, erroneous conduct of counsel must be of such character as to have deprived the accused of his constitutional right to a fair and impartial trial, or otherwise of due process.

> "The fact that a criminal, after conviction, is of the opinion that the trial was not properly or wisely conducted by his counsel, constitutes no ground for the issuance of a writ of habeas corpus unless counsel's conduct was so prejudicial as to deprive defendant of a fair trial or otherwise deprive him of due process." *Commonwealth* v. *Banmiller,* 143 A. (2nd) 657, 393 Pa. 530.
>
> "It is easy to condemn the exercise of counsel's judgment after the case is lost which would be praised if the case were won. But no lawyer can be expected to do more than exercise a reasonable skill which cannot be fairly judged by the result of the trial alone." *Commonwealth* v. *Thompson,* 367 Pa. 102, 109, 79 A. (2nd) 401, 404 (1951).
>
> "The right to counsel and the effective assistance of counsel does not vest the petitioner with the absolute privilege of retroactively assessing the quality of his counsel's trial representation against his present feeling as to what might have been better strategy." *Commonwealth ex rel. Davis* v. *Maroney,* 210 A. (2nd) 920 at 922, 206 Pa. Super 68 (1965); *LaRue* v. *Rundle,* 417, Pa. 383, 207 A. (2nd) 829.

Counsel in the trial of cases is faced with innumerable decisions of strategy which arise as the trial scene unfolds. He has to judge whether jurors should be challenged, whether to use a certain type of *voir-dire* questionnaire in ascertaining the impartiality of the jury. The type of cross-examination, easy or forceful, must be elected, depending on what in counsel's sound discretion, will be the least prone to prejudice the jury. He must advise the accused on the knotty and very crucial question as to whether the accused should testify. He is always aware of the danger of objecting too much. He must be careful in his handling of objections to judicial conduct. The tenor of his argument will vary according to the atmosphere at the time of presentation. There may be many other trial problems to solve. His main purpose must be to procure for his client a fair trial within the norms of due process.

Much discretion must be permitted counsel. Strategy at trial will not legally support the setting aside of a conviction through habeas corpus, unless the cumulative effect of the trial errors ascribed to counsel has reduced the trial to a farce or a sham, or the legal representation was of such low calibre as to amount to no representation. *U. S. ex rel. Feeley* v. *Ragen*, 166 F. (2nd) 976; *People* v. *Reeves*, 107 N.E. (2nd) 861, 412 Ill. 555; *Mitchell* v. *U. S.*, 259 F. (2nd) 787 at pages 792 and 793.

Massive recrimination against counsel's trial conduct will avail nothing, where, as in this case, the trial atmosphere was fair, the rights of the accused properly and competently protected and the jury verdict just.

Petitioner was satisfied with the conduct of his attorney during trial as there is no suggestion in the record of any complaint on his part to the presiding justice. Petitioner's confidence carried through beyond the trial scene until his appeal was denied by this court; after the petitioner realized that his avenues of escape from sentence had been

sealed, it is then, and only then, that he first voiced these charges against counsel.

We have carefully perused the whole record and we find absolutely no merit in petitioner's accusations. Counsel displayed constant alertness and vigor throughout a lengthy trial, made numerous and wise objections to State's evidence and to court rulings thereon in his endeavor to protect petitioner's rights. The cross-examination of the State's witnesses was very extensive and exhaustive. There is nothing in the record to show that the conduct of petitioner's defense was in any degree less than the conduct expected from the lawyer of average skill. The record discloses a skillful and competent defense.

As stated in our own case of *Dwyer* v. *State,* 151 Me. 382, 120 A. (2nd) 276,

> "the petitioner, at a hearing on a writ of error coram nobis (now habeas corpus), is not presumed innocent. The petitioner must, therefore, prove the truth of his allegations to the satisfaction of the presiding justice by a preponderance of evidence."
>
> "A judgment of conviction carries with it a presumption of regularity which cannot lightly be set aside . . . When a judgment of conviction is attacked collaterally in habeas corpus, the complaining party has the burden of clearly establishing the facts which would justify the conclusion of lack of due process which he asserts." *Commonwealth ex rel. Storch* v. *Maroney,* 204 A. (2nd) 263, at page 265, 416 Pa. 55 (1964). *Commonwealth ex rel. Davis* v. *Maroney,* 210 A. (2nd) 920, 206 Pa. Super 68 (1965).

The petitioner has the burden of proof, albeit only by the fair preponderance of the evidence, *Dwyer* v. *State, supra;* he has the burden of showing fundamental unfairness in the trial proceedings. In this he has failed dismally.

Petitioner's further complaint that his counsel erred in not advising him properly as to his right to relief on the federal level, is devoid of factual basis and need not be further considered.

Our review of the record satisfies us again that petitioner had a fair and impartial trial upon the merits, that he was properly represented by competent counsel during all phases of the trial and that the jury returned a proper verdict. The discharge of the writ of habeas corpus by the single justice was correct.

The entry will be

Appeal denied.

HERBERT A. GENTLE
vs.
ALISTON B. JEWELL

Aroostook. Opinion, November 18, 1965.

Damages. Jury.

Where jury could find that plaintiff had been involved in serious accident five months before collision with defendant, that he suffered permanent partial impairment that persisted at time of second accident and thereafter, that impact between automobiles in accident with defendant was slight, and opinion of medical expert was that second accident did not aggravate any pre-existing condition, award of $516 was not so inadequate as to make it apparent that jury acted under some bias, prejudice or improper influence or made some mistake of fact or law.

ON APPEAL.

This is an appeal by the Plaintiff in a personal injury case who received a verdict which he claims was inadequate. The damages awarded by the jury in the amount

of $516 were not so inadequate as to make it apparent that the jury acted under some bias, prejudice or improper influence or made some mistake of fact or law.

Malcolm I. Berman, for Plaintiff.

Albert M. Stevens, for Defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, MARDEN, RUDMAN, DUFRESNE, JJ.

PER CURIAM

Plaintiff on appeal asserts that a jury verdict against the defendant in the amount of $516 is so inadequate as to require a new trial on damages only. The issue is whether or not the award is so inadequate as to make it "apparent that the jury acted under some bias, prejudice, or improper influence, or have made some mistake of fact or law." *Cayford* v. *Wilbur* (1894), 86 Me. 414, 416, 29 A. 1117, 1118; *Gregory* v. *Perry* (1927), 126 Me. 99, 136 A. 354; *Fotter* v. *Butler* (1950), 145 Me. 266, 75 A. (2nd) 160. We view the evidence as to damages in the light most favorable to the defendant as we determine whether the verdict is grossly inadequate.

The jury could find that the plaintiff had been involved in a serious accident five months before the event which gave rise to the action in the instant case; that in the prior accident he suffered a permanent partial impairment which persisted at the time of the second accident and thereafter; that the impact between the automobiles in the instant case was slight and not likely to produce the injuries subsequently claimed by plaintiff; and that the opinion of a medical witness that the second accident did not aggravate any preexisting condition was persuasive. There is no occasion to disturb the verdict.

Appeal denied.

STATE OF MAINE
vs.
LOUIS JALBERT

Androscoggin. Opinion, November 26, 1965.

Conspiracy. Indictment and Information. Bribery. False Pretenses.

Gravamen of conspiracy is combination, concerted action and unlawful purpose.

When act to be accomplished is itself criminal or unlawful, it is not necessary to set out in indictment the means by which it is to be accomplished, but when act is not in itself criminal or unlawful, unlawful means by which it is accomplished must be distinctly set out.

A judicial officer may be subject to bribe not only concerning matters pending but also those that may legally come before him.

Count charging defendant with feloniously conspiring and agreeing with another named individual to commit crime of bribery by attempting to influence investigation of case which might legally come before a particular municipal court judge was sufficient to charge conspiracy, even though it failed to use the word "together."

Count of indictment charging defendant with cheating by false pretense was sufficient in law since grand jury left no uncertainty as to what it meant in alleging that defendant had represented that he had worked hard to fix case with judge.

Where defendant filed general demurrer to indictment which was overruled and defendant did not reserve right to plead over, presiding justice had no alternative but to order judgment for State.

ON EXCEPTIONS.

This is on exceptions to the overruling of the respondent's demurrer on a two-count indictment charging the crimes of Conspiracy and Cheating by False Pretenses. Exceptions overruled.

David R. Hastings, Special Asst. Attorney General, Laurier T. Raymond, Jr., County Attorney

for Androscoggin County, for Plaintiff.

George M. Carlton, Jr., for Defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, MARDEN, RUDMAN, JJ. SULLIVAN, J., sat at argument but retired before the opinion was adopted.

TAPLEY, J. On exceptions. The defendant was indicted by the Grand Jury at the September Term, 1964 of the Superior Court, within and for the County of Androscoggin. The indictment contains two counts, one charging the crime of conspiracy to bribe, and the other for cheating by false pretenses. Defendant filed a general demurrer to the indictment without requesting or being granted the right to plead over. The presiding justice, after due consideration, found the indictment sufficient, overruled the demurrer, ordered judgment for the State and continued the case for sentence. The defendant seasonably filed exceptions to the overruling of the demurrer and the case is now before us on these exceptions.

Defendant's contentions, as expressed in his brief, are in manner and form as follows:

> "1. Does a general demurrer test every aspect of the indictment?
>
> 2. Must an indictment for conspiracy specifically set forth and allege that two or more persons did conspire and agree *together* as is contained in the language of the statute?
>
> 3. Must an indictment for conspiracy contain an allegation indicating a mutuality of intent of the co-conspirator and mutuality of agreement to do an unlawful act?

4. Is an indictment charging conspiracy sufficient when the alleged bribery is by the language of the indictment dependent upon a future contingency which also by the language of the indictment is pure speculation?

5. Is it sufficient that an indictment for conspiracy to commit the crime of bribery merely set forth 'a gratuity and valuable consideration' without further specifying what the gratuity or valuable consideration is?

6. Is an indictment for cheating by false pretenses sufficient when it fails to:

a. set forth that the subject matter of the false pretense is an existing fact?

b. set forth what the act 'worked hard' specifically consists of as a false pretense?

c. specifically negate the truth of the pretense alleged?

d. set forth that there was such a relationship between the respondent and the one alleged to have been deceived that would permit the one deceived to in some way rely upon the representation of the respondent?

7. Is an indictment sufficient as a matter of law when the several counts therein contain allegations so completely inconsistent as to preclude the possibility of a proper consideration by the Grand Jury?"

The indictment under attack reads:

"AT THE SUPERIOR COURT, begun and holden at Auburn, within and for the County of Androscoggin, on the first Tuesday of September in the year of our Lord one thousand nine hundred and sixty-four.

"THE JURORS FOR SAID STATE upon their oath present that Louis Jalbert, of the City of Lewiston, in said County of Androscoggin and State of Maine, on the second day of February, in the year of our Lord, one thousand nine hundred and sixty-three, at said Lewston, feloniously did conspire and agree with one Joseph A. P. St. Pierre, otherwise called Paul St. Pierre, with fraudulent and malicious intent, wrongfully and wickedly to commit a crime punishable by imprisonment in the state prison, to wit: the crime of bribery, by the said Louis Jalbert then and there feloniously conspiring and agreeing with said Joseph A. P. St. Pierre, with said fraudulent and malicious intent, feloniously and corruptly to offer, promise and give to one Harris M. Isaacson a gratuity and valuable consideration, and by the said Louis Jalbert then and there feloniously conspiring and agreeing with said Joseph A. P. St. Pierre, with said fraudulent and malicious intent, feloniously and corruptly to offer to do, promise to do and do certain acts beneficial to said Harris M. Isaacson, the said Harris M. Isaacson being then and there, to the knowledge of said Louis Jalbert and said Joseph A. P. St, Pierre, a judicial officer, to wit: the duly appointed and qualified Associate Judge of the Municipal Court for said City of Lewiston, said gratuity and valuable consideration to be offered, promised and given, as aforesaid, and said beneficial acts to be offered, promised and done, with the felonious and corrupt intent to influence the action, vote, opinion and judgment of said Harris M. Isaacson in a certain matter that might come legally before him in his said official capacity as Associate Judge, to-wit: the criminal prosecution in said Municipal Court of one Leo J. St. Pierre, the said Leo J. St. Pierre being then and there, to the knowledge of said Louis Jalbert and said Joseph A. P. St. Pierre, under investigation as a suspected larcenist by officers of the police department of said City of Lewiston in connection with certain larcenies supposed to have

been committed within said City of Lewiston during the year last past, against the peace of said State, and contrary to the form of the statute in such case made and provided.

"And the jurors aforesaid, upon their oath aforesaid, do further present that Louis Jalbert, of the City of Lewiston, in said County of Androscoggin, and State of Maine, on the second day of February, in the year of our Lord, one thousand nine hundred and sixty-three, at said Lewiston, feloniously, designedly and with intent to defraud, did falsely pretend to one Joseph A. P. St. Pierre, otherwise called Paul St. Pierre, for the purpose of inducing the said Joseph A. P. St. Pierre to pay a certain sum of money, to-wit: the sum of two hundred dollars, to him, the said Louis Jalbert, that he, the said Louis Jalbert, had then and there worked hard to fix the case against Leo St. Pierre with Judge Isaacson (meaning that he, the said Louis Jalbert, had worked hard to make an arrangement, and had arranged, with one Harris M. Isaacson, the said Harris M. Isaacson then and there being, to the knowledge of said Louis Jalbert and said Joseph A. P. St. Pierre, the duly appointed and qualified Associate Judge of the Municipal Court for said City of Lewiston, to have certain criminal investigations then and there being conducted by officers of the police department of said City of Lewiston, involving as a suspected larcenist one Leo J. St. Pierre, father of said Joseph A. P. St. Pierre, in connection with certain larcenies supposed to have been committed within said City of Lewiston during the year last past, disposed of without any formal complaint against and without any criminal prosecution of the said Leo J. St. Pierre) and moreover, the said Louis Jalbert then and there feloniously, designedly and with intent to defraud, for the purpose aforesaid, did falsely pretend to said Joseph A. P. St. Pierre that he, the said Louis Jalbert, had to have two hundred dollars to buy a set of golf clubs for Judge Isaacson (meaning that he, the said Louis Jalbert, by reason of said arrangement to

dispose of said criminal investigations, as aforesaid, was under obligation to buy and give to said Harris M. Isaacson a set of golf clubs, of the value of two hundred dollars) whereas in truth and in fact the said Louis Jalbert had not arranged with said Harris M. Isaacson to dispose of said criminal investigations as aforesaid, and was under no obligation by reason of any such arrangement to give to said Harris M. Isaacson any valuable consideration whatsoever, all of which the said Louis Jalbert then and there well knew, which said false pretenses were believed to be true and were relied upon by the said Joseph A. P. St. Pierre, and he was thereby deceived and induced to pay over and deliver and did then and there pay over and deliver to the said Louis Jalbert, and the said Louis Jalbert thereby and solely by means of said false pretenses did then and there feloniously, designedly and with intent to defraud obtain from the said Joseph A. P. St. Pierre, the said sum of money, to-wit: divers national bank bills, treasury notes and certificates of the aggregate value and amount of one hundred dollars, current as money in the United States of America, a more particular description of which is to said jurors unknown, and one good and available bank check and order dated February 2, 1963, drawn by said Joseph A. P. St. Pierre, under his name of Paul St. Pierre, on the First-Manufacturers National Bank of Lewiston and Auburn, a corporation duly existing by law, of the amount and value of one hundred dollars, payable to the order of said Louis Jalbert, all of the aggregate value and amount of two hundred dollars and all of the property of said Joseph A. P. St. Pierre,

against the peace of said State, and contrary to the form of the statute in such case made and provided."

COUNT CHARGING CONSPIRACY

This count charged the defendant with feloniously conspiring and agreeing with one Joseph A. P. St. Pierre,

fraudulently, with malicious intent, wrongfully and wickedly to commit a crime punishable by imprisonment in the State Prison, the crime being bribery. The defendant and Joseph A. P. St. Pierre, with fraudulent and malicious intent, agreed to offer, promise and give to Harris M. Isaacson a gratuity and valuable consideration, with intent to influence the action, vote, opinion and judgment of said Harris M. Isaacson on a certain matter that might legally come before him in his official capacity as Associate Judge, the official matter being that one Leo J. St. Pierre was under investigation in connection with certain larcenies and that the result of the investigations might come legally before Harris M. Isaacson, Associate Judge, the capacity of Harris M. Isaacson as Associate Judge of the Municipal Court for the City of Lewiston being well known to both the defendant and Leo J. St. Pierre. The count charging a conspiracy to bribe in the case at bar is much like the one upon which the prosecution was based in the case of *State* v. *Papalos,* 150 Me. 370, 372, excepting that in the instant case the subject of conspiracy, to wit, the crime of bribery, is more specifically described in the indictment.

> " - - - - the gravamen of conspiracy is 'combination,' 'concerted action' and 'unlawful purpose.' "
> *State* v. *Trocchio,* 121 Me. 368, 375.

> "When the act to be accomplished is itself criminal or unlawful, it is not necessary to set out in the indictment the means by which it is to be accomplished; but, when the act is not in itself criminal or unlawful, the unlawful means by which it is to be accomplished must be distinctly set out."
> *Berger* v. *State of Maine,* 147 Me. 111, 115.

The indictment does not allege any case pending before Judge Isaacson but the bribery statute makes it a crime to illegally influence a judicial officer "in any matter pending, or *that may come legally before him in his official capacity.*"

> "Whoever gives, offers or promises to an executive, legislative or judicial officer, before or after he is qualified or takes his seat, any valuable consideration or gratuity whatever, or does, offers or promises to do any act beneficial to such officer, with intent to influence his action, vote, opinion or judgment in any matter pending, or that may come legally before him in his official capacity, shall be punished - - - - -."
>
> R. S., 1954, Chap. 135, Sec. 5 (17 M.R.S.A., Sec. 601).

The language of the statute makes it clear that a judicial officer may be subject to a bribe, not only concerning pending matters but also those that may legally come before him.

> "If 2 or more persons conspire and agree together, with the fraudulent or malicious intent wrongfully and wickedly - - - - - to commit a crime punishable by imprisonment in the State Prison, they are guilty of a conspiracy; - - - - -."
>
> R. S., 1954, Chap. 130, Sec. 25 (17 M.R.S.A., Sec. 951).

Defendant argues that the conspiracy count is not valid because it fails to use the word "together" as contained in the statute. In *Moody, Petr.* v. *Warden, Maine State Prison,* 145 Me. 328, at page 334, the court said, in considering the use of statutory language in an indictment:

> "In the case of *State v. Lynch,* 88 Me. 195, which was an indictment for an assault with intent to kill and murder, a statutory offense which requires a specific intent, this court laid down the rule with respect to the use of the words of the statute setting forth the elements of a statutory crime. In that case we said:
>
> 'It is also necessary that the indictment should employ "so many of the substantial words of the statute as will enable the court to see on what one it is framed; and, beyond this, it

> must use all the other words which are essential to a complete description of the offense; or, if the pleader chooses, words which are their equivalent in meaning; or, if again he chooses, words which are more than their equivalents, provided they include the full significations of the statutory words, not otherwise." Bishop on Criminal Procedure, vol. 1, Sec. 612.' "

In the instant case there were *two* men involved in the alleged conspiracy. It is obvious that in conspiring and agreeing to commit an unlawful act they must have done it together. There is no merit in the contention that because of the failure to include the word "together" in the count alleging conspiracy that it is insufficient in law.

We are of the opinion, and so find, that the count in the indictment charging conspiracy in every particular is sufficient in law.

Count Charging Cheating By False Pretenses

R. S., 1954, Chap. 133, Sec. 11 (17 M.R.S.A., Sec. 601)

Counsel for defendant attacks this count on several grounds: (1) the pretense as alleged in the second count in the indictment is not capable of defrauding; (2) the count does not contain a direct and positive averment that the pretense made was in fact false; and, further, that the negation does not contest pretense relied upon that the defendant had "worked hard to fix the case against Leo St. Pierre with Judge Isaacson." There are further complaints that there were no allegations contained in the count that defendant was acquainted with Judge Isaacson; that there was any connection between the defendant and Isaacson and that there was power in the judge to halt the investigation. The State in alleging the false pretenses used this language in setting out the false pretenses:

"that he, the said Louis Jalbert, had then and there worked hard to fix the case against Leo St. Pierre with Judge Isaacson (meaning that he, the said Louis Jalbert, had worked hard to make an arrangement, and had arranged, with one Harris M. Isaacson, - - - - - - - to have certain criminal investigations then and there being conducted by officers of the police department of said City of Lewiston, involving as a suspected larcenist one Leo J. St. Pierre, father of said Joseph A. P. St. Pierre, in connection with certain larcenies supposed to have been committed within said City of Lewiston during the year last past, disposed of without any formal complaint against and without any criminal prosecution of the said Leo J. St. Pierre.)"

The count then goes on to state as a false pretense:

"that he, the said Louis Jalbert, had to have two hundred dollars to buy a set of golf clubs for Judge Isaacson (meaning that he, the said Louis Jalbert, by reason of said arrangement to dispose of said criminal investigations, as aforesaid, was under obligation to buy and give to said Harris M. Isaacson a set of golf clubs, of the value of two hundred dollars.)"

The negation is set out in the following language:

"whereas in truth and in fact the said Louis Jalbert had not arranged with said Harris M. Isaacson to dispose of said criminal investigations *as aforesaid* and was under no obligation by reason of any such arrangement to give to said Harris M. Isaacson any valuable consideration whatsoever, - - - -." (Emphasis supplied.)

In *State* v. *Binette,* 159 Me. 231, the court considered, on demurrer, the sufficiency of an indictment charging the crime of cheating by false pretenses. The indictment, in part, alleged that the defendant,

> "had, through the color of his office, been one of the persons *who had worked very hard* to get the new Biddeford High School project started, and that he would like to have something to compensate him for the work that he and others had done ----." (Emphasis supplied.)

In considering this language the court said on *page 233:*

> "This language partakes more of innuendo than direct allegation, but in any event too many questions remain unanswered. What was meant by 'work' as used in this context? Is the 'work' referred to the same 'work' previously described as being involved in getting the project started? If so, there is no denial that some such 'work' was done. In the opinion of the speaker, efforts to get the project started initially might ultimately have accrued to the benefit of the complainant since he did obtain a contract. The word 'work' itself in this context, otherwise undefined, is more an expression of opinion than of fact."

In the count charging cheating by false pretenses the Grand Jury left no uncertainty as to what it meant in alleging that "---- Louis Jalbert, had then and there worked hard to fix the case against Leo St. Pierre with Judge Isaacson" when it set out in detail that Jalbert had worked hard to make an arrangement and made the arrangement with Judge Isaacson to dispose of any formal complaint and any criminal prosecution against Leo J. St Pierre. The Grand Jury also alleged that Jalbert falsely pretended to Joseph A. P. St. Pierre that he, Jalbert, "had to have two hundred dollars to buy a set of golf clubs for Judge Isaacson" and to clarify this allegation the Grand Jury set out in detail that Jalbert, by reason of the arrangements to dispose of the criminal investigation, was under obligation to buy and give to Judge Isaacson a set of golf clubs which would cost two hundred dollars.

In *State* v. *Deschambault,* 159 Me. 223, at 226, the court cited with approval the general rule pertaining to allega-

tions in indictments charging the crime of cheating by false pretenses.

> " 'GENERALLY. — In conformity with rules relative to indictments and informations generally, an indictment for obtaining property by false pretenses is sufficient if the language used is such that it designates the person charged and indicates to him the crime of which he is accused. An indictment is not invalidated by the fact that it charges the several acts constituting the offense to have been committed by the defendant in some particular capacity. Such an allegation may be treated as surplusage. An indictment for false pretenses must, however, have that degree of certainty and precision which will fully inform the accused of the special character of the charge against which he is called on to defend and will enable the court to determine whether the facts alleged on the face of the indictment are sufficient in the contemplation of law to constitute a crime, so that the record may stand as a protection against further prosecution for the same alleged offense.' 22 Am. Jur., False Pretenses, Sec. 90."

The count charging the defendant with the crime of cheating by false pretenses is good and sufficient in law.

When defendant, through counsel, filed a general demurrer to the indictment, which was overruled, he did not reserve the right to plead over. Without request to plead over, the presiding justice had no alternative but to order judgment for the State. *State* v. *Dresser,* 54 Me. 569; *State* v. *Cole,* 112 Me. 56; *State* v. *Rogers,* 149 Me. 32.

In addition to the rule laid down in the above cited cases, there is statutory law requiring the trial judge to impose sentence "upon conviction, either by verdict or *upon demurrer* - - - - -" (emphasis supplied) of crimes not punishable by life imprisonment.

"Sentence shall be imposed upon conviction, either by verdict or *upon demurrer,* of a crime which is not punishable by imprisonment for life. The court at the term of conviction may in its discretion continue the matter for sentence, suspend sentence or stay the execution of sentence, although exceptions are alleged. - - - - -" (emphasis supplied).

R. S., 1954, Chap. 148, Sec. 29 (15 M.R.S.A., Sec. 1701).

The entry will be:

Exceptions overruled.

Judgment for the State.

FORTUNAT J. MICHAUD

vs.

STATE OF MAINE, ET AL.

York. Opinion, December 13, 1965.

Habeas Corpus. Criminal Law. Confessions.

Evidence in habeas corpus proceeding supported finding that no direct promise was made by any police officer that if 15-year-old defendant would confess murder, officer would see that defendant was given sentence in state school for boys or that such promise was given to defendant in writing and afterwards turned over to sheriff.

Although some liberality is afforded as to draftsmanship of petition for post-conviction relief, when counsel has been appointed, petition amended and reamended, and issues fixed and limited by pleadings and pretrial process, state should not be required at post-conviction stage to meet issues not thus tendered.

If amended allegations of habeas corpus petition clearly stating specific constitutional deprivation are not supported by credible evidence, state should prevail.

Test with respect to voluntariness of confession is whether or not there has been under all circumstances violation of fundamental fairness.

Record on appeal in habeas corpus proceedings by petitioner, who was convicted of murder when he was 15 years of age, failed to support claim that petitioner was not competently represented by counsel at trial.

ON APPEAL.

This is a habeas corpus petition in which the State appealed a Superior Court Order granting the Petitioner a new trial predicated upon alleged unlawful admissions. Appeal sustained. Judgment for the State. Petitioner remanded in execution of his sentence.

Charles W. Smith, for Petitioner.

John W. Benoit, Asst. Atty. General, for Defendants.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, MARDEN, RUDMAN, JJ. SULLIVAN, J., sat at argument but retired before the opinion was adopted.

WEBBER, J. This was a petition for the writ of habeas corpus brought pursuant to 14 M.R.S.A. Sec. 5502 (formerly R. S., 1954, Chap. 126, Sec. 1-A). The petitioner is serving a life sentence for the crime of murder. The writ was issued and the matter fully heard by the justice below, the petitioner being represented by court appointed counsel. Many allegations of the petition were disposed of before issuance of the writ in a manner not challenged by either party. The only issues remaining for determination at the time of hearing were raised by Counts V and IX and may be briefly summarized as follows:

1. Whether or not the conviction of the petitioner for murder resulted in part from the State's use of a

"confession" obtained from the petitioner in violation of his constitutional rights.

2. Whether or not the petitioner at his original trial, being then indigent, was afforded adequate representation by competent counsel.

The justice below resolved the first issue in favor of the petitioner and therefore deemed it unnecessary to determine the second issue. A new trial was ordered and the State has appealed.

We turn at once to the first and decisive issue. Since our decision must rest squarely on the peculiar facts of this case, some recitation thereof is essential at the outset.

Fortunat J. Michaud was in 1955, the time of this tragic event, a boy 15 years of age. He was unable to read or write and possessed the mental capacity of a normal 12 year old. He had resided with foster parents for all but the first two years of his life. In September, 1964 when hearing was held on the matter now before us, he was 24 years old and had served 9 years in prison. The victim of this homicide was one Doris Trudeau, a child of 11 years. On the day in question Doris failed to return home at the usual hour and in due course the police were alerted to her disappearance. They obtained a slender lead suggesting that Doris had been seen during the day in company with a boy answering the description of Michaud. About 9 o'clock in the evening an officer called at his home and asked him if he had seen Doris that day. Michaud disclosed the fact that he had been with the girl in the forenoon before they returned to their respective homes for lunch, but he related none of the events of the afternoon leading up to and culminating in the fatal assault. Captain Tardiff, the investigating officer, then sought and obtained the permission of the foster mother to take Michaud to the police station for further questioning. It is important to know that at this point

the police *had no knowledge* of Doris' whereabouts or that any crime had been committed. Questioning by two officers continued for about three hours. The justice below found on the basis of credible evidence that the petitioner at no time requested counsel and was not during those evening hours advised of any right to counsel or that any statement made by him could be used against him; that he was not during this period of interrogation "held incommunicado" as alleged although he was not visited by friends or relatives; and that he was not abused physically or mentally or subjected to any force. It appears that during the greater part of the evening Michaud continued to deny any knowledge of the whereabouts of Doris. Neither the transcript of the testimony at the original trial, made available as a part of this record, nor the evidence adduced at the habeas corpus hearing serve to make it clear as to just when or why the interrogating officers began to entertain a lively suspicion that Doris might be the victim of some sort of foul play of which Michaud possessed as yet undisclosed knowledge. In any event there came a time when these suspicions were heightened by certain of Michaud's responses to questions. Officer McAlevy, one of the interrogators, described that moment as follows:

> "This particular case, during the course of the interrogation he kept making the statement of that he went over the tracks and she turned around and went back home. Well, we asked him this question several times. Now the last time that he said it he made the statement of that, he stated, 'We started up —', and he stopped. He had used the plural. He says, 'We started up.' Which in that particular area at that time, the only place he could have been started up would have been a set of railroad tracks. * * * As I was going to say, as we went on to interrogate him I more or less asked him a leading question and said, asked him, said, 'She's still up there, isn't she?' And he shook his head as if to say, 'Yes,'

> she was still up there. So, I mean, as far as anything that's concerned, we've already established that — that the body was in that area. We didn't pinpoint it down as to exactly where it was. But we knew it was up off the railroad tracks."

We can only attribute to the training and instincts of the experienced police officer the fact that with what proved later to be perfect accuracy the official mind apparently jumped instantly to the conclusion, first, that the girl Doris was dead and, second, that her body would be found in the area "up off the railroad tracks." The record is silent as to the subsequent course of the interrogation. We are informed only that there came a time when a conversation took place which forms the basis of the decision before us for review. The justice below accepted the testimony of Officer McAlevy as accurately and truthfully recapitulating this conversation. At the habeas corpus hearing he was asked the following question and gave the following answer:

> "Q. To your knowledge then, the best of your knowledge — being some 9 years ago, you didn't give him or take part in drafting any written promise.
>
> A. However, in all fairness to Mr. Michaud, I would like to state this: That during the course of the investigation that I did—he—he—well, he said to me in so many words, he said, 'What will happen to me?' Something to that effect. And I says, 'I don't really know. I know that you are a minor.' I says 'I don't know if they'll send you to State School for boys, or where they'll send you. It'll be up to the courts to decide.' And that's the only thing that I can — ."

And later on cross examination he added:

> "Well, he asked me and I told that, yes, I agree with that, that — he asked me, 'What will hap-

> pen to me?' And then that's the way I asked him. I says, 'I know that you're a minor, and I realize that you're sorry for what you done.' Etc., etc. And I says, 'I don't know exactly where you'll go, whether you'll go to State School for Boys, or, exactly where you go.' I said this verbally to him. Nothing was written down."

The witness was not asked and we are not otherwise informed as to what occurred thereafter or how long the questioning continued after the quoted conversation took place. We know only that the interrogation ceased about midnight and the officers and a physician were led by Michaud to a place in the woods where the dead body of Doris Trudeau was found. There is no evidence that any formal accusation or charge had been lodged against Michaud at least until after the body had been found and examined.

Upon return to the police station at about 4 A.M. Michaud was questioned by an officer of the Maine State Police. They were alone. The officer asked him if he had been arrested and he replied that he didn't know but guessed so. Michaud, after being informed as to the identity and purpose of his interrogator and after being warned that what he said could be used against him, was invited to "tell the truth and nothing but the truth." Michaud then related the events of the day and this narration was subsequently incorporated in a written confession. We note in passing that the preliminary oral confession, although excluded from evidence in the early stages of the trial until the mental capacity of the then respondent to make a voluntary confession had been shown, was thereafter admitted without objection. In due course counsel was appointed to represent Michaud and the latter was then committed to the Augusta State Hospital for observation and examination with respect to mental illness. Michaud again narrated the details of his criminal conduct, this time to the as-

sembled staff. Although this version was substantially the same as those previously given, it varied in some respects and Michaud admitted that he had not been truthful on prior occasions as to these details. This narration was given without objection in fullest detail to the jury under the questioning of both the State and the then respondent.

We come now to the specific allegations and the proof tendered in support thereof at the hearing below in the instant case. The justice below accurately summarized the allegations of Count V of the petition as follows:

> "That the petitioner was taken to the Saco jail and held incommunicado against his wishes, surrounded by police officials and was not afforded the opportunity of counsel or made aware of his rights to counsel. That he was promised if he would make a confession, the police officials would see that he was given a sentence in the State School for Boys and that said promise was reduced to writing and given to the petitioner, whereupon a confession was given by him. That the petitioner retained the promise until just prior to his arraignment in Municipal Court when he gave the promise to police officials upon request and with the promise that they would show the promise to the Judge and intercede in his behalf to secure a sentence to the State School for Boys. That the State at the time of trial had or should have had the written promise and should have produced it for the Court's consideration in ruling upon the preliminary question of admissibility of any purported confession. That petitioner's counsel was informed of the existence of the written promise. That the written promise was not shown to the Court at the time of trial."

In an effort to prove these contentions, the petitioner testified in substance that when he was being interrogated between 9 P.M. and midnight on August 24, 1955 he told the two officers (Captain Tardiff and Officer McAlevy) that

he had not harmed or killed Doris Trudeau; that he persisted in this denial until he finally said to them, "You promise to talk to the judge, and get me sent to the State's *(sic)* School or something like that, and I'll tell you where she is;" that McAlevy then wrote "it" down and both officers signed "it" and gave "it" to him; that although he could not read "it," the officers did not then know he couldn't read; that he put what he believed to be their written promise in his shirt pocket; that thereafter he took the officers to the location of the body; that at the municipal court on the next morning the "high sheriff" engaged him in the following conversation:

"Q. The officers promise you something?
A. Yes.

Q. You got a piece of paper?
A. Yes.

Q. Well, why don't you give it to me. I'll give it to the judge for you;"

that thereupon he passed the paper over to him; and that at some time during his subsequent jury trial he told the attorney then acting as his trial counsel that such a promise had been given but no subsequent use was made of it. On cross-examination the petitioner admitted that on the first two occasions when he talked with his counsel he "forgot" the promise. He described the paper as white, written upon in pencil, about 4 inches wide and 5 inches long and containing 4 or 5 written lines. It is apparent that the petitioner's testimony, wholly uncorroborated and flatly contradicted by the State's witnesses, was deemed unworthy of belief by the justice below. The decree states: "I am not satisfied that *any direct promise* was made by any officer that if he would confess, the officer would see that he was given a sentence in the State School for Boys, or that such a promise was given to him in writing and afterwards turned over to the Sheriff." (Emphasis supplied.) This

finding, fully justified and supported by the evidence, completely negatives the contention of the petitioner that the government improperly suppressed evidence during trial, knowing that evidence to be favorable and important to the petitioner on the preliminary issue of the voluntariness of any confession.

We think this finding effectively disposed of Count V. Although some liberality is afforded as to the draftsmanship of petitions for post conviction relief, we see no reason why, when counsel has been appointed, the petition amended and reamended, and the issues fixed and limited by the pleadings and pre-trial process, the State should be required at this post conviction stage to meet issues not thus tendered. If the amended allegations of the petition which clearly state a specific constitutional deprivation are not supported by credible evidence, the State should prevail. So in this case the petitioner alleged a *written promise suppressed by the State.* He proved neither an oral or written promise and no such suppression.

At the hearing below as already noted, however, the State offered as a witness Officer McAlevy who, after denying the giving of any written promise, quite unresponsively but with refreshing candor volunteered the information relating to his reference to the State School for Boys quoted above. The justice below found in this testimony a basis for holding that petitioner's conviction must be set aside. After reviewing certain undisputed facts already covered earlier in this opinion he continued as follows:

> "However, something was said at the interrogation in regard to the State School for Boys. I quote from the testimony of one of the officers taking part in the interrogation as follows: (here follows the McAlevy statement above quoted). The petitioner testified that during the course of the trial he told his counsel of the promise. I am not satisfied that he did this, or that he realized

> the importance of disclosing the information. In any event, the matter was not brought to the attention of the presiding justice by testimony or otherwise. * * * In view of the questioning by his interrogators, the act of the petitioner was in effect a verbal confession of the crime of murder. It affected the whole course of the trial. Taking into consideration the petitioner's age and mental capacity, the statement of the officer, who had been interrogating, undoubtedly raised in the petitioner's mind the hope that a sentence to the Boys' School might be imposed, and constituted an inducement to disclose the location of the body to the officers. Furthermore, fair play would seem to require the officers to make known to a person of petitioner's mental capacity the fact that he could ask for counsel, and that anything he said would be used against him; also that he was not required to talk. If, at the time of the trial, the presiding justice had known of the facts testified to by the officer at the hearing on this petition, the whole course of the proceedings would have been changed. Due inquiry undoubtedly would have been made into the circumstances surrounding the examination of the petitioner which resulted in his showing the location of the body. I find that the constitutional right of the respondent to due process has been violated and that he should be given an opportunity to have a new trial."

The State contends that the act of leading the officers to the woods, pointing out articles of clothing, a bicycle and the like belonging to the deceased, and later taking them to the location of the body was an "admission" rather than a "confession." It is urged that such an act, unaccompanied by any admission of guilt, is admissible without regard to voluntariness. The authorities are by no means in harmony on this point. We have discovered no cases in Maine and none have been called to our attention which directly meet and control the issue. In *State* v. *Gilman* (1862), 51 Me. 206, the accused was called by a coroner

and gave sworn testimony at an inquest. This testimony was reduced to a written statement which he signed. The statement was later offered in evidence at the trial of the accused for murder. It contained no confession but rather comprised a complete denial of any knowledge or participation in the death of the deceased. Nevertheless the court applied the test of voluntariness and satisfied itself that the statement was not obtained by compulsion or inducement. In *State* v. *Priest* (1918), 117 Me. 223, 230, 103 A. 359, the court seemed to imply that "mere admissions" were not subject to the test of voluntariness. In this case the statement was in the nature of an exculpatory explanation of certain conduct which neither directly nor indirectly pointed toward the guilt of the narrator. In *State* v. *O'Donnell* (1932), 131 Me. 294, 301, 161 A. 802, the court said: "The government does not rely, in his instance, on a confession, but on his admission of independent facts, from which, when considered with other facts, it is insisted, his guilt was inferable. A confession is the voluntary acknowledgment of the criminal act charged, or of participation in its commission. Incriminating admissions may be made without any intention of confession." This opinion, while distinguishing confessions from admissions, falls far short of teaching us whether or not admissions as thus defined should be admitted even though coerced or induced.

Wigmore on Evidence, 3d Ed., Vol. III, Sec. 822, Page 246 states the basis of exclusion of a confession obtained by promise or threat. "The principle upon which a confession is treated as sometimes inadmissible is that *under certain conditions it becomes untrustworthy as testimony.*" Sec. 821, Page 238 defines a confession as "*an acknowledgment in express words,* by the accused in a criminal case, *of the truth of the guilty fact charged or of some essential part of it.*" Wigmore asserts that "exculpatory statements" and "acknowledgments of subordinate facts colorless with ref-

erence to actual guilt" do not logically fall within the reasons for exclusion. It is plain, however, that there is a split of authority as to whether admissions of facts short of guilt are subject to the same rules as to voluntariness, at least where such facts are inculpatory or tend to show criminal intent.

The Massachusetts Court, distinguishing confessions from admissions, held that the rule excluding a confession of guilt by the defendant which he was induced to make through hope of benefit or because of fear has no application to a statement which is no more than an admission of subordinate facts. *Commonwealth* v. *Gleason* (1928), 262 Mass. 185, 159 N.E. 518, 520; *Commonwealth* v. *Dascalakis* (1923), 137 N.E. (Mass.) 879. And the trial court need not hold a preliminary hearing to test the voluntariness of a mere admission, even though so requested. *Commonwealth* v. *Haywood* (1923), 247 Mass. 16, 141 N.E. 571. But compare *Commonwealth* v. *Wallace* (1963), 190 N.E. (2nd) (Mass.) 224, 229. Reaching like results *State* v. *Spencer* (1953), 258 P. (2nd) (Idaho) 1147, 1152; *State* v. *McGee* (1962), 91 Ariz. 101 370 P. (2nd) 261; *State* v. *Robinson* (1961), 89 Ariz. 224, 360 P. (2nd) 474, 477; *Watts* v. *State* (1950), 95 N.E. (2nd) (Ind.) 570, 583; *State* v. *George* (1945), 43 A. (2nd) (N.H.) 256, 262; *Cram* v. *United States* (1963), 10 Cir., 316 F. (2nd) 542, 544; see *State* v. *Callaghan* (1963), 81 N.J. Super. 518, 196 A. (2nd) 245.

Other courts, however, have under varying circumstances applied the test of voluntariness to admissions. In *Bram* v. *United States* (1897), 168 U.S. 532, 42 L.ed. 568, the accused made a statement exculpatory in nature and in no sense an admission of guilt. The court applied the test of voluntariness. In *Opper* v. *United States* (1954), 348 U.S. 84, 75 S. Ct. 158, dealing with the requirement of corrobation, the court treated the accused's admissions of es-

sential facts or elements of the crime as of the same character as confessions. In *Ashcraft* v. *State of Tennessee* (1946), 327 U.S. 274, 66 S. Ct. 544, accused under coercion admitted knowledge that murder had been committed and by whom without however admitting any guilty participation. The court, characterizing the statement as very damaging and carrying "the strongest implications of a guilty knowledge" applied the test applicable to confessions.

We find the subject excellently summarized by Mr. Justice Traynor in *People* v. *Atchley* (1959), 346 P. (2nd) (Cal.) 764, 768, 769:

> "There has been considerable confusion as to the admissibility in a criminal proceeding of statements allegedly made by the defendant involuntarily. * * * Many opinions distinguish 'confessions' and 'admissions' and state that the latter are admissible without regard to their involuntary character. * * * The distinctions between confessions and admissions, however, are 'subtle and questionable.' * * * We have required preliminary proof of the voluntary character of statements that include 'an important incriminating fact.' * * *
>
> "Involuntary confessions are excluded because they are untrustworthy, because it offends 'the community's sense of fair play and decency' to convict a defendant by evidence extorted from him, and because exclusion serves to discourage the use of physical brutality and other undue pressures in questioning those suspected of crime. * * * All these reasons for excluding involuntary confessions apply to involuntary admissions as well. * * * Accordingly, any statement by an accused relative to the offense charged is inadmissible against him if made involuntarily."

Followed in *People* v. *Fitzgerald* (1961), 366 P. (2nd) (Cal.) 481.

The Maryland Court, noting the split of authority, held that an admission which is "significantly incriminating" but short of a confession of guilt must nevertheless be voluntary and not improperly induced. The court reasoned that where an admission is "in substance a partial confession" or "in the nature of a confession" there is the "same potential danger of coercion." *Stewart* v. *State* (1963), 232 Md. 318, 193 A. (2nd) 40, 43.

On balance we are disposed to think that the reasoning of the California and Maryland opinions is persuasive and better accords with the modern trend of the law with respect to the constitutional rights of individuals. We are not satisfied that we can rest decision in the instant case on the ground urged by the State that we are dealing with "mere admissions." We can hardly overlook the fact that the act of taking the officers to the woods where they obtained their first objective and tangible evidence that a crime had been committed was under all the existing circumstances "significantly incriminating." We believe that the decision in this case more properly rests on other grounds.

We turn then to an examination of all of the circumstances and apply the test of voluntariness as though to a confession. We take particular note of the following cases which serve to demonstrate the development of the applicable law in the past twenty years: *Ashcraft* v. *State of Tennessee, supra; Haley* v. *State of Ohio* (1948), 332 U.S. 596, 68 S. Ct. 302; *Crooker* v. *State of California* (1958), 357 U.S. 433, 78 S. Ct. 1287; *Cicenia* v. *La Gay* (1958), 357 U.S. 504, 78 S. Ct. 1297; *Spano* v. *People of the State of New York* (1959), 360 U.S. 315, 79 S. Ct. 1202; *Culombe v. Connecticut* (1961), 367 U.S. 568, 81 S. Ct. 1860; *Gallegos* v. *State of Colorado* (1962), 370 U.S. 49, 82 S. Ct. 1209; *Haynes* v. *State of Washington* (1963), 373 U.S. 503, 83 S. Ct. 1336; *Lynumn* v. *State of Illinois* (1963), 372 U.S.

528, 83 S. Ct. 917; and *Escobedo* v. *State of Illinois* (1964), 378 U.S. 478, 84 S. Ct. 1758.

We learn from these cases that the United States Supreme Court, in ascertaining whether or not a conviction in a state court has resulted in part from the use of a confession improperly obtained from an accused person, will examine the "totality of circumstances" in the particular case. The sum total of operating "factors" may or may not in a given case reach the "coercive intensity" which precludes the use of the incriminating statement. Among the "factors" which have been considered are the age and mental capacity of the accused, the duration and method of interrogation, the absence or denial of access to parents, friends or attorney, failure to take the accused promptly before a magistrate, failure to warn and advise the accused of his right to request counsel and remain silent, and the use of force, threat or promise. On the other hand the necessity for proper investigation and interrogation by the police is fully recognized. In *Escobedo,* the most recent of the cases cited above, the court said at page 1766 of 84 S. Ct.: "Nothing we have said today affects the powers of the police to investigate 'an unsolved crime' * * * by gathering information from witnesses and by other 'proper investigative efforts.' * * * We hold only that *when the process shifts from investigatory to accusatory* — when its focus is on the accused and its purpose is to elicit a confession — our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer." (Emphasis ours.) In short, with respect to voluntariness the test is always whether or not there has been under *all* the circumstances a violation of "fundamental fairness" or what we ourselves have sometimes termed "governmental fair play." With respect to the right to counsel and to remain silent specifically relied upon in *Escobedo,* we look first to discover whether the

process is beyond the investigatory stage. *Commonwealth* v. *Lapore* (1965), 207 N.E. (2nd) (Mass.) 26.

Although we accept the findings of fact of the justice below, we are not bound by his conclusion of law that the sum total of these factual circumstances constituted such a deprivation of the constitutional rights of this petitioner as to compel the setting aside of his conviction.

On the one hand we recognize the youth, the illiteracy and mental retardation of the petitioner in 1955. We note that he was interrogated for about three hours during which time he was not in fact visited by friends or relatives; that during that time he was not advised by anyone of a right to have counsel or that any statement he might make could be used against him. We do not overlook the fact that a reference was made by the investigating officer to the State School for Boys at some time prior to the petitioner's offer to show the officers where Doris was. On the other hand we deem it important that *the police had no knowledge that a crime had been committed.* They knew only that Doris Trudeau who had last been seen in the company of the petitioner had not returned home at the usual time and had been missing for several hours. Their first objective was to find out if possible where Doris was. Until they knew positively that a crime had been committed, they could accuse the petitioner of nothing. This investigation had not even progressed to the "unsolved crime" stage referred to above in *Escobedo.* Trial balloon and random shot questions based on mere suspicion that there *may* have been some sort of foul play and the petitioner *might* know more than he had divulged would seem to be entirely appropriate at this stage of the inquiry. Add to this the facts that the police had the permission of the petitioner's foster mother to question him, that he was not held incommunicado, that he was not cut off from access to parents, friends or attorney, that he was not abused physically or mentally,

that he was not subjected to what has been termed a "massive interrogation" aimed at securing a confession of guilt of a known crime, and we have a "totality of circumstances" vastly different from those existing in those cases cited above in which confessions were deemed coerced.

Turning directly to the alleged inducement or promise proffered by the officer, again we deem the surrounding circumstances important. The officer's remark was made in response to a question asked by the petitioner who up to that moment had been accused of no crime. *At that moment neither the petitioner nor the officer knew that Doris was dead.* It is important to note that the petitioner in his subsequent confessions never deviated from his story that she was alive and breathing when he left her in the woods, that he thought she was only "knocked out" and that his purpose in dragging her to the point where she was found was to delay her finding her way out of the woods after she regained consciousness and thereby to afford himself more time to escape. The officer, interestingly enough, was speculating about the possible consequences to Michaud of events, the existence and nature of which he could only conjecture. More important, however, is the fact that the officer *made no promise nor did he offer any assurances.* We are not concerned here with the effect of any erroneous interpretation which the petitioner may have given to the officer's remark. We are concerned with the reasonable and intended meaning of what was said and the circumstances under which the words were spoken. No offer was made in return for an admission or a confession. The officer merely answered a question. His answer made it clear even to a person of somewhat limited intelligence that he did not know what might happen to Michaud and only the courts could determine. He did not even suggest that he or anyone else would intervene on petitioner's behalf. *And we reiterate that the officer did not then know what the petitioner had done.* If the petitioner then suddenly

and voluntarily decided to show the officers where he had left Doris, he did so for reasons of his own and not because of any coercive treatment or improper inducement on the part of the police. We say in summary that in our view the police did not under all the circumstances here present exceed the bounds of permissible police investigation of an unexplained disappearance. We find no vestige of constitutional deprivation.

The petitioner relies primarily on *Haley, Gallegos* and *Escobedo, supra.* The "totality of circumstances" in each of these cases, however, was very different from that presented in the instant case. In Haley the police were investigating a murder committed during the course of a robbery. The issue was the voluntariness of Haley's signed confession admitted in evidence at his trial. Haley was a Negro boy 15 years of age. He was questioned by the police working in relays for about five hours. In effect the police were primarily seeking confirmation by confession of what they already knew, for in the course of the interrogation the police showed Haley the confessions of his two accomplices. Immediately after this event Haley confessed. As Mr. Justice Frankfurter said in his concurring opinion (page 307 of 68 S. Ct.): "Of course, the police meant to exercise pressures upon Haley to make him talk. That was the very purpose of their procedure." The court noted that Haley was held incommunicado for three days, that a lawyer retained by his mother was twice refused admission by the police and the mother herself was not allowed to see him for five days. He was not taken before a magistrate for three days after the signing of the confession. This conduct, although for the most part occurring after the confession was made, was viewed by a divided court as evidence of "such a callous attitude of the police towards the safeguards which respect for ordinary standards of human relationships compels," that the court took "with a grain of salt their present apologia that the five hour gril-

ling of this boy was conducted in a fair and dispassionate manner." In the instant case there are no intimations even from the petitioner himself that the police acted in any such manner.

In *Gallegos,* involving the formal confession of a 14 year old boy, the accused was held incommunicado for six days. His mother was not permitted to see him and "he was cut off from contact with any lawyer or adult advisor." Here again the police were dealing with a known crime, assault and robbery ultimately culminating in murder when the victim died. The participation of the accused in the assault and robbery was admitted orally by him immediately upon his apprehension but the formal confession held involuntary by the court was signed only at the end of his "long detention." A divided court, listing the operative factors, determined that "all these combine to make us conclude that the formal confession on which this conviction may have rested was obtained in violation of due process." We view the combination of circumstances in *Gallegos* as readily distinguishable from those obtaining here.

In *Escobedo* the case turned on the deprivation of the right to counsel as guaranteed by the sixth amendment and made obligatory upon the states by the fourteenth. The accused had an attorney who obtained his release from custody by writ of habeas corpus on the first occasion of attempted interrogation. After the police had obtained information from the accomplice implicating the accused in the murder under investigation, Escobedo was again arrested. His retained attorney arrived shortly after the accused reached police headquarters but was denied access to his client. He persisted for several hours in his efforts to see the accused but to no avail. During a long interrogation Escobedo was kept handcuffed and in a standing position. As Mr. Justice Goldberg stated at page 1762 of 84 S. Ct.: "When petitioner requested, and was denied, an

opportunity to consult with his lawyer, the investigation had ceased to be a *general investigation of 'an unsolved crime.'* * * * Petitioner had become the accused, and the purpose of the interrogation was to 'get him' to confess his guilt despite his constitutional right not to do so." (Emphasis supplied.) A divided court deemed this to be a "critical stage" when the assistance of counsel was required. "Petitioner had, for all practical purposes, already been charged with murder." These facts bear no relation to those in the instant case.

As already noted the petitioner did not at any time before leading the officers to the place in the woods where the body of the child was discovered request the presence of counsel. We are aware that some courts are of the view that *Escobedo* does not require the exclusion of a confession otherwise voluntary in a case in which counsel has not been requested by the accused or effectively denied by the police even though the accused was not warned of his right to counsel or his right to remain silent. *People* v. *Hartgraves* (1964), 31 Ill. (2nd) 375, 202 N.E. (2nd) 33; *People* v. *Lewis* (1965), 32 Ill. (2nd) 391, 207 N.E. (2nd) 65; *People* v. *Richardson* (1965), 32 Ill. (2nd) 472, 207 N.E. (2nd) 478; *Commonwealth* v. *Ladetto* (1965), 207 N.E. (2nd) (Mass.) 536, 541; (but cf. *Commonwealth* v. *McCarthy* (1964), 200 N.E. (2nd) (Mass.) 264; *Hinkley* v. *State* (1965), 389 S.W. (2nd) (Tex.) 667; *Cowans* v. *State* (1965), 238 Md. 433, 209 A. (2nd) 552; *Jenkins* v. *State* (1965), 238 Md. 451, 209 A. (2nd) 616; *Bull* v. *State* (1965), 239 Md. 101, 210 A. (2nd) 396; *Bean* v. *State* (1965), 398 P. (2nd) (Nev.) 251; *Commonwealth* v. *Patrick* (1965), 416 Pa. 437, 206 A. (2nd) 295; *Commonwealth* v. *Coyle* (1964), 415 Pa. 379, 203 A. (2nd) 782, 794; *People* v. *Gunner* (1965), 15 N.Y. (2nd) 226, 205 N.E. (2nd) 852; *Browne* v. *State* (1964), 24 Wis. (2nd) 491, 131 N.W. (2nd) 169; *State* v. *Fox* (1964), 131 N.W. (2nd) (Iowa) 684. We would nevertheless hesitate to

assume that *Escobedo* might not be applied in an appropriate case even though there had been no request for or denial of counsel once the case had reached an accusatory stage. In a case in which a respondent was entitled to the assistance of counsel at the trial stage the Supreme Court of the United States held that such right was not lost by failure to request the aid of counsel. *Carnley* v. *Cochran* (1962), 369 U.S. 506, 613, 82 S. Ct. 884, 889. To the same effect *U. S.* v. *LaVallee* (1964), 2nd Cir., 330 F. (2nd) 303. The California court determined that confessions taken at the accusatory stage must be barred from evidence unless the accused intelligently waived his right to counsel and to remain silent. The court declined to make the right dependent upon a request for counsel by the accused. *People* v. *Dorado* (1965), 42 Cal. Rptr. 169, 398 P. (2nd) 361. Reaching the same result *State* v. *Dufour* (1965), 206 A. (2nd) (R.I.) 82; *State* v. *Neely* (1964), 395 P. (2nd) (Ore.) 557; *People* v. *Davis* (1965), 44 Cal. Rptr. 454, 402 P. (2nd) 142; *State* v. *Mendes* (1965), 210 A. (2nd) (R.I.) 50, 54; *United States ex rel. Russo* v. *New Jersey* (May 20, 1965), 3rd Cir., 351 F. (2nd) 429.

We neither intimate nor suggest what our holding would be in a case in which decision turned on the absence of any request for the aid of counsel and denial of the same. It is apparent that a resolution of the divergent views expressed in the opinion above cited must await a further opinion of the Supreme Court of the United States. It suffices to say that all the cases which have come to our attention are in accord that failure to warn of the right to counsel and to remain silent has no adverse effect on the admissibility of admissions and confessions elicited from one during the purely *investigatory* stage. We have discussed this issue only because it is apparent that the justice below based his decision in part upon the concept that this petitioner suffered a constitutional deprivation when the police failed to give him such warnings at the stage when they were

merely investigating an unexplained disappearance without any knowledge that a crime had been committed. Even under the so-called liberal rule announced by *Dorado* the right to be warned had not accrued at this stage.

Even if *Escobedo* were otherwise applicable in the instant case we would not be disposed to give it retrospective application in the absence of an unequivocal holding by the Supreme Court of the United States that such a result is required. We are dealing here with post conviction relief which is sought many years after the conviction of the petitioner became final. In a recent case the California court declined to apply *Escobedo* retroactively on a collateral attack at the post conviction stage. The court said in part that "new interpretations of constitutional rights have been, and should be, applied retroactively only in those situations in which such new rules protect the innocent defendant against the possibility of conviction of a crime he did not commit; * * * an absolute rule of retroactivity as to interpretations of constitutional rights which envisage the correction of future practices would impair the administration of criminal law and ultimately result in constitutional rigidity. * * * Thus the rule contemplated the prospective prevention of coercive practices — not the extirpation of such practices committed in the past. * * * We cannot say that the possibility of abuse in the past is such that the *voluntary* statement then elicited must now be exorcised." *In Re Lopez* (1965), 42 Cal. Rptr. 188, 398 P. (2nd) 380, 383.

The New Jersey court held in a post conviction relief case that the issue of voluntariness of a confession had been finally adjudicated and was no longer open; that insofar as *Escobedo* might be deemed to invalidate prior convictions (apart from voluntariness) the rule therein announced should not be given retrospective application. The court was of opinion that society reasonably expects that when

a man has been convicted of a crime by a method not considered unfair according to the rules of law then in effect, such a conviction will stand. The court noted that at the time *Escobedo* was decided, almost all of the states permitted the introduction of voluntary confessions given in the absence of counsel during police investigation. Retroactive application would therefore have far reaching consequences. The purpose of *Escobedo* was to change the conduct of police in the future, a purpose which is in nowise furthered by retrospective application. *State* v. *Johnson* (1965) 43 N.J. 572, 206 A. (2nd) 737.

We think the reasons given by the Supreme Court of the United States for not giving retrospective application to its newly announced rule in *Mapp* v. *Ohio* (1961), 367 U.S. 643, 81 S. Ct. 1684 relate with equal force to the retroactivity of *Escobedo*. In *Linkletter* v. *Walker* (1965), ... U. S. ——, 85 S. Ct. 1731, the court held that *Mapp* should not be applied retrospectively to state court convictions which had become final before the rendition of the opinion in the latter case. The court acted upon the premise that it was "neither required to, nor prohibited from applying a decision retrospectively" and must "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." The court was of opinion that the prime purpose of *Mapp* was the effective deterrence of lawless police action and this purpose would not be advanced by making the rule retrospective. "The misconduct of the police prior to *Mapp* has already occurred and will not be corrected by releasing the prisoners involved." The court was also concerned for the administration of justice if the rule were applied retrospectively to old cases in which evidence has been long since destroyed, misplaced or deteriorated and witnesses are no longer available or their memory is dimmed. The court distinguished situations involving "the

fairness of the trial — the very integrity of the fact finding process." In two very recent cases the courts declined to apply *Escobedo* retrospectively. *United States ex rel. Walden* v. *Pate* (July 27, 1965), 7th Cir., ... F. (2nd) ....; *Commonwealth* v. *Negri* (Sept. 29, 1965), ... Pa. ...., ... A. (2nd) .....

We conclude as to Count V that the admissions of the petitioner leading up to and including the act of directing the officers to the scene of the crime were not the product of any improper inducement or coercion; that the petitioner suffered no constitutional deprivation with respect to his right to counsel and to remain silent; and that no evidence adduced in support of this count warrants post conviction relief or requires a new trial.

As to Count IX charging incompetence of counsel, we have reviewed the entire trial record and can find no evidence to support or justify such a finding. As noted above, the justice below made no determination of this issue. Given the premise that no promise was ever made to the petitioner or communicated to his counsel, we are left with a case in which the defense attorney was faced with overwhelming and conclusive evidence of guilt. He could not demonstrate that the confessions of his client were inadmissible nor could he prove the petitioner's insanity. The quality of his representation was certainly not such as to constitute a constitutional deprivation.

The entry will be

Appeal sustained.

Judgment for the State.

Petitioner remanded in execution of his sentence.

ALBION M. BENTON
AND
ELIZABETH F. BENTON
vs.
MAINE STATE HIGHWAY COMMISSION

York. Opinion, December 13, 1965.

Highways. Eminent Domain. County Commissioners.

1934 petition to compel county commissioners to relocate and redefine highway was void, where it was signed only by city clerk and contained no statement either that location of boundaries was lost or that true boundaries could only be established by user, were doubtful, uncertain or lost.

Jurisdiction must appear in petition to compel county commissioners to relocate and redefine highway, and lacking jurisdiction, actions of county commissioners in entertaining petition and in entering order defining highway limits must be held void.

Although generally no particular form of words is required in petition to compel county commissioners to relocate and redefine highway, nor is strict technical accuracy expected therein, jurisdiction depends upon whether sufficient jurisdictional facts are set out in petition which forms foundation of action by county commissioners.

Claim that written description in connection with 1958 taking of land for highway purposes specifically limited easterly boundary of highway to present easterly line of existing highway, whatever that might be, and that such effectively prevented any encroachment on or taking of property of adjoining owners was not open to state, on appeal by owners in land damage case, where written description was found only in state's brief and not in record.

Where record on appeal by property owners in land damage case established that it remained to be determined where easterly boundary of highway as it existed prior to 1958 taking had been established either by lawful location or user, appeal would be sustained so that it could be developed to what extent, if any, property of adjoining owners was taken by 1958 action.

ON APPEAL.

Land damage case arising from taking of land for highway purposes by eminent domain. The Superior Court entered judgment that no land was taken, and the adjoining property owners appealed. Held, that where record established that it remained to be determined where easterly boundary of highway as it existed prior to 1958 taking had been established either by lawful location or user, appeal would be sustained so that it could be developed to what extent, if any, property of adjoining owners was taken by 1958 action. Appeal sustained.

Ronald M. Roy, for State Highway Commission.

Albert Knudsen, for Defendant.

Charles W. Smith, for Plaintiffs.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, RUDMAN, JJ. MARDEN, J., did not sit. SULLIVAN, J., sat at argument but retired before the opinion was adopted.

WILLIAMSON, C. J. This land damage case arises from a taking in 1958 by the State Highway Commission of land for highway purposes by eminent domain. The case reaches us on appeal from the judgment of the Superior Court entered on an appeal from a "joint board" decision. R. S., 1954, c. 23, § 23. The controversy is over the finding by the presiding justice that no land was taken. No objection is made to an award of $100 for slope and drainage easements.

The appellants' property adjoins Route 1 in Saco. The State Highway Commission in the present proceedings took by eminent domain land bounded on the east by what it contends was the east line of Route 1 determined and settled in a relocation of the highway bounds in 1934. It is

agreed that the 1958 line is precisely the line allegedly described in the 1934 report of the County Commissioners.

The appellants contend that the east line of Route 1 was not validly settled in the 1934 proceedings or thereafter by the State, and that the west line of their property lies westerly of the east line of the 1958 taking. From this it follows, they say, that land was taken from them in 1958 for which they are entitled to compensation.

We may picture the claims in this manner. In 1934 the east line of the highway along the appellants' property was allegedly defined by the County Commissioners under R. S., 1930, c. 27, § 11 (now 23 M.R.S.A. § 2101) which reads in part as follows:

> "When the true boundaries of highways or town ways duly located, or of which the location is lost, or which can only be established by user, are doubtful, uncertain, or lost, the county commissioners of the county wherein such highway or town way is located, upon petition of the municipal officers of the town wherein the same lies, shall, after such notice thereon as is required for the location of new ways, proceed to hear the parties, examine said highway or town way, locate, and define its limits and boundaries. . ."

In 1958 the State Highway Commission to correct any errors again took by eminent domain the same land (setting aside the slope and drainage easements), adopting the east line of the 1934 report as the east line of the 1958 taking. If the State Highway Commission took nothing, then the landowners lost nothing. But the latter say the east line of the highway was not determined in 1934, or subsequently until 1958, and therefore their west line (or the highway east line) had not been hitherto established at the line claimed by the State.

The points of appeal are:

That the court erred in not allowing evidence of the location of the easterly side line of the highway prior to the 1934 report of the County Commissioners and in excluding evidence with reference to the validity of the 1934 proceedings, and that the court erred in holding the alleged relocation in 1934 to be valid and legal.

The main issue, in the view of the State Highway Commission, is whether the ruling was correct that the validity of the 1934 relocation could not be questioned or raised in the present action, and that the right so to claim was barred.

In our opinion the 1934 relocation was void at the outset. The county commissioners were without authority to locate the bounds of the highway. No suitable petition was before them on which they had authority to proceed. The document upon which jurisdiction must depend was in the following terms:

"(SEAL) CITY OF SACO

Saco, Maine, August 2, 1932

Board of County Commissioners
of York County, Maine.

Gentlemen;

The Municipal Officers of the City of Saco respectfully petition the Board of County Commissioners of York County, State of Maine to redefine the highway limits on Highway 'A' located in the City of Saco from the Cascade Road to the compact section of Saco just west of Goose Fair Underpass.

Municipal Officers of City of Saco.
By Ralph N. Perry. . . City Clerk."

Accepting for our purposes that "redefine" in the petition is the equivalent of "locate," and that the descriptions

of the interests to be taken and of the way are adequate, we have the petition in 1932 signed "Municipal Officers of City of Saco. By Ralph N. Perry, City Clerk." The municipal officers of the City of Saco were the mayor and aldermen. R. S., 1930, c. 1, § 6-XXV (now 1 M.R.S.A. § 72-12). No authority is suggested permitting a petition in their behalf to be signed by the city clerk, or any persons other than themselves, or a majority of their number. R. S., 1930, c. 1, § 6-III (now 1 M.R.S.A. § 71-3). Cf. *Curtis* v. *City of Portland,* 59 Me. 483.

Even assuming that "Highway A" between stated termini was a way known to and identifiable by the public (which on this record is not free from doubt), the "petition" fails to state essential jurisdictional facts. There is no statement either that the "location" of the boundaries is "lost" or that the true boundaries "can only be established by user, are doubtful, uncertain, or lost." No statutory reason is given to "locate, and define its limits and boundaries."

Jurisdiction must appear in the petition, and lacking jurisdiction, as here, the actions of the County Commissioners in entertaining the petition and in entering their order defining the highway limits in 1934 must be held void. *Haile, et al.* v. *Sagadahoc County Commissioners,* 140 Me. 16, 31 A. (2nd) 925; *Phippsburg* v. *Sagadahoc County,* 127 Me. 42, 141 A. 95; *Bethel* v. *County Commissioners,* 42 Me. 478; *Small* v. *Pennell,* 31 Me. 267. As was stated in *Hayford* v. *County Commissioners,* 78 Me. 153 (3 A. 51), at p. 156: "Moreover, while generally no particular form of words is required in the petition, nor is strict technical accuracy expected therein . . ., their jurisdiction generally depends upon whether sufficient jurisdictional facts are set out, as they always should be, *in the petition which forms the foundation of their action.*" (Emphasis supplied.)

The court below, in hearing the issue by stipulation of the parties before proceeding to the final hearing from

which comes the judgment appealed from, found and held as follows:

> "This Court cannot avoid judicial notice of the fact that the 'Portland Road', now 'State Highway 1' has since long before 1933 been the main artery for traffic from Portsmouth, New Hampshire into Maine and it must be concluded that owners of property adjacent to that highway must have been aware of the entry upon, use, widening, if any, improvement, if any, relocation, if any, over the years, and even though such entry and use were not brought about by statutory condemnation, such entry and occupation for public use constitutes a taking in a constitutional sense. 18 Am. Jur., Eminent Domain § 133 and see *Canadian Pacific Railway Company* v. *Moosehead Telephone Company* 106 Me. 363, 366. Seasonable action by the land owner would afford him a remedy in equity by injunction, *Moosehead, supra,* and in law by a real action to try title, or complaint in trespass to his possession, *Hussey* v. *Bryant* 95 Me. 49, 51. This election is not before the Court."

In our examination of the record we find nothing to establish that the State ever occupied the land to the east line set forth in the 1934 proceedings. Herein lies the weakness of the State's position. In both *Moosehead* and *Hussey,* the action was against a defendant in possession. In *Hussey* there was the further fact not here present that the claimant having accepted damages for land taken, sought damages again in trespass on the ground the taking was insufficient.

On the state of the record, we have no more than the following:

(1) An old highway with "true boundaries . . . doubtful, uncertain, or lost. . . ." 23 M.R.S.A. § 2101, *supra;*

(2) An attempt to locate and define the boundaries and limits in 1934;

(3) Uncertainty whether the State occupied any land beyond the limits of the old highway after the 1934 proceedings;

(4) The taking by the State in 1958 by eminent domain to precisely the line to which it claims title had been established in 1934.

Thus we have the unusual if not unique situation of the taker by eminent domain claiming that he has taken nothing.

The State has failed to show that the highway was established in the 1934 proceedings or that it has otherwise acquired title. In the 1958 taking, therefore, it must establish what land it has in fact taken. The search will not preclude an inquiry into the limits of the highway acquired prior to 1958 by use or otherwise except insofar as the claim may be based upon the action of the County Commissioners in 1934.

The State further argues: that where in fact the east line of Route 1 was on the face of the earth at the time of the taking is a matter of indifference, that it acquired in 1958 no land outside of the then existing route wherever located; and that regardless of the validity or invalidity of the 1934 proceedings no land was taken in 1958.

The State contends that the written description in the 1958 taking specifically limits the easterly boundary to the present easterly line of State Highway No. 1, wherever that may be, or, to quote from its brief that "[the 1958 line] follows along the easterly line of the then existing Highway No. 1 where it borders the appellant's land."

This, so the argument runs, effectively prevented any encroachment on or taking of the property of the appellants

(apart from the easements) in 1958. The written description, however, is found only in the State's brief and not in the record. The argument accordingly is not open to the State.

We are limited to the pleadings, stipulations, and the map admitted as an exhibit placing the line on the face of the earth.

Assuming the record included the description, it is nevertheless significant that that description is related to a base line and stations produced on the map in such manner as to make it sufficiently clear that the taking was to an easterly boundary ascertainable upon the face of the earth which the State merely claimed to be the easterly boundary of the existing State Highway No. 1. It follows that it still remains to be determined where the easterly boundary of the highway as it existed prior to 1958 had been established either by lawful location or user. Only thus can it be known to what extent, if any, property of the appellants was taken by the 1958 action. The right to develop this issue is exactly what the appellants are contending for in the instant case.

The entry will be

Appeal sustained.

MAINE RULES OF CRIMINAL PROCEDURE

MAINE DISTRICT COURT CRIMINAL RULES

Effective December 1, 1965

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STATE OF MAINE
SUPREME JUDICIAL COURT
MAINE RULES OF CRIMINAL PROCEDURE
and
DISTRICT COURT CRIMINAL RULES

All of the Justices concurring therein, the following rules are hereby adopted, prescribed and promulgated for the District and Superior Courts, Supreme Judicial Court, and Supreme Judicial Court sitting as the Law Court, to become effective on the first day of December, 1965, being six months after the date hereof. Said rules shall be recorded in the Maine Reports.

All former Court rules relating to criminal cases and matters are superseded as of the first day of December, 1965.

Dated the first day of June, 1965.

Robert B. Williamson
Chief Justice

Donald W. Webber

Walter M. Tapley, Jr.

Francis W. Sullivan

Harold C. Marden

Abraham M. Rudman

INTRODUCTORY STATEMENT

To the Members of the Maine Bar:

The Court greatly appreciates the courtesy of the Boston Law Book Company in printing and distributing to the entire Maine Bar the Maine Rules of Criminal Procedure and the Maine District Court Criminal Rules as promulgated on June 1, 1965, to become effective on December 1, 1965. Every lawyer thus has a copy of the Rules as promulgated with the Reporter's Notes in ample time for careful study before the effective date.

The Criminal Rules project was launched following action by the 1963 Legislature, Laws 1963, c. 227, and Resolves 1963, c. 89. In July 1963 the Court appointed an Advisory Committee of Harold D. Carroll, Esq. of Biddeford, Chairman, Roger A. Putnam, Esq. of Portland, Francis A. Brown, Esq. of Calais, Richard A. Foley, Esq. of Augusta, and Philip M. Isaacson, Esq. of Lewiston. Shortly thereafter Professor Harry P. Glassman of the University of Maine Law School was named Reporter and Consultant to the Committee and to the Supreme Judicial Court.

A "working draft" of proposed Rules prepared by the Reporter was submitted to the Committee in November 1963. After study and revision, a "Proposed Draft" was submitted to the Supreme Judicial Court in May 1964. A "Second Proposed Draft," prepared in September 1964, was considered at a Conference of the Justices of the Supreme Judicial and Superior Courts, the Deputy Attorney General, and the Advisory Committee. The District Court Rules were then written. Chief Judge Chapman and Judge Browne of the District Court have often been consulted.

Although numerous changes have been made by the Court as a result of consultation with the Reporter and the Committee, and of our own intensive study, the first draft submitted by the Committee remains the foundation of the

Rules as promulgated. It may fairly be said that we have adopted the Federal Rules tailored to our needs.

The Reporter's Notes are not part of the Rules and are not in any way binding upon the Court. This seeming limitation does not, however, lessen their value to the Bench and Bar.

We acknowledge our continuing indebtedness to the Committee and to Professor Glassman for their invaluable services in preparing the new Rules.

Responsibility for the Rules rests solely on the Supreme Judicial Court.

ROBERT B. WILLIAMSON

Chief Justice, Supreme Judicial Court

MAINE
RULES OF CRIMINAL PROCEDURE

Effective December 1, 1965

Analysis

X. **General Provisions**—Continued

I. SCOPE, PURPOSE, AND CONSTRUCTION

RULE 1. SCOPE OF RULES

These rules govern the procedure in the Superior Court in all criminal proceedings, including appeals to the Superior Court from the District Court, and proceedings for post-conviction relief, with the exceptions stated in Rule 54. Insofar as applicable, they shall also govern the procedure in felony proceedings in the District Court and before complaint justices and bail commissioners. These rules also govern the procedure in the Supreme Judicial Court when sitting as the Law Court in criminal cases.

RULE 2. PURPOSE AND CONSTRUCTION

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

II. PRELIMINARY PROCEEDINGS

RULE 3. THE COMPLAINT

The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a magistrate or other officer empowered to issue warrants against persons charged with offenses against the State. If the defendant is not in custody or before the court, such magistrate or other officer shall examine on oath the complainant and any witnesses he may produce, take their statements, cause them to be subscribed by the persons making them and cause them to be filed and made a permanent part of the record in the case. The statements of the complaint and any witnesses may be submitted in the form of affidavits.

RULE 4. WARRANT OR SUMMONS UPON COMPLAINT

(a) Issuance. If it appears from the complaint, or from an affidavit or affidavits sworn to before a magistrate or other officer empowered to issue process against persons charged with offenses against the State and filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it, unless the defendant is in custody or otherwise before the court. Upon the request of the attorney for the State a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

(b) Form.

(1) *Warrant.* The warrant shall bear the caption of the court or division of the court from which it issues. It shall be signed by the magistrate or other person authorized to issue warrants and shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall be directed to an appropriate officer or officers and shall command that the defendant be arrested and brought before the judge of the court from which it issues.

(2) *Summons.* The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a court at a stated time and place.

(c) Execution or Service; and Return.

(1) *By Whom.* The warrant shall be executed by any officer authorized by law. The summons may be served by any constable, police officer, sheriff, deputy sheriff, warden of the Department of Sea and Shore Fisheries and Fish and

Game or any person authorized to serve a summons in a civil action.

(2) *Territorial Limits.* The warrant may be executed or the summons may be served at any place within the State of Maine.

(3) *Manner.* The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest, but upon request he shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The summons shall be served upon a defendant by delivering a copy to him personally, or by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by mailing it to the defendant's last known address.

(4) *Return.* The officer executing a warrant shall make return thereof to the magistrate before whom the defendant is brought pursuant to Rule 5. At the request of the attorney for the State or upon his own motion the magistrate may order any unexecuted warrant to be returned to the magistrate or other officer by whom it was issued, and it may be cancelled by him. On or before the return day the person to whom a summons was delivered for service shall make return thereof to the magistrate before whom the summons is returnable. At the request of the attorney for the State made at any time while the complaint is pending a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the magistrate or other person who issued the warrant or summons to any authorized person for execution or service.

RULE 5. PROCEEDINGS BEFORE THE MAGISTRATE

(a) Appearance Before the Magistrate. An officer making an arrest under a warrant issued upon complaint shall take the arrested person without unnecessary delay before a magistrate as commanded in the warrant; if the arrest is made at a place 100 miles or more from the place where the warrant was issued, the person arrested, if bailable, shall, if he so demands, be taken before the nearest available magistrate within the division in which he was arrested, or before a bail commissioner, who may admit him to bail for appearance before the proper magistrate. Any person making an arrest without a warrant having been issued shall take the arrested person without unnecessary delay before the nearest available magistrate within the division within which the arrest was made. When a person arrested without a warrant is brought before a magistrate the complaint shall be filed with that magistrate forthwith.

(b) Statement by the Magistrate. When a person arrested, either under a warrant or without a warrant, is brought before the magistrate, or a defendant who has been summoned appears before the magistrate in response to a summons, the magistrate shall inform him of the complaint against him, of his right to retain counsel, of his right to request the assignment of counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The magistrate shall allow the defendant reasonable time and opportunity to consult counsel and shall admit him to bail as provided in these rules.

(c) Preliminary Examination. The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the magistrate shall forthwith hold him to answer in the Superior Court in the county in which trial is to be held pursuant to Rule 18. If the defendant does not

waive examination, the magistrate shall hear the evidence within a reasonable time. The defendant may cross examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the magistrate that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the magistrate shall forthwith hold him to answer in the Superior Court in the county in which trial is to be held pursuant to Rule 18; otherwise the magistrate shall discharge him. The magistrate shall admit the defendant to bail as provided in these rules. After concluding the proceeding the magistrate shall transmit forthwith to the appropriate clerk of the Superior Court all papers in the proceeding and any bail taken by him.

III. INDICTMENT AND INFORMATION

RULE 6. THE GRAND JURY

(a) Number of Grand Jurors. The grand jury shall consist of not less than thirteen nor more than twenty-three jurors and a sufficient number of legally qualified persons shall be summoned to meet this requirement.

(b) Objections to Grand Jury and to Grand Jurors.

(1) *Challenges.* Either the attorney for the State or a defendant who has been held to answer may challenge the array of jurors or an individual grand juror. A challenge to the array may be made only on the ground that the grand jury was not selected, drawn or summoned in accordance with the law. An individual grand juror may be challenged on the ground that he is not legally qualified or that a state of mind exists on his part which may prevent him from acting impartially. All challenges to the array must be made before the jurors are sworn. All challenges to individual jurors must be in writing and allege the ground upon which

the challenge is made, and such challenges must be made prior to the time the grand jurors commence receiving evidence at each session of the grand jury. If a challenge to the array is sustained, the grand jury shall be discharged; if a challenge to an individual grand juror is sustained, he shall be discharged and the court may replace him from persons drawn or selected for grand jury service.

(2) *Motion to Dismiss.* If not previously determined upon challenge, a motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualifications of an individual juror or on the ground that a state of mind existed on his part which prevented him from acting impartially; but an indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that twelve or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

(c) Foreman and Deputy Foreman.

The court shall appoint one of the jurors to be foreman and another to be deputy foreman. The foreman shall have power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of court, but the record shall not be public except on order of the court. During the absence of the foreman the deputy foreman shall act as foreman.

(d) Who May Be Present.

Attorneys for the State, the witness under examination, interpreters when needed and for the purpose of taking the evidence, in the discretion of the court for good cause shown, an official court reporter may be present while the grand jury is in session; but no person other than the

jurors may be present while the grand jury is deliberating or voting.

(e) Secrecy of Proceedings and Disclosure.

Disclosure of matters occurring before the grand jury, other than its deliberations and the vote of any juror, may be made to the attorneys for the State for use in the performance of their duties. Otherwise a juror, attorney, interpreter or official court reporter may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. In the event an indictment is not returned any stenographic notes of an official court reporter and any transcriptions of such notes shall be impounded by the court. The court may direct that an indictment be kept secret until the defendant is in custody or has given bail, and in that event the court shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance of a warrant or summons.

(f) Finding and Return of Indictment.

An indictment may be found only upon the concurrence of twelve or more jurors. The indictment shall be returned by the grand jury to a judge in open court. If the defendant is in custody or has given bail and twelve jurors do not concur in finding an indictment, the foreman shall so report to the court in writing forthwith.

(g) Excuse.

At any time for cause shown, the court may excuse a juror either temporarily or permanently, and in the latter

event the court may impanel another person in place of the juror excused. No juror may participate in voting with respect to an indictment unless he shall have been in attendance at the presentation of all the evidence produced in favor of and adverse to the return of the indictment.

RULE 7. THE INDICTMENT AND THE INFORMATION

(a) Use of Indictment or Information. All criminal proceedings originating in the Superior Court and all felony proceedings shall be prosecuted by indictment, unless indictment is waived, in which case prosecution may be by information.

(b) Waiver of Indictment. Any offense except one punishable by life imprisonment, may be prosecuted by information upon request of the defendant, if the defendant, after being advised by the court of the nature of the charge and of his rights, shall in writing signed by him waive prosecution by indictment; such waiver with the approval of the court endorsed thereon shall be annexed to the information. The information may charge the defendant with any lesser offense which is contained in the greater offense intended to be charged in the complaint.

The attorney for the State upon investigation may elect to charge the defendant with another offense or offenses not punishable by life imprisonment and not alleged in the complaint upon which such defendant has been bound over, in which event he may, before consenting to proceeding by information, prepare and sign an information or informations setting forth such offense or offenses, file the same with the clerk of courts and cause the defendant to be served with an attested copy thereof in order that the defendant may have an opportunity to waive indictment upon such other offense or offenses, and a written waiver of indictment by the defendant shall be presented to the court or any justice thereof whereupon the case may proceed as hereinbefore provided.

A magistrate who holds an accused person to answer before the Superior Court shall notify him of his right to apply for a waiver of indictment.

(c) Nature and Contents. An indictment shall be signed by the foreman of the grand jury, and an information shall be signed by the attorney for the State and certified on information and belief. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It need not contain a formal commencement, a formal conclusion, or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation of a statute or its omission shall not be grounds for the dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

(d) Surplusage. The court on motion of the defendant may strike surplusage from the indictment or information.

(e) Amendment of Information and Complaint. The court may permit an information or complaint to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

(f) Bill of Particulars. The court for cause may direct the filing of a bill of particulars. A motion for a bill of particulars may be made only within ten days after arraignment or at such other time before or after arraignment as

may be ordered by the court. The bill of particulars may be amended at any time subject to such conditions as justice requires.

RULE 8. JOINDER OF OFFENSES AND OF DEFENDANTS

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions which are connected or which constitute parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

RULE 9. WARRANT OR SUMMONS UPON INDICTMENT OR INFORMATION

(a) Issuance. Upon the request of the attorney for the State, or by direction of the court, the clerk shall issue a warrant for each defendant named in the indictment. The clerk shall issue a summons instead of a warrant upon the request of the attorney for the State or by direction of the court. Upon like request or direction he shall issue more than one warrant or summons for the same defendant. He shall deliver the warrant or summons to a person authorized by law to execute or serve it. If a defendant fails to appear in response to the summons, a warrant shall issue.

(b) Form.

(1) *Warrant.* The form of the warrant shall be as provided in Rule 4 (b) (1) except that it shall be signed by the court, or the clerk, or his deputy. It shall describe the offense charged in the indictment or information and it shall command that the defendant be arrested and brought before the court. The amount of bail may be fixed by the court and endorsed on the warrant.

(2) *Summons.* The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before the court at a stated time and place.

(c) Execution or Service; and Return.

(1) *Execution or Service.* The warrant shall be executed or the summons served as provided in Rule 4(c) (1), (2) and (3). A summons to a corporation shall be served in the same manner as a summons to a corporation may be served in civil cases. The officer executing the warrants shall bring the arrested person promptly before the court or, for the purpose of admission to bail, before a bail commissioner.

(2) *Return.* The officer executing a warrant shall make return thereof to the court. At the request of the attorney for the State, or upon its own motion, the court may order that any unexecuted warrant shall be returned and cancelled. On or before the return day the person to whom a summons was delivered for service shall make return thereof. At the request of the attorney for the State made at any time while the indictment or information is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the clerk to any authorized person for execution or service.

IV. ARRAIGNMENT AND PREPARATION FOR TRIAL

RULE 10. ARRAIGNMENT

Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge and calling on him to plead thereto. The clerk shall cause a copy of the indictment or information to be furnished to the defendant or his counsel before the defendant is called upon to plead and notation thereof shall be made in the docket.

RULE 11. PLEAS

A defendant may plead not guilty, not guilty by reason of insanity, guilty, or, with the consent of the court, *nolo contendere.* A defendant may plead both not guilty and not guilty by reason of insanity to the same charge. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* in any felony proceeding without first (a) making such inquiry as may satisfy it that the defendant in fact committed the crime charged, and, (b) addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead, or if the court refuses to accept a plea of guilty, or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

RULE 12. PLEADINGS AND MOTIONS BEFORE TRIAL; DEFENSES AND OBJECTIONS

(a) **Pleadings and Motions.** Pleadings in criminal proceedings shall be the complaint on appeal from the District Court, the indictment and the information, and the pleas of not guilty, not guilty by reason of insanity, guilty and *nolo*

contendere. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore would have been raised by one or more of such other pleas or pleadings shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(b) The Motion Raising Defenses and Objections.

(1) *Defenses and Objections Which May Be Raised.* Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

(2) *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment, information, or complaint on appeal from the District Court, other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment, information, or complaint on appeal from the District Court to charge an offense shall be noticed and acted upon by the court at any time during pendency of the proceeding.

(3) *Time of Making Motion.* The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

(4) *Hearing on Motion.* A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. All issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct.

(5) *Effect of Determination.* If a motion is determined adversely to the defendant, he shall be permitted to plead if he has not previously pleaded. A plea previously entered shall stand. If the motion is based upon a defect which may be cured by amendment of the complaint or information, the court may deny the motion and order that the complaint or information be amended. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment, information or complaint the defendant shall be discharged.

RULE 13. TRIAL TOGETHER OF INDICTMENTS OR INFORMATIONS

The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.

RULE 14. RELIEF FROM PREJUDICIAL JOINDER

If it appears that a defendant or the State is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

RULE 15. DEPOSITIONS

(a) When Taken. If it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may upon motion and notice

to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness.

(b) Notice of Taking. The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time.

(c) Defendant's Counsel and Payment of Expenses. If a defendant is without counsel the court shall advise him of his right and assign counsel to represent him unless the defendant elects to proceed without counsel or is able to obtain counsel. If it appears that a defendant at whose instance a deposition is to be taken cannot bear the expense thereof, the court may direct that expenses of travel and subsistence of the defendant's attorney for attendance at the examination shall be paid by the county in which the case is pending.

(d) How Taken. A deposition shall be taken in the manner provided in civil actions. The court at the request of a defendant may direct that a deposition be taken on written interrogatories in the manner provided in civil actions.

(e) Use. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears: That the witness is dead; or that the witness is out of the State of

Maine, unless it appears that the absence of the witness was procured by the party offering the deposition; or that the witness is unable to attend or testify because of sickness or infirmity; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts.

(f) Objections to Admissibility. Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions.

(g) At the Instance of the State or Witness. The following additional requirements shall apply if the deposition is taken at the instance of the State or a witness. The officer having custody of a defendant shall be notified of the time and place set for the examination, shall produce him at the examination and shall keep him in the presence of the witness during the examination. A defendant not in custody shall be give notice and shall have the right to be present at the examination. The court shall order the county in which the case is pending to pay to the defendant's attorney and to a defendant not in custody expenses of travel and subsistence for attendance at the examination.

RULE 16. DISCOVERY, INSPECTION, AND NOTICE OF ALIBI

(a) Discovery and Inspection. Upon timely motion of a defendant and upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable, the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph designated books, papers, documents, or tan-

gible objects, which are within the possession, custody, or control of the State, including written or recorded statements or confessions made by the defendant or a co-defendant, written or recorded statements of witnesses, and the results or reports of physical examinations and scientific tests, experiments, and comparisons. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

(b) Notice of Alibi. No less than 10 days before the date set for trial, the attorney for the State may serve upon the defendant or his attorney a demand that the defendant serve a notice of alibi if the defendant intends to rely on such defense at the trial. The demand shall state the time and place that the attorney for the State proposes to establish at the trial as the time and place where the defendant participated in or committed the crime. If such a demand has been served, the defendant, if he intends to rely on the defense of alibi, shall not more than five days after service of such demand, serve upon the attorney for the State and file a notice of alibi which states the place which the defendant claims to have been at the time stated in the demand. If the defendant fails to serve and file a notice of alibi after service of a demand, he shall not be permitted to introduce evidence at the trial tending to show the defense of alibi other than his own testimony unless the court for cause shown orders otherwise.

RULE 17. SUBPOENA

(a) For Attendance of Witnesses; Form; Issuance. A subpoena shall be issued by the clerk under the seal of the court or by a Justice of the Peace. It shall state the name of the court and the title, if any, of the proceeding and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The

clerk shall issue a subpoena, signed and sealed but otherwise in blank, to a member of the bar requesting it, who shall fill in the blanks before it is served.

(b) Indigent Defendants. The court or a justice thereof shall order at any time that a subpoena be issued for service on a named witness upon a written ex parte application of a defendant or his counsel upon finding, after appropriate inquiry, that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense. The written application required by this rule shall be impounded until entry of judgment, at which time it shall be removed and filed with the other records in the proceedings. If the court or justice orders the subpoena to be issued the person so subpoenaed shall be paid witness fees and mileage which together with the cost of the service of process shall be paid in the same manner in which similar costs are paid in case of a witness subpoenaed on behalf of the State.

(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable, oppressive or in violation of constitutional rights. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

(d) Service. A subpoena may be served by the sheriff, by his deputy, by a constable or by any person who is not a party and who is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to

the person named and, except in the case of a person subpoenaed on behalf of the State or a person subpoenaed on behalf of an indigent defendant pursuant to Rule 17(b), by tendering to him the fee for one day's attendance and mileage allowed by law.

(e) Place of Service.

(1) *In State.* A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the State of Maine.

(2) *Out of State.* A subpoena directed to a witness outside the State of Maine shall issue under the circumstances and in the manner and be served as provided in the Uniform Act to Secure Attendance of Witnesses from Without the State.

(f) For Taking Deposition; Place of Examination.

(1) *Issuance.* An order to take a deposition authorizes the issuance by the clerk of the court of subpoenas for the persons named or described therein.

(2) *Place.* A resident of this State shall not be required to travel to attend an examination outside the county where he resides, or is employed, or transacts his business in person, or a distance of more than fifty miles one way, whichever is greater, unless the court otherwise orders. A nonresident of the State may be required to attend only in the county wherein he is served with a subpoena, or within fifty miles from the place of service, or at such other convenient place as is fixed by order of court.

(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court in which the action is pending or in the county in which the deposition is taken. Punishment for such contempt shall be as provided by law.

V. VENUE

RULE 18. PLACE OF TRIAL

In all criminal prosecutions, the trial shall be in the county in which the offense was committed, except as otherwise provided by law.

RULE 19. RESERVED

RULE 20. RESERVED

RULE 21. CHANGE OF VENUE

(a) For Prejudice in the County. The court upon motion of the defendant shall transfer the proceeding as to him to another county if the court is satisfied that there exists in the county where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that county.

(b) Offense Committed in Two or More Counties. The court upon motion of the defendant shall transfer the proceeding as to him to another county if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one county and if the court is satisfied that in the interest of justice the proceedings should be transferred to another county in which the commission of the offense is charged. When two or more offenses are charged against the defendant, the court may upon motion of the defendant and in the interest of justice transfer all or part of the counts if any one of the counts which is transferred charges an offense committed in the county to which the transfer is ordered.

(c) Proceedings on Change of Venue. If the defendant is in custody, when a change of venue is ordered, the order shall direct that he be forthwith delivered to the custody

of the sheriff of the county to which the proceeding is transferred. The clerk shall transmit to the clerk of the court to which a proceeding is transferred all papers in the proceeding or certified copies thereof and any bail taken and the prosecution shall continue in that county.

RULE 22. TIME OF MOTION FOR CHANGE OF VENUE

A motion to change venue under these rules may be made only before the jury is impaneled or, where trial by jury is waived, before any evidence is received.

VI. TRIAL

RULE 23. TRIAL BY JURY OR BY THE COURT

(a) Trial by Jury; Waiver. The defendant with the approval of the court may waive a jury trial. The waiver must be in writing.

(b) Jury of Less than Twelve. Juries shall be of twelve but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than twelve.

(c) Trial Without a Jury. In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

RULE 24. TRIAL JURORS

(a) Examination of Jurors. The court shall conduct the examination of prospective jurors unless in its discretion it permits the parties or their attorneys to do so. The

court shall permit the parties or their attorneys to suggest additional questions to supplement the inquiry and shall submit to the prospective jurors such additional questions as it deems proper, or the court in its discretion may permit the parties or their attorneys themselves to make such additional inquiry as it deems proper.

(b) Challenges for Cause. Challenges for cause of individual prospective jurors shall be made at the bench, at the conclusion of the examination.

(c) Peremptory Challenges.

(1) *Manner of Exercise.* Peremptory challenges shall be exercised by striking out the name of the juror challenged on a list of the drawn prospective jurors prepared by the clerk.

(2) *Order of Exercise.* In any action in which both sides are entitled to an equal number of peremptory challenges, they shall be exercised one by one, alternatively, with the State exercising the first challenge. In an action in which the State is entitled to 10 peremptory challenges and the defendant or defendants jointly to 20 peremptory challenges, the State shall exercise the first challenge, the defendant or defendants jointly shall then exercise two challenges, and the State and the defendant or defendants jointly shall continue to alternate exercising peremptory challenges, with the State exercising its challenges one at a time, and the defendant or defendants jointly exercising challenges two at a time, until both sides have exhausted their allotted number of peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges, permit the additional challenges to be exercised separately or jointly, and determine the order of the challenges.

(3) *Number.* If the offense charged is punishable by life imprisonment, the State is entitled to 10 peremptory

challenges and the defendant or defendants jointly to 20 peremptory challenges. In all other felony prosecutions each side shall be entitled to 8 peremptory challenges. In all other criminal prosecutions each side shall be entitled to 4 peremptory challenges.

(d) Alternate Jurors. The court may direct that not more than four jurors in addition to the regular panel be called and impaneled to sit as alternate jurors as provided by law. The manner and order of exercising peremptory challenges to alternate jurors shall be the same as provided for peremptory challenges of regular jurors. If the offense charged is punishable by life imprisonment, the State is entitled to one peremptory challenge of the alternate jurors and the defendant or defendants jointly are entitled to two peremptory challenges of the alternate jurors. In all other criminal prosecutions, each side shall be entitled to one peremptory challenge of the alternate jurors. (As amended effective Feb. 1, 1966.)

RULE 25. DISABILITY OF A JUSTICE

If by reason of death, resignation, removal, sickness or other disability, a justice before whom a defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt any other justice assigned thereto by the Chief Justice of the Supreme Judicial Court may perform those duties; but if such other justice is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

RULE 26. EVIDENCE

(a) Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of this

State, or under the rules of evidence applied in the courts of this State.

(b) Examination of Witnesses. The examination and cross examination of each witness shall be conducted by one counsel only on each side, except by special leave of court, and counsel shall stand while so examining or cross examining unless the court otherwise permits. Any re-examination of a witness shall be limited to matters brought out in the last examination by the adverse party except by special leave of court.

(c) Order of Evidence. A party who has rested his case cannot thereafter produce further evidence except in rebuttal unless by leave of court.

(d) Attorneys Not to be Bail or Witnesses. No attorney shall give bail or recognizance as surety in any criminal matter in which he is employed as counsel, nor shall any attorney without special leave of court be permitted to take any part in the conduct before a jury of a trial in which he is a witness for his client.

RULE 27. PROOF OF OFFICIAL RECORD

An official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions.

RULE 28. EXPERT WITNESSES AND INTERPRETERS

(a) Expert Witnesses. The court may order the defendant or the State or both to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A

witness so appointed shall be informed of his duties by the court at a conference at which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any, and may thereafter be called to testify by the court or by any party. He shall be subject to cross examination by each party if called to testify by the court, otherwise the witness shall be subject to the usual rules relating to direct and cross examination. Unless the witness is called to testify by the court, the jury shall not be informed by the court or by either counsel that the witness was appointed by the court. The court may determine the reasonable compensation of such a witness and direct its payment by the State. The parties also may call expert witnesses of their own selection.

(b) Interpreters. The court may appoint a disinterested interpreter of its own selection and may determine the reasonable compensation of such interpreter and direct its payment by the county in which the case is pending. Interpreters shall be appropriately sworn.

RULE 29. MOTION FOR ACQUITTAL

(a) Motion for Judgment of Acquittal. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the State is not granted, the defendant may offer evidence without having reserved the right. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve the decision on the motion, submit the case to the jury and decide the motion either be-

fore the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.

(b) Motion after a Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within ten days after the jury is discharged or within such further time as the court may fix during the ten-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury. A motion for new trial shall be deemed to include a motion for judgment of acquittal as an alternative.

RULE 30. ARGUMENT OF COUNSEL; INSTRUCTIONS TO JURY

(a) Time for Argument. After the evidence is closed, the attorney for the State shall argue and shall be limited to fifty minutes. The attorney for each defendant shall then argue and be limited to one hour. The attorney for the State shall be allowed ten minutes for rebuttal. The court may, before the commencement of argument, for good cause shown, allow further time which shall in all cases be fixed and definite.

(b) Instructions. At the close of the evidence, or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to the adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party shall assign as error

any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing and presence of the jury.

RULE 31. VERDICT

(a) Return. The verdict shall be unanimous. It shall be returned by the jury to the judge in open court, in the presence of the defendant or defendants.

(b) Several Defendants. If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

(c) Conviction of Lesser Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein, if the attempt is an offense.

(d) Poll of Jury. When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

(e) Verdict on Holiday. The court may receive a verdict on a court holiday, or outside the usual business hours, from a jury which commenced its deliberations on a regular business day.

VII. JUDGMENT

RULE 32. SENTENCE AND JUDGMENT

(a) Sentence. Sentence shall be imposed without unreasonable delay, provided however, the court may suspend the execution thereof to a date certain or determinable. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall address the defendant personally and ask him if he desires to be heard prior to the imposition of sentence. The defendant may be heard personally or by counsel or both. Failure of the court to so address the defendant shall not constitute grounds for relief under Rule 35(b) of these rules, unless the defendant shows that he has been prejudiced thereby.

(b) Judgment. A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(c) Pre-Sentence Investigation.

(1) *When Made.* The court may in its discretion direct the State Board of Probation and Parole to make a pre-sentence investigation and report to the court before the imposition of sentence or the granting of probation. The report shall not be submitted to the court or its content disclosed to anyone unless the defendant has pleaded or has been found guilty.

(2) *Report.* The report of the pre-sentence investigation shall contain any prior criminal record of the defendant and such information on his characteristics, his financial condition, and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting pro-

bation or in the correctional treatment of the defendant, and such other information as may be required by the court. If the defendant is represented by counsel, the court before imposing sentence shall permit counsel for the defendant to read the report of the pre-sentence investigation or to be present at the presentation of an oral report and shall afford such counsel an opportunity to comment thereon. If the defendant is not represented by counsel, the court shall communicate, or have communicated to the defendant the essential facts in the report of the pre-sentence investigation and shall afford the defendant an opportunity to comment thereon. Confidential sources of information may be excluded from any report which counsel is permitted to read, which is presented in counsel's presence, or the essential facts of which are communicated to the defendant.

(d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

(e) Probation. After conviction of an offense not punishable by life imprisonment, the defendant may be placed on probation as provided by law.

(f) Revocation of Probation. The court shall not revoke probation except after a hearing at which the defendant shall be present and apprised of the grounds on which such action is proposed.

RULE 33. NEW TRIAL

The court on motion of the defendant may grant a new trial to him if required in the interest of justice. If the trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if

entered, take additional testimony and direct entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case; upon the filing of such a motion while an appeal is pending the clerk of the court shall immediately send notice to the clerk of the Law Court of the filing of such a motion. A motion for a new trial based on any other ground shall be made within ten days after verdict or finding of guilty or within such further time as the court may fix during the ten-day period.

RULE 34. ARREST OF JUDGMENT

The court on motion of a defendant shall arrest judgment if the indictment, information or complaint on appeal from the District Court does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made prior to the entry of judgment or within ten days thereafter or within such further time as the court may fix during the ten-day period.

RULE 35. CORRECTION AND REVISION OF SENTENCE; POST-CONVICTION RELIEF

(a) Correction and Revision of Sentence. The justice who imposed sentence may revise a sentence prior to the commencement of execution thereof and may correct an illegal sentence or a sentence imposed in an illegal manner within sixty days after the sentence is imposed, or within sixty days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal.

(b) Post-Conviction Relief.

(1) *Persons Entitled to Bring Proceeding.* Any person convicted of a crime and incarcerated thereunder including any person committed as a juvenile offender, or re-

leased on probation, or paroled from a sentence thereof, or fined, who claims that he is illegally imprisoned, or that there were errors of law of record, or that his sentence was imposed in violation of the Constitution of the United States or of this State, or that there were errors of fact not of record which were not known to the accused or the court and which by the use of reasonable diligence could not have been known to the accused at the time of trial and which, if known, would have prevented conviction may institute a petition for a writ of habeas corpus in the manner provided by law.

(2) *Form of Petition.* A petition for writ of habeas corpus:

(a) Shall conform to the requirements of Revised Statutes of 1964, Title 14, § 5504.

(b) Shall conform to the requirements of Rule 10 of the Maine Rules of Civil Procedure, except that the State of Maine shall be named as respondent in all proceedings, and if the petitioner is in custody, the individual having custody of the petitioner shall also be named as a respondent.

(c) Shall, if petitioner is imprisoned or in custody of any type, contain the name of the individual having custody of petitioner and the place of confinement, if any.

(d) Shall be verified by the petitioner.

(e) May include a request that counsel be appointed to represent the petitioner, if he is indigent, but the failure to include such a request in the petition shall not bar an indigent petitioner from requesting the court to appoint counsel.

(f) Shall concisely set forth the facts upon which the petition is based; if the petition alleges errors of

law appearing of record in a court other than the court with which the petition is filed there shall be attached as an exhibit to the petition a certified copy of the record in such other court.

(g) Need not specify the precise relief requested but shall be sufficient if it states that petitioner requests that he be granted any relief to which he may be entitled.

(3) *Form of Verification.* The verification to a petition for writ of habeas corpus shall be subscribed and either sworn to or affirmed by the petitioner; shall reflect that the petitioner has read the petition, or that he is unable to read the English language, that the petition and verification have been read to him, and that he understands the same; and that all matters therein within his personal knowledge are true.

(4) *Form of Writ.* The writ of habeas corpus shall:

(a) If petitioner is imprisoned or in custody of any type and is to be produced at the time of hearing, be directed to the person having custody of petitioner; otherwise, the writ should be directed to the State of Maine.

(b) Contain notice of the time and place of hearing; if petitioner is imprisoned or in custody of any type, it may direct that he be produced at the time and place of hearing.

(c) Specify the grounds alleged in the petition upon which hearing is to be held.

(d) Be signed by the justice issuing the writ.

(5) *Nature of Proceeding.* A proceeding under this subdivision (b) is a civil proceeding. In respects not covered by statute, these rules, together with the Maine Rules of Civil Procedure where applicable, shall govern the prac-

tice in these proceedings. The admissibility of evidence and the burden of proof shall be governed by the standards applicable in civil proceedings.

RULE 36. CLERICAL MISTAKES

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the Law Court, and thereafter, while the appeal is pending may be so corrected with leave of the Law Court.

VIII. APPEAL

RULE 37. APPEAL TO THE LAW COURT

(a) How Taken. Whenever a judgment of the Superior Court is by law reviewable by the Law Court, such review shall be by appeal in accordance with these rules. Review by exception, motion, writ of error, or otherwise than by appeal is abolished.

The defendant may appeal from the judgment by filing a notice of appeal with the clerk. An appeal from a judgment preserves for review any claim of error in the record including any claim of error in the denial of a motion for new trial, the denial of a motion for judgment of acquittal, or the denial of a motion in arrest of judgment. An appeal shall not be dismissed because it is designated as being taken from such an order, but shall be treated as an appeal from the judgment. An appeal may be dismissed by stipulation filed with the clerk, or, after the docketing of the appeal in the Law Court, with the clerk of the Law Court,

provided that after the appeal is argued to the Law Court, it may be dismissed only with leave of the Law Court.

Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal; but the appeal will be dismissed for appellant's failure to take any such further step within the time prescribed therefor unless the Law Court on petition shall determine that exceptional circumstances excuse the failure and justice demands that the appeal be heard. The Superior Court shall take no action upon a motion to dismiss an appeal while a petition for relief is pending before the Law Court.

(b) Notice of Appeal. The notice of appeal shall set forth the title of the case, the name and address of the appellant and of appellant's attorney, a general statement of the offense, a concise statement of the judgment or order, giving its date and any sentence imposed, the place of confinement if the defendant is in custody and a statement that the appellant appeals from the judgment or order. The notice of appeal shall be signed by the appellant or appellant's attorney, or by the clerk if the notice is prepared by the clerk as provided in subdivision (c) of this rule. Notification of the filing of the notice of the appeal shall be given by the clerk by mailing a copy thereof to the attorney for the State, but his failure so to do does not affect the validity of the appeal. The clerk shall note in the criminal docket the names of the persons to whom he mails the copy, with date of mailing.

(c) Time for Taking Appeal. An appeal by a defendant may be taken within ten days after entry of the judgment or order appealed from. If a timely motion for new trial, or judgment of acquittal after verdict or in arrest of judgment has been made, an appeal from the judgment of conviction may be taken within ten days after entry of the

order denying the motion, except that a motion for new trial on the ground of newly discovered evidence will not extend the time within which to appeal from the judgment of conviction unless the motion is made within ten days after the entry of the judgment. When a court after trial imposes sentence on a defendant not represented by counsel, or represented by court appointed counsel, the defendant shall be advised of his right to appeal, and if he so requests, the court shall cause a notice of appeal to be prepared and filed on behalf of the defendant forthwith.

(d) Filing Record on Appeal. Twelve copies of the record on appeal as provided for in the Rules of Civil Procedure, together with one additional copy for each of the parties of record, shall be filed with the clerk of the Superior Court within 60 days from the filing of the final designation of the contents of the record as provided in Rule 75(a) of the Maine Rules of Civil Procedure. In all cases the court in its discretion and with or without motion or notice may extend the time for filing the record on appeal, if its order for extension is made before the expiration of the period for filing as originally prescribed or as extended by previous order.

(e) Certification of Record; Transmission to Law Court. It shall be the duty of the clerk promptly to examine and certify the copies of the record on appeal as true and correct. The clerk shall thereupon transmit twelve copies of the record to the clerk of the Law Court and furnish a copy of the record to counsel for each of the parties. The case shall be marked "law" on the docket and no further action shall be taken thereon until after certificate of decision from the Law Court except as otherwise provided in these rules. The case shall be docketed in the Law Court upon receipt of the record on appeal.

RULE 37A. REPORT OF CASES AND INTERLOCUTORY APPEALS

(a) Report by Agreement of Important or Doubtful Questions. The court may, where the defendant and the State so agree, report any proceedings to the Law Court if it is of the opinion that any question of law is involved of sufficient importance or doubt to justify the same, provided that the decision thereof would in at least one alternative finally dispose of the action.

(b) Appeal of Interlocutory Rulings. If the court is of the opinion that a question of law involved in an interlocutory order or ruling made by it in any action ought to be determined by the Law Court before any further proceedings are taken therein, it may, on motion of an aggrieved defendant, report the case to the Law Court for that purpose and stay all further proceedings except such as are necessary to preserve the rights of the parties without making any decision therein.

(c) Determination by the Law Court. Any proceeding reported under this rule shall be entered in the Law Court and heard and determined in the manner provided in case of appeals. (As amended effective May 31, 1966.)

RULE 38. STAY OF EXECUTION, AND RELIEF PENDING REVIEW

(a) Stay of Execution.

(1) *Imprisonment.* A sentence of imprisonment shall be stayed if an appeal is taken and the defendant elects not to commence service of the sentence or is admitted to bail.

(2) *Fine.* A sentence to pay a fine or a fine and costs shall be stayed by the Superior Court upon request of the defendant if an appeal is taken and if he shall deposit the whole of the fine and costs with the clerk of the Superior

Court or shall be admitted to bail. If the judgment is reversed, the clerk shall forthwith refund to the defendant, or to such person as he shall direct, any funds deposited to cover the defendant's fine and costs. If the judgment is affirmed, the funds so deposited shall be applied by the clerk in payment of the fine and costs. The clerk shall forthwith notify the defendant that such application has been made and the fine and costs paid in full.

(3) *Probation.* An order placing the defendant on probation shall be stayed if an appeal is taken.

(b) Bail. Admission to bail upon appeal shall be as provided in these rules.

(c) Application for Relief Pending Review. If application is made to a Justice of the Supreme Judicial Court for bail pending appeal, the application shall be upon notice and shall show that application to the trial court is not practicable or that application has been made to the trial court and denied, with the reasons given for the denial, or that the action on the application did not afford the relief to which the applicant considers himself to be entitled. Such application shall be made to a single Justice of the Supreme Judicial Court and following his decision upon the application no subsequent application shall be entertained by any other Justice of the Supreme Judicial Court.

RULE 39. THE LAW COURT: RECORD ON APPEAL; PROCEEDINGS; DISMISSAL OF APPEAL

(a) Record on Appeal to the Law Court; Proceedings in the Law Court. Except as otherwise provided by these rules, Rule 75 of the Maine Rules of Civil Procedure shall govern the preparation and form of the record on appeal in criminal cases and Rule 76A(a), (b) and (c) of the Maine Rules of Civil Procedure shall govern the procedure in the Law Court in criminal cases.

(b) Dismissal. Any appeal which is not in order for hearing at the first term of the Law Court following the expiration of six months from the date of docketing of the appeal in the Law Court shall be dismissed unless the Law Court on petition shall determine that exceptional circumstances excuse the failure and justice demands that the appeal be heard.

RULE 39A. APPEALS BY INDIGENTS

A person who has been convicted of a crime and who has filed notice of appeal to the Law Court who claims to be without financial means to employ counsel to prosecute his appeal or to obtain a stenographic transcript of the proceedings at his trial for the purpose of securing appellate review of his conviction may file, within ten days following the filing of his notice of appeal, a petition requesting that counsel be assigned to represent him on the appeal and that he be furnished with a stenographic transcript of the proceedings at his trial. The petition shall be verified by the petitioner and shall specify the grounds for the appeal, and shall allege facts showing that he is at the time of filing the petition without financial means to employ counsel or to pay for a transcript.

The matter shall be heard forthwith by the presiding justice on the issue of the indigency of the petitioner. If, after hearing, the presiding justice finds that the petitioner is without financial means with which to prosecute his appeal or with which to obtain a transcript of the proceedings at his trial, he shall appoint competent counsel to represent the defendant on appeal. If, after hearing, the presiding justice finds that the petitioner has sufficient financial means with which to bear a portion of the expense of prosecuting his appeal, the justice shall appoint competent counsel to represent the defendant on appeal but may condition his order on the defendant's paying a specified portion of

the counsel fees or costs of preparation of the transcript. When such a conditional order is issued the presiding justice shall file a decree setting forth his findings.

Counsel for the petitioner and for the State may then, with the approval of the justice who presided at the trial, designate by written stipulation the parts of the record, proceedings, and evidence to be included in the record on appeal. By agreement of counsel for the petitioner and for the State, all or part of the testimony may be furnished in narrative form, rather than by question and answer. Such justice shall then cause to be prepared an original and two copies of the record on appeal as has been designated by counsel for the petitioner and for the State. A copy of the record on appeal shall be delivered to the petitioner without charge, and a copy thereof shall be delivered to the attorney for the State.

If the presiding justice finds that the petitioner has financial means with which to employ counsel or with which to pay for the transcript, the petition shall be denied and the presiding justice shall file a decree setting forth his findings. From the findings filed following the denial of a petition or the granting of a conditional order, the petitioner may, in ten days after the filing thereof, appeal in writing to any Justice of the Supreme Judicial Court, who, after notice to counsel for the State, shall hear the matter de novo, and may affirm, modify, or reverse the findings of the justice below. If the findings of the presiding justice are modified or reversed, the matter shall be remanded to the court below for appropriate action by the justice who presided at the trial. The decision of the reviewing Justice shall be final.

In the hearings before the presiding justice, or, upon appeal, before a Justice of the Supreme Judicial Court, the testimony of the witnesses shall be taken subject to the penalties of perjury.

During the pendency of proceedings seeking appointment of counsel or the provision of a transcript, the time provided in Rule 37 for the perfection of the appeal shall not run, but shall commence to run upon final judgment on the petition.

The court reporter, and counsel to represent petitioner, shall be paid out of money appropriated for this purpose, on certification of the presiding justice, and approval and order by the Chief Justice of the Supreme Judicial Court.

Whenever the petition for the appointment of counsel or the furnishing of a transcript is allowed, the presiding justice, notwithstanding any other provision of these rules, may, by order, specify the manner by which the record on appeal may be prepared and settled to the end that the petitioner may be able to present his case to the Law Court in the most economical manner. If the Law Court deems it necessary or advisable to have an enlargement of the record, it may order such enlargement, or the matter may be remanded to the court below for appropriate action by the justice who presided at the trial.

IX. SUPPLEMENTARY AND SPECIAL PROCEEDINGS

RULE 40. APPELLATE REVIEW OF CERTAIN SENTENCES

(a) How Secured. Any person entitled by statute to appellate review of a sentence imposed in a criminal case, may appeal to the appellate division of the Supreme Judicial Court by filing an original and four copies of a notice of appeal with the clerk of the Superior Court in the county in which sentence was imposed.

(b) Notice of Appeal. The notice of appeal shall set forth the title of the case, the name and address of the appellant, a general description of the offense, a concise statement of the judgment, giving its date and the sentence imposed, the name of the justice who imposed sentence, the place of confinement if the defendant is in custody and a statement that the appellant seeks review of the sentence by the appellate division. The notice of appeal shall be signed by the appellant. The clerk shall forthwith notify the Chief Justice of the Supreme Judicial Court, the justice who imposed the sentence appealed from, the County Attorney of the county where the case was prosecuted, and the clerk of the appellate division by mailing a copy thereof to each of them. The clerk shall note in the criminal docket the giving of such notification, with the date thereof.

(c) Time for Taking Appeal. The notice of appeal must be filed within 30 days after the imposition of sentence, except that a person who, on December 1, 1965, is imprisoned under a sentence to the State Prison imposed prior to December 1, 1965, may file his notice of appeal at any time on or before November 30, 1967. When a court imposes a sentence to the State Prison which may by statute be reviewed, the clerk of the court shall notify the person sentenced of his right to appeal and note the fact of such notification in the criminal docket.

(d) Proceedings Before Appellate Division.

(1) *Time of Review.* The appellate division shall as soon as practicable after the filing of the notice of appeal review the sentence appealed from. The appellate division shall decline to review the sentence in any case in which there is pending a motion for new trial, a motion for judgment of acquittal after verdict, a motion in arrest of judgment or an appeal to the Law Court pursuant to Rule 37. In such case, the appeal shall not be dismissed, but review

shall be continued until final termination of the proceedings then pending.

(2) *Hearing.* The appellate division may review the sentence with or without hearing, but no sentence may be increased without giving the appellant an opportunity to be heard. If a hearing is to be held, the appellate division shall cause the defendant, his attorney of record in the appellate division and the attorney for the State to be given notice of the time and place of hearing at least 10 days prior to the holding thereof, and, if the defendant is in custody, shall take the necessary steps to secure his attendance.

(e) Decision. The final order of the appellate division shall be filed with the clerk of the Superior Court in the county in which sentence was imposed, who shall forthwith notify the Chief Justice of the Supreme Judicial Court, the justice who imposed sentence, the appellant, and the Warden of the State Prison in which the appellant is confined, of the final action of the appellate division. If the judgment is amended by an order substituting a different sentence or sentences or disposition of the case, any Justice of the Superior Court when in Knox County shall resentence the defendant or make any other disposition of the case ordered by the appellate division.

RULE 41. SEARCH AND SEIZURE

(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a District Judge or complaint justice with jurisdiction of the area wherein the property sought is located.

(b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property:

(1) Stolen or embezzled; or

(2) Designed or intended for use or which is or has been used as a means of committing a criminal offense; or

(3) The possession of which is unlawful.

(c) Issuance and Contents. A warrant shall issue only on an affidavit sworn to before a person authorized by this rule to issue warrants specifically designating the place to be searched, the owner or occupant thereof, if known to the affiant, and the person or thing to be searched for, and establishing the grounds for issuing the warrant. If the judge or complaint justice is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to any officer authorized to enforce or assist in enforcing any law of the State of Maine. It shall state the grounds of probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct it be served at any time. It shall designate the judge to whom it shall be returned.

(d) Execution and Return with Inventory. The warrant may be executed and returned only within ten days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they were present, or in the presence

of at least one credible person other than the applicant for the warrant or the person from whose possession or whose premises the property was taken, and shall be verified by the officer. The judge or complaint justice shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) Motion for Return of Property and To Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the Superior Court in the county in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that:

(1) The property was illegally seized without warrant, or

(2) The warrant is insufficient on its face, or

(3) The property seized is not that described in the warrant, or

(4) There was not probable cause for believing the existence of the grounds on which the warrant was issued, or

(5) The warrant was illegally executed.

The justice shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any criminal proceeding. The motion to suppress evidence may also be made in the county where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing. Any proceedings in the District Court

shall be stayed during the pendency of a motion to suppress evidence.

(f) Return of Papers to Clerk. The judge or complaint justice who has issued a search warrant shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the Superior Court for the county in which the property was seized.

(g) Scope and Definition. This rule does not modify any act inconsistent with it, regulating search, seizure and the issuance and execution of search warrants and under circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects.

RULE 42. CRIMINAL CONTEMPT

(a) Summary Disposition. A criminal contempt may be punished summarily if the justice certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the justice and entered of record.

(b) Disposition upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the justice in open court in the presence of the person charged or, on application of an attorney for the State or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The person charged is entitled to admission to bail as provided in these rules. If

the contempt charged involves disrespect to or criticism of a justice, that justice is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

X. GENERAL PROVISIONS

RULE 43. PRESENCE OF THE DEFENDANT

The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury, and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by life imprisonment, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the verdict. A corporation may appear by counsel for all purposes. In prosecutions for offenses punishable by fine or by imprisonment for less than one year, or both, the court may permit arraignment, plea, trial and imposition of sentence in the defendant's absence. The defendant's presence is not required at proceedings for post-conviction relief under Rule 35(b), although the court may require the defendant's presence.

RULE 44. RIGHT TO AN ASSIGNMENT OF COUNSEL

If the defendant in a felony proceeding appears in any court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or has sufficient means to employ counsel. Counsel appointed in the District Court shall continue to

represent the defendant until appointment of counsel by the Superior Court.

RULE 45. TIME

(a) Computation. In computing any period of time the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When a period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

(b) Enlargement. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the exipration of the specified period permit the act to be done if the failure to act was the result of excusable neglect; but the court may not extend the time for taking any action under rules 29, 33, 34, 35 (a), 37(c), 37(d) and 39(b), except and to the extent and under the conditions stated in them.

(c) Unaffected by Expiration of Term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The existence or expiration of a term of court in no way affects the power of a court to act in a criminal proceeding. This rule shall not affect the times at which a grand jury may be summoned nor shall it affect the limitations upon the power of bail commissioners.

(d) For Motions; Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than seven days before the time specified for the hearing unless a different period is fixed by rule or order of the court. For cause shown such an order may be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and opposing affidavits may be served not less than one day before the hearing unless the court permits them to be served at a later time.

(e) Additional Time After Service by Mail. Whenever a party has the right or is required to do any act within a prescribed period after the service of a notice or other paper upon him and the notice or other paper is served upon him by mail, three days shall be added to the prescribed period.

RULE 46. BAIL

(a) Right to Bail. A defendant shall be admitted to bail before conviction and may be admitted to bail after conviction and pending appeal in accordance with the constitution and statutes of this State. Pending appeal bail may be allowed by the justice who presided at the trial or by a Justice of the Supreme Judicial Court, to run until final termination of the proceedings.

(b) Bail for Witness. If it appears by affidavit that the testimony of a person is material in any criminal proceeding and if it is shown that it may become impracticable to secure his presence by subpoena, the court or magistrate may require him to give bail for his appearance as a witness in an amount fixed by the court. If the person fails to give bail the court may commit him to the custody of the sheriff pending final disposition of the proceeding in which the testimony is needed, may order his release if he has been

detained for an unreasonable length of time and may modify at any time the requirement as to bail.

(c) Amount. If the defendant is admitted to bail the terms thereof shall be such as, in the judgment of the person authorized to fix bail, will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the financial ability of the defendant to give bail, the character of the defendant and the policy against unnecessary detention of defendants pending trial.

(d) Form, Conditions and Place of Deposit. A person required or permitted to give bail shall execute a written bond for his appearance. The person authorized to fix bail, having regard to the considerations set forth in subdivision (c), may require one or more sureties, may authorize the acceptance of cash or bonds or other security in an amount equal to or less than the face amount of the bond, or may authorize the release of the defendant without security upon such conditions as may be prescribed to assure his appearance. Bail given originally on appeal shall be deposited with the clerk of the Superior Court in the county in which the trial was had.

(e) Forfeiture.

(1) *Declaration.* If there is a breach of condition of a bond, the court in which the defendant is to appear shall declare a forfeiture of the bail.

(2) *Setting Aside.* The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.

(3) *Enforcement.* When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. By entering into a bond the obligors submit to the jurisdiction of the court in which

the defendant is to appear and irrevocably appoint the clerk of that court in the county in which the bail is posted as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the obligors to their last known addresses.

(4) *Remission.* After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision.

(f) Exoneration. When the condition of the bond has been satisfied or the forfeiture thereof has been set aside or remitted, the court shall exonerate the obligors and release any bail. A surety may be exonerated by a deposit of cash in the amount of the bond or by a timely surrender of the defendant into custody.

(g) Practice in Taking Bail. Every bail commissioner upon taking bail shall endorse upon the warrant upon which the prisoner is held the following facts: date and place (town or city) of taking bail, court and term at which the prisoner is required to appear, the offense of which he is accused, the amount of bail, the names and residences for principal and each surety; or if the bail is taken after arrest and before the issuing of a warrant, shall forthwith deliver to the officer having the prisoner in charge a memorandum, signed by such bail commissioner, containing the foregoing information.

RULE 47. MOTIONS AND MOTION DAY

(a) Motions. An application to the court for an order shall be by motion. A motion other than one made during

a trial or hearing shall be in writing unless the court permits it to be made orally. It shall state with particularity the grounds upon which it is made and shall set forth the relief or order sought. It may be supported by affidavit. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(b) Motion Day. Unless local conditions make it impracticable, the Chief Justice of the Supreme Judicial Court shall establish for each county regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the court at any time or place and on such notice, if any, as it considers reasonable may make orders for the advancement, conduct and hearing of actions.

To expedite its business or for the convenience of the parties, the court may make provision for the submission and determination of motions without oral hearing upon brief written statements of the reasons in support and opposition.

RULE 48. DISMISSAL

(a) By Attorney for the State. The attorney for the State may with written leave of the court file a written dismissal of an indictment, information or complaint setting forth the reasons for the dismissal and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

(b) By Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the Superior Court, or if there is unnecessary delay in bringing a defendant to trial, the court may upon motion of the defendant dismiss the indictment, information, or complaint.

RULE 49. SERVICE AND FILING OF PAPERS

(a) Service: When Required. Written motions other than those which are heard ex parte, written notices, designations of record on appeal and similar papers shall be served upon each of the parties.

(b) Service: How Made. Whenever under these rules or by an order of the court service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made in the manner provided in civil actions.

(c) Notice of Orders. Immediately upon entry of an order made on a written motion subsequent to arraignment the clerk shall mail or deliver to each party a notice thereof and shall make a note in the docket of the mailing or delivery.

(d) Filing. Papers required to be served shall be filed with the court. Papers shall be filed in the manner provided in civil actions.

RULE 50. RESERVED

RULE 51. EXCEPTIONS UNNECESSARY

Exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; but if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

RULE 52. HARMLESS ERROR AND OBVIOUS ERROR

(a) Harmless Error, Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Obvious Error. Obvious errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

RULE 53. REGULATION OF CONDUCT IN THE COURTROOM

The taking of photographs in the courtroom or radio or television broadcasting or transmitting of judicial proceedings from the courtroom during the progress of judicial proceedings or any recess thereof shall not be permitted by the court.

RULE 53A. ADMINISTRATION OF JUSTICE

No attorney for the State, clerk of courts, or deputy clerk of courts, and no judge, associate judge, recorder or clerk of a municipal court, or any trial justice, shall be retained or employed or shall act as attorney for any defendant in any criminal proceeding in any court of this State or in any civil case involving the same facts.

No attorney holding himself out as a partner or associate of a judge, associate judge, or recorder of municipal court or any trial justice shall be retained or employed, or shall act as attorney for any defendant on the criminal side of such court or on appeal from any case originating there or any civil case involving the same facts. No attorney holding himself out as a partner or associate of an attorney for the State, or clerk of courts shall be retained or employed, or shall act as attorney for any defendant on the criminal side of any court in the county of such officer or on appeal from any case originating in any such court or in a civil case involving the same facts.

RULE 54. APPLICATION AND EXCEPTION

(a) Courts. These rules apply to all criminal proceedings and proceedings for post-conviction relief in the Superior Court and Supreme Judicial Court. They apply to all criminal proceedings in which a felony is charged before the District Court, municipal courts, trial justices, complaint justices, and bail commissioners.

(b) Proceedings.

(1) *Proceedings for Prevention of Crime.* These rules do not alter the power of the judges or justices of the State of Maine to require a person to give security to keep the peace and be of good behaviour pursuant to the provisions of Revised Statutes of 1964, Title 15, Sections 281-292, but in such cases the procedure shall conform to these rules so far as they are applicable.

(2) *Misdemeanors.* These rules do not apply to proceedings before the District Court, municipal courts, trial justices, complaint justices and bail commissioners, in which the offense charged is a misdemeanor.

(3) *Other Proceedings.* These rules are not applicable to extradition and rendition of fugitives; forfeiture of property for violation of a statute of the State of Maine; or the collection of fines and penalties. They do not apply to proceedings under Revised Statutes of 1964, Title 15, Part 5—Juvenile Offenders—so far as they are inconsistent with that part.

(c) Application of Terms. As used in these rules, the term "law" includes statutes and judicial decisions. "Civil action" refers to a civil action in the Superior Court. "Oath" includes affirmations as provided by law. "Attorney for the State" means the Attorney General, an authorized deputy or assistant of the Attorney General, a county attorney, an authorized assistant to a county attorney, or

such other person or persons as may be authorized by law to act as a representative of the State of Maine in a criminal proceeding. "District Court" includes municipal courts and trial justices. "Magistrate" refers to a judge of the District Court, a judge of the municipal court, or a trial justice. The words "demurrer," "motion to quash," "plea in abatement," "plea in bar," and "special plea in bar" or words to the same effect in any statute in the State of Maine shall be construed to be the motion raising a defense or objection provided in Rule 12.

RULE 55. BOOKS AND RECORDS KEPT BY THE CLERK AND ENTRIES THEREIN

(a) Criminal Docket. The clerk shall keep the criminal docket and shall enter therein each criminal proceeding to which these rules are applicable. Proceedings shall be assigned docket numbers. Upon the filing of an indictment or information with the court, the christian and surname of each defendant shall be entered upon the docket. Thereafter the name and address of the attorney appearing for any defendant shall be entered. All papers filed with the clerk, all appearances, pleas, motions, orders, verdicts, and judgments shall be noted chronologically upon the docket and shall be marked with the docket number. The notations shall briefly show the nature of each paper filed, writ issued, plea entered, or motion made and the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date of the judgment or order and the date the notation is made.

(b) Criminal Judgments and Orders. After the rendition of judgment the clerk shall, without unreasonable delay, make extended records, as provided by law.

(c) Custody of Papers by Clerk. The clerk shall be answerable for all records and papers filed with the court,

and they shall not be taken from his custody without special order of the court; but the parties may at all times have copies.

(d) Other Books and Records. The clerk shall keep such other books and records as may be required from time to time by the Chief Justice of the Supreme Judicial Court.

RULE 56. COURTS AND CLERKS

The Superior Court shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Sundays, legal holidays, and such Saturdays as the county commissioners of the several counties may in their discretion order such offices closed.

RULE 57. RULES OF COURT

When no procedure is specifically prescribed the court shall proceed in any lawful manner not inconsistent with the Constitution of the State of Maine, these rules or any applicable statutes.

RULE 58. FORMS

The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.

RULE 59. EFFECTIVE DATE

These rules will take effect on December 1, 1965. They govern all criminal proceedings thereafter commenced and all criminal proceedings then pending, except to the extent that in the opinion of the court their application in a par-

ticular proceeding pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

RULE 60. TITLE

These rules may be known and cited as the Maine Rules of Criminal Procedure.

APPENDIX OF FORMS

INTRODUCTORY STATEMENT

1. The following forms are intended for illustration only, but they are expressly declared by Rule 58 to be sufficient under the rules. They are limited in number. No attempt is made to furnish a manual of forms. Each draftsman of a pleading must still be certain his pleading accurately states what he intends to plead. For example, the statutes defining some crimes specify a number of acts, any one of which would be sufficient to establish the offense. The form of indictment included in this Appendix may describe only one of the acts enumerated by the statute. The draftsman of an indictment must make appropriate changes if he intends to charge that the offense was committed by the commission of some other act. Some of the forms include alternative or additional provisions, these are indicated by parentheses.

2. Except where otherwise indicated, each pleading, motion, and other paper should have a caption similar to that of the indictment, with the designation of the particular paper substituted for the words "Indictment Charging, etc."

3. For convenience, the forms indicate the number of the rule upon which they are based.

FORM 1. COMPLAINT (RULE 3)

DISTRICT COURT

STATE OF MAINE _____ DISTRICT

_____, SS DIVISION OF _____

CRIMINAL DOCKET NO. ____

STATE OF MAINE
v.
JOHN DOE

Complaint for violation of
17 M.R.S.A. § 2651

Richard Roe, being duly sworn, deposes and says (on information and belief),

That, (as more fully appears from the affidavit attached hereto,) on or about the _____ day of _____ 19__, in the City of _____, County of _____, State of Maine, the above named defendant, John Doe, did unlawfully and with malice aforethought kill one Jane Doe.

_____

Sworn to before me this _____ day of _____, 19__.

_____

[*Title of officer before whom sworn*]

FORM 2. ORDER HOLDING DEFENDANT TO ANSWER IN SUPERIOR COURT

STATE OF MAINE
_____, SS

DISTRICT COURT
_____ DISTRICT
DIVISION OF _____

STATE OF MAINE
v.
JOHN DOE

On this _____ day of _____, 19__, came the attorney for the State and the defendant appeared in person and by counsel (without counsel; the Court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the Court, and the defendant thereupon stated that he waived the right to the assistance of counsel).

After hearing (The defendant having waived hearing) it appeared to the Court that there is probable cause to believe the offense set forth in the complaint on file herein has been committed and that the defendant has committed it.

It is ordered that the defendant _____ personally appear at the Superior Court to be held at _____ in and for the County of _____ on the _____ Tuesday of _____ next, to answer to the accusation contained in said complaint and abide by the orders of the Court.

It is ordered that the defendant is hereby committed to the custody of _____ who shall without needless delay remove the defendant to the County Jail in the County of _____ and deliver him into the custody of the keeper thereof who shall keep the defendant in his custody in said jail until the defendant gives bond in the amount of _____ dollars with(out) _____ (sufficient) sureties to personally appear as ordered above, or he be otherwise discharged by due course of law.

_____

District Court Judge

The above named defendant was on this date, in open court, advised of his right to waive prosecution by indictment.

Date: _____

_____

District Court Judge

FORM 3. WARRANT OF ARREST ON COMPLAINT (RULE 4)

[*Title of Court and Cause*]

To the Sheriff of _____ County, or any of his deputies, or any other authorized officer:

YOU ARE HEREBY COMMANDED to arrest John Doe and bring him without unnecessary delay before the above entitled court to answer to a complaint charging him with the murder of Jane Doe in violation of 17 M.R.S.A. § 2651.

Date _____

_____

Complaint Justice

FORM 4. INDICTMENT FOR MURDER (RULE 7)

STATE OF MAINE
_____, ss

SUPERIOR COURT
CRIMINAL DOCKET NO. _____

STATE OF MAINE
v.
JOHN DOE

Indictment for violation of
17 M.R.S.A. § 2651

The grand jury charges:

On or about the _____ day of _____, 19__, in the County of _____, State of Maine, John Doe unlawfully and with malice aforethought killed Richard Roe.

A True Bill

_____
Foreman

Date: _____

FORM 5. INDICTMENT FOR RECKLESS HOMICIDE (RULE 7)

[*Title of Court and Cause*]

Indictment for violation of
29 M.R.S.A. § 1315

The grand jury charges:

On or about the _____ day of _____, 19__, in the County of _____, State of Maine, John Doe operated a vehicle with reckless disregard for the safety of others, in that [*here insert facts constituting recklessness*] and thereby caused the death of Richard Roe within one year.

A True Bill

_____
Foreman

Dated: _____

FORM 6. INDICTMENT FOR ROBBERY (RULE 7)

[*Title of Court and Cause*]

Indictment for violation of
17 M.R.S.A. § 3401

The grand jury charges:

On or about the _____ day of _____, 19__, in the County of _____, State of Maine, John Doe did by force and violence (by putting in fear), take, steal and carry away the property of Richard Roe, to wit, Fifty ($50.00) Dollars, from the person of Richard Roe with the intent to permanently deprive the owner of his property.

A True Bill

_____
Foreman

Dated: _____

FORM 7. INDICTMENT FOR RAPE (RULE 7)

[*Title of Court and Cause*]

Indictment for violation of
17 M.R.S.A. § 3151

The grand jury charges:

On or about the _____ day of _____, 19__, in the County of _____, State of Maine, John Doe did by force and against her will ravish and carnally know Ruth Roe, a female who had attained her fourteenth birthday.

A True Bill

_____
Foreman

Dated: _____

FORM 8. INDICTMENT FOR LARCENY (RULE 7)

[*Title of Court and Cause*]

Indictment for violation of
17 M.R.S.A. § 2101

The grand jury charges:

On or about the _____ day of _____, 19__, in the County of _____, State of Maine, John Doe did, with intent to permanently deprive the owner of his property, steal, take and carry away one wristwatch, the property of Richard Roe, of a value in excess of One Hundred ($100.00) Dollars.

A True Bill

_____

Foreman

Dated: _____

FORM 9. INDICTMENT FOR LARCENY BY EMBEZZLEMENT (RULE 7)

[*Title of Court and Cause*]

Indictment for violation of
17 M.R.S.A. § 2107

The grand jury charges:

On or about the _____ day of _____, 19__, in the County of _____, State of Maine, John Doe, who was then and there an agent of Richard Roe, did, without the consent of his employer, and with intent to permanently deprive Richard Roe, the owner, of his property, embezzle and fraudulently convert a sum of money, to wit, Two Hundred Fifty ($250.00) Dollars, which was in his possession and under his care by virtue of his employment.

A True Bill

_____

Foreman

Dated: _____

FORM 10. INDICTMENT FOR FALSE PRETENSES (RULE 7)

[*Title of Court and Cause*]

Indictment for violation of
17 M.R.S.A. § 1601

The grand jury charges:

On or about the _____ day of _____, 19__, in the County of _____, State of Maine, with knowledge of the falsity thereof and for the purpose of inducing Richard Roe to purchase a watch, John Doe did falsely pretend to said Richard Roe that a certain watch which he then exhibited to said Richard Roe was a gold watch, which pretense was false, and in reliance thereon and believing said pretense to be true, Richard Roe did buy said watch and pay to John Doe the sum of One Hundred Twenty Five ($125.00) Dollars.

A True Bill

_____
Foreman

Dated: _____

FORM 11. BREAKING, ENTERING AND LARCENY (RULE 7)

[*Title of Court and Cause*]

Indictment for violation of
17 M.R.S.A. § 2103

The grand jury charges:

On or about the _____ day of _____, 19__, in the _____, County of _____, State of Maine, John Doe did break and enter the office of Richard Roe, Inc., a corporation, and therein did, with intent to permanently deprive Richard Roe, Inc., a corporation, of its property, steal, take

and carry away Two Hundred Fifty ($250.00) Dollars in money.

A True Bill

_____

Foreman

Dated: _____

FORM 12. WAIVER OF INDICTMENT (RULE 7)

[*Title of Court and Cause*]

John Doe, the above named defendant, who is accused of _____ requests that the proceeding be by information rather than indictment.

_____

Defendant

Dated: _____

John Doe, the above named defendant, who is accused of _____ having been advised of the nature of the charge and of his rights, hereby waives prosecution by indictment and consents that the proceeding may be by information.

_____

Defendant

_____

Counsel for Defendant

Dated: _____

Approved:

_____

Justice of the Superior Court

FORM 13. INFORMATION FOR FORGERY (RULE 7) (False Making)

[*Title of Court and Cause*]

Information for violation of
17 M.R.S.A. § 1501

The County Attorney of _____ County charges:

On or about the _____ day of _____, 19__, in the County of _____, State of Maine, John Doe, with intent to defraud, did falsely make a written instrument, purporting to be a promissory note, a copy of which is attached hereto and made a part hereof:

[*Attach copy of instrument*]

_____
County Attorney

Dated: _____

STATE OF MAINE
_____, SS

The above named _____ personally appeared before me and made oath that the above information signed by him is true to the best of his information and belief.

Dated _____, before me _____
Notary Public

FORM 14. WARRANT FOR ARREST OF DEFENDANT (RULE 9)

[*Title of Court and Cause*]

Warrant of Arrest

To the Sheriff of _____ County, or any of his deputies, or any other authorized officer:

YOU ARE HEREBY COMMANDED to arrest John Doe and bring him, without unnecessary delay, before the Su-

perior Court in the _____, County of _____, to answer to an indictment charging him with the murder of Richard Roe, in violation of 17 M.R.S.A. § 2651.

Dated: _____

_____
Clerk

_____
Deputy Clerk

FORM 15. SUMMONS (RULE 9)

[*Title of Court and Cause*]

Summons

To John Doe:

You are hereby summoned to appear before the Superior Court of the State of Maine at the Court House in the _____, County of _____, on the _____ day of _____, 19__, at 10:00 A.M. to answer to an indictment charging you with the reckless homicide of Richard Roe.

_____
Clerk

_____
Deputy Clerk

This summons was received by me at _____ on _____.

_____
Defendant

FORM 16. MOTION BY THE DEFENDANT TO DISMISS THE INDICTMENT (RULE 12)

[*Title of Court and Cause*]

The defendant moves that the indictment be dismissed on the following grounds:

1. The offense, if any, is not cognizable in this county for the reason that _____.

2. The indictment does not state facts sufficient to constitute an offense against the State of Maine.
3. The defendant has been acquitted (convicted, in jeopardy of conviction) of the offense charged herein in the State of Maine v. _____, in the Superior Court of the State of Maine, County of _____, Criminal Docket No. _____ terminated on _____.
4. The offense charged is the same offense for which the defendant was pardoned by the Governor of the State of Maine on the _____ day of _____, 19__.
5. The indictment was not found within six years next after the alleged offense was committed.

Signed _____

_____

Address

FORM 17. DEMAND FOR NOTICE OF ALIBI (RULE 16)

[*Title of Court and Cause*]

To John Doe, defendant above named:

Pursuant to Maine Rules of Criminal Procedure 16(b), demand is hereby made that, within 5 days, you serve and file a Notice of Alibi, if you intend to rely upon such defense at the trial of the above entitled and numbered action.

The State intends to prove that the acts with which you are charged were committed at the intersection of Congress and High Streets, in the City of Portland, County of Cumberland, at approximately 10:00 o'clock in the forenoon, on the 1st day of April, 1965.

_____

County Attorney

Dated: _____

FORM 18. SUBPOENA TO TESTIFY (RULE 17)

[*Title of Court and Cause*]

To:

You are hereby commanded to appear in the Superior Court of the State of Maine in the County of _____, at the Court House in the _____, on the _____ day of _____, 19__, at 10:00 A.M. to testify in the case of State of Maine v. John Doe.

This subpoena is issued on application of the (State of Maine) (defendant).

_____
Clerk

By _____
Deputy Clerk

[*Seal*]

FORM 19. SUBPOENA TO PRODUCE DOCUMENT OR OBJECT (RULE 17)

[*Title of Court and Cause*]

To:

You are hereby commanded to appear in the Superior Court of the State of Maine at the Court House in the _____, County of _____, on the _____ day of _____, 19__, at 10:00 A.M. to testify in the case of State of Maine v. John Doe and bring with you

This subpoena is issued upon application of the (State of Maine) (defendant).

_____
Clerk

By _____
Deputy Clerk

[*Seal*]

FORM 20. WAIVER OF JURY TRIAL (RULE 23)

[*Title of Court and Cause*]

John Doe, the defendant herein having been furnished a copy of the indictment in the above entitled and numbered action and having been informed of his rights, waives trial by jury and requests that he be tried by the court.

_____

Defendant

Approved by the Court

_____

Justice of the Superior Court

FORM 21. JUDGMENT AND COMMITMENT (RULE 32)

[*Title of Court and Cause*]

On this _____ day of _____, 19__, came the attorney for the State and the defendant appeared in person and by counsel (without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel).

It is adjudged that the defendant has been convicted on his plea of _____ of the offense of _____ as charged _____; and the court having asked the defendant whether he wished to make a statement in his own behalf, or whether there was any reason why sentence should not then be imposed, and no sufficient cause to the contrary being shown or apparent to the court;

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the sheriff of _____ County or his authorized representative who shall without needless delay remove the defendant to the state prison in Thomaston in the County of Knox and deliver him into the custody of the warden of said state prison who shall cause the defendant to be punished by imprisonment, at hard labor, for not less than _____ years and not more than _____ years within the precincts of said state prison.

It is ordered that the sentence imposed upon the defendant be suspended and that he be placed upon probation for a term of _____ upon the conditions attached hereto.

It is ordered that the clerk deliver a certified copy of this judgment and commitment to the sheriff of _____ County or his authorized representative and that the copy serve as the commitment of the defendant.

_____

Justice of the Superior Court

FORM 22. JUDGMENT AND COMMITMENT—COUNTY JAIL (RULE 32)

[*Title of Court and Cause*]

On this _____ day of _____, 19__, came the attorney for the State and the defendant appeared in person and by counsel (without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel).

It is adjudged that the defendant has been convicted on his plea of _____ of the offense of _____ as charged

_____; and the court having asked the defendant whether he wished to make a statement in his own behalf, or whether there was any reason why sentence should not then be imposed, and no sufficient cause to the contrary being shown or apparent to the court;

It is adjudged that the defendant is guilty as charged and convicted.

It is ordered that the sentence imposed upon the defendant be suspended and that he be placed upon probation for a term of _____ upon the conditions attached hereto.

It is adjudged that the defendant is hereby committed to the custody of the sheriff of _____ County or his authorized representative for imprisonment in the county jail at _____ for the term of _____.

_____

Justice of the Superior Court

FORM 23. MOTION FOR NEW TRIAL (RULE 33)

[*Title of Court and Cause*]

To:

The defendant moves the court to grant him a new trial for the following reasons:

1. The court erred in denying defendant's motion for acquittal made at the conclusion of the evidence.
2. The verdict is contrary to the weight of the evidence.
3. The verdict is not supported by substantial evidence.
4. The court erred in sustaining objections to questions addressed to the witness Richard Roe.
5. The court erred in admitting testimony of the witness Richard Roe to which objections were made.

6. The court erred in charging the jury and in refusing to charge the jury as requested.
7. The defendant was substantially prejudiced and deprived of a fair trial by reason of the following circumstances:

_____

8. The court erred in denying defendant's motion for a mistrial.

_____

Attorney for Defendant

FORM 24. MOTION IN ARREST OF JUDGMENT (RULE 34)

[*Title of Court and Cause*]

The defendant moves the court to arrest the judgment for the following reasons:

1. The indictment does not state facts sufficient to constitute an offense against the State of Maine.
2. This court is without jurisdiction of the offense in that _____.

_____

Attorney for Defendant

FORM 25. PETITION FOR WRIT OF HABEAS CORPUS (RULE 35)

STATE OF MAINE — SUPERIOR COURT

_____, ss

_____,

Petitioner

v.

THE STATE OF MAINE,

(_____)

Respondents

Petition for Writ of Habeas Corpus

Petitioner _____ respectfully alleges that:

Count I

1. Petitioner was the respondent in a criminal proceeding before the _____ Court at _____, entitled State of Maine v. _____, bearing Criminal Docket No. _____, in which proceeding petitioner was convicted of the crime of _____, judgment having been entered on the _____ day of _____, 19__, and petitioner sentenced to _____.

(2. Petitioner is presently in custody of _____ at _____ pursuant to said sentence.)

(3. Petitioner does not have sufficient funds with which to retain counsel to represent him in this proceeding.)

(4. Petitioner did heretofore, on the _____ day of _____, 19__, petition _____ for a _____, which petition was _____. No other proceeding for relief from the above described conviction has been taken.)

5. Petitioner is (was heretofore) illegally imprisoned in that

[*here set forth facts relied upon to establish illegal imprisonment*].

Count II

1. Petitioner repleads all and singular the allegations set forth in paragraphs 1, 2, 3, and 4 of Count I of this petition.

2. There were errors of law of record in the above described proceedings, in that

[*here set forth alleged errors of law*].

(3. A certified copy of the record in the proceedings described above is attached hereto and marked Exhibit A.)

Count III

1. Petitioner repleads all and singular the allegations set forth in paragraphs 1, 2, 3, and 4 of Count I of this petition.

2. Petitioner's sentence was imposed in violation of the Constitution of the United States, in that

[*here set forth alleged violation of constitutional rights*].

Count IV

1. Petitioner repleads all and singular the allegations set forth in paragraphs 1, 2, 3, and 4 of Count I of this petition.

2. There were errors of fact not of record which were not known to the petitioner or the court and which by the use of reasonable diligence could not have been known to the petitioner at the time of trial and which, if known, would have prevented petitioner's conviction. Said facts are:

[*here set forth the facts relied upon*].

WHEREFORE, petitioner prays:

A. That a Writ of Habeas Corpus issue pursuant to 14 M.R.S.A., § 5505 and a hearing be had upon said Writ.

B. That petitioner be afforded any further relief to which he may be entitled.

(C. This Honorable Court appoint counsel to represent petitioner in this proceeding.)

Dated: _____

_____

Petitioner

[*Verification*]

Reporter's Note

The material enclosed in parentheses in the preceding form of Petition for Writ of Habeas Corpus, is to be included only when applicable.

Although the form is in several counts, alleging a variety of grounds for relief, it is not to be anticipated that every petitioner will allege all of the grounds alleged in the form. The petitioner should use the particular form of allegation which suits the grounds he relies upon for relief.

FORM 26. VERIFICATION TO PETITION (RULE 35)

STATE OF MAINE

_____, SS

_____ being first duly sworn deposes (affirms) and says:

He is the petitioner named in the foregoing petition; that he has read the same; that all matters set forth therein are true, except such matters as are alleged on information and belief, and as to those matters he alleges that he believes them to be true.

[*s*] _____

Subscribed and sworn to (affirmed) before me this _____ day of _____, 19__.

[*s*] _____

[*Office of person authorized to administer oaths*]

FORM 27. ALTERNATIVE FORM OF VERIFICATION FOR THOSE UNABLE TO READ ENGLISH (RULE 35)

STATE OF MAINE

_____, SS

_____ being first duly sworn deposes (affirms) and says:

He is the petitioner named in the foregoing petition; that he is unable to read the English language, that the petition

and this verification have been read to him and that he understands the same; that all matters set forth therein are true, except such matters as are alleged on information and belief, and as to those matters he alleges that he believes them to be true.

[*s*] _____

Subscribed and sworn to (affirmed) before me this _____ day of _____, 19__.

[*s*] _____
[*Office of person authorized to administer oaths*]

FORM 28. WRIT OF HABEAS CORPUS WHEN PETITIONER IN CUSTODY (RULE 35)

[*Title of Court and Cause*]

Writ of Habeas Corpus

To _____:

We command you, that you have the body of _____, under your custody, before me, on the _____ day of _____ 19__, at _____ o'clock in the _____noon, in the Courthouse in _____ county, for hearing on said _____'s petition, wherein it is alleged:

[*here set forth, in substance or by reference, those grounds alleged in the petition upon which the hearing is to be held*]

that we may cause justice to be done in accordance with the laws and customs of the State of Maine.

Done at _____ this _____ day of _____, 19__.

[*Seal*]

_____
Justice of the _____

FORM 29. ALTERNATIVE WRIT OF HABEAS CORPUS WHEN THE PETITIONER IS NOT IN CUSTODY OR WHEN PETITIONER IS NOT TO BE PRODUCED AT THE TIME OF HEARING (RULE 35)

[*Title of Court and Cause*]

Writ of Habeas Corpus

To the Sheriffs of the respective counties of the State of Maine, and their deputies:

We command you, that you make known to the State of Maine, that it may appear, if it sees cause, before me, on the _____ day of _____ 19__, at _____ o'clock in the _____noon, in the Courthouse in _____ county, for hearing on the petition of _____, wherein it is alleged:

[*here set forth, in substance or by reference, those grounds alleged in the petition upon which the hearing is to be held*]

that we may cause justice to be done in accordance with the laws and customs of the State of Maine.

Done at _____ on this _____ day of _____, 19__.

_____

Justice of the _____

[*Seal*]

FORM 30. NOTICE OF APPEAL (RULE 37)

[*Title of Court and Cause*]

Name and address of appellant _____.

Name and address of appellant's attorney _____.

Offense _____.

Concise statement of judgment or order, giving date, and any sentence _____.

Name of institution where now confined, if not on bail _____.

I, the above named appellant, hereby appeal to the Supreme Judicial Court of Maine sitting as the Law Court from the above stated judgment.

Dated: _____

_____
Appellant

FORM 31. SEARCH WARRANT (RULE 41)

[*Title of Court and Cause*]

To:

Affidavit having been made before me by John Doe that he has reason to believe that on the premises known as _____ Street, in the City of _____, County of _____, State of Maine, there is now being concealed certain property, namely, a thirty-eight caliber revolver used in the unlawful killing of Richard Roe, and as I am satisfied that there is probable cause to believe that the property so described and used is being concealed on the premises above described.

You are hereby commanded to search the place named for the property specified, serving this warrant and making the search in the day time and if the property be found there to seize it, prepare a written inventory of the property seized, and bring the property before me.

Dated this _____ day of _____, 19__.

_____
District Judge

FORM 32. MOTION FOR THE RETURN OF SEIZED PROPERTY AND THE SUPPRESSION OF EVIDENCE (RULE 41)

[*Title of Court and Cause*]

John Doe hereby moves this court to direct that certain property of which he is the owner, a schedule of which is annexed hereto, and which on the night of _____, 19__, at the premises known as _____ Street, in the City of Portland, County of Cumberland, State of Maine, was unlawfully seized and taken from him by two officers of the Portland City Police, whose true names are unknown to the petitioner, be returned to him and that it be suppressed as evidence against him in any criminal proceeding.

The petitioner further states that the property was seized against his will and without a search warrant.

_____

Attorney for Petitioner

FORM 33. APPEARANCE BOND (RULE 46)

[*Title of Court and Cause*]

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to the State of Maine the sum of _____ ($_____).

The condition of this bond is that the defendant John Doe is to appear in the Superior Court of the State of Maine in the City of Portland, County of Cumberland, at _____ in accordance with all the orders and directions of the court relating to the appearance of the defendant before the court in the case of State of Maine v. _____, Criminal Docket No. _____; and if the defendant appears as ordered and obeys all orders of the court then this bond

is to be void, but if the defendant fails to perform this condition, payment of the amount of the bond shall be due forthwith. If the bond is forfeited and if the forfeiture is not set aside or remitted, judgment may be entered upon motion in the Superior Court of the State of Maine in the County of Cumberland against each debtor jointly and severally for the amount above stated together with interest and costs, and execution may be issued or payment secured as provided by Maine Rules of Criminal Procedure and by other laws of the State of Maine.

This bond is signed on _____ day of _____ 19__, at _____.

_____	_____
Defendant	Address
_____	_____
Surety	Address
_____	_____
Surety	Address

Signed and acknowledged before me this _____ day of _____, 19__.

Approved: _____ _____

FORM 34. APPEARANCE BOND (RULE 46)

[*Title of Court and Cause*]

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to the State of Maine the sum of _____ ($_____).

The condition of this bond is that the defendant _____ shall appear in the District Court for the State of Maine, _____ District, at _____ and, if ordered, in the Superior

Court to be held in the County of _____ in accordance with all orders and directions of any judge of the District Court or any justice of the Superior Court relating to the appearance of the defendant in either said District Court or said Superior Court in the case of State of Maine v. _____, District Court Criminal Docket No. _____; and if the defendant appears in accordance with all orders and directions of either court then this bond is to be void, but if the defendant fails to perform this condition, payment of the amount of this bond shall be due forthwith. If this bond is forfeited and if the forfeiture is not set aside or remitted, judgment may be entered upon motion in the District Court of the State of Maine in the _____ District, Division of _____, or in the Superior Court held in said County of _____, against each debtor jointly and severally for the amount above stated together with interest and costs, and execution may be issued or payment secured as provided by Maine District Court Criminal Rules, Maine Rules of Criminal Procedure, and by other laws of the State of Maine.

This bond is signed on this _____ day of _____, 19__, at _____.

_____	_____
Signature of Defendant	Address
_____	_____
Signature of Surety	Address
_____	_____
Signature of Surety	Address

Signed and acknowledged before me this _____ day of _____, 19__.

Approved: _____ _____

FORM 35. APPEARANCE BOND ON APPEAL (RULE 46)

[*Title of Court and Cause*]

The defendant _____ having appealed, from the judgment of conviction in the above entitled and numbered action, to the Supreme Judicial Court of Maine;

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to the State of Maine the sum of _____ ($_____).

The condition of this bond is that the defendant _____ is to appear in the Superior Court of the State of Maine in the City of _____ County of _____, upon the return of the mandate of the Supreme Judicial Court to the Superior Court in the above entitled and numbered action, and submit to all orders and judgments of the court; and if the defendant appears as required and submits to all orders and judgments of the court, then this bond is to be void, but if the defendant fails to perform this condition payment of the amount of the bond shall be due forthwith. If the bond is forfeited and if the forfeiture is not set aside or remitted, judgment may be entered upon motion in the Superior Court of the State of Maine in the County of _____ against each debtor jointly and severally for the amount above stated together with interest and costs, and execution may be issued for payment as provided by the Maine Rules of Criminal Procedure and by other laws of the State of Maine.

This bond is signed on the _____ day of _____, 19__, at _____.

_____	_____
Signature of Defendant	Address
_____	_____
Signature of Surety	Address
_____	_____
Signature of Surety	Address

Signed and acknowledged before me this _____ day of _____, 19__.

_____

Approved: _____

FORM 36. NOTICE OF APPEAL FROM SENTENCE (RULE 40)

[*Title of Court and Cause*]

Name and address of appellant _____

Offense _____.

Concise statement of judgment, giving date and sentence imposed _____.

Name of Justice who imposed sentence _____.

Name of institution where now confined _____.

I, the above named appellant, hereby appeal to the appellate division of the Supreme Judicial Court of Maine, and request review of the sentence imposed in the above entitled and numbered action.

Dated: _____

_____

Appellant

[I, _____, Esq. appear for the appellant in the above noted appeal to the appellate division of the Supreme Judicial Court of Maine.

Dated: _____

_____

Signature of Attorney

_____

Address]

MAINE
DISTRICT COURT CRIMINAL RULES
(As Amended)

Effective December 1, 1965

Analysis

Rule

RULE 1. SCOPE AND CONSTRUCTION OF RULES

These rules govern the procedure in the District Court in all misdemeanor criminal proceedings. They are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

RULE 2. RESERVED

RULE 3. THE COMPLAINT

(a) Nature and Contents. The complaint shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged and shall be signed and sworn to by the complainant. It need not contain a formal commencement, a formal conclusion, or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The complaint shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation of a statute or its omission shall not be grounds for the dismissal of the complaint or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

(b) How Made. The complaint shall be made before a magistrate or other officer empowered to issue warrants against persons charged with offenses against the State.

(c) Surplusage. The court on motion of the defendant may strike surplusage from the complaint.

(d) Amendment of Complaint. The court may permit a complaint to be amended at any time before finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

(e) Bill of Particulars. The court for cause may direct the filing of a bill of particulars. The motion for a bill of particulars may be made at the time of arraignment or at such other time as may be ordered by the court. The bill of particulars may be amended at any time subject to such conditions as justice requires.

RULE 4. WARRANT OR SUMMONS UPON COMPLAINT

(a) Issuance. When, from the complaint or from his examination of the complainant and the witnesses by him produced, the magistrate or other officer empowered to issue process against persons charged with offenses against the state is satisfied that the accused committed the offense charged, he shall issue a warrant for the arrest of the accused to any officer authorized by law to execute it, unless the defendant is in custody or otherwise before the court. Upon the request of the attorney for the State a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

(b) Form.

(1) *Warrant.* The warrant shall bear the caption of the court and division from which it issues. It shall be signed by the magistrate or other person authorized to issue warrants and shall contain the name of the defendant, or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It

shall describe the offense charged in the complaint. It shall be directed to an appropriate officer or officers and shall command that the defendant be arrested and brought before the judge of the court from which it issues.

(2) *Summons.* The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a court at a stated time and place.

(c) Execution or Service; and Return.

(1) *By whom.* The warrant shall be executed by any officer authorized by law. The summons may be served by any constable, police officer, sheriff, deputy sheriff, warden of the Department of Sea and Shore Fisheries and Fish and Game, or any person authorized to serve a summons in a civil action.

(2) *Territorial Limits.* The warrant may be executed or the summons may be served at any place within the State of Maine.

(3) *Manner.* The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest, but upon request he shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The summons shall be served upon a defendant by delivering a copy to him personally, or by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by mailing it to the defendant's last known address.

(4) *Return.* The officer executing a warrant shall make return thereof to the magistrate before whom the defendant is brought pursuant to Rule 5. At the request of the

attorney for the State, or upon his own motion, the magistrate may order any unexecuted warrant to be returned to the magistrate or other officer by whom it was issued, and it may be cancelled by him. On or before the return date a person to whom a summons was delivered for service shall make return thereof to the magistrate before whom the summons is returnable. At the request of the attorney for the State, made at any time while the complaint is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the magistrate or other person who issued the warrant or summons to any authorized person for execution or service.

RULE 5. PROCEEDINGS BEFORE THE MAGISTRATE

(a) Appearance Before the Magistrate. An officer making an arrest under a warrant issued upon a complaint shall take the arrested person without unnecessary delay before a magistrate as commanded in the warrant; if the arrest is made at a place 100 miles or more from the place where the warrant was issued, the person arrested, if bailable, shall, if he so demands, be taken before the nearest available magistrate within the division in which he was arrested, or before a bail commissioner or other person authorized to take bail, who may admit him to bail for appearance before the proper magistrate. Any person making an arrest without a warrant having been issued shall take the arrested person without unnecessary delay before the nearest available magistrate within the division in which the arrest was made. When a person arrested without a warrant is brought before a magistrate, the complaint shall be filed forthwith.

(b) Arraignment. When a person arrested, either under a warrant or without a warrant, is brought before the mag-

istrate, or a defendant who has been summoned appears before the magistrate in response to a summons, the magistrate, in open court, shall read the complaint to the defendant or state to him the substance of the charge, inform him of his right to retain counsel, that he is not required to make a statement and that any statement made by him may be used against him and that he may be allowed a reasonable time and opportunity to consult counsel. He shall then call upon the defendant to plead to the complaint and shall admit him to bail as provided in these rules.

RULE 6. RESERVED

RULE 7. RESERVED

RULE 8. JOINDER OF OFFENSES AND OF DEFENDANTS

(a) Joinder of Offenses. Two or more offenses may be charged in the same complaint in a separate count for each offense if the offenses charged are both misdemeanors and are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions which are connected or which constitute parts of a common scheme or plan.

(b) Joinder of Defendants Two or more defendants may be charged in the same complaint if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

RULE 9. RESERVED

RULE 10. FINE ON ACCEPTANCE OF GUILTY PLEA

The clerk may, at the signed request of the defendant, accept a guilty plea upon payment of a fine as set by the judge in the particular case or as set by the judge in accordance with a schedule of fines established by the judge with the approval of the Chief Judge for various categories of such offenses.

RULE 11. PLEAS

A defendant may plead not guilty, not guilty by reason of insanity, guilty, or, with the consent of the court, *nolo contendere.* A defendant may plead both not guilty and not guilty by reason of insanity to the same charge. The court may refuse to accept a plea of guilty. If a defendant refuses to plead or if a court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

RULE 12. PLEADINGS AND MOTIONS BEFORE TRIAL; DEFENSES AND OBJECTIONS

(a) Pleadings and Motions. Pleadings in criminal proceedings shall be the complaint and the pleas of not guilty, not guilty by reason of insanity, guilty and *nolo contendere.* All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore would have been raised by one or more of such other pleas or pleadings shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(b) The Motion Raising Defenses and Objections.

(1) *Defenses and Objections Which May Be Raised.* Any defense or objection which is capable of determination

without the trial of the general issue may be raised before trial by motion.

(2) *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the complaint other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the complaint to charge an offense shall be noticed and acted upon by the court at any time during pendency of the proceeding.

(3) *Time of Making Motion.* The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

(4) *Hearing on Motion.* A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue.

(5) *Effect of Determination.* If a motion is determined adversely to the defendant, he shall be permitted to plead if he has not previously pleaded. A plea previously entered shall stand. If the motion is based upon a defect which may be cured by amendment of the complaint, the court may deny the motion and order that the complaint be amended. If the court grants a motion based on a defect in the institution of the prosecution or in the complaint, the defendant shall be discharged.

RULE 13. TRIAL TOGETHER OF COMPLAINTS

The court may order two or more complaints or both to be tried together if the offenses, and the defendants if there

is more than one, could have been joined in a single complaint. The procedure shall be the same as if the prosecution were under such single complaint.

RULE 14. RELIEF FROM PREJUDICIAL JOINDER

If it appears that a defendant or the State is prejudiced by a joinder of offenses or of defendants in a complaint or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants, or provide whatever other relief justice requires.

RULE 15. DEPOSITIONS

Rule 15(a), (b), (d), (e), (f), and (g) of the Maine Rules of Criminal Procedure governs the procedure in the District Court.

RULE 16. DISCOVERY AND INSPECTION; NOTICE OF ALIBI

Rule 16 of the Maine Rules of Criminal Procedure governs procedure in the District Court.

RULE 17. SUBPOENA

Rule 17 of the Maine Rules of Criminal Procedure governs procedure in the District Court.

RULE 18. PLACE OF TRIAL

In all criminal prosecutions, the trial shall be in the division in which the offense was committed, except as otherwise provided by law, but if the proceeding involves two or more offenses committed in different divisions, it may be brought in any one of them.

RULE 19. RESERVED

RULE 20. RESERVED

RULE 21. CHANGE OF VENUE

Upon consent or upon motion by any party or on its own initiative the court may transfer a case to another division for hearing for the convenience of parties or witnesses or the interests of justice. Any judgment or sentence rendered in such a transferred case shall be deemed to be the judgment and sentence of the transferring division.

RULE 22. TIME OF MOTION FOR CHANGE OF VENUE

A motion to change venue under these rules may be made only before any evidence is received.

RULE 23. RESERVED

RULE 24. RESERVED

RULE 25. DISABILITY OF A JUDGE

If by reason of death, resignation, removal, sickness or other disability, a judge before whom a defendant has been tried is unable to perform the duties to be performed by the court after a finding of guilt any other judge assigned thereto by the Chief Judge of the District Court may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

RULE 26. EVIDENCE

Rule 26 of the Maine Rules of Criminal Procedure governs proceedings in the District Court so far as applicable.

RULE 27. PROOF OF OFFICIAL RECORD

Rule 27 of the Maine Rules of Criminal Procedure governs procedure in the District Court.

RULE 28. RESERVED

RULE 29. MOTION FOR ACQUITTAL

The court on motion of a defendant or of its own motion shall, at the close of the evidence offered by the State, order the entry of judgment of acquittal of one or more offenses charged in the complaint if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal is not granted, the defendant may offer evidence without having reserved the right.

RULE 30. ARGUMENT OF COUNSEL

The attorneys for each party shall be allowed such time for argument as the court shall order. The attorney for the State shall argue first. The attorney for each defendant shall then argue. The attorney for the State shall then be allowed time for rebuttal.

RULE 31. RESERVED

RULE 32. SENTENCE AND JUDGMENT

(a) Sentence. Sentence shall be imposed without unreasonable delay, provided however, the court may suspend the execution thereof to a date certain or determinable. Pending sentence the court may commit the defendant or continue or alter bail.

(b) Judgment. A judgment of conviction shall set forth the plea, and the adjudication and sentence. The judgment shall be signed or initialed by the judge and entered by the clerk.

(c) Pre-sentence Investigation. Rule 32(c) of the Maine Rules of Criminal Procedure governs procedure in the District Court.

(d) Withdrawal of Plea of Guilty. Rule 32(d) of the Maine Rules of Criminal Procedure governs procedure in the District Court.

(e) Probation. Rule 32(e) of the Maine Rules of Criminal Procedure governs procedure in the District Court.

(f) Revocation of Probation. Rule 32(f) of the Maine Rules of Criminal Procedure governs procedure in the District Court.

RULE 33. RESERVED

RULE 34. ARREST OF JUDGMENT

The court on motion of a defendant shall arrest judgment if the complaint does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made prior to the entry of judgment or within five days thereafter or within such further time as the court may fix during the five-day period.

RULE 35. CORRECTION AND REVISION OF SENTENCE; POST-CONVICTION RELIEF

(a) Correction and Revision of Sentence. The judge who imposed sentence may revise a sentence prior to the commencement of execution thereof and may correct an illegal sentence or a sentence imposed in an illegal manner within fifteen days after the sentence is imposed.

(b) Post-Conviction Relief. Proceedings for post-conviction relief shall be brought pursuant to Rule 35(b) of the Maine Rules of Criminal Procedure.

RULE 36. CLERICAL MISTAKES

Rule 36 of the Maine Rules of Criminal Procedure governs procedure in the District Court so far as applicable.

RULE 37. APPEAL TO THE SUPERIOR COURT

An aggrieved defendant may appeal from a judgment of the District Court to the Superior Court in the county in which the division of the District Court entering judgment is located. The appeal may be taken within five days after pronouncement of judgment. The running of the time for appeal is terminated by a timely motion made pursuant to Rule 34 and the full time for appeal fixed in this rule commences to run and is computed from the entry of an order denying a timely motion in arrest of judgment. The appeal shall be taken by orally giving notice of appeal in open court or by filing a notice of appeal with the clerk.

Prior to the holding of the term of the Superior Court to which the appeal is taken, the clerk shall enter the appeal in the Superior Court. Upon the docketing of the appeal in the Superior Court, jurisdiction of the case is transferred to the Superior Court.

RULE 38. STAY OF EXECUTION

If an appeal is taken the sentence shall be stayed and the defendant admitted to bail as provided in these rules.

RULE 39. RECORD ON APPEAL; PROCEEDINGS IN THE SUPERIOR COURT; WITHDRAWAL OF APPEAL

(a) Record on Appeal. Prior to the holding of the Superior Court to which the appeal is taken, the clerk shall

transmit to said appellate court the whole process and all writings and exhibits in the District Court pertaining to the case in which said appeal has been taken.

(b) Proceedings in the Superior Court. The appellant shall be entitled to a trial de novo in the Superior Court and the proceedings therein shall be in accord with the Maine Rules of Criminal Procedure.

(c) Withdrawal. An appellant may, at any time before the appeal has been docketed in the appellate court, come personally or, with leave of court, by his attorney, before the judge, who may permit him, on motion, to withdraw his appeal and abide by the sentence appealed from; whereupon, the appeal shall be withdrawn. If the appellant is detained in jail for failure to give bail to prosecute his appeal, he may give notice in writing to the clerk of the court of his desire to withdraw his appeal and abide by the sentence appealed from; whereupon his appeal shall be withdrawn.

RULE 40. APPEAL WITHOUT TRIAL

In all prosecutions in the District Court, the defendant may plead not guilty and waive a hearing, whereupon he shall be sentenced as provided in Rule 32 of these rules and may appeal as provided in Rule 37, as if there had been a full hearing.

In those cases in which the clerk may accept a guilty plea upon payment of a fine under Rule 10 the defendant may plead not guilty and waive a hearing before the clerk, whereupon the clerk shall impose sentence, accept his notice of appeal, and fix and take bail as if there had been a full hearing.

Failure of a defendant, prior to taking an appeal pursuant be raised under Rule 12 will constitute a waiver thereof.
to this rule, to present any defense or objection which must

RULE 41. SEARCH AND SEIZURE

In misdemeanor proceedings in the District Court Rule 41(a), (b), (c), (d), and (g) of the Maine Rules of Criminal Procedure governs the procedure.

RULE 42. CRIMINAL CONTEMPT

Rule 42 of the Maine Rules of Criminal Procedure governs the procedure in the District Court.

RULE 43. PRESENCE OF THE DEFENDANT

The defendant shall be present at the arraignment, at every stage of the trial and at the imposition of sentence, except as otherwise provided by these rules. The defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including imposition of sentence. A corporation may appear by counsel for all purposes. The court may permit arraignment, plea, trial and imposition of sentence in the defendant's absence, provided he is represented by counsel.

RULE 44. RESERVED

RULE 45. TIME

Rule 45 of the Maine Rules of Criminal Procedure governs procedure in the District Court so far as applicable.

RULE 46. BAIL

(a) Right to Bail. A defendant shall be admitted to bail either before conviction or after conviction and pending appeal in accordance with the constitution and statutes of this State. Pending appeal bail shall be allowed by the judge who presided at the trial to run until entry of judgment in the Superior Court.

(b) Bail for Witness. If it appears by affidavit that the testimony of a person is material in any criminal proceeding and if it is shown that it may become impracticable to secure his presence by subpoena, the court or magistrate may require him to give bail for his appearance as a witness, in an amount fixed by the court. If the person fails to give bail, the court may commit him to the custody of the sheriff pending final disposition of the proceedings in which the testimony is needed, may order his release if he has been detained for an unreasonable length of time and may modify at any time the requirement as to bail.

(c) Amount. If the defendant is admitted to bail the terms thereof shall be such as, in the judgment of the person authorized to fix the bail, will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the financial ability of the defendant to give bail, the character of the defendant and the policy against unnecessary detention of defendants pending trial.

(d) Form, Conditions, and Place of Deposit. A person required or permitted to give bail shall execute a written bond for his appearance. The person authorized to fix bail, having regard to the considerations set forth in subdivision (c) may require one or more sureties, may authorize the acceptance of cash or bonds or other security in an amount equal to or less than the face amount of the bond, or may authorize the release of the defendant without security upon such conditions as may be prescribed to assure his appearance. Bail given originally on appeal shall be deposited with the clerk of the District Court in the division in which the trial was had.

(e) Forfeiture.

(1) *Declaration.* If there is a breach of condition of a bond, the District Court shall declare a forfeiture of the bail.

(2) *Setting Aside.* The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.

(3) *Enforcement.* When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. By entering into a bond the obligors submit to the jurisdiction of the District Court and irrevocably appoint the clerk of the District Court in the division in which the bail is posted as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the obligors to their last known addresses.

(4) *Remission.* After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision.

(f) Exoneration. When the condition of the bond has been satisfied or the forfeiture thereof has been set aside or remitted, the court shall exonerate the obligors and release any bail. A surety may be exonerated by a deposit of cash in the amount of the bond or by a timely surrender of the defendant into custody.

(g) Practice in Taking Bail. Every bail commissioner on taking bail shall endorse upon the warrant upon which the prisoner is held the following facts: date and place (town or city) of taking bail, court and time at which the prisoner is required to appear, the offense of which he is accused, the amount of bail, the names and residences for principal and each surety; or if bail is taken after arrest and before the issuance of a warrant shall forthwith deliver

to the officer having the prisoner in charge a memorandum, signed by such bail commissioner, containing the foregoing information.

RULE 47. MOTIONS AND MOTION DAY

(a) Motions. An application to the court for an order shall be by motion. A motion other than one made during a trial or hearing shall be in writing unless the court permits it to be made orally. It shall state with particularity the grounds upon which it is made and shall set forth the relief or order sought. It may be supported by affidavit. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(b) Motion Day. Unless local conditions make it impracticable, the Chief Judge of the District Court shall establish for each division regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the court at any time or place and on such notice, if any, as it considers reasonable, may make orders for the advancement, conduct and hearing of actions.

To expedite its business or for the convenience of the parties, the court may make provision for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

RULE 48. DISMISSAL

(a) By Attorney for the State. The attorney for the State may with written leave of the court file a written dismissal of a complaint setting forth the reasons for the dismissal and the prosecution shall thereupon terminate.

Such a dismissal may not be filed during the trial without the consent of the defendant.

(b) By Court. If there is unnecessary delay in bringing a defendant to trial, the court may upon motion of the defendant dismiss the complaint.

RULE 49. SERVICE AND FILING OF PAPERS

Rule 49 of the Maine Rules of Criminal Procedure governs procedure in the District Court so far as applicable.

RULE 50. RESERVED

RULE 51. RESERVED

RULE 52. RESERVED

RULE 53. REGULATION OF CONDUCT IN THE COURT ROOM

The taking of photographs in the court room or radio or television broadcasting or transmitting of judicial proceedings from the court room during the progress of judicial proceedings or any recess thereof shall not be permitted by the court.

RULE 53A. ADMINISTRATION OF JUSTICE

Rule 53A of the Maine Rules of Criminal Procedure governs procedure in the District Court.

RULE 54. APPLICATION AND EXCEPTION

(a) Courts. These rules apply to all misdemeanor proceedings before the District Court, municipal courts, trial justices, complaint justices, and bail commissioners.

(b) Proceedings.

(1) *Proceedings for Prevention of Crime.* These rules do not alter the power of the judges or justices of the State of Maine to require a person to give security to keep the peace and be of good behavior pursuant to the provisions of Revised Statutes (1964) Title 15, sections 281-292.

(2) *Felonies.* These rules do not apply to proceedings before the District Court, municipal courts, trial justices, complaint justices, and bail commissioners, in which the offense charged is a felony.

(3) *Other Proceedings.* These rules are not applicable to extradition and rendition of fugitives; forfeiture of property for violation of the statutes of the State of Maine; or the collection of fines and penalties. They do not apply to proceedings under Revised Statutes of 1964, Title 15, Part 5—Juvenile Offenders—so far as they are inconsistent with the provisions thereof.

(c) Application of Terms. As used in these rules, the term "law" includes statutes and judicial decisions. "Civil action" refers to a civil action in the District Court. "Oath" includes affirmation as provided by law. "Attorney for the State" means the Attorney General, an authorized deputy or assistant of the Attorney General, the county attorney, an authorized assistant to the county attorney, or such other person or persons as may be authorized by law to act as a representative of the State of Maine in a criminal proceeding. "District Court" includes municipal courts and trial justices. "Magistrate" refers to a judge of the District Court, a judge of a municipal court, or a trial justice. The words "demurrer," "motion to quash," "plea in abatement," "plea in bar," and "special plea in bar" or words to the same effect in any statute in the State of Maine shall be construed to be the motion raising a defense or objection provided in Rule 12.

RULE 55. BOOKS AND RECORDS KEPT BY THE CLERK AND ENTRIES THEREIN

(a) Criminal Docket. The clerk for each division shall keep the criminal docket and shall enter therein each criminal proceeding to which these rules are applicable. Proceedings shall be assigned docket numbers. Upon the filing of a complaint with the court, the christian and surname of each defendant shall be entered upon the docket. Thereafter the name and address of the attorney appearing for a defendant shall be entered. All papers filed with the clerk, all appearances, pleas, motions, orders, findings, and judgments shall be noted chronologically upon the docket and shall be marked with the docket number. The notation shall briefly show the nature of each paper filed, writ issued, plea entered, or motion made and the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date of the judgment or order and the date the notation is made. No extended record need be kept or made.

(b) Custody of Papers by Clerk. The clerk shall be answerable for all records and papers filed with the court, and they shall not be taken from his custody without special order of the court; but the parties may at all times have copies.

(c) Other Books and Records. The clerk shall keep such other books and records as may be required from time to time by the Chief Judge of the District Court.

RULE 56. DISTRICT COURTS AND CLERKS

(a) District Courts Always Open. The District Court shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders.

(b) Trials and Hearings; Orders in Chambers. All trials upon the merits shall be conducted in open court and except

as provided in Rule 21, shall be held within the division where the proceeding is pending. All other acts and proceedings may be done or conducted by a judge in chambers and at any place within the State either within or without the division where the proceeding is pending.

(c) Clerk's Office. The clerk's office with the clerk or an assistant clerk in attendance shall be open at the place for holding court for each division during such hours or such days as the Chief Judge of the District Court shall designate for the transaction of business not requiring action by a district judge.

RULE 57. RULES OF COURT

When no procedure is specifically prescribed the court shall proceed in any lawful manner not inconsistent with the Constitution of the State of Maine, these rules, or any applicable statutes.

RULE 58. FORMS

The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.

RULE 59. EFFECTIVE DATE

These rules will take effect on December 1, 1965. They govern all criminal proceedings thereafter commenced and all criminal proceedings then pending, except to the extent that in the opinion of the court their application in a particular proceeding pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

RULE 60. TITLE

These rules may be known and cited as the Maine District Court Criminal Rules.

APPENDIX OF FORMS

INTRODUCTORY STATEMENT

1. The following forms are intended for illustration only, but they are expressly declared by Rule 58 to be sufficient under the rules. They are limited in number. No attempt is made to furnish a manual of forms. Each draftsman of a pleading must still be certain his pleading accurately states what he intends to plead. Some of the forms include alternative or additional provisions; these are indicated by parentheses.

2. Except where otherwise indicated, each pleading, motion, and other paper should have a caption similar to that of the complaint with the designation of the particular paper substituted for the words "complaint charging etc."

3. For convenience, the forms indicate the number of the rule upon which they are based.

FORM 1. COMPLAINT FOR DRIVING UNDER INFLUENCE (RULE 3)

DISTRICT COURT

STATE OF MAINE _____ DISTRICT

_____, ss DIVISION OF _____

CRIMINAL DOCKET NO. ____

STATE OF MAINE
v.
JOHN DOE

Complaint for violation of 29 M.R.S.A. § 1312

Richard Roe, being duly sworn, deposes and says (on information and belief),

That, (as more fully appears from the affidavit attached hereto) on the _____ day of _____, 19__, on _____, in the town of _____, County of _____, the above named defendant, John Doe, did operate a motor vehicle while under the influence of intoxicating liquor.

_____

Sworn to before me this _____ day of _____, 19__.

_____

FORM 2. SUMMONS (RULE 4)

[*Title of Court and Cause*]

To John Doe:

You are hereby summoned to appear before the _____ Division of the _____ District of the District Court at the Courthouse in the City of _____, on the _____ day of _____, 19__, at 10:00 o'clock A.M. to answer a complaint charging you with operating a motor vehicle while under the influence of intoxicating liquor.

Dated: _____

_____

Complaint Justice

This summons was received by me at _____ on _____.

_____

Defendant

FORM 3. JUDGMENT AND ORDER OF COMMITMENT (RULE 32)

[*Title of Court and Cause*]

On the _____ day of _____ 19__, the defendant appeared in person (and by counsel).

The defendant having pleaded _____ to the charge of _____ (and a hearing having been held);

It is adjudged that the defendant is (not) guilty as charged.

It is ordered that the defendant forfeit and pay the sum of _____ dollars to and for the use of the State, (and upon default of payment that he be imprisoned in the _____ County Jail at _____ for the term of _____ days at hard labor.)

(The defendant having failed to pay said sum;)

(It is ordered that the defendant be imprisoned in the _____ County Jail at _____ for the term of _____ at hard labor.)

(It is ordered that the sentence imposed upon the defendant be suspended and that he be placed upon probation for a term of _____ upon the conditions attached hereto.)

(It is ordered that the defendant is hereby committed to the custody of _____ who shall without needless delay remove the defendant to the _____ County Jail at _____ and deliver h__ into the custody of the keeper thereof who shall cause the defendant to be imprisoned at hard labor within said County Jail in accordance with this judgment.

It is ordered that the clerk deliver a certified copy of this judgment and commitment to _____ and that the copy serve as the commitment of the defendant.)

_____

Judge of the District Court

FORM 4. APPEARANCE BOND (RULE 46)

[*Title of Court and Cause*]

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to the State of Maine the sum of _____ ($_____).

The condition of this bond is that the defendant _____ shall appear in the District Court for the State of Maine, _____ District, at _____ and, if ordered, in the Superior Court to be held in the County of _____ in accordance with all orders and directions of any judge of the District Court or any justice of the Superior Court relating to the appearance of the defendant in either said District Court or

said Superior Court in the case of State of Maine v. _____, District Court Criminal Docket No. _____; and if the defendant appears in accordance with all orders and directions of either court then this bond is to be void, but if the defendant fails to perform this condition, payment of the amount of this bond shall be due forthwith. If this bond is forfeited and if the forfeiture is not set aside or remitted, judgment may be entered upon motion in the District Court of the State of Maine in the _____ District, Division of _____, or in the Superior Court held in said County of _____, against each debtor jointly and severally for the amount above stated together with interest and costs, and execution may be issued or payment secured as provided by Maine District Court Criminal Rules, Maine Rules of Criminal Procedure, and by other laws of the State of Maine.

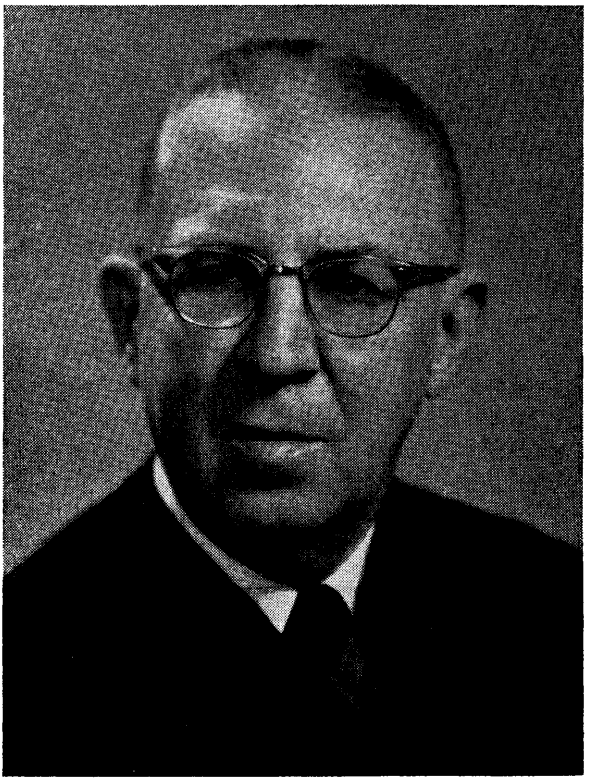
This bond is signed on this _____ day of _____ 19__, at _____.

_____	_____
Signature of Defendant	Address
_____	_____
Signature of Surety	Address
_____	_____
Signature of Surety	Address

Signed and acknowledged before me this _____ day of _____, 19__.

Approved: _____ _____

In Memoriam



HONORABLE F. HAROLD DUBORD

IN MEMORIAM

Services and Exercises

Before the Supreme Judicial Court

at Augusta, December 7, 1965

In Memory of

HONORABLE F. HAROLD DUBORD

Late Justice of the Supreme Judicial Court

Born December 14, 1891 Died October 14, 1964

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, MARDEN, RUDMAN, DUFRESNE, JJ.

PRAYER OFFERED BY FATHER ROLAND J. MARCOTTE

MR. ARTHUR F. TIFFIN:

MAY IT PLEASE THE COURT:

In my capacity as President of the Kennebec Bar Association, I rise to ask this Honorable Court to pause from its deliberations, so that the Bar may present remarks and resolutions and the Bench may reply, in honor of the memory of the late F. Harold Dubord of Waterville, a former Associate Justice of this Court, the Supreme Judicial Court.

We respectfully request that the proceedings of this memorial service may be entered upon and become a part of the permanent records of this Court and a record of these proceedings be given to the immediate family.

I think that I speak for all of the members of the Bar that knew Justice Dubord that he was a conscientious and

just Judge, always courteous and patient, and that we all learned to love and respect him.

He was my personal friend and I am proud to have a part in honoring his memory.

At this time I present the Hon. Robert A. Marden of Waterville to speak for and in behalf of the Kennebec Bar Association.

MR. ROBERT A. MARDEN:

MAY IT PLEASE THE COURT:

As one who entered the practice of law in Waterville with a close relative, soon to be otherwise employed, and as one who became a close, personal friend of our Attorney General, who was then in an identical legal family relationship, but of different ethnic, religious and political affiliation, and as one who practiced law first with trepidation developing great respect as an adversary of the late F. Harold Dubord, later to join with him in litigation and still later to share offices with him and in partnership with his distinguished son, I am privileged of course to address this Court on this occasion in his memory. Our families have been closely tied and our professional relationship more adhesive, due perhaps to these very differences.

Frederick Harold Dubord was born in Waterville, December 14, 1891, the eldest of two sons. His brother, Carl A. Dubord, here today, is a Waterville accountant and a half brother, Arthur E. Dubord, I understand, resides in California. Justice Dubord was a lifelong resident of his native city, attended the Waterville Public Schools and was graduated from Waterville High School in 1910.

Always a vibrant and aggressive force in Maine's Democratic Party it should be noted that his father was a Republican as was his wife's family.

In 1917 Justice Dubord served as City Treasurer of Waterville, the office of which adjoined that of City Clerk, where was employed as Assistant Clerk his wife-to-be, Blanche Letourneau. They were married May 14, 1917 and their children were three: Elizabeth Dubord Goulette, who attended Colby College and thereafter graduated from Forsythe Dental Infirmary as Hygienist, Robert P. Dubord, who attended Holy Cross College, graduated from Tufts Dental College and now a practicing dentist in Waterville, and Richard J. Dubord, Holy Cross College, Boston University Law School *summa cum laude,* engaged in the general practice of law in Waterville and now Attorney General of the State of Maine. There are nine grandchildren.

Justice Dubord attended Colby College 1910-1912, and until 1919 when he entered law school at the University of Maine, he was engaged in a retail clothing business with his brother, Carl, known as Dubord Brothers, and during this interim he was a member of the Maine National Guard and Clerk to the City's Common Council.

Meantime, through the influence of the then U. S. Democratic Senator Charles F. Johnson of Waterville, Justice Dubord pledged his future with the Democratic Party and served the City of Waterville as its Clerk, as a Member of its Board of Education and City Treasurer. In 1919 Justice Dubord's interest turned to the law, and he attended the University of Maine Law School in its last year of operation, finishing his courses at Boston University Law School, receiving his LL.B. degree in 1922, previous to which he had passed the Maine Bar Examination, and was admitted to practice on February 16th of that year. While at Boston University he was a member of Phi Delta Phi, the Honorary Legal Fraternity, and he was granted an Honorary Degree of Doctor of Laws in June, 1960 at Boston University. Colby College similarly honored him in June, 1964.

Justice Dubord began the practice of law by himself and made his first appearance before this Court in *State* v. *Davis,* 123 Me. 317 in 1923, where exception to the admissibility of certain evidence was sustained.

He served five terms as Mayor of his City, and served for fifteen years as a Member of the Democratic National Committee. For five years he was Attorney for the Receiver of the People's Ticonic National Bank, and for a year was State Director of the Federal Home Owners Loan Corporation, during which period of time he was not only the strong voice of his party in Maine, but became personally acquainted with many national figures in the party, and was entertained on more than one occasion by President Franklin D. Roosevelt at the White House, and developed a lasting friendship with the then National Chairman of the Democratic Party, James A. Farley.

In Justice Dubord's campaigns for the United States Senate in 1934 and for Governor of Maine in 1936, as well as for Congress in 1938 he spared nothing in his efforts in the promotion of the Democratic cause, and opposition to what has been termed the "One Party System" in Maine. Achievement of success in these campaigns at a time when public adherence to the Democratic cause was traditionally weak, only narrowly escaped him, as did indeed an appointment to the First Circuit Court of Appeals in March of 1941.

He was admitted to practice before the United States Supreme Court in April of 1937.

At all of these times Justice Dubord was engaged in an extensive law practice as a single man office and he established an unusual professional position in that he attended to both civil and criminal matters with equal success. His description as being a fighter for the "underdog" is not complete because his interest in the full prosecution of *any*

case which he accepted was not so much governed by whether or not the cause was popular, but whether there was what he considered a poor or weak law to be challenged, or a new law to be made.

He argued his causes before this Court of last resort on sixty-eight occasions, the decisions on which record indelibly the principles above expressed, and his unusual success in their application.

A member of the City, County, State and National Bar Associations, and also a member of the American Judicature Society, he served as a Trustee of the Waterville Public Library and of the Thayer Hospital, as well as being a Member of the Board of Directors of the Waterville Savings Bank.

He carried to the Superior Court of Maine, upon his appointment in June of 1955, practicality, experience, and professional wisdom, and upon his elevation to the Supreme Judicial Court in October of 1956 he reflected the characteristics represented by his vast experience, together with his fresh experience with the Trial Court. Upon this occasion he was honored by a dinner sponsored by his home post of the American Legion and received Waterville's Distinguished Citizen Award and plaque. He served actively as an Associate Justice until his retirement on December 10, 1962, when he returned to a discriminating practice of law with his son in Waterville.

Death claimed Justice Dubord on October 14, 1964, after a brief illness, and the respects paid to his memory by the attendance of State and National figures at a funeral service at St. Francis DeSales Church in Waterville, was a tribute to the position he held in the hearts of his neighbors, friends, professional and political acquaintances. One of the saddest aspects of his passing is that he was not priv-

ileged to see his son become Attorney General of the State of Maine in which his friends in his memory rejoice.

Justice Dubord was first, last and foremost a family man and a church man. He was never reluctant to admit to the indescribable loyalty and support of his good wife at all times through his trials and tribulations, politically and legally. His home and cottage at North Pond were rallying places for his children and grandchildren. A man of limitless wit and humor, he regaled his friends and associates with French Canadian yarns and poems, as well as countless incidents of humor arising from his extensive professional experience.

Small in stature, Justice Dubord was a *big* man, within whom burned the fires of a courageous, legal and political advocate, subdued by secret sentimentality, best evidenced as he would sing the verse of Sweet Adeline, "In the Evening as I Sit Alone Adreaming." His contributions to his fellowman shine on as a guiding beacon for all of us.

MR. ARTHUR F. TIFFIN:

MAY IT PLEASE THE COURT:

I would like to present at this time Honorable Albert L. Bernier of Waterville, who will make brief remarks.

MR. ALBERT L. BERNIER:

MAY IT PLEASE THE COURT:

Judge Dubord, like most men of great talent and determination, was a many-faceted man. Among his many qualities, three characteristics, I think, marked the man, in a very uncommon way — his unreserved love of the law, his lifelong dedication to public service, and a gift of simple, immediate, wholehearted friendliness.

Judge Dubord would have approved Lord Coke's apt characterization of the law as "the gladsome light of jurisprudence." He looked upon the profession of the law as a happy, challenging and dramatic adventure. He loved the law. In its pursuit, he found fulfillment. He was a lawyer in the grand tradition to the very marrow of his bones.

Law was not a "codeless myriad of precedent" — "A wilderness of single instances" to Judge Dubord. It was the very structure that promotes and fosters coherence and order for free men in a free society.

His vision of the law permitted no gulf and no conflict between devotion to the law as a calling and continuous dedication to public service. Advocacy in the courtroom was complementary to advocacy in the community. They were both expressions of his one fundamental conviction that truth among men emerges in the frank and free exchange of ideas.

Judge Dubord realized that debate, whether in the courtroom or in public life, implied conflict. He had the courage to confront the crossfire and tensions of trial. He had the larger courage to take his stand and confront the often rather merciless exposure to public opinion. He engaged in both with a unique sense of fair play. And I think that his unfailing sense of fair play was nourished by his belief that the conflict and clash of debate justified themselves, whether in the courtroom or in the community, only insofar as they promoted consensus as expressed by the rule of reason. As a judge, he frequently affirmed his faith in the fairness of jury verdicts. As a citizen, often consulted by members of both parties, embroiled in public affairs, his unfailing message of encouragement was that the majority of the people would listen to the voice of reason.

Judge Dubord was one of the great trial lawyers of his generation. His skill was compounded of many gifts. He

was meticulous and demanding in preparing the law and the facts for trial. He never assumed familiarity with any relevant statute or case. He read them and reread them. He shepardized his cases and explored the legislative background of applicable statutes with an almost religious sense of duty. He had an uncanny capacity for resolving each case to its crucial facts and of relating those facts to their concrete living context. Above all, he had that paradoxical gift of detachment and identification — detachment which permitted him to marshal his knowledge and skills freely in the courtroom and that imaginative capacity for identification with his client, which gives sincerity and drama, in the best sense of the word, to any trial.

His experience as a trial lawyer bore fruit when he was elevated to the bench. He was at home in the hurly-burly of trial. He was eminently capable of catching facts on the wing and reducing them to a pattern relevant to the case at hand. He was well equipped to master that tension frequently called judicial impartiality which scrutinizes and weighs the facts as they pass in review yet withholds judgment until the facts are in.

With these thoughts in mind, and with our own indebtedness to his legacy, Miles Frye will present resolutions in behalf of the Kennebec Bar Association.

MR. MILES P. FRYE:

MAY IT PLEASE THE COURT:

It is my privilege to present at this time the following resolutions embodying our recognition of the achievements of Justice Dubord. Therefore, be it

RESOLVED: The members of the bar desire to record our tribute to the memory of our colleague and friend, F. Harold Dubord.

RESOLVED: We humbly acknowledge that he was proud of his profession, was fully in sympathy with its high ideals, and practiced it with devotion to truth and justice. He was knowledgeable in the law, agreeable in the commerce between its practitioners, and skilled in the acts of the advocate. His fidelity to the common law tradition of defending the rights of his fellowmen has contributed materially to the heritage of freedom and independence of all members of the bar.

RESOLVED: As a citizen he gave without limit of his time and attention to public service. He was firm in his convictions and resolute in pursuing their accomplishment. His courage and strength carried him through many crises. Many of his cherished beliefs have become accepted and ingrained in our social and political structures. He combined a genuine sympathy and understanding of human weakness with an unerring sense of responsibility which gained him the love of all of us who knew him.

RESOLVED: In the discharge of his judicial duties he acted always with great ability, skill, fidelity and strict impartiality. In his wisdom he recognized that no less would suffice and no more could be demanded.

RESOLVED: In his passing we have lost a true friend and in reflecting upon his life and accomplishments, his example as attorney, citizen and judge has enriched the lives of all who knew him and has left an influence among men both far-reaching and permanent.

MR. ARTHUR F. TIFFIN:

MAY IT PLEASE THE COURT:

It is my pleasure at this time to present the Honorable Benjamin L. Berman of Lewiston, President of the Maine State Bar Association, who will speak for and in behalf of the State Bar Association.

MR. BENJAMIN L. BERMAN:

MAY IT PLEASE THE COURT:

Representing the Maine State Bar Association, and, in its behalf, I deem it an honor and a privilege to be permitted to join in these Memorial Exercises for him, whose life, character and worth, we are today recalling to mind, and to the memory of whom we seek to honor.

It is not my purpose to review, in detail, the life's history of the late Justice Dubord, but, rather, to acknowledge the gratitude and the debt that the people of Maine, as well as the Judicial and Legal Fraternity, owe to his life's work, and to pay tribute to his magnificent qualities as a loyal citizen, as a successful and vigorous, as well as profound, lawyer, and as a Judge of unquestioned integrity and proven ability.

His accomplishments, and the many positions of trust, that he held during his lifetime, his successes at the Bar, his profound opinions, written by him while a member of this Court, alone attest, beyond mortal words, the grandeur of his life in every phase thereof.

It is not for me to repeat that which has been said of him, by persons who were more intimately acquainted with him, nor for me to indulge in lofty poetic expressions of praise, but to recount, in simple language, my personal picture of the man himself.

Prior to his appointment to the Superior Court, I was not intimately acquainted with him, and neither did I have the opportunity to come in contact with him very often, but the reputation of F. Harold Dubord, that reached me in Androscoggin, induced me to regard him as a lawyer of deep conviction, profound earnestness, of extreme graciousness and completely trustworthy.

After his appointment to the Superior Court, I tried many cases before him at *nisi prius*, both before the jury and as a Court; also as a Referee. From the moment that I made contact with Justice Dubord, I was struck by his humility, his friendliness, the warmth of his disposition, the radiance of his personality, his manifest fairness and his conscientious effort to find the truth and to administer justice.

One phase of Judge Dubord's character, that is indelibly impressed upon my mind, was his courage, his faith in humanity, his loyalty and his dogged determination to pursue his political philosophy in spite of many frustrations.

I speak of the disappointments that he must have suffered during the course of his political life, in failing to attain many of the emoluments and much of the recognition that he was entitled to expect and that which he had earned.

Another person, less courageous and less dedicated to fairness and justice, and less loyal, would have become cynical and would have withdrawn from further political activities — but not F. Harold Dubord.

In spite of the many successes that he did attain, he, nevertheless, in a political sense, suffered many frustrations — his unsuccessful pursuit of the United States Senatorship of Maine — his unsuccessful campaign for the United States Congress — his unsuccessful campaign for the Governorship of our State — his failure to obtain the appointment of United States District Attorney, and later United States District Court Judge and Judge of the United States Circuit Court of Appeals.

These frustrations did not "sour" him, prejudice him or cause him to withdraw from political and civic activities, but rather heightened his hopes, his ambitions, his loyalties and his purpose to serve his fellowmen.

"His faith in humanity and his consistent loyalty finally rewarded him, for, as has been said, he was honored by appointment to the Superior Court in June, 1955, and to the Supreme Judicial Court in October, 1956.

It was while serving in these judicial capacities that I more frequently came in contact with him.

I never saw Judge Dubord become impatient, lose his temper or deviate, in the least bit, from the standard of absolute courtesy. He was always considerate, understanding and motivated solely by an intense desire to do justice by all parties."

His great objective was to be right.

His opinions, written while he was a Justice of this Court, reflect the profound knowledge of the law and the deep concentrated study of which he was capable.

In his opinions, his search for the law extended far and wide, and his conclusions were set forth in clear, plain and understandable language.

His meticulous preparation of detail, which was a part of his very nature, and his courage in blazing new trails in our jurisprudence, is best illustrated by a case that he tried a few months prior to his appointment to the Superior Court — that series of cases against *Robbins & White, Inc.*, reported in 151 Maine, Page 114, where he brought about the reversal of an adverse decision by Referees, on a seemingly pure question of fact, and, at the same time, caused this Court to distinguish and further clarify the decision in *Reynolds* v. *Hinman Co.*, 145 Me. 343.

Again, this profound knowledge of the law and penchant for deep study and wide research, is reflected by the decision in the case of *Poretta* v. *Superior Dowel*, 153 Me. 308, which established the law in our State, and settled the law in our land, pertaining to the liability of an undisclosed

principal, in a case where the agent had made a good-faith settlement with the other party to the transaction. Well do I remember that decision because it was our office that was on the losing end.

In this latter opinion, Judge Dubord reviewed practically every case touching this subject, both in this country and in England. His opinion occupies 22 pages of the Report.

So deep an impression did this opinion make, that it attracted the attention of the Annotater in 71 A.L.R. (2nd), at Page 921, where we find the following language, in reference to this opinion:

> "In imposing liability upon the principal, despite its good-faith settlement with its agent, the Court, after thoroughly reviewing both English and American Authorities, which it stated to be in hopeless confusion, forthrightly adopted the view of Section 208 of the Restatement of Agency."

Another sterling opinion, showing the depth of Judge Dubord's learning and the clarity of his reasoning and exposition, is that of First Portland National Bank, as Trustee under the *Will of Charles R. Cressey* v. *Alice F. Rodrique, et al.*, 157 Me. 277.

This latter opinion likewise reviews the authorities over a wide area and occupies 11 pages in the Report.

No great encomium can be given to him, and no finer wreath can be placed upon the tablets of memory of man, than to say that the Members of the Maine State Bar Association, held him in the highest esteem, and had the fullest measure of confidence in his ability, integrity and his honesty.

And now, in closing, I borrow the words of a former great Chief Justice of this Court — Edward F. Merrill — who, at the Memorial Services for the late Justice Sidney St. Felix Thaxter, said:

> "His opinions are a monument more enduring than shafts of stone or tablets of bronze. They are engraved upon, nay, they form an essential and integral part of the jurisprudence of this, our beloved State of Maine."

Justice F. Harold Dubord died honored, respected and mourned by all who knew him. His memory we cherish, and the Maine State Bar Association will ever remember him as one of our members who, from humble origin, attained distinction, and was ever faithful to the traditions of our profession.

MR. ARTHUR F. TIFFIN:

MAY IT PLEASE THE COURT:

It is with great pleasure at this time that I introduce our own Justice James L. Reid, who will speak for the Superior Court.

JUSTICE JAMES L. REID:

MAY IT PLEASE THE COURT:

Mrs. Dubord and members of the family: It is, of course, an honor and a privilege to participate in these proceedings as a representative of the Superior Court.

I first met Harold Dubord when he was a man of about 40 years and I a young attorney just beginning in the practice of law here in Kennebec County. This was in the early 1930's, during the depression years, when business was rather slow and there was ample time for young lawyers to attend jury trials and Law Court Sessions to observe and learn from the skill and experience of others. I was introduced to Judge Dubord by a young reporter and well remember how thrilled I was when the Justice explained the nature of his case to me and also handed me a spare copy

of his trial brief so that I could follow the entire case from beginning to end with advance knowledge of the legal points at issue. I sat through the whole case right there at the reporter's table and today I have a vivid recollection of Justice Dubord as he quietly opened his case, deftly examined and cross examined and finally came to his summation. Slight of physical stature, well poised, soft spoken, he skillfully marshalled on his side the credible evidence most favorable to his client and then proceeded to dismiss as though relatively unimportant, the credible evidence most favorable to his opponent. Despite a highly developed sense of humor which exhibited itself to the delight of all at our annual Kennebec Bar Association meetings I do not recall that when addressing the jury he was anything but serious in his approach to the case. Speaking of sense of humor, I might say in passing that his son Richard, our Attorney General possesses the same gifted sense of humor as did his father. And I am sure we have all had the benefit of listening to some of his stories as we did to his beloved father.

During the next ten years I followed rather closely the activities of Justice Dubord. Though I knew he was engaged in many political affairs not once do I recall that these affairs interfered in any real degree with his primary love, the active practice of law. He must have worked long hours each day and on weekends because I never knew him to come to Court other than fully prepared. Beyond all this I know and did then know, that he would take cases, civil or criminal for indigent clients from whom he could not hope for anything but a nominal fee, and this despite the fact that he had a lucrative probate and corporate as well as trial practice.

During the next decade after the war I came to have a closer association with him for we were on the same or opposite sides of many cases. At legal conferences he might

arrive with a brief case packed with documents and correspondence but this did not prevent him from quickly reaching into the important factual and legal issues involved in the matter at hand. Energetic, keen of mind and remarkably resourceful he was indeed an adversary to be at once feared and respected. He tried with all his might against the best in the State but not once did I ever hear a word spoken in derogation of his ability, courage or integrity.

Then in 1955 he came to the bench of the Superior Court. How eminently qualified he was! He had the ability to make decisions constantly giving the reasons therefor with regard to the quality of evidence and the application of either statutory or case law to the factual situation. His previous experience before the bar was such that correct decisions on the admissibility of evidence were made by him almost intuitively.

Chief Justice Tauro of the Massachusetts Superior Court recently outlined the following necessary qualifications for a Trial Judge.

The integrity to demonstrate moral courage in everyday conduct: Judicial temperament indicating courtesy, dignity, tact and patience: Legal ability offering training and capacity for rendering opinions: Mental and physical health, industry and diligence.

None can deny that Justice Dubord was lacking in any of the foregoing but, on the contrary, possessed all of these qualifications to the highest degree.

A year and a few months later he was appointed to the Supreme Judicial Court and graced that bench until he retired in December of 1962. As a Justice of the Supreme Judicial Court he continued to exhibit patience, courtesy and dignity. His decisions reflect the same clarity of thought that helped to make him one of the truly great lawyers of our time.

When he retired he was not content to simply enjoy the leisure time afforded to him by retirement. It quickly appeared that he was willing and perhaps anxious to be of continued service in the field of law. I do not know how many cases were referred to him by agreement of counsel and approval of court but I do know that whenever a reference was suggested his name was immediately proposed and agreed upon subject of course to his willingness to accept. So far as I know he accepted all the cases referred to him even though the work involved was arduous and time consuming, at the same time setting dates for hearings and rendering decisions with characteristic dispatch. He thus helped greatly in his latter years to relieve congested dockets in many of the counties of this State.

The presence in this court room of Justice Dubord will always be remembered by those who enter and knew him for what he was — a splendid man, a brilliant lawyer and a learned judge.

MR. ARTHUR F. TIFFIN:

MAY IT PLEASE THE COURT:

That concludes the portion of these memorial services from the bar. At this time I think it is proper that we hear from the bench.

HON. ROBERT B. WILLIAMSON, C. J.: Mrs. Dubord, members of the family, Father Marcotte, members of the bench and bar, and friends:

In accordance with our time honored tradition, we meet to honor the memory of our brother. In doing this we reflect in the quiet of the courtroom upon all the facets of life about us, and of the part that Frederick Harold Dubord played so finely and so well. Quite naturally we turn our

thoughts particularly to his life and service in the profession of the law.

I wish to read communications received from friends of Justice Dubord who were unable to be present today, and whose presence would have added much to the occasion. I read first a letter from our Governor.

December 1, 1965

"I regret that I am unable to be present with you today for the exercises in memory of the late Justice F. Harold Dubord.

"Justice Dubord held a number of important positions in Maine during his life and to each one he brought the same kind of integrity and prestige. He was a man that had the respect of all who knew him. He was truly a credit to his country and his state, and the things that he did were accomplished with dignity. He was also a fine family man who could be proud of his children.

"This man set an example in public service of the highest order. As a jurist his contributions were many and his legal mind was respected by all of his peers.

"In an early account of his background, during a time when he was seeking the office of Governor he attributed whatever measure of success he had then gained or might gain in the future to his wife. He was this kind of man. One who would share with these around him the credit for his many achievements.

"It is well that his memory is honored here today.

Sincerely yours,

JOHN H. REED
Governor"

A COMMUNICATION FROM SENATOR MUSKIE:

"Time passes quickly, and it is hard to realize that it has been more than a year since the death of my dear friend and mentor, Harold Dubord. Significantly, his memory remains fresh and live to me.

"The wisdom of his counsel, I am sure, will help guide me throughout my lifetime. The encouragement he gave me during a quarter century of friendship will always be a source of strength.

"It was my profound privilege to have known Harold Dubord. I grew in the warmth of his spirit and the strength of his character.

"As a human being, a lawyer and a public servant, Harold Dubord gave freely of himself to his friends, his colleagues and his state. All of us are his beneficiaries.

"It is a measure of a man that the values he lives by and worked for remain cherished goals by those surviving him.

"It is a measure of a man that his life remains a guide for those who knew him.

"It is a measure of a man that his community and state are finer places for his having lived there.

"By these any any standards, Harold Dubord was a towering man."

AND FROM JUDGE GIGNOUX OF THE UNITED STATES DISTRICT COURT, who regrets that he is unable to be present:

"As United States District Judge for the District of Maine, I was privileged to be associated with Justice Dubord in various activities which were of common concern to the federal and state courts in the State of Maine. I am most happy personally to endorse the respect and affection with which he was regarded by all of us who knew him.

"Since I shall be unable personally to be present, may I, through the medium of this letter, join with the bench and the bar of the State of Maine in this splendid tribute to the memory of a distinguished public servant.

Sincerely yours,

EDWARD T. GIGNOUX
Judge, United States District Court"

AND, LAST OF THE COMMUNICATIONS, A LETTER FROM JUDGE FRANK M. COFFIN OF THE UNITED STATES COURT OF APPEALS. He writes:

"It is an honor, though a sombre one, to participate in honoring the memory of F. Harold Dubord.

"The record of his roles and achievements gives ample evidence of his keen intelligence and wide-ranging public interest — in his community as lawyer and civic leader, in the state as political leader, candidate, and jurist, and in the nation as a key policy-making official of his party's national committee. It was eminently fitting that Justice Dubord's career be capped by distinguished service on the Supreme Judicial Court.

"But even such a record does not fully reveal the stature of the man. In him was embodied, more than in most men, a sturdy independence of thought and action, based on a faith in open and effective advocacy. All he asked, whether in law or in politics, was a chance to present his case.

"He did not condition his involvement in causes — whether legal, civic, or political — on their likelihood of success. The indigent were served with the same investment of skill and energy as the wealthy. During the years when his political party was seldom competitive, his own strenuous labors on its behalf did not flag; indeed, his own amaz-

ing campaign for election to the United States Senate nearly succeeded.

"This wide experience as an advocate served him well on Maine's highest Court. For to the bench he brought an independent, inquisitive mind and a compassion that illuminated analysis and increased wisdom.

"Harold Dubord was a 'public man' in the classical sense of the phrase. His achievements were all the more admirable in that, through all this varied life of commitment, he remained a 'private man' whose home was always a cherished sanctuary. The unusual affection and sharing of interests in his close-knit family are testimony to his success as husband and father. His family is indeed blessed in their happy memories.

"I have known few men who had Harold Dubord's ability to transcend a generation and make himself a friend and contemporary of younger people. I count myself privileged to have been one of those who had his understanding friendship and counsel.

"The heritage of our State is enriched by the life and memory of this man of Maine.

Sincerely,

FRANK M. COFFIN"

In responding for the Court, I shall not touch upon the details of our brother's life. The record has been ably and well-stated.

Justice Dubord came to the Bench in 1955 soundly equipped to administer Justice. We knew well his ability as an advocate before Judge and Jury, and as a counsellor. He came to us from a commanding position at the Bar, and with wide experience in public affairs.

After 16 months on the Superior Court he was appointed in October 1956 to the Supreme Judicial Court. From that day until his retirement we shared chambers in the courthouse. We were, as we often said, a "firm."

The easy friendship of young lawyers from the early days of practice gained the intimacy associated with membership on the Court. It was a happy partnership for me and, I am confident, for him as well.

During the six years on the Law Court, Justice Dubord wrote, if my count is accurate, 52 opinions and two dissents — commencing with *Inhabitants of Norridgewock* v. *Inhabitants of Hebron,* 152 Me. 280, and ending with *Greenlaw* v. *Rodick,* 158 Me. 440.

The opinions, as has been so well stated this afternoon, are without exception clear in meaning, well-reasoned and carry evidence of thorough study of the law. In his writing he covered nearly the breadth of legal subjects coming before our Court. *Poretta* v. *Superior Dowel Co.,* 152 Me. 308, on agency and undisclosed principals, and *First Portland Nat'l Bank* v. *Rodrique,* 157 Me. 277, involving the construction of a will and the Rule against Perpetuities, to name only two of his leading opinions will, I venture to predict, and I am not alone in that understanding this afternoon, be "land mark" cases for many years.

The published opinions of a Justice by no means tell the complete story of his work upon the Court. In the trial of cases as a single Justice, in the preparation of the civil rules, day after day in the conference room — and indeed in his every act — Justice Dubord administered Justice in the finest traditions of his office.

Our friend had a full, active, happy and fruitful life. He was justly proud of his family and justly proud that his son chose the profession of the Law. Our friend loved the Law; and he was a good and a just Judge.

On behalf of the Court, I thank the Kennebec Bar Association and all who have participated in the exercises. The resolutions are gratefully received and with the remarks will be placed upon the records of the Court.

As a further mark of our respect, love and affection for our Brother the Court will adjourn until tomorrow morning at 9:30 A. M.

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 as amended are hereby adopted, prescribed and promulgated to become effective on the 22nd day of March A. D. 1965. Said rule as thus amended shall be recorded in the Maine Reports.

Dated this 19th day of March A. D. 1965.

ROBERT B. WILLIAMSON
Chief Justice

DONALD W. WEBBER

WALTER M. TAPLEY, JR.

FRANCIS W. SULLIVAN

HAROLD C. MARDEN

AMENDMENT OF MAINE RULES OF CIVIL PROCEDURE

Effective March 22, A. D. 1965

Rule 17 (b) is amended by striking out the present heading of the rule **"INFANTS or INCOMPETENT PERSONS"** and substituting therefor:

"GUARDIANS AND OTHER REPRESENTATIVES" and is further amended by adding the following sentence at the end of Rule 17 (b):

> "In any action in which there are or may be defendants who have been served only by publication and who have not appeared, the court may appoint an agent, guardian ad litem, or next friend to represent them."

STATE OF MAINE

SUPREME JUDICIAL COURT

AMENDMENTS TO MAINE RULES OF CIVIL PROCEDURE

All of the Justices concurring therein, the following amendments are hereby adopted, prescribed and promulgated to become effective on the second day of February, 1965. Said rule as thus amended shall be recorded in the Maine Reports.

Dated this second day of February, 1965.

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 February 2, 1965

Rule 73 (e) is amended by striking out "18" in line 4 thereof and in the place thereof substituting "12".

STATE OF MAINE

SUPREME JUDICIAL COURT

AMENDMENTS TO MAINE RULES OF CIVIL PROCEDURE and MAINE DISTRICT COURT CIVIL RULES

All of the Justices concurring therein, (1) Form 30 entitled "Writ of Execution" in the Appendix of Forms to the Maine Rules of Civil Procedure is hereby amended, effective forthwith, in the last sentence thereof by striking out the words "3 months" and inserting in place thereof the words "1 year," and (2) Form 30 entitled "Writ of Execution" in the Appendix of Forms to the Maine District Court Civil Rules is hereby amended, effective forthwith, in the last sentence thereof by striking out the words "3 months" and inserting in place thereof the words "1 year." The above amendments shall be recorded in the Maine Reports.

Dated the 23rd day of November, 1965.

ROBERT B. WILLIAMSON
Chief Justice

DONALD W. WEBBER

WALTER M. TAPLEY, JR.

HAROLD C. MARDEN

ABRAHAM M. RUDMAN

ARMAND A. DUFRESNE, JR.

STATE OF MAINE

SUPREME JUDICIAL COURT

AMENDMENT TO MAINE RULES OF CIVIL PROCEDURE

All of the Justices concurring therein, Rule 76B of the Maine Rules of Civil Procedure is hereby adopted, prescribed and promulgated to become effective on September 14, 1965 as follows:

THE MAINE RULES OF CIVIL PROCEDURE ARE HEREBY AMENDED BY ADOPTING RULE 76B TO BECOME EFFECTIVE SEPTEMBER 14, 1965

RULE 76B

CERTIFICATION OF QUESTIONS OF LAW BY FEDERAL COURTS

(a) When Certified. When it shall appear to the Supreme Court of the United States, or to any of the Courts of Appeal or District Courts of the United States that there are involved in any proceeding before it one or more questions of law of this state which may be determinative of the cause and that there are no clear controlling precedents in the decisions of the Supreme Judicial Court, such federal court may, upon its own motion or upon request of any interested party, certify such questions of law of this state to the Supreme Judicial Court sitting as the Law Court, for instructions concerning such questions of state law.

(b) Contents of Certificate. The certificate provided for herein shall contain the style of the case, a statement of facts showing the nature of the case and the circumstances out of which the question of law arises, and the question or questions of law to be answered.

(c) Preparation of Certificate. The certificate may be prepared by stipulation or as directed by such federal court. When prepared and signed by the presiding judge of said federal court, 12 copies thereof shall be certified to the Supreme Judicial Court by the clerk of the federal court and under its official seal. The Supreme Judicial Court may, in its discretion, require the original or copies of all or any portion of the record before the federal court to be filed with said certificate where, in its opinion, such record may be necessary in answering any certified question of law.

(d) Costs of Certificate. The costs of the certificate and filing fee shall be equally divided between the parties unless otherwise ordered by the Supreme Judicial Court.

(e) Time of Hearing. The questions certified to the Supreme Judicial Court shall, unless it otherwise directs, be in order for hearing at the first term of the Law Court commencing not less than 35 days after the filing of the certificate with the Clerk of the Law Court. The hearing shall be by briefs and oral argument, both of which shall be controlled by the same rules as briefs and oral argument on appeals.

(f) Intervention by the State. When the constitutionality of an act of the legislature of this state affecting the public interest is drawn in question upon such certification to which the State of Maine or an officer, agency, or em-

ployee thereof is not a party, the Supreme Judicial Court shall notify the Attorney General, and shall permit the State of Maine to intervene for presentation of briefs and oral argument on the question of constitutionality.

Said Rule 76B shall be recorded in the Maine Reports.

Dated the 14th day of September, 1965.

ROBERT B. WILLIAMSON
Chief Justice

DONALD W. WEBBER

WALTER M. TAPLEY, JR.

HAROLD C. MARDEN

ABRAHAM M. RUDMAN

ARMAND A. DUFRESNE, JR.

ACCORD AND SATISFACTION

Accord and satisfaction is a question of fact to be submitted to jury unless testimony is such that only one inference or finding can be made.

Plaintiff who was not entitled to a jury determination on issue of accord and satisfaction could not complain of alleged errors in instructions given by presiding justice.

Proof to establish an accord and satisfaction must be clear, convincing, and satisfactory to create a preponderance of evidence.

Wiggin vs. *Sanborn*, 175.

ADMISSION

It is not unreasonable to require that the State be able to prove guilt beyond a reasonable doubt without resort to the use of admissions or confessions made as a part of a court ordered mental examination.

Introduction of admissions made during a court ordered mental examination as a part of the State's main case on the issue of guilt or innocence violated the purpose and intent of the examination statute, deprived the respondent of due process of law and constituted reversible error.

State of Maine vs. *Hathaway, Jr.*, 225.

APPEAL AND ERROR

Appellants abandoned points made as basis for appeal where they filed no brief and made no argument.

Shane, et al. vs. *Colson, et al.*, 51.

Upon appeal from directed verdict at close of plaintiff's case, the Supreme Judicial Court reviews the evidence including inferences seasonably to be drawn therefrom in the light most favorable to the plaintiff.

Plaintiff's failure to prove evidence at the trial, which he anticipated to prove in the pre-trial order, does not remove the doctrine of res ipsa loquitur from the case.

Res ipsa loquitur is not to be discarded, at least in the absence of surprise which would make reliance upon the doctrine unfair to the defendant.

J. & Jay, Inc. vs. *E. Perry Iron & Metal Co., Inc.*, 229.

Unresponsive reply of expert witness to hypothetical question was not prejudicial error.

Ruling providing that a professor of civil engineering and specialist in structural engineering and in use of metallic materials could testify as an expert witness was well within the bounds of the justice's discretion.

Qualification of a witness as an expert is a preliminary question for the court and its determination is conclusive in the absence of error in law.

Poulin vs. *Bilodeau, et al.*, 306.

Where application of landowner in 1964 for permit to establish and maintain automobile junkyard or graveyard was denied, and landowner then brought suit for declaration of his rights under per-

APPEALS

ARREST

BAIL

Statute permitting presiding justice in his discretion in habeas corpus proceeding to admit applicant to bail following adverse decision and pending review by law court was not operative in post-conviction habeas corpus proceeding under later modulated and conformed provisions of statute.

Petitioner, who appealed from decision dismissing his petition for post-conviction habeas corpus relief, was not entitled to bail pending appeal.

Wood vs. *State of Maine*, 13.

BLOOD SAMPLES

The statute does not expressly state that a blood analysis, to be admissible, must be of blood extracted with consent of the defendant. However, there are strong and compelling statutory implications that consent is required.

It has been the rule in Maine for a substantial number of years to require a prior determination by the presiding justice of circumstances surrounding the giving of a confession in order to determine its voluntariness before submitting it to the jury.

State of Maine vs. *Merrow*, 111.

BRIBE

A judicial officer may be subject to bribe not only concerning matters pending but also those that may legally come before him.

State of Maine, vs. *Jalbert*, 505.

CHARITIES

"Benevolent" within tax exemption statute relating to benevolent and charitable institutions, is synonymous with "charitable" and defines and limits nature of charity intended.

Nonstock corporation which used property as wildlife sanctuary, for purpose of benefiting wild animals, was not "charitable", within tax exemption statute, there being no benefit to community or public, since purposes were not limited to prevention of cruelty to animals or research or disease control, and particularly since prohibition on deer hunting was contrary to state game management policy.

Trust for promotion of purposes which are of character sufficiently beneficial to community to justify permitting property to be devoted forever to their accomplishment is "charitable"; trust to prevent or alleviate suffering of animals is charitable.

Trust for purpose accomplishment of which is contrary to public policy, although not forbidden by law, is invalid.

Holbrook Island Sanctuary vs. *Inhabitants of Town of Brooksville, et al.*, 476.

CONDITIONAL SALES

Antecedent waiver by conditional vendee of statutory notice as to conditional vendor's resale was against public policy and sale by assignee of conditional vendor without notice to vendee was invalid.

C. I. T. Corporation vs. *Herbert C. Haynes*, 353

CONFESSIONS

CONSIDERATION

CONSPIRACY

CONSTITUTIONAL LAW

COUNSEL

A criminal defendant is ordinarily entitled to employ counsel of his own choice but that does not mean that the operation of the court must be adjusted to conform to his whim or preference. The attorney is available to meet the calendar of the court.

Where defendant has been given reasonable opportunity to obtain counsel and failed for approximately a month to take reasonable and adequate steps to prepare for a trial which he knew to be imminent, the court did not abuse its sound judicial discretion in appointing a lawyer as defendant's counsel and in denying a further continuance.

State vs. *Carll*, 210.

COUNTY COMMISSIONERS

1934 petition to compel county commissioners to relocate and redefine highway was void, where it was signed only by city clerk and contained no statement either that location of boundaries was lost or that true boundaries could only be established by user, were doubtful, uncertain or lost.

Jurisdiction must appear in petition to compel county commissioners to relocate and redefine highway, and lacking jurisdiction, actions of county commissioners in entertaining petition and in entering order defining highway limits must be held void.

Although generally no particular form of words is required in petition to compel county commissioners to relocate and redefine highway, nor is strict technical accuracy expected therein, jurisdiction depends upon whether sufficient jurisdictional facts are set out in petition which forms foundation of action by county commissioners.

Albion M. and Elizabeth F. Benton vs. *Maine State Highway Commission*, 541.

CRIMINAL LAW

Supreme Court would not decide important question of law on report wholly unaided by brief or argument of counsel for criminal respondent, but would discharge report and remand case.

State of Maine vs. *Corey*, 59.

Motion for new trial in felony case must be decided in first instance by justice presiding at nisi prius in Superior Court and if motion is denied by such justice, then defendant may appeal to Law Court, and motion may not be presented directly to Law Court.

Wood vs. *State of Maine, et al.*, 87.

There is as much reason for requiring verification of an amendment which recites new facts as for requiring verification of the original petition.

Signature of petition appended to and made a part of a proper form of verification under oath, satisfied statutory and jurisdictional requirements.

Ordinarily, post conviction relief will not reach inequalities alleged to have occurred in felony cases at the District Court level.

Events occurring at or in connection with the preliminary hearing stage may become significant but only insofar as such events have

DAMAGES

A plaintiff in a divorce action, relying upon the grounds of cruel and abusive treatment, must, by a preponderance of the evidence, prove two elements: (1) the cruel and abusive conduct of plaintiff's spouse, and (2) that such conduct caused the plaintiff physical or mental injury or that a continuation of the marriage relationship would jeopardize physical or mental health. Failure to prove either or both is fatal.

Gruber vs. *Gruber*, 289.

ELECTRICITY

Electric cooperatives are not public utility and, therefore, not subject to the provisions of 35 M.R.S.A. § 2303 requiring satisfactory proof of public convenience and necessity to allow two electric companies to serve the same area.

Electric cooperatives do not have a right of exclusive franchise as against a public utility.

Electric cooperative attack on sufficiency of complaint and notice is without merit in view of the fact that they were not challenged until the hearing had proceeded to an appreciable degree without complaint.

Heath, et al. vs. *Maine Public Service Company*, 217.

EMINENT DOMAIN

Property owner seeking to enjoin municipal urban authority from asserting title to her property on ground of alleged illegality of condemnation procedure has burden of proving that the authority failed to comply with all applicable statutory provisions governing such appropriation.

Where municipal officers were provided with ample and abundant information to warrant finding of blight in area where plaintiff's real estate was located, their finding that such blight existed was final.

Municipal officers of Waterville were the mayor and aldermen; a majority of the municipal officers had the authority to act with committal of that body.

Warren vs. *Waterville Urban Renewal Authority*, 160.

While activities of county agricultural society which conducted annual fair benefited public in some degree, they fell short of constituting such "public uses" as would exempt society's property from eminent domain process.

The distinction between "public use" and "private use" lies in character of use and must to large extent depend on facts of each case.

Mere benefit of public or permission by owner for use of property by public are not enough to constitute a public use.

It is essential to public use, for eminent domain purposes, that public must, to some extent, be entitled to use or enjoy property, not by favor, but as a matter of right.

Oxford County Agricultural Society vs. *School Administrative District No. 17*, 334.

Claim that written description in connection with 1958 taking of land for highway purposes specifically limited easterly boundary of highway to present easterly line of existing highway, whatever that

ESCAPE

EVIDENCE

HABEAS CORPUS

INDICTMENT AND INFORMATION

INDIVIDUAL GIFTS

INDUSTRIAL ACCIDENT COMMISSION

INSURANCE

JUDGMENT

JURISDICTION

When case is heard on an agreed statement of facts with no oral testimony, the "Clearly erroneous" test is not applied and court is free to find the facts without reference thereto.

In Re Will of Susan G. Edwards, 141.

JURIES

A written condition will present a jury question only when language employed is ambiguous or there is either an exchange of correspondence or an oral conversation of such a nature as to create doubt as to what was intended or should reasonably have been understood.

Where facts as to an alleged accord and satisfaction were not in dispute, there was no occasion for submission of issue to jury but no prejudice resulted to defendant since the jury resolved issue in defendant's favor and returned only verdict which could be sustained on facts.

Wiggin vs. *Sanborn,* 175.

JURY

Verdicts in criminal as well as civil cases must be found by an impartial jury and must be the result of honest deliberations absolutely free from prejudice or bias.

Statute relating to challenges to jury for cause is declaratory of common law and set up legal machinery whereby parties may safeguard their constitutional right to an impartial trial by an impartial jury.

Relationship by consanguinity or affinity within the 6th degree according to civil law or within the degree of 2nd cousins inclusive will disqualify person who is required to be disinterested in matter in which others are interested, and this statutory rule is applicable to jurors.

There is no waiver of objection to juror because of his relationship to a party where objecting party is not aware of any circumstances affecting competency of juror until after verdict, and the verdict must be set aside.

Bennett vs. *State of Maine, et al.,* 489.

Where jury could find that plaintiff had been involved in serious accident five months before collision with defendant, that he suffered permanent partial impairment that persisted at time of second accident and thereafter, that impact between automobiles in accident with defendant was slight, and opinion of medical expert was that second accident did not aggravate any pre-existing condition, award of $516 was not so inadequate as to make it apparent that jury acted under some bias, prejudice or improper influence or made some mistake of fact or law.

Gentle vs. *Jewell,* 503.

JURY INSTRUCTIONS

Whether it was practicable for 15-year old girl pedestrian to be walking on right side of road was a fact for the jury.

Requested instruction that overtaking motorist had burden of proof by a preponderance of evidence pedestrian had violated the law was properly refused, in view of evidence of due care on the part of the pedestrian.

St. Peter, et al. vs. *Dyer*, 302.

JURY CHARGE

Defendant who failed to object to charge and offered no request for further instructions regarding testimony of accomplice waived any complaint with respect thereto.

State of Maine vs. *James*, 17.

LANDLORD AND TENANT

Fact that landlord had control and possession of passageway in which tenant was injured imposed upon him, entirely apart from any contractual obligation, duty to exercise reasonable care and to maintain passageway reasonably safe for use by occupants of premises and by their invited guests.

Evidence was sufficient to support finding that landlord retained control of outside common passageway in which tenant was injured and, by allowing broken tile pipe to remain projecting under snow in proximity of passageway, was negligent in failing to exercise reasonable care to maintain the walk in a reasonably safe condition and to keep it free from objects which could tend to create hazard to tenant, member of tenant's family and his invitees.

Where defendant landlord knew for some time prior to tenant's injury, and by reasonable diligence should have known, that there was broken tile pipe, concealed by covering of snow, projecting in proximity of common passageway, landlord's duty of ordinary care was not fulfilled when he failed to fix the pipe, remove it, or otherwise prevent it from creating hazardous condition.

The criterion of landlord's liability for injuries occurring in common stairways and passageways is the obligation to exercise due care to keep such common ways in reasonably safe repair with right of control for that purpose.

Landlord, in action brought by tenant for injuries sustained through alleged negligence of landlord in maintaining safe walkway, was not prejudiced by evidence that tenant and witness for tenant had been previously convicted of lascivious cohabitation, where judge made it clear in instructions that admission of such evidence was for purpose of determining credibility of tenant and witness.

Complaint of tenant injured in tripping over broken tile concealed under snow on common walkway set forth cause of action against landlord.

Anderson vs. *Marston*, 378.

LEGISLATIVE INTENT

The legislature has made mandatory the requirement of verification; a lack thereof must be considered a fatal jurisdictional defect.

Holbrook vs. *State of Maine*, 102.

MANDAMUS

MENTAL DISEASE OR DEFECT

Instructions that the defendant must prove preponderantly that he could not at the time of the imputed crime distinguish between right and wrong and that his alleged malefaction was the product of such disease or defect constitute reversible error because such instructions deprived the defendant of jury consideration and estimation of the medical testimony presented upon the issue of defendant's inability because of some mental disease or defect to refrain from the imputed homicide irrespective of defendant's knowledge of right and wrong at the time of the tragic incident.

The jury must decide whether upon all the evidence the defendant had proved by a preponderance that at the occurrence of the fatal

PARDON AND PAROLE

PARENT AND CHILD

PARTIES

PROCEDURE

PROPERTY

Possession of personal property is deemed prima facie evidence of title and right to possession and person who claims adversely has burden of showing right to immediate possession superior to that of one in actual possession.

In appropriate circumstances equitable estoppel can defeat recovery for alleged conversion.

One may be bound by his conduct, and where there is duty to speak, by his silence.

Howard II vs. *Brown*, 52.

PUBLIC UTILITIES

The authority of the Maine Public Utilities Commission can only be that authority that is granted to it by the Legislature. The Commission has authority and dominion over regulated public utilities.

Appellants have the burden of showing that electric cooperatives are regulated public utilities within Cooperative Enabling Act.

Legislature did not intend an electric cooperative to be a regulated utility, nor was it intended that a cooperative should invade the territory of a regulated utility without the approval of the Commission.

The Enabling Act (35 M.R.S.A. Ch. 221) authorizing the creation of electric cooperatives states that they shall not be deemed to be public utilities. It also places cooperatives in a limited and restrictive sense under the regulatory powers of the Commission.

The Commission has no authority over cooperatives excepting that restricted and limited authority which is defined in Sec. 2809.

The consent of the public utility to the petition of the cooperative that it be permitted to serve part of the area serviced by the public utility was not an abandonment of its franchise.

Heath, et al. vs. *Maine Public Service Co.*, 217.

SALES

Provision in conditional sales contract granting seller power to repossess and sell chattel on buyer's default is valid and by itself does not impair contract.

C. I. T. Corporation vs. *Herbert C. Haynes*, 353.

SALES AND USE TAX

Tax assessor could not make sales tax deficiency assessment when taxpayer's sales records showed gross sales and credits due retailers on exempt sales were adequate to enable tax assessor to determine retail sales tax liability.

Farrar Brown Company vs.
Ernest H. Johnson, State Tax Assessor, 75.

SARDINE TAX LAW

Court would take judicial notice of fact that area in which sardine factories were located at time of passage of Sardine Tax Law was depressed.

SEARCH

SEARCH AND SEIZURE

SERVICE OF PROCESS

SETTLEMENTS

SODOMY

STATUTES

TAXATION

WITNESSES

Where one motorist was killed in a head-on collision, the surviving motorist became incompetent to testify when administratrix suing for deceased's death and funeral expenses invoked the statute against the surviving motorist.

Emery vs. *Frateschi*, 281.

WORKMEN'S COMPENSATION

1961 Amendment to Workmen's Compensation Act relating to suspension of compensation pending hearing and final decision was designed to make certain and definitive limitations upon decrease or suspension of compensation payments prior to final decision on review of incapacity.

Basic purpose of Workmen's Compensation Act is to provide compensation for loss of earning capacity from actual or legally presumed incapacity to work arising from accidents in industry.

Legislature had authority to limit review of incapacity and to surround exercise of process by conditions designed to protect employee.

Paul G. Waltz, Appellant vs. *Boston & Rockland Transportation Company and Travelers Insurance Company*, 359.

Declared intent of both workmen's compensation statute and commission rule is that answers to petitions for compensation shall respond specifically to employees' claims to effect a speedy, efficient and inexpensive disposition of all proceedings.

If real issue in petition for industrial accident compensation be whether incident causing injury is "accident" within statute, claimant is not required to prove his status as an employee with a named employer on a stated date.

If real issue in petition for industrial accident compensation be extent of injury, employee is not required to present proof of his status, his employer, date of injury and proof of accident.

Request for further time for filing pleading responsive to petition for industrial accident compensation is to be made before expiration of period originally prescribed or as previously extended not by virtue of but consistent with practice under civil rule.

Purported answer of a general denial to petition for industrial accident compensation was insufficient as a matter of law and motion to take the complaint as confessed was in order.

Newell vs. *North Anson Reel Co. And/or Liberty Mutual Insurance Co.*, 461.

WRIT OF ERROR CORAM NOBIS

A writ of error can challenge only errors of record.

An appellant may raise errors of fact, not of record, in a petition for writ of error coram nobis.

Denial of court appointed counsel on petition for post-conviction relief was not error where no facts were pleaded upon which lack of due process could be predicated.

The transcript of a presentence investigation can be considered on a petition for post-conviction relief.

Cressey vs. *State of Maine, et al.*, 295.