MAINE REPORTS

139

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

MAY 1, 1942, to MAY 1, 1943

GAIL LAUGHLIN
REPORTER

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HAROLD I. GOSS

SECRETARY OF STATE FOR THE STATE OF MAINE

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PORTLAND, MAINE

JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

HON. GUY H. STURGIS, CHIEF JUSTICE

HON. SIDNEY ST. F. THAXTER

HON. JAMES H. HUDSON

HON. HARRY MANSER

HON. GEORGE H. WORSTER[1]

HON. HAROLD H. MURCHIE

HON. ARTHUR CHAPMAN[2]

[1] Retired July 31, 1942.

[2] Appointed November 4, 1942

JUSTICES OF THE SUPERIOR COURT

HON. ARTHUR CHAPMAN[1]

HON. GEORGE L. EMERY

HON. EDWARD P. MURRAY

HON. ALBERT BELIVEAU

HON. RAYMOND FELLOWS

HON. ROBERT A. CONY

HON. NATHANIEL TOMPKINS

HON. ARTHUR E. SEWALL[2]

[1] Appointed to Supreme Judicial Court November 4, 1942.

[2] Appointed December 17, 1942.

ACTIVE RETIRED JUSTICE OF THE SUPERIOR COURT

HON. WILLIAM H. FISHER

ATTORNEY GENERAL

HON. FRANK I. COWAN

REPORTER OF DECISIONS

GAIL LAUGHLIN

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CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

ANNA K. BISBEE AND ALMON S. BISBEE

vs.

FREELAND A. KNIGHT.

Cumberland. Opinion, May 2, 1942.

Collateral Attack on Judgment.

Where a collateral attack is made upon the validity of a judgment rendered by a court of general jurisdiction, every reasonable presumption will be indulged in to support the judgment, and to that end it will be presumed that all facts necessary to give such a court jurisdiction to render the particular judgment were duly found except where the contrary affirmatively appears.

There is a distinction between the facts giving jurisdiction and evidentiary facts after jurisdiction has been conferred.

Whether, in the instant case, at the time of the absolute conveyance, there was a separate instrument of defeasance executed at that time or as a part of the same transaction, is an evidentiary fact after conferment of jurisdiction.

That being so, it must be presumed, in the instant case, that the Court, before it rendered the conditional judgment and ordered the issue of the writ of possession, had found as a fact that there was such a separate instrument of defeasance, there appearing nothing to the contrary in the original record.

ON APPEAL.

Plaintiffs brought a bill in equity to redeem an equitable mortgage held by the defendant, which the latter had fore-

closed by obtaining possession under a writ of possession issued on a conditional judgment as provided by R. S. 1930, Chapter 104, Section 3, Par. I, and from which foreclosure the mortgagors did not redeem as provided by said Chapter 104. The plaintiffs claimed that the foreclosure was invalid because the mortgage was not of the kind described in Section 1 of said Chapter 104 as possible of foreclosure, inasmuch as, according to plaintiffs' claim, there was no separate instrument of defeasance executed at the time of the absolute conveyance or as a part of the same transaction. Plaintiffs' bill was dismissed. Plaintiffs appealed.

Appeal dismissed. Decree of Court below affirmed. The facts fully appear in the opinion.

Jacob H. Berman,

Edward J. Berman,

Sidney W. Wernick,

Joseph E. Hall,

Willis B. Hall, for plaintiffs.

Robert T. Smith, for defendant.

SITTING: STURGIS, C. J., HUDSON, MANSER, WORSTER, MURCHIE, JJ.

HUDSON, J. This is an appeal from a decree dismissing the plaintiffs' bill in equity brought "for a full and complete accounting, and for directions as to redemption" of an equitable mortgage.

In May, 1930, Mrs. Bisbee held title to certain real estate on Allen Avenue in the City of Portland and Mr. Bisbee to two wood lots in Peru and Woodstock in the County of Oxford. On the Portland property there were three mortgages, the first to the Maine Savings Bank of Portland, the second to a Mr. Wing, and the third to a Mrs. Weinberg.

The second mortgage had been foreclosed and the equity of

redemption had expired when on May 28, 1930, the property therein described was deeded by Mr. Wing to the defendant, Mr. Knight, in pursuance of an arrangement whereby it is claimed Mr. Knight held it only as security and agreed to reconvey it upon receiving payment in full of what he then should have in the property. Claim also was made by the plaintiffs that the defendant then agreed to pay the indebtedness to Mrs. Weinberg, although her interest in the property had been cut off by foreclosure of the Wing mortgage, and further, that to secure Mr. Knight for such payment, Mr. Bisbee deeded the two wood lots to him. On the other hand, Mr. Knight's contention was that these lots were deeded to him only as additional security for money expended in the purchase from Mr. Wing. As a matter of fact, however, the indebtedness to Mrs. Weinberg was not paid by the defendant, but by foreclosure (not here contested as to validity) Mr. Knight obtained title to the wood lots.

While in this bill redemption originally was sought of both the Portland and Oxford Country real estate, yet the plaintiffs now contend only for right of redemption of the Portland property, their only claim now being that the foreclosure of the equitable mortgage on the latter was invalid as a matter of law.

On August 18, 1932, Mr. Knight brought a writ of entry against Mr. and Mrs. Bisbee to obtain possession of the Portland property as a mode of foreclosure of his equitable mortgage. R. S. 1930, Chap. 104, Sec. 3, Par. I. Other means of foreclosure (not here material) are provided by the same section. Sec. 4 of the same chapter provides that "Possession obtained in either of these three modes, and continued for one year, forever forecloses the right of redemption."

By agreement dated November 5, 1932, the writ of entry was defaulted and continued for rendition of a conditional judgment in the sum of $2,950 and issue of a writ of possession. Judgment was rendered January 2, 1933 and on May 12, 1933 Mr. Knight took possession under the writ of possession, which

he has since maintained. There having been no redemption, he now claims absolute title as a defense to this action to redeem. But, in turn, plaintiffs herein contend that the foreclosure was invalid, because unauthorized under said statute. They rely on its Sec. 1, which reads:

> "Mortgages of real estate, mentioned in this chapter, include those made in the usual form, in which the condition is set forth in the deed, and those made by a conveyance appearing on its face to be absolute, with a separate instrument of defeasance executed at the same time or as part of the same transaction."

This statute found its first expression in Sec. 1 of Chap. 125, R. S. 1840. The last clause of the present statute then read, "... with a separate instrument of defeasance of the same date and executed at the same time." In R. S. 1857, Chap. 90, Sec. 1, this section was changed to read as it now appears in said Sec. 1 of Chap. 104, R. S. 1930.

The plaintiffs claim that when the deed was given by Mr. Wing to the defendant, it was an absolute conveyance *with only an oral agreement of defeasance.* We do not find it necessary, however, to decide whether an equitable mortgage with only an oral agreement is forecloseable under this statute, that is, whether the statute is exclusive or not, for we do not consider that the plaintiffs have a right to attack collaterally the judgment rendered in the former action. It has not been made to appear that an inspection of the record therein would show that that judgment was rendered on a finding of fact that there was or was not a separate instrument of defeasance executed at the same time or as part of the same transaction. If in the former action it were found that there was a separate written instrument of defeasance, the statute, clearly, would apply.

In the present action, a collateral attack is being made upon the validity of a judgment rendered by a court of general jurisdiction. As to such, every reasonable presumption will be in-

dulged in to support the judgment and "it will be presumed in such a case that the court had jurisdiction both of the subject matter and of the person, and that all the facts necessary to give the court jurisdiction to render the particular judgment were duly found, except where the contrary affirmatively appears.... It will also be presumed ... that plaintiff was entitled to maintain the action; ... that the judgment was supported by the pleadings and proof." 34 C. J., Sec. 841, pages 537-541.

In 31 Am. Jur., Sec. 414, on page 78, entitled "Of Jurisdiction," it is stated:

> "Under this rule, a judgment is supported not only by a presumption that the court had jurisdiction of the subject matter, but by a presumption that the court had jurisdiction of the parties as well. *The presumption is that the court acted within the general scope of its powers, and that the judgment was rendered with authority.*" (Italics ours.)

Also see *Wade* v. *Hurst, et al.*, 143 Ga., 26, 84 S. E., 65, on page 66; *Hancock* v. *Tifton Guano Co.*, 19 Ga. App., 185, 91 S. E., 246; *Gladden* v. *Chapman*, 106 S. C., 486, 91 S. E., 796; *Amos* v. *Massey*, 140 Ky., 54, 130 S. W., 950; *Gibson* v. *Oppenheimer*, Tex. Civ. App., 154 S. W., 694.

In *Glidden-Felt Mfg. Co.* v. *Robinson*, 163 Mo. App., 488, 143 S. W., 1111, it is stated on page 1114, S. W.:

> "It goes without saying that it was open to defendants, in the suit upon which the judgment was founded, to have there raised the defense that the plaintiff was not a corporation or one authorized to do business in this state. Whether he then and there raised that or not, judgment went in favor of plaintiff as a corporation; it is a judgment of a court of record, a court of general jurisdiction, and the presumption is irrefutable, by plea or proof, that plaintiff, when it recovered judgment, was a corporation and entitled to maintain the action."

Also see *Morgan* v. *Chicago & N. W. Ry. Co.*, 167 Wis., 48, 166 N. W., 777, for this statement:

> "Obviously such determination must be based upon the evidence then before the court, and it cannot be presumed in an action such as this, where the validity of that order is collaterally questioned, that the court did not have before it, upon the face of the record, facts sufficient to confer jurisdiction, if, indeed, the question can be considered at all in a collateral attack upon the validity of the order."

In *Penobscot R. R. Co.* v. *Weeks*, 52 Me., 456, this Court stated on page 459:

> "The records of courts of limited jurisdiction, and of foreign courts, may sometimes be contradicted by plea and proof, when the purpose is to show want of jurisdiction; but the records of domestic courts of general jurisdiction cannot be thus contradicted,—it can only be done when proceedings are instituted for the express purpose of setting them aside.
>
> "But the records of all courts are liable to be impeached if it can be done by inspection alone; and if such inspection discloses want of jurisdiction over the person of the defendant, the judgment as against him will be void for every purpose."

In *Blaisdell* v. *Pray*, 68 Me., 269, this Court also stated on page 272:

> "But it is equally well settled that in the case of a court of general jurisdiction, unless the want of jurisdiction appears by the record itself, the judgment is regarded as valid and binding until reversed, and not liable to be impeached when collaterally attacked. . . ."

Also see *Treat* v. *Maxwell*, 82 Me., 76, on page 79, 19 A., 98, and *Tourigny* v. *Houle*, 88 Me., 406, on page 408, 34 A., 158.

But it may be objected that the presumption arises only where the former proceedings are according to the course of common law and are not founded on statute. This is so held in *Prentiss* v. *Parks,* 65 Me., 559, where "the proceedings, as a whole," were held not to be "according to the common law" and so the former judgment was adjudged a nullity in a collateral proceeding. However, the decision in that case was clarified in *City of Rockland* v. *Inhabitants of Hurricane Isle,* 106 Me., 169, 76 A., 286. In the latter case, which had to do with the validity of a prior naturalization, it was claimed that it was invalid because the record did not disclose "that the applicant had resided in this State one year prior to the application, the defendant's legal position being that such residence is requisite in order to give this court any jurisdiction over the cause, and as in naturalization proceedings this court has only a special jurisdiction, not in the course of the common law, but conferred by federal statute, the record must on its face show the existence of all facts necessary to confer such jurisdiction or it is void." *City of Rockland* v. *Inhabitants of Hurricane Isle,* supra, 106 Me., on page 170, 76 A., on page 286.

But the Court therein distinguished between "facts giving jurisdiction" and "evidentiary facts after jurisdiction has been conferred" and held that the required residence in the State for one year was only a matter of proof. This distinction is confirmed in *Thompson, Appellant,* 116 Me., 473, on page 480, 102 A., 303.

Here the statute under consideration conferred upon a court of general jurisdiction the right to adjudge foreclosure not only of legal but of equitable mortgages upon proof of certain facts. We consider that whether there existed the required separate instrument of defeasance was an evidentiary fact after conferment of jurisdiction just as much as was the year's residence in the City of Rockland case, supra. That being so, it must be presumed that the Court, before it rendered the conditional judgment and ordered the issue of the writ of possession, had found as a fact that there was such "a separate instrument of

defeasance," there appearing nothing to the contrary in the original record.

Appeal dismissed.
Decree below affirmed.

INHABITANTS OF TOWN OF MEXICO
vs.
INHABITANTS OF MOOSE RIVER PLANTATION.

Oxford. Opinion, May 9, 1942.

Pauper Settlement. Disputed Facts.

In the case of a disputed question of fact it is the province of a referee to determine the facts and the reasonable inferences and conclusions to be drawn therefrom.

When a man leaves a town and has no habitation there, there is no presumption that he intends a temporary absence and has a continuing purpose to retain it as his home nor, on the other hand, is there any presumption that he has no such intention.

The burden is upon the party setting up the five years' continuous residence to prove it.

ON EXCEPTIONS TO ACCEPTANCE OF REFEREE'S REPORT.

The action was for reimbursement to the Town of Mexico for supplies furnished to one Edgar Dayon and his wife. The only issue was whether the plaintiff town was entitled to reimbursement on the ground that the pauper Dayon had a derivative pauper settlement in Moose River Plantation. The facts were in dispute. The Referee evidently decided from the evidence that continuity of the residence of the Dayon family in Moose River Plantation had been interrupted by removal therefrom to the town of Jackman for a considerable period of time and decided in favor of defendants. Plaintiffs excepted. Exceptions overruled. Case fully appears in the opinion.

Fred E. Hanscom, Rumford, for plaintiffs.

Clayton E. Eames, Skowhegan, for defendants.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

MANSER, J. On exceptions to the acceptance of a Referee's report. The action is for pauper supplies furnished to Edgar Dayon and his wife by the Town of Mexico beginning November 6, 1939. The only issue involved is whether the plaintiff town was entitled to reimbursement from the defendant, Moose River Plantation, upon the contention that Edgar Dayon had a derivative pauper settlement therein.

Edgar Dayon was born in May 1909. At that time, his parents lived in Jackman, Maine, but in 1916 moved to Moose River Plantation. These places adjoin and are organized plantations.

The Jackman Lumber Co. had a place of business in Jackman and a large saw mill in Moose River Plantation. The father, variously called Napoleon and Paul Dayon, was employed by this concern as a locomotive fireman, it appearing that the Lumber Co. operated a short line of railroad for its own purposes in transporting materials between its mill and its place of business.

In 1925, the mill burned and was not rebuilt. The family then moved away and the father did not acquire a pauper settlement in any other town before his son, Edgar Dayon, became of age in 1930. It is conceded that the father received no pauper supplies from 1916 to 1925. It is also admitted that Edgar Dayon has not acquired a pauper settlement in his own behalf since he became of age in 1930 for two reasons, that he has received pauper supplies at intervals since 1933, and has not lived for five years continuously in any one town.

If the father lived continuously in Moose River Plantation from 1916 to 1925, without receiving pauper supplies, he thereby acquired a pauper settlement which would constitute the derivative settlement of Edgar Dayon, his minor son, and which would continue to be the settlement of Edgar Dayon until he had acquired one himself after he became of age. R. S.,

c. 33, § 1, Par. II and V, as amended P. L. of Maine 1935, c. 186.

The question of fact presented, however, was whether the father did live continuously for more than five years in Moose River Plantation. It is not disputed that another fire occurred at the Jackman Mill in 1920, which caused considerable destruction of buildings and also seriously damaged machinery. For a period from at least August 1920 to March 1921, the plant was being rehabilitated and was not being operated for business. There were, however, a number of employees who remained to assist in the reconstruction. Defendant introduced evidence tending to show that the Dayon family moved back to Jackman after the fire occurred, and lived in a house owned by the father until the plant was put into operation in the spring of 1921. There was testimony from a grocer and his clerk that groceries were delivered to the family in Jackman during that period. On the other hand, Mrs. Gilbert, a daughter of Mr. Dayon, who was married in 1920, testified that she was then living with her husband, Fred Gilbert, in Moose River and remained there until 1926; that her father also continued to live in Moose River after the first fire and remained at work for the Jackman Lumber Co.

This testimony presented a disputed question of fact. Neither the pauper nor any other relative testified.

It is evident that the Referee decided from the evidence that continuity of the residence of the Dayon family in Moose River Plantation was interrupted by removal to the town of Jackman for a considerable period of time in 1920 and 1921.

The only other issue which could then arise is stated in *Moscow* v. *Solon,* 136 Me., 220, 7 A. (2d), 729, and *Ripley* v. *Hebron,* 60 Me., 379, to the effect that when a man leaves a town and has no habitation there, there is no presumption that he intends a temporary absence and has a continuing purpose to retain it as his home, nor, on the other hand, is there any presumption that he has no such intention. The burden, however, is upon the party setting up the five years' continuous residence, to prove it. It must be shown affirmatively that

the legal home remained there, notwithstanding the absence. In this case, however, there was no attempt to offer such proof because the plaintiff insisted that there had been no absence, temporary or otherwise, but instead an actual physical continuous residence in Moose River Plantation.

It was the province of the Referee to determine the facts, and the reasonable inferences and conclusions to be drawn therefrom. There was credible evidence to support his decision, and thus finality is reached. *Hovey* v. *Bell*, 112 Me., 192, 91 A., 844.

Exceptions overruled.

STATE OF MAINE *vs.* WILLIAM BERUBE.

York. Opinion, May 9, 1942.

Criminal Law. Admission and Exclusion of Evidence. Effect of Denial of Motion for New Trial.

The only machinery provided by statute to carry the denial of a motion for new trial to the Supreme Judicial Court for review is by appeal. R. S. 1930, Chapter 146, Section 27. In the absence of such an appeal, denial in the trial court represents final adjudication upon all the allegations of the action.

Testimony of acts of a respondent, of earlier happening than the offense charged in an indictment, committed upon the person named therein as the victim of an alleged crime, is admissible to show relationship between the parties.

Cross-examination of a respondent seeking admissions as to his declarations, introduced in evidence in the establishment of the State's case without objection, does not constitute prejudicial error.

Defense testimony intended to establish prejudice against a respondent on the part of the mother of a female minor, named in an indictment as the victim of his alleged crime, is not admissible in the absence of evidence connecting that mother with the prosecution.

Negative testimony concerning noise or other unusual circumstance, at the time and place of an alleged crime, is not material where the record suggests no such noise or circumstance as incidental to the commission thereof.

A municipal court complaint charging a respondent with a crime different from the one alleged in an indictment upon the basis of the identical facts charged therein is not material evidence in the trial of such respondent under the indictment.

ON EXCEPTIONS BY RESPONDENT.

Respondent was convicted of a violation of Section 6 of Chapter 135 of the Revised Statutes. His exceptions related to the admission of testimony concerning earlier acts, similar to the crime alleged, with the same female minor, admitted for the limited purpose of showing the relationship between the parties, and to the allowance of cross-examination of respondent intended to secure admissions as to his declarations made to a witness for the State who had been permitted to testify, without objection, that such admissions had been made. Complaint as to the exclusion of testimony related to evidence offered by him to prove that he had had trouble with the mother of the minor prior to the date of the alleged offense, and that she had made threats against him, and the absence of noise or other unusual circumstances at the time and place of the alleged crime. The mother of the female minor was not shown to have been connected in any way with the prosecution, and did not appear as a witness. The exclusion of a copy of a municipal court complaint against the respondent alleging a different crime on the basis of the identical facts prosecuted under the indictment was the basis of an additional exception.

Exceptions overruled. Judgment for the State. Worster and Hudson, JJ., dissented.

The case fully appears in the opinion.

Harold D. Carroll, County Attorney, York County, for the State.

Armstrong & Spill by *Richard H. Armstrong,*

Merle C. Rideout, Jr., for the respondent.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

MURCHIE, J. This case come to the Court on exceptions by a respondent convicted in the Superior Court under an indictment charging a violation of the provisions of Section 6 of

Chapter 135 of the Revised Statutes. The exceptions requiring consideration relate to the admission of two items of testimony against the objection of the respondent and to the exclusion of four items of testimony offered in his behalf. Exception in each case was properly taken and allowed.

In addition to these exceptions, counsel for the respondent noted an exception to the action of the justice in the Trial Court in denying a motion for a new trial. The bill of exceptions recites that "an application for appeal" was made a part of the bill of exceptions, but neither the record, nor the docket entries which are a part of it, shows that an appeal was taken.

The requirements of proper practice have been so frequently stated in this regard that it seems unnecessary to do more than call attention to the very complete review of Mr. Justice Wilson in *State* v. *Dodge*, 124 Me., 243, 127 A., 899, and note that the only machinery provided by statute to carry the denial of a motion for new trial to this Court for review is by appeal. R. S. (1930), Chap. 146, Sec. 27. In the absence of such an appeal, denial in the Trial Court represents final adjudication upon all the allegations of the motion. The issue before this Court involves only the question as to whether any evidence was improperly admitted or excluded.

The respondent complains as to the admission of testimony that the female minor named in the indictment was permitted, over objection, to testify to acts of earlier happening between the parties, similar to the offense charged, and relies upon *State* v. *Acheson*, 91 Me., 240, 39 A., 570. The principle declared in that case is not applicable to the present. There evidence of offenses similar to the one charged was admitted not for the purpose of showing intent or relationship between the parties but as proof of such other substantive offenses, upon the express condition, declared by the Court, that the prosecution would be required, before the case was submitted to the jury, to elect which one of the several offenses covered by the testimony was being prosecuted. Decision hinged upon an exception to the charge alleging that it was inadequate and mis-

leading in view of the absence of election and the fact that testimony about four independent acts of assault, committed on different dates, had been introduced. In the instant case we have no exception to the charge nor could one have been taken, since the testimony was admitted only for the purpose of showing the relationship between the parties, for which it was entirely proper. *State* v. *Witham,* 72 Me., 531; *State* v. *Williams,* 76 Me., 480; *State* v. *Bennett,* 117 Me., 113, 102 A., 974; *State* v. *Buckwald,* 117 Me., 344, 104 A., 520; *State* v. *Morin,* 126 Me., 136, 136 A., 808. In point of fact the danger of misapprehension was eliminated by a special instruction given to the jury after consultation with counsel to the effect that respondent was not being tried "upon what occurred before the offense complained of" in the indictment.

As to the second item of admitted testimony of which the respondent complains, the County Attorney was permitted, against objection, to interrogate the respondent in cross-examination as to whether or not he had told the chief of police about (1) having other little girls go to his home, and (2) paying money to such other little girls. It is sufficient answer to the exception that neither of the replies elicited any admission from the respondent which could have operated to prejudice him, but it may be noted also that direct testimony had already been given on both points by the witness referred to and that no objection was interposed when the evidence was first introduced into the case.

As to the exclusion of evidence, the respondent complains that he was not permitted to interrogate (1) the female minor to whom the offense charged relates, and who testified for the State, as to trouble between her mother and the respondent, (2) one presumably disinterested witness, who testified for the defense, as to unusual noises or anything else in connection with the respondent, or his tenement, at the approximate time the offense is alleged to have been committed, (3) another presumably disinterested defense witness as to whether threats had been made against the respondent by said mother, and

(4) to introduce a copy of a complaint and warrant issued from the Municipal Court charging the respondent with a different offense against the particular female minor based upon the identical occurrence to which the indictment relates.

As to the first and third of these points, the testimony relative to trouble between the mother of the minor and the respondent, and threats made against the respondent by that mother, reliance is placed upon the general statement of law set forth in 52 C. J., 1056, Section 81, that a defendant may introduce any competent evidence, either direct or circumstantial, to show that a particular charge against him was concocted by a prosecutrix *or others* (italics ours). Notwithstanding the relationship between parent and child, the record does not disclose that the mother (another within the rule stated) had any connection with the charge, the indictment or any part of the proceedings. She did not appear as a witness, and the testimony is specific that the child did not report the alleged occurrence to her but rather to a third party. There is nothing in the case which would so connect the mother with it as to justify the admission of testimony referring either to trouble between her and the respondent or to her threats against him.

The testimony excluded as to the absence of noise or other unusual circumstances at the scene of the alleged crime at the approximate time thereof was not merely negative in character, which would not necessarily render it inadmissible, but under the particular facts so remote from the issue as to be entirely immaterial, since there was no suggestion in the case that the minor female made any protest, or offered any resistance, which would have created noise or disturbance, or otherwise attract attention to her presence upon the premises. No foundation was laid for the introduction of the evidence excluded on this point.

The exclusion of the Municipal Court record constituted no prejudice against the respondent. The copy of the complaint, which was identified as Respondent's Exhibit No. 1, does not

appear in the record. It may be proper to infer, although the record is silent, that a different offense was charged therein, as is recited in the bill of exceptions, but if that inference is proper, this Court must recognize not only that indictments returned by a Grand Jury represent the judgment of its members as to the exact offense indicated by the evidence adduced before them, but that there is a very distinct line of demarcation between the crime of rape, which is that stated in the bill of exceptions to have been charged in the Municipal Court, and the offense alleged in the indictment, which was adequately proved by testimony in the case if believed by the jurors as the verdict shows it must have been.

We find no prejudicial error in either the admission or the exclusion of the testimony to which the exceptions relate. This leaves for consideration one additional question, raised by counsel for the respondent in argument, that notwithstanding the requirements of the 18th Rule governing practice in our Superior Courts, an entire charge may be considered, in the absence of particular exceptions, to determine whether the jurors may have been misled as to the exact issue requiring decision. The charge before us shows the case submitted to the jury under proper instructions on the evidence presented. The verdict indicates that the jury believed the evidence of the State rather than that offered by the respondent and his witnesses. The case does not fall within the exception to Rule 18 which has been carefully limited by this Court in numerous cases reviewed in the recent decision *Roberts* v. *Neil,* 138 Me., 105, 22 A. (2d), 135, cited, and relied on, in the respondent's brief. *McKown* v. *Powers et al.,* 86 Me., 291, 29 A., 1079; *Pierce* v. *Rodliff,* 95 Me., 346, 50 A., 32; *State* v. *Wright,* 128 Me., 404, 148 A., 141; *Inhabitants of Trenton* v. *City of Brewer,* 134 Me., 295, 186 A., 612.

Exceptions overruled.
Judgment for the State.

WORSTER, J., dissenting. I am unable to concur in the majority opinion.

The respondent was required to answer, over his objection, and subject to his exception, the following question:

> "Do you remember telling the Chief of Police you had little girls go up there and you paid them twenty-five cents, fifty cents and a dollar?"

As I view it, this question was inadmissible, and highly prejudicial, and its admission was not rendered harmless by the respondent's answer or by any other testimony disclosed by the record.

Exception sustained.

HUDSON, J., dissenting. I concur in the dissent of Mr. Justice Worster.

FLORENCE LEWIS *vs.* H. L. MARSTERS.

York. Opinion, May 13, 1942.

Exceptions to Decision in a Jury-Waived Case. Rescission of Contract.

It is too late to claim that exceptions are not properly before the Supreme Judicial Court when the bill of exceptions was allowed by the presiding justice and the plaintiff's attorney had signed a memorandum consenting thereto.

Exceptions will not lie to the decision of a presiding justice in a jury-waived case heard on an agreed statement of facts if the decision is supported by the agreed facts or by inferences which may be properly drawn therefrom.

Parties to a contract which has not been fully performed on either side may rescind it by mutual consent.

A rescission, by mutual consent, of a contract which is still executory on both sides, constitutes a new contract, supported by a sufficient consideration, for the release of one is sufficient consideration for the release of the other.

Whether or not such an executory contract has been rescinded by mutual consent is a question of fact which need not be proved by express terms, but may be inferred from the attendant circumstances and the conduct of the parties.

A rescission by mutual consent, of an executory contract not fully performed on either side, may properly include an undertaking by either or both parties to make restitution, as a part of the contract of rescission.

ON EXCEPTIONS BY DEFENDANT.

Action on an agreed statement of facts for recovery of a balance claimed by plaintiff to be due from defendant. In February, 1941, the plaintiff entered into a written contract with the defendant to purchase a Chevrolet automobile turning in, in part payment, a 1938 Ford coupe. Defendant sold the Ford car per agreement, receiving altogether the sum of $400.00, from which he paid a balance of $200.00 due to a finance company and deducted the sum of $45.12 for repairs, commissions, etc. This left a balance of $154.88 due the plaintiff. Subsequent to the sale of the Ford, the plaintiff informed the defendant that she could not purchase the Chevrolet. The defendant thereupon promised the plaintiff that he would turn over to her the balance of $154.88 and sent her a check for $100.00 with a marginal notation that it was "a portion of credit she had toward new car leaving a balance of 54.88." This action was brought to recover that balance. Defendant contended that his promise to pay said balance was without consideration and void. Judgment was for the plaintiff, and defendant excepted thereto. Exceptions overruled. The case fully appears in the opinion.

Armstrong & Spill by *Richard H. Armstrong,* for plaintiff.

Edwin G. Walker,

Clarence B. Rumery, for defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

WORSTER, J. The case was heard below by the presiding justice, without a jury, upon an agreed statement of facts. Decision was for the plaintiff, and the matter is brought here on the defendant's exceptions.

The plaintiff claims that the exceptions are not properly before us, because the right to take exceptions had not been reserved. But it is too late to raise that point. The bill was allowed by the presiding justice, and the assent of the plaintiff thereto is shown by the "seen and agreed to" memorandum thereon, signed by her attorney. See *Graffam* v. *Casco Bank & Trust Company*, 137 Me., 148, 16 A. (2d), 106.

Frank v. *Mallett*, 92 Me., 77, 42 A., 238, and *Stern* v. *Fraser Paper, Limited*, 138 Me., 98, 22 A. (2d), 129, cited by the plaintiff in argument, do not support her contention. In the original case of *Stern* v. *Fraser Paper, Limited*, referred to in the last cited case, and in *Frank* v. *Mallett*, supra, no bill of exceptions was allowed by the presiding justice, and so the point presented here was not involved in those cases.

The defendant's bill of exceptions is properly before us.

Exceptions, however, will not lie to the decision of a presiding justice in a jury-waived case, heard on an agreed statement of facts, if the decision is supported by the agreed facts, or by inferences which may properly be drawn therefrom. But, in the instant case, the defendant contends that, on the facts presented, the decision rendered is erroneous as a matter of law. We think otherwise.

It appears from the agreed statement of facts, when considered in connection with the so-called purchase contract thereto attached and made a part thereof, that on February 5, 1941, the plaintiff, in writing, ordered of the defendant a certain type of a 1941 Chevrolet automobile, for $849, to be delivered on or about June 1, 1941. That contract was accepted by the defendant, in writing, on said February 5th. On the face of the contract, sometimes called an order, there appears the following sentence:

> "The front and back hereof comprise the entire agreement affecting the order and no other agreement or understanding of any nature concerning same has been made or entered into."

And, on the back of that order, among other provisions, appears this statement:

> "The order on the reverse side hereof is subject to the following terms and conditions which have been *mutually* agreed upon." (The italics are ours.)

This last-quoted statement is followed by provisions covering certain possible contingencies, among which are provisions relative to the allowance to the seller, of commissions, losses and damages, in case the purchaser should fail or refuse to complete the purchase.

On this trade, the plaintiff delivered to the defendant a used 1938 Ford car, at an agreed price of $400. Out of that amount, the defendant paid a finance company $200, covering the balance due it on the Ford. The remaining $200 was credited to the plaintiff on the purchase price of the Chevrolet, leaving a balance due of $649.

On March 20, 1941, in accordance with one of the provisions appearing on the back of the order, the defendant sold the Ford for $350, for which he received $150 in cash and a 1937 Ford which he afterward sold for $250.

On April 19, 1941, the defendant was informed by the plaintiff that she could not purchase the Chevrolet. Thereupon the defendant promised her, in substance, that he would turn over to her the proceeds received from the sales of both the Fords, after deducting therefrom the cost of repairs, the amount paid the finance company, and his commissions, computed at a certain amount then stated. This left a balance due the plaintiff of $154.88, and, on April 29, 1941, pursuant to said promise, the defendant caused a check for $100 to be delivered to the plaintiff, on which appeared the following marginal notation:

> "A portion of credit she had toward new car leaving a balance of 54.88."

This action is brought to recover the last mentioned balance of $54.88.

The defendant contends, in substance and effect, that the plaintiff cannot recover, because, he says, the promise of the defendant, relied upon by the plaintiff, was without consideration and void. That contention cannot be sustained. Undoubtedly the contract was completed when the defendant accepted the plaintiff's order. Thereupon the plaintiff became bound to purchase the Chevrolet upon the terms and conditions stated in the order, subject to the provisions on the back thereof, upon which the parties had mutually agreed; and the defendant, by his acceptance, impliedly agreed to sell and deliver the Chevrolet to the plaintiff upon the same terms and conditions, and subject to the same provisions.

For "a seller who takes a written order or agreement to buy, thereby not only assents to receive the buyer's promise, but also impliedly agrees to sell." 1 Williston on Contracts, revised edition, sec. 90, page 254.

But at the time the plaintiff informed the defendant that she could not purchase the Chevrolet, and at the time he made the promise relied on here, the purchase contract was executory on both sides. The plaintiff had yet to pay the balance due, and, upon payment thereof at the appointed time, the defendant would be required to complete the performance of his part of the contract by delivering the Chevrolet to her.

Parties to a contract which has not been fully performed on either side, may rescind it by mutual consent. 12 Am. Jur., sec. 409, page 988.

This right of rescission is entirely distinct from the right of one of the parties to a contract to rescind it for cause, against the consent of the other, and from the right to rescind it pursuant to some provision in the contract. 17 C. J. S., sec. 386, page 878; *Ogg* v. *Herman et al.*, 71 Mont., 10, 227 P., 476.

A rescission, by mutual consent, of a contract which is still executory on both sides, constitutes a new contract, supported by a sufficient consideration, for "the release of one is sufficient consideration for the release of the other." *Savage Arms Corporation, Appt.* v. *United States,* 266 U. S., 217, 69 Law ed.,

253, 46 S. Ct., 30 and cases there cited; 12 Am. Jur., sec. 409, page 988; 17 C. J. S., sec. 391, page 883.

Whether or not such an executory contract has been rescinded by mutual consent is a question of fact which need not be proved by express terms, but may be inferred from the attendant circumstances and the conduct of the parties. 6 Williston on Contracts, revised edition, sec. 1826; *Wheeden* v. *Fiske et al.*, 50 N. H., 125; see, also, note 74 Am. Dec., 657.

What, then, is the fair inference to be drawn from the attendant circumstances and the conduct of the parties in the instant case?

It must be borne in mind that the Chevrolet was not to be delivered until on or about June 1, 1941, and then it was to be delivered as a cash sale. There is no evidence of breach of contract by the plaintiff, or of any refusal on her part to complete the purchase, unless the statement made by her to the defendant in April of that year, to the effect "that she could not purchase the" Chevrolet can be so construed. But it is unnecessary to determine the legal effect of that statement as of that time (see *South Gardiner Lumber Company* v. *Bradstreet et al.*, 97 Me., 165, at page 172, 53 A., 1110) for it is plainly indicated by the very terms of the settlement made by the parties during that April that they did not adjust their differences on the basis of a breach of contract or refusal of the plaintiff to complete the purchase. None of the contractual provisions applicable in such events were complied with. They were utterly ignored by the parties. Nothing was allowed to the defendant for any alleged losses or damages, and even the commissions agreed upon for selling the Fords were less than he would have been entitled to receive under the contract, if it had been terminated through the fault of the plaintiff. Since none of these contractual provisions were followed and complied with, it is but fair to infer, in the light of the record as a whole, that the parties did not agree to settle on the basis of a breach of contract or refusal of the plaintiff to complete the

purchase. The settlement not having been made on either of those grounds, the inference is that, for reasons best known to themselves, the parties rescinded their contract by mutual consent, while it was still executory on both sides, and, by agreement, endeavored to place each other as nearly in statu quo as could possibly be done in the changed circumstances in which they found themselves, as they had a perfect right to do.

A rescission by mutual consent, of an executory contract not fully performed on either side, may properly include an undertaking by either or both parties to make restitution, as a part of the contract of rescission. See 6 Williston on Contracts, revised edition, sec. 1826, supra; See, also, Restatement of the Law of Contracts, sec. 409.

Therefore, the promise of the defendant, as a part of their valid contract of rescission, that he would turn over to the plaintiff the proceeds received from the sales of the Fords, less the deductions above mentioned, was supported by a sufficient consideration, and this action is maintainable. There was no error in the decision of the presiding justice.

Cases applicable to substituted or modified contracts under which other and different obligations were assumed by the parties, are not in point. In such cases a contract to be performed still continues to exist, but in a changed form. Here the contract, having been rescinded, no longer exists.

The conclusion at which we have arrived renders it unnecessary to analyze and discuss the authorities cited in the defendant's brief.

The provisions on the back of the order, relative to the rights of the defendant in case the plaintiff failed or refused to complete the purchase, were rendered nugatory by the rescission, by mutual consent, of the executory contract of which they were a part.

Exceptions overruled.

THE OSTEOPATHIC HOSPITAL OF MAINE

vs.

CITY OF PORTLAND.

Cumberland. Opinion, May 21, 1942.

Taxation of Benevolent and Charitable Institutions, Exemptions. Ruling of Referee on Questions of Law Reviewable.

In view of the indisputability of the facts in the instant case and the conclusions to be drawn therefrom, the accuracy of the rulings of the Referee was one of law and was open for consideration by the Supreme Judicial Court.

The rule that the use of property at the time a tax is assessed determines whether the property is or is not exempt from taxation is not arbitrarily controlling or decisive. It is the actual appropriation of its property by a benevolent institution for the use for which the institution is organized and not the physical use on the exact day of the assessment which controls.

Determination as to exemption in the case of benevolent and charitable institutions depends upon whether there is an actual appropriation of the property for which exemption is claimed to the purposes of the institution. Upon the whole record, in the instant case, there clearly appears to have been such appropriation by the plaintiff. Because the purposes had not all attained fruition, uncertainty as to the exact time of fulfillment of a definite scheme of development to which plaintiff corporation was distinctly committed did not preclude exemption.

It was error on the part of the Referee to restrict the application of the exempting statute to land actually and physically currently used by the plaintiff for its own purposes. Such rule has effect under the statute relative to purely religious institutions. (R. S. 1930, Chapter 13, Section 6, Par V.) The applicable rule as to the plaintiff, however, is Paragraph III of said Section 6 of Chapter 13, R. S. 1930.

ON EXCEPTIONS TO ACCEPTANCE OF REPORT OF REFEREE.

The assessors of the City of Portland assessed a tax on a portion of the real estate of the plaintiff corporation for the year 1940. The plaintiff paid the tax under protest and brought this action to recover the amount paid, upon the claim that it was entitled to exemption upon the entire tract. The action was referred. The Referee decided in favor of the defendant,

ruling, in effect, that the right of the plaintiff to tax exemption must be determined in the light of the use being made of the property on the date of the assessment April 1, 1940; that the land taxed was not shown to be occupied for its own purposes; that although the land taxed was held for intended use by the plaintiff, such use was to be at some indefinite future time, and the land was therefore currently taxable.

Plaintiff excepted. Exceptions sustained. The case fully appears in the opinion.

Jacob H. Berman,

Edward J. Berman,

Sidney W. Wernick, for plaintiff.

W. Mayo Payson, Corporation Counsel, for defendant.

SITTING: THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

MANSER, J. The Osteopathic Hospital of Maine, Inc., was incorporated in 1935 and for some years conducted a hospital on Pleasant Ave. in Portland. Finding the premises insufficient for its expanding needs, the corporation acquired other property in Portland which had been used as a private hospital. This was effected March 15, 1940. The tract of land purchased contains approximately 5 acres and extends from Brighton Ave. to Prospect St. in Portland.

For the purposes of taxation, however, the assessors divided the tract into two parcels, assessing one and exempting the other. The exempted plot has a frontage of 220 ft. on Brighton Ave. and extends back to the rear of two vacant lots which border on Prospect St. Upon this lot are the buildings, and the present hospital is located so that its northerly side wall is 50 ft. southerly of the dividing line. The remainder of the land was taxed. It has a frontage on Brighton Ave. of 185 ft. It contains approximately 2½ acres, and consists of a wooded pine grove and some vacant land, including the two lots fronting

on Prospect St. No actual physical demarcation was made. There are no fences or markers.

By their action the assessors conceded that the Hospital was a benevolent and charitable institution and was entitled to tax exemption of so much of its real estate as was "occupied for its purposes" as provided by R. S., c. 13, § 6, Par. III. The Referee found such to be the fact, and the record amply supports the finding.

The hospital paid the tax under protest and brought this action to recover back the amount paid. The Referee reported that judgment should be for the defendant.

The case comes forward on exceptions to the acceptance of the Referee's report. The gist of the exceptions is that the Court should not have accepted the report because the Referee erred in finding and ruling

> that the right of the hospital to tax exemption must be determined in the light of the use being made of the property on the date of the assessment, April 1, 1940;
>
> that the Referee erred in concluding as a matter of law that, under the evidence, the land taxed was not shown to be occupied for its own purposes;
>
> that although the Referee properly found the land taxed was held for intended use by the hospital, it was error to hold that such use was to be at some indefinite future time, and the land was therefore currently taxable.

Aside from a stipulation as to certain facts not now in issue, the record upon which the Referee made his rulings consisted of the testimony of Dr. Campbell, the Treasurer of the hospital. On March 15, 1940 the hospital conveyed the property it then owned to Dr. Westcott and purchased from him the property now owned at the price of $30,000, the original property being valued at $12,500 in exchange. At the time of the conveyance, there were 24 beds in the original hospital and the business having doubled in four years and being consistently

on the increase, the present facilities were obtained. At the time of the hearing, there were 35 beds, an elevator and sprinkler had been installed, and a garage was being remodeled for staff meetings and quarters for hospital interns. The property was bought as one parcel. With reference to utilization of the property, Dr. Campbell testified:

> "We hope to be able in time to enlarge our hospital. We feel certain we are going to have to. (This has reference to the present building which was exempted from taxation.) We will, of necessity, have to provide quarters for our nurses, as a nurses' home. We will build a solarium. Over there near the woods, in the grove, or near the grove, we intend to put rest places where patients may be taken by the nurses during their convalescence. We intend to use the entire hospital property for hospital uses. "

The Doctor further testified that it was not the intention to sell any part of the property or to use it for any purpose not connected with the hospital work. He further said:

> "We had the opportunity of purchasing this property from Doctor Wescott, to give the hospital proper setting, proper quietness, and sufficient land there to meet any necessities for future development, and that is the reason why we exchanged property with Doctor Wescott."

The Referee, evidently relying upon the theory that present use was essential to tax exemption, elicited the fact that the only buildings then occupied were the hospital and garage, and that the grove and vacant land were not in actual use except as patients and nurses walked therein and occupied chairs scattered throughout the grove. Further, that there had been no definite determination as to the location of the proposed solarium and nurses' home, although the witness testified that an appropriate site for the home would be on one of the vacant lots fronting on Prospect St.

The first ruling complained of is as follows:

> "All taxes are assessed in this state as of the first day of April of each year. It is the use of the property at the time when a tax is assessed which determines whether the property is or is not exempt from taxation."

Such rule is not arbitrarily controlling or decisive. In *Camp Emoh Associates* v. *Lyman,* 132 Me., 67, 106 A., 59, 60, the plaintiff corporation acquired property for the erection and support of camps for the care, maintenance and assistance of poor and indigent Jewish children. In 1930, the corporation had on its land a group of camps. The property was assessed for taxes. During July and August of that year, upwards of 250 children were at the camps by invitation or assignment. Under these facts, our Court said:

> "At the end of the season, the camp was closed, not to be opened again until the next year. The property, it is true, was not in actual use on the day of the assessment, i.e., the first day of April, 1930. To hold that to secure exemption, it must have then been in actual use, would ignore the spirit and intendment of the law. Actual use on that particular day is not the test."

In *Ferry Beach Park Assn.* v. *Saco,* 136 Me., 202, 7 A. (2d), 428, as in the former case of *Ferry Beach Park Assn.* v. *Saco,* 127 Me., 136, 142 A., 65, property found to be definitely devoted to the purposes of the Association was held to be exempt, although in both cases the property was occupied only during the summer months.

As distinctly pointed out in *Camp Emoh Associates* v. *Lyman,* supra, it is the "actual appropriation of its property for the purposes for which the plaintiff corporation was incorporated," not the physical use on the exact date of the assessment, which controls.

Concerning the broader question of exemption by reason of occupation or appropriation of real estate for the purposes of the corporation, confusion sometimes arises by undertaking

to apply identical rules of construction as to tax exemption statutes which are essentially different. Thus in Maine, as in Massachusetts, we find that the statute itself places benevolent and charitable institutions in a different category from purely religious institutions. As to the first group, the law provides, R. S., c. 13, § 6, Par. III:

> "The following property and polls are exempt from taxation . . . the real and personal property of all benevolent and charitable institutions incorporated by the state; . . . but so much of the real estate of such corporations as is not occupied by them for their own purposes shall be taxed in the municipality in which it is situated."

The exempting statute as to the second group is found in Par. V of the same section, as follows:

> "Houses of religious worship, including vestries, and the pews and furniture within the same, except for parochial purposes; tombs and rights of burial; and property held by a religious society as a parsonage, not exceeding six thousand dollars in value, and from which no rent is received, and personal property not exceeding six thousand dollars in value. But all other property of any religious society, both real and personal, is liable to taxation the same as other property."

The term "real estate" is not found in the exemption of the statute as to the last group. The central purpose is to exempt the church or house of worship and a parsonage of limited value. Even this statute has been sanely interpreted as including the land on which the buildings stand and such as may be necessary for convenient ingress and egress, light, air or appropriate and decent ornament, as the Massachusetts court has held in *All Saints Parish* v. *Brookline,* 178 Mass., 404, 59 N. E., 1003, 52 L. R. A., 778; *Trinity Church* v. *Boston,* 118 Mass., 164; *Third Congregational Society* v. *Springfield,* 147 Mass., 396, 18 N. E., 68, 69.

In the case last cited above, the distinction is clearly pointed out. The exempting statute, of similar import as at present, provided for benevolent and charitable institutions in the third clause, and for religious institutions in the seventh clause of the section. The Court said:

> "It will be observed, that religious societies are not included in the enumeration of the third clause, and that the exemption of their property from taxation is found in the seventh clause . . . and it is impossible to extend by construction the operation of the third clause above cited to religious societies."

The procedure of the assessors of Portland in the present case, however, is patterned after that adopted in *All Saints Parish* v. *Brookline,* supra, concerning a religious society. In that case, a corner lot on Beacon St. and Dean Road in Brookline was conveyed to the Society with the provision that a church edifice should be erected on the premises. In the first instance, a wooden church was built on the westerly half. During the year that the tax was assessed, the erection of a stone church was begun, and it was planned that the wooden church would be removed to a corner of the lot to be used as a Sunday School room. There were no fences and the land had never been leased or occupied by any parties other than the plaintiff. There was no intention of using the land taxed for secular purposes. The assessors exempted the wooden church and about 21,000 square feet of land and assessed a tax on the remaining 20,000. The plaintiff offered testimony to show that the entire lot was not more than sufficient for convenient ingress or egress, light, air and decent and appropriate ornament. This evidence was rejected. The decision upheld the assessment. The reason given was:

> "The portion of the lot which was intended for use in the erection of the stone church could not be exempted, for there was no house of religious worship, nor any part of such a house upon it.

"The evidence which was offered and rejected had no tendency to show that the whole lot was needed for the small wooden church, or that it was used as a reasonably necessary or proper incident to the maintenance and use of that church."

The case of *Redemptorist Fathers* v. *Boston*, 129 Mass., 178, cited by the defendant and used by the Referee as authority that actual use for the purposes warranting exemption is essential to preclude taxation, also concerned a religious society. Moreover, the facts are entirely dissimilar. This is demonstrated in the statement of the Court:

"The lot of land which, as the plaintiff contends, was wrongfully taxed in this case, has not been so appropriated. No church edifice has been erected upon it, and we do not find upon the facts agreeed that any such edifice is intended to be erected upon it. On the contrary, it was found to be an unsuitable place for the church, and it is the plaintiff's intention to occupy it with one or more light buildings of wood for school purposes. It is separated by a clearly defined lane or passageway from the portion upon which the church stands; it is not necessary or incidental to the use of the church as a house of public worship, and the avowed intention of the plaintiff is to appropriate it to a purpose, which, however useful and praiseworthy in itself, is not public worship, and therefore not entitled to the exemption from taxation provided for in the second clause."

Further, the defendant argued that the "dominant use" principle had application, asserting that the record showed that the property taxed was currently used only for trivial and inconsequential purposes which were subordinate to the dominant purpose that the property be held for future expansion of the hospital. But this is an attempt to contrast two uses for the same general purpose, one actual and the other prospec-

tive. The cases which construe the principle contended for demonstrate that it has application when there are two or more divergent uses to which the property is subjected, one promotional of the charitable purpose and the other of a non-exempt character. Thus we find in *Foxcroft* v. *Campmeeting Association*, 86 Me., 78, 29 A., 951, our Court held that

> "If it be a benevolent and charitable institution, the property used for the stabling of horses for hire, let for victualing purposes and for the use of cottages is clearly not occupied by the association for its own purposes . . . It is property from which revenue is derived — just as much business property as a store or mill would be."

In *Auburn* v. *Y. M. C. A.*, 86 Me., 244, 29 A., 992, of the defendant's real estate, a portion was let for a boarding-house and another portion for stores and it was held that such portions were not exempt from taxation.

Application of the principle to different circumstances, held sufficient to warrant exemption, is found in *Curtis* v. *Odd Fellows*, 99 Me., 356, 59 A., 518, 520, in which the Court said:

> "where a building of such an association is designed for use by it for its own purposes, and a substantial use is made of all of the building by the association for its own purposes, in good faith, the property is exempt from taxation under our statutes, notwithstanding such occupation may not be exclusive, and the owner may sometimes allow other associations and individuals to use some portions of the property for a rental, when it can be done without interfering with the use of the same by the owner for its own purposes."

This statement was confirmed in *Lewiston* v. *All Maine Fair Association*, 138 Me., 39; 21 A. (2d), 625, in which it was held that certain property was non-exempt, and certain other property although temporarily and occasionally used for pur-

poses foreign to the conduct of its Fair was exempt because such use did not interfere with its general occupation for its own purposes.

If the property is not used at all for other purposes, it must be determined whether use was made thereof for its own purposes, which may be shown by incidental uses and by an actual appropriation to the purposes of the owner with a definite intention to broaden the scope of its use thereof in the future, thus counteracting any implication of evasion of taxation.

Upon the whole record such clearly appears to be the case here. True, the exact location of additional buildings has not been determined, or the date of their erection. The Referee recognizes in his report that the tract was acquired in one unit "to give the hospital proper setting, proper quietness and sufficient land there to meet any necessities for future development;" that it was intended to "develop an osteopathic center here in Portland," that there was an existing intention to hold the vacant land as a site or sites for new and additional buildings to take care of its growing business, and that such land was used by convalescent patients, and by nurses and employes. Because these purposes had not all attained fruition, the Referee held that uncertainty as to the time of fulfillment precluded exemption.

The Massachusetts court has given consideration to the claim of tax exemption by benevolent corporations as to large tracts of land held under circumstances analogous to those here existing. Upon the legal principles involved, our own Court has been in agreement with the Court of that jurisdiction.

In *Massachusetts Gen. Hospital* v. *Somerville,* 101 Mass., 319, the Court in construing a statute of like import with our own, held:

> "The statute contains no limitation of the amount of real estate that may be thus held exempt from taxation; and we know of no authority under which, or rule by

which, the court can affix any such limitation. The only condition upon which the exemption depends is the proviso as to the purposes for which the real estate is occupied.

"In construing and applying this proviso, the court cannot restrict it to the limit of necessity.The statute does not indicate such an intention on the part of the legislature; and we do not think that any considerations of public policy require us to confine the exemption to narrower limits than the terms of the statute fairly imply. What lands are reasonably required, and what uses of land will promote the purposes for which the institution was incorporated, must be determined by its own officers. The statute leaves it to be so determined, by omitting to provide any other mode. In the absence of anything to show abuse, or otherwise to impeach their determination, it is sufficient that the lands are intended for and in fact appropriated to those purposes.

"In this case, it is manifest that the intention with which the lands in question were purchased and held was to promote the purposes for which the institution was incorporated."

In the above case, the area of lands so held was 110 acres.

So in *Thayer Academy* v. *Braintree*, 232 Mass., 402 at 408, 122 N. E., 410, at page 412, the Court said:

"The dominant purpose of the managing officers of the corporation, in the use of the property which they direct or permit, is often, although not always, controlling. So long as they act in good faith and not unreasonably in determining how to occupy and use the real estate of the corporation, their determination cannot be interfered with by the courts." *Emerson* v. *Milton Academy*, 185 Mass., 414, 415, 70 N. E., 442.

Again, in passing on a situation as to occupation of land similar to that actually existing here, and entirely aside from prospective use, the Court in *Wheaton College* v. *Norton*, 232 Mass., 141, at 148, 122 N. E., 280, 282, said:

> "The two and one half acre lot on April 1, 1914, was a grove of old growth pines; it was free from underbrush, had a few benches, was unenclosed, and was used by students and townspeople. It was not used for college purposes except for recreation purposes for students who wished to walk, stroll or saunter there. The judge rightly found and ruled that this tract was exempt within the rule laid down in *Amherst College* v. *Amherst*, 193 Mass., 168," 79 N. E., 248.

We adopt the reasoning of the Court in the above cited cases. In view of the indisputability of the facts and the conclusions to be drawn therefrom, the accuracy of the ruling of the Referee is one of law and is open for consideration by the Court. On the record the plaintiff was entitled to tax exemption.

Exceptions sustained.

INHABITANTS OF THE CITY OF HALLOWELL

vs.

INHABITANTS OF THE CITY OF PORTLAND.

Kennebec. Opinion, May 21, 1942.

Pauper Settlement.

Legitimate children have the settlement of their father if he has any in the state; if he has not, they shall be deemed to have no settlement in the state (Chap. 203, P. L. 1933) and are state paupers.

While the legislature has no power to disturb vested rights, it does have the right to establish rules for the settlement of paupers as matters of mere positive or arbitrary regulation, and is limited in its power only by its own perception of what is proper and expedient.

The legislature may alter pauper settlement law from time to time so long as it does not interefere with vested rights.

Towns do not have a vested right to have a particular pauper settlement continue to exist as is.

Determinative is the settlement of the pauper at the time the supplies are furnished, not what it may formerly have been.

The rights of parties are not to be governed by statutes which have been repealed.

ON REPORT. AGREED STATEMENT OF FACTS.

A pauper action in which the plaintiffs sought reimbursement for money expended for relief of one Elmer Andrews and his family. Only one question was involved, namely, the settlement of the pauper at the time of furnishing the relief. Said Elmer was born in Portland on November 2, 1918, his father having no pauper settlement in the state and having had none since that date. At the time of Elmer's birth his mother's place of residence was Portland. In 1933 (Chap. 203 P. L.), an amendment to the law in regard to pauper settlement was adopted which provided that legitimate children have the settlement of their father if he have any in the state; but if he have not, then the children shall have no settlement in the state. The supplies to said Elmer were furnished in 1940. The question therefore was what said Elmer's settlement was in 1940. The Court held that at that time he must be deemed to have had no settlement in the state.

Judgment was for the defendants.

The case fully appears in the opinion.

Joseph B. Campbell, for the plaintiffs.

Barnett I. Shur, for the defendants.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

HUDSON, J. Report on agreed statement of facts.

This is a pauper action in which the plaintiffs seek reimbursement for money expended for relief of one Elmer Andrews and his family furnished from August 26, 1940 to December 31, 1940. Because of admissions, only one question is involved, the settlement of the pauper.

He was born in Portland on November 2, 1918, the legitimate son of Vernon and Winifred Andrews. His father had no pauper settlement in the state; his mother's was in Portland. In June, 1919, Elmer was emancipated by his father then having no settlement in the state, nor has the father since acquired one herein.

In both 1918 and 1919, the law as to the pauper settlement of legitimate children was as follows:

> "Legitimate children have the settlement of their father, if he has any in the state; if he has not, they have the settlement of their mother within it; but they do not have the settlement of either, acquired after they are of age and have capacity to acquire one." Chap. 29, Sec. 1, Par. II, R. S. 1916. Also see Chap. 33, Sec. 1, Par. II, R. S. 1930.

Thus continued to be the law until it was amended by Chap. 203, Sec. 2, P. L. 1933, when as amended it read as follows:

> "Legitimate children have the settlement of their father, if he has any in the state; if he has not, they shall be deemed to have no settlement in the state. . . ."

Whereas formerly a legitimate child of a father who had no pauper settlement in the state took derivatively that of his mother in the state, now such a child under such circumstances, because of the change in the statute, is a state pauper without settlement in the state. Relief furnished to a state pauper is reimbursable by the state as provided in Chap. 33, Sec. 25, R. S. 1930.

The question here is not what Elmer's settlement may formerly have been, but what it was in 1940 when these supplies were furnished by the plaintiffs. The repealing statute of 1933, supra, contained no saving clause, but on the other hand, in Sec. 4 of said Chap. 203, it was provided that "All acts and parts of acts inconsistent with this act are hereby repealed." Likewise, it is to be noted that the general statute as to statutes, Sec. 5 of Chap. 1, R. S. 1930, entitled "Construction and effect of repealing acts," has no application in this case.

This Court in *Lewiston* v. *North Yarmouth*, 5 Me., 66, stated in effect that while "The legislature has no power to disturb vested rights," it does have the right to establish rules for the settlement of paupers "as matters of mere positive or arbitrary regulation," and "is limited in its power only by its own perception of what is proper and expedient." It held that a law rendering valid a certain class of marriages, so far as it has a bearing upon questions of settlement under the pauper laws, for expenses incurred subsequent to its passage, is constitutional. The Court stated on page 69:

> "So far therefore, as the resolve of March 19, 1821, has a bearing upon questions of settlement under our pauper laws for expenses incurred subsequently to its passage, we cannot doubt its constitutionality."

The effect of that decision is that towns do not have a vested right to have a particular pauper settlement continue to exist as is. This case was cited in *Inhabitants of Appleton* v. *City of Belfast*, 67 Me., 579, on page 581, in which the Court declared that "The legislature have the right to prescribe what may constitute a settlement, or, within reasonable limits, what shall be evidence of a settlement, *and may alter the law upon the subject from time to time.*" (Italics ours.)

It reaffirmed the principle established in the Lewiston case, supra, that the later act, although it changes the law of settlement, governs, where the relief is furnished subsequently

thereto, there being in such a case no interference with a vested right.

In *Rangeley* v. *Bowdoin,* 77 Me., 592, 1 A., 892, 893, one who had his pauper settlement in the defendant town lost it by reason of a provision in a later statute that one living out of the town of his settlement for five successive years in any unincorporated place shall lose his town settlement. It was claimed that this statute effecting a change as to settlement was invalid, but the Court held otherwise, saying that the liability of towns to relieve and support paupers having no elements of contract, express or implied, rests solely in the positive and arbitrary provisions of statute, which the legislature may change as well as originally enact, citing *Lewiston* v. *Yarmouth,* supra, and *Appleton* v. *Belfast,* supra. The Court added: "Although the residence in the unincorporated place, which was the operating cause of losing the settlement in Bowdoin, was before the statute became operative, still the cause of action — which consisted in furnishing the supplies — arose thereafter." Also see *Portland* v. *Auburn,* 96 Me., 501, 502, 52 A., 1011.

Recently this Court in *Rockland* v. *Inhabitants of Lincolnville,* 135 Me., 420, 198 A., 744, 745, adjudicated a pauper settlement in accordance with the law as it was at the time of the furnishing of the supplies rather than what it had formerly been, relying upon *Appleton* v. *Belfast,* supra, and *Rangeley* v. *Bowdoin,* supra, and said: "The rights of parties are not to be governed by statutes which are repealed."

Thus, inasmuch as the pauper settlement in the case at bar must be determined in accordance with the law existing at the time the supplies were furnished, our conclusion is that Elmer Andrews, the pauper, at the time of relief being a legitimate child of his father who then had no pauper settlement in the state, (employing the language of the statute) must "be deemed to have" had "no settlement in the state."

Judgment for defendants.

GWENDOLYN HODGES

vs.

THE SOUTH BERWICK WATER COMPANY and
SOUTH BERWICK WATER COMPANY, INC.

Somerset. Opinion, June 2, 1942.

Corporations. Water Companies. Powers of Public Utilities. Joint Defendants.

A corporation may be organized under the general law to carry on as a public utility within the State the business of supplying water for the use of the public. (R. S. 1930, Chapter 56, Section 8 as amended by P. L. 1937, Chapter 99, Section 1.)

The authorization to South Berwick Water Company, Inc., as set forth in its charter, to carry on all kinds of general business was merely collateral and ancillary to its main purpose, namely, to furnish water for the use of the public.

By statute (R. S. 1930, Chapter 62, Section 44, as amended by P. L., 1935, Chapter 30) a public utility may lawfully sell all of its corporate property when it shall have first secured from the Public Utilities Commission an order authorizing it so to do.

Where there are joint defendants and but one bill of exceptions is filed, the exceptions should be sustained if either defendant is aggrieved by the ruling of the court.

ON EXCEPTIONS BY DEFENDANTS.

Action of assumpsit against both of the above named defendants. The South Berwick Water Company was organized in 1893. In 1937, South Berwick Water Company, Inc., was organized, and in April, 1937, the stockholders of The South Berwick Water Company voted, subject to the approval of the Public Utilities Commission, to sell all of the assets, with the exception of its franchise, to South Berwick Water Company, Inc. The sale was approved by the Commission by decree dated April 24, 1937. Subsequently, the plaintiff turned over to one Alvin B. Strout the president, manager and controlling stockholder of both defendant corporations, cash and

securities totalling in value, as alleged, to $13,773.77. The sum realized was used by Strout, according to his testimony, in improving the plant and facilities of South Berwick Water Company, Inc. The case was heard by a single justice, who ordered judgment for the plaintiff against both companies in the sum of $13,773.77. Defendants excepted. Exceptions sustained. The case fully appears in the opinion.

Harvey D. Eaton, for plaintiff.

Cyrus N. Blanchard,

Bradley, Linnell, Nulty & Brown, for defendants.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

THAXTER, J. This action of assumpsit was brought in the Superior Court against two corporations, The South Berwick Water Company and the South Berwick Water Company, Inc. The plea was the general issue. The writ contains two counts, the first an account annexed, the second an omnibus account under which the plaintiff specifies that she will offer proof of the items in the account annexed, also of a promissory note of South Berwick Water Company, Inc. dated July 1, 1937, for $2,800. and payable in one year with interest at 6%, also of another note of the same corporation dated November 28, 1938, for $1,000. payable on February 1st with interest at 5%, also of a check dated November 24, 1937, for $250. and a check dated November 26, 1938, for $942.50. The specifications do not allege by whom the checks were drawn. The exhibits, however, indicate that the plaintiff refers to two checks drawn by her to the order of Alvin B. Strout who seems to have been the president, principal and controlling stock owner, and manager of both of the defendant corporations.

A hearing was had before a single justice in vacation with right of exceptions reserved who ordered judgment against both companies in the amount of $13,773.77. From this ruling

the defendants have brought the case to this court on a bill of exceptions. These are based on the ground that such ruling is unsupported by evidence and that the principles of law relied upon by the court are erroneous.

The general contention of the plaintiff is as set forth in the bill of exceptions, that she advanced certain securities and money to the defendants as set forth in the account annexed, the securities having the value declared upon in that account.

The record shows that The South Berwick Water Company was organized under a special act of the legislature in 1893 to furnish water to the people of South Berwick. It was given, subject to the conditions set forth in its charter, the right to issue stock and bonds and to acquire property by eminent domain. Alvin B. Strout acquired the stock of this company on March 17, 1937 and became its president and general manager. Shortly thereafter he caused to be organized under the general law the South Berwick Water Company, Inc. This corporation came into being early in April, 1937. Its purpose was to furnish water to the people of South Berwick. As collateral and ancillary to such general purposes it was, as set forth in Par. 4 of its certificate, authorized to carry on all kinds of general business. April 5, 1937, the stockholders of The South Berwick Water Company voted, subject to the approval of the Public Utilities Commission, to sell all of its assets with the exception of its franchise to this new corporation, the consideration for said sale to be all of the capital stock of the new company "and such bonds and as many bonds as the Maine Public Utilities Commission will permit said South Berwick Water Company, Inc. to issue on the credit of the assets to be conveyed." On the same day the stockholders of South Berwick Water Company, Inc. voted to purchase such assets and to pay such consideration for the property to be transferred to it. By decree dated April 24, 1937, the Public Utilities Commission authorized such sale for the consideration of $5,000. of the capital stock of the South Berwick Water Company, Inc. and such bonds as might be authorized by the commis-

sion. In accordance with this decree the property was conveyed; the obligation to supply water was assumed by the new company; and thereafter The South Berwick Water Company did no further business.

Shortly after this transaction was completed the plaintiff comes into the picture. She was approached by Strout, a lifelong friend, who told her that he was interested in The South Berwick Water Company. At various times beginning June 30, 1937, and ending November 28, 1938, she turned over to him various securities and cash totalling according to her account annexed $14,773.77. It is admitted that there is a duplication of items amounting to $1,000. The judgment for $13,773.77 ordered by the sitting justice apparently takes this error into consideration. These securities and cash were turned over to Strout personally and his receipts for them specify that they were "to be used as I see fit." There was nothing set up on the books of either company showing any obligation to the plaintiff. Strout testified that the money which he had received from the plaintiff and also from the sale of her securities totalling somewhere between $11,500. and $12,000. was used in improving the plant and facilities of the South Berwick Water Company, Inc. It seems to have been credited to his account on the books of the company. He testified that he agreed to give to Mrs. Hodges bonds or preferred stock of this company for what she had turned over to him. She says that she was to receive first mortgage bonds; but she does not seem to know by which company the securities were to be issued. She does not claim to have dealt with the companies as such but to have relied on Strout to do what was right under the circumstances. She had perfect confidence in him which seems to have been sadly misplaced.

Though the defendants have been sued as joint obligors, the claims against each appear altogether inconsistent. The liability of The South Berwick Water Company seems to be based on the assumption that it is still the owner of the property which it purported to transfer to the new corporation and

that it is indebted to the plaintiff for money advanced by her which went into extensions and improvements on this property. The argument is that the new company never had a legal existence in that it could not have been lawfully organized under the general law to carry on the business of a water company, and that even though it had a legal existence the transfer to it of the property of the old company was void. In spite of all this, the plaintiff claims that the new company is liable also, apparently not because of any direct liability but on the theory of an implied obligation based on the assumption that the value of its property, which the plaintiff but a moment before contended the new company did not own, has been enhanced in value by reason of extensions and improvements paid for with the plaintiff's money.

It is not an easy matter to evaluate these conflicting claims, but we regard it as important at least to determine the one against the original company which rests on the theory that the conveyance by the old company to the new was void.

The plaintiff's contention that the new company was never legally organized cannot be sustained. A corporation may be organized under the general law to carry on as a public utility within the State of Maine the business of supplying water for the use of the public. Rev. Stat. 1930, Ch. 56, Sec. 8, as amended by Pub. Laws 1937, Ch. 99, Sec. 1, provides for the organization of corporations under the general law. The provisions of this section apply to the organization of corporations "to carry on any lawful business anywhere. . . ." There then follows an enumeration of certain types of corporations to which the statute applies. The inclusion of such specific types does not, however, limit the general scope of the preceding language. Then are listed certain classes of corporations which are excepted from the provisions of the section; but water companies do not come within such excepted class. Then significantly there is an enumeration of certain classes which may be organized to do business when permissible by law without the

State of Maine. This list comprises certain kinds of public utilities but again there is no mention of water companies. The failure specifically to except water companies in the general exception clause coupled with the omission to include water companies in the provision applicable to other public utilities authorized to do business without the state is very cogent evidence that water companies were assumed to be included within the general provision authorizing the formation of corporations "to carry on any lawful business anywhere."

The plaintiff claims that the purposes of the South Berwick Water Company, Inc. as set forth in its certificate of organization are not confined to those necessary for the operation of a public utility but authorize the corporation to engage generally in all kinds of business. If this were the proper construction of the charter, we do not know that it is a matter of great moment, for no case has been cited from this jurisdiction which holds that such a combination of purposes is improper. Cf. *Brown* v. *Gerald*, 100 Me., 351, 61 A., 785, 70 L. R. A., 472. It is not, however, necessary to discuss this question, for as previously stated, the purposes set forth in Par. 4 of the certificate of organization are but collateral and ancillary to the main purpose to furnish water for the use of the public as set forth in Par. 1.

Aside from the question of whether the new corporation had a legal existence and could operate as a public utility, the plaintiff argues that the sale by the old company to the new company was void. As authority for this proposition counsel call to our attention the case of *Brunswick Gas Light Co.* v. *United Gas, Fuel & Light Co.*, 85 Me., 532, 27 A., 525, 35 Am. St. Rep., 385, which holds that a public service corporation such as was The South Berwick Water Company cannot without legislative authority sell or lease its corporate property and privileges and thereby disable itself from performing the duties which it owes to the public. It should be noted that in the case before us the sale of the corporate franchise is not involved,

but counsel are quite right in assuming that under the doctrine of the Brunswick case a public service corporation cannot without such authority lawfully sell all of its corporate property so as to disable itself from continuing in business. This case is well recognized law. Counsel, however, fail to consider that this case was decided before the passage of the statute establishing in this state a public utilities commission and that under that statute, Rev. Stat. 1930, Ch. 62, Sec. 44, as amended by Pub. Laws. 1935, Ch. 30, the right is expressly given to a public utility to make such a sale when "it shall have first secured from the commission an order authorizing it so to do." This was "legislative authority," as those words are used in the Brunswick case, granted on a condition which in this instance has been complied with. We therefore hold on the record now before us that the sale of its assets by The South Berwick Water Company to the South Berwick Water Company, Inc. was valid.

So far as this record shows there was, therefore, no liability on the part of The South Berwick Company to the plaintiff.

We do not regard it as necessary to express any opinion as to the liability of the South Berwick Water Company, Inc. The plaintiff in her pleadings claimed against the defendants on a joint liability; there was a joint plea of the general issue; the order of the court was for the entry of a joint judgment; and but one bill of exceptions filed by both defendants is before us. On the authority of *Day* v. *Scribner*, 127 Me., 187, 142 A., 727, under such circumstances as these, the bill of exceptions should be sustained if either defendant is aggrieved by the ruling of the court. The procedure adopted in *Plante* v. *Canadian Nat. Rys. et al*, 138 Me., 215, 23 A. (2d), 814, has no application to this case.

Exceptions sustained.

CHARLES S. ERWELL *vs.* THELMA HARMON.

Cumberland. Opinion, July 7, 1942.

Automobiles. Due Care. Proximate Cause.

Where automobiles are in collision, failure to exercise due care is a proximate cause of the accident, and where such failure is by the plaintiff, a nonsuit should be granted.

ON EXCEPTIONS BY PLAINTIFF.

Action for personal injury and property damage resulting from a collision between plaintiff's automobile and that of defendant. The presiding justice granted a motion for nonsuit. Plaintiff excepted. Exceptions overruled. The case fully appears in the opinion.

Jacob H. Berman,

Edward J. Berman, for plaintiff.

William B. Mahoney, for defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

MANSER, J. This is an action for personal injury and property damage resulting from an automobile collision. The case comes forward on exceptions to a nonsuit. Two other exceptions relating to the admission of written statements made by certain witnesses, contradictory of testimony given by them, were abandoned.

On Sunday noon, November 18, 1940, the plaintiff, then seventy-five years of age, started from his home on Pleasant Street in Brunswick, driving his 1928 Hupmobile cabriolet. The day was fair. His destination was the golf course, but he intended to extend the courtesy of driving a young lady to the same place. Her home was on Lavallee Street, a side road entering but not crossing Pleasant Street and to the south.

Pleasant Street itself runs east and west and forms a part of the main highway, Route 1, between Brunswick and Portland. In this vicinity the highway is composed of two abutting lanes of concrete slabs, each ten feet in width, and with wide hard-packed gravel sides on the same grade. The road is level and straight, and at its junction with Lavallee Street there is an unobstructed view in each direction of at least a quarter of a mile. Driving westerly and arriving at the junction of the two streets, the plaintiff found Sunday automobile traffic passing along the south side of the highway, and also traffic to his rear. He drove off the concrete slab and to his right and then manipulated his car so that it came to a standstill, headed in the direction of the entrance to Lavallee Street, and with the bumper projecting just over the edge of the concrete. Then with the gears of the car disengaged, the motor idling, he was in the situation of an automobilist about to depart from a private driveway and cross the lanes of both east- and west-bound traffic in order to enter Lavallee Street.

The law charges the driver of a car making such a crossing with the duty of so watching and timing the movements of other cars as to reasonably insure himself and them of a safe passage. *Verrill* v. *Harrington,* 131 Me., 390, 163 A., 266; *Fernald* v. *French,* 121 Me., 4, 115 A., 420; *Esponette* v. *Wiseman,* 130 Me., 297, 155 A., 650.

Going forward with the story of the facts, the east-bound traffic soon cleared. The plaintiff says that to his left he saw the defendant's car approaching, but in his estimation it was then 450 feet away. He fixes the distance by the fact that he also saw pedestrians crossing the road in front of the defendant's car and in line with a public garage and a store on opposite sides of the road, which buildings were 375 feet from him.

He saw nothing about the speed of the defendant's car which attracted his attention. The testimony of the two other eye witnesses gives no indication of excessive speed. One estimated it at 25 to 30 miles an hour and the other at "a fairly good clip."

The plaintiff says he then started his car and kept it moving forward. As the front end of the car was about at the dividing line between the two concrete slabs, he saw that the defendant's car was then 90 to 120 feet away and seemed to be veering to its left. He accelerated his speed but his car had not travelled more than an additional three feet when it was struck on its left side.

The plaintiff testified that he regarded himself as "a very competent judge of distances." Giving full credit to the honesty of his statements, yet his version would portray a physical impossibility, and he cannot thereby exculpate himself. He did not so watch and time and correlate his movements and those of the approaching car as to reasonably insure himself of a safe passage.

There are but two reasonable inferences to be drawn from his testimony and both are fatal to the maintenance of his action. One is that he entirely misjudged the distance between the two vehicles and the other that after seeing the approaching car he delayed his start until it was fraught with danger.

The last inference is the more likely and is emphasized by the testimony of the eye witnesses. Mr. Colbath saw the plaintiff as he prepared to cross the street and did not see the defendant's car until it was within seventy feet of the point of collision. In fact, in his original statement, made a day after the accident, he estimated this distance as thirty feet.

Mr. Lumbert, the other witness, testified that he was proceeding in his own car from Church Road, 300 feet westerly from and parallel with Lavallee Street, out to the Portland highway. He stopped before entering this through way. He saw the plaintiff's car as it stood headed in the direction of Lavallee Street. He saw the defendant's car 300 feet beyond. Then he started up his own car, turned into the Portland road and proceeded toward the point of the accident. He estimated that he was "quite near" or "just about 75 feet" from the two cars when the impact occurred. If this be true, he had started from a standstill, turned into the main highway and travelled 225

feet while the plaintiff claims that during the same time he had not succeeded in clearing a ten-foot slab.

An ingenuous statement made by this witnes tends to clarify the real situation. Having said that the plaintiff's car was stopped when he first saw it, he was asked:

"Q. And then what happened? A. After a while I noticed him start up" etc.

This clearly indicates a pause of some length, during which the defendant's car and that of the witness were approaching from opposite directions.

The application of the established legal principle to the circumstances of the case rendered it incumbent on the presiding justice to grant a motion for nonsuit. The plaintiff's failure to exercise due care was a proximate cause of the accident. The defendant was entitled to the ruling as a matter of law.

Exceptions overruled.

JOHN R. DEVINE

vs.

KATHERINE R. TIERNEY and GEORGE P. FINDLEN

Aroostook. Opinion, July 8, 1942.

Equitable Mortgage; Rights of Equitable Mortgagor.

The mortgagor, in the case of an equitable mortgage, has an equitable right to redeem the premises from the mortgage upon the payment of the indebtedness or liability secured. A resulting trust arises by implication of law in favor of the equitable mortgagor when the mortgaged premises are sold by the mortgagee.

The title of a purchaser of the premises from an equitable mortgagee if for a valuable consideration, however, could not be defeated by a trust however declared or implied by law unless the purchaser had notice thereof under R. S., Chap. 87, Sec. 18.

If the equitable mortgagee conveys the property to a bona fide purchaser without notice, although as to him the right of redemption is barred, the

mortgagee remains a trustee for any balance of the purchase moneys received in excess of the amount due on the mortgage.

If the conveyance by the equitable mortgagee is to a purchaser with notice, he takes the property subject to the outstanding equity of redemption and it may be redeemed from him.

Under R. S., Chap. 87, Sec. 18, the notice which will defeat the title of a purchaser for a valuable consideration is actual notice either of the trust or of facts which would or ought to put him upon inquiry in reference to it.

As to what facts are sufficient to excite inquiry in such a case and charge the purchaser with implied actual notice under the statute there is no hard and fast rule, each case depending on its peculiar facts and circumstances.

Facts which would lead a fair and prudent man with ordinary caution to make inquiry are sufficient to charge a purchaser with implied actual notice under the statute.

The fact that the purchaser of farm property knows that the equitable mortgagor rather than his own vendor, is in possession of and operating the farm which is bought does not, alone, directly prove actual notice of the existence of the outstanding equity or compel inquiry concerning it but it is a circumstance to be considered with others in determining whether inquiry should have been made.

Although the purchaser of property subject to an equitable mortgage has a right to remain silent, not testify in his own defense and rely on the denials of his pleading on facts relating to his having received notice of the existence of the complainant's equity of redemption, his failure to take the stand under these circumstances has some probative significance.

In the instant case, when the equitable mortgagee, defendant Tierney, conveyed the mortgaged premises, her vendee with notice occupied the position of an assignee of the mortgage. Inasmuch as the redemptioner had notice of the assignment, which apparently was absolute, his demand for an accounting was properly made upon the assignee and his bill to redeem was properly brought against the assignee, and the joinder of the original mortgagee was unnecessary.

It is axiomatic that the courts of equity of a state have no authority to render a decree in personam against a non-resident who has not been served with process within the state or voluntarily submitted to the jurisdiction.

In the instant case, inasmuch as on the case made by the bill and proof, accounting by and redemption from the defendant Findlen was the only relief to which the complainant was entitled and a decree consistent with equity and good conscience could be entered affecting him alone, the absent defendant Tierney was not an indispensable party and her joinder as a defendant did not require a dismissal of the Bill as to defendant Findlen; and a dismissal as to defendant Tierney, for want of jurisdiction, effectually terminated her status in the Bill as a party.

ON APPEAL BY PLAINTIFF.

A bill in equity to redeem certain lands and buildings in Fort Fairfield from an equitable mortgage was brought by the plaintiff.

On or about December 31, 1923, John R. Devine of Fort Fairfield, having lost his homestead farm there situate to the Federal Land Bank of Springfield, Massachusetts, through mortgage foreclosure, procured the conveyance of the farm to his wife's sister, Katherine R. Tierney, of Arlington, Massachusetts, who gave her mortgage on account of the purchase price and paid the balance out of moneys of which he contributed a part and orally agreed he should occupy the farm provided he paid the annual insurance premiums and taxes and installments due on the mortgages and that she would convey the property to him when he repaid her advances.

Pursuant to this agreement, John R. Devine, being then in possession of the farm, continued with his family to occupy and operate it, paid the taxes and insurance premiums with reasonable regularity and kept up the installments due on the mortgages, but, having made no payments to Katherine R. Tierney on account of her advances, on February 17, 1941, without his knowledge or consent, for a valuable and adequate consideration she conveyed the entire property to the defendant, George P. Findlen, who claimed title to the premises as a bona fide purchaser without notice. Bill was dismissed. Plaintiff appealed. Appeal was sustained and the case was remanded for the entry of a decree that the bill be sustained as to defendant Findlen with costs of the appeal and costs in the lower court, and that he be ordered to render an account as mortgagee in possession; and when, in further proceedings, the amount due on the mortgage was determined, appropriate orders be made as to the payment thereof by the complainant and a reconveyance of the mortgaged premises to him; and as to the defendant Tierney, that the bill be dismissed for want of jurisdiction over her person. The case fully appears in the opinion.

George B. Barnes, for plaintiff.

Bernard Archibald,

Melvin P. Roberts, for defendant George P. Findlen.

Bernard Archibald, for defendant Katherine R. Tierney.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

STURGIS, C. J. This is an appeal from a decree dismissing a Bill in Equity to redeem certain lands and buildings situated in Fort Fairfield, Maine, from an equitable mortgage.

On or about December 31, 1923, John R. Devine of Fort Fairfield mortgaged his homestead farm to the Federal Land Bank of Springfield, Massachusetts, and the mortgage not having been paid according to its terms was in due course foreclosed and the statutory period of redemption on August 1, 1937, had expired. On that day he procured the conveyance of the farm to his wife's sister Katherine R. Tierney of Arlington, Massachusetts, who gave the Federal Land Bank mortgages on account of the purchase price, paid the balance out of moneys of which he contributed a part and orally agreed that he should occupy the farm provided he paid the annual insurance premiums and taxes and installments due on the mortgages and that she would convey the property to him when he repaid her advances.

Pursuant to this agreement, John R. Devine, being then in possession of the farm continued with his family to occupy and operate it, paid the taxes and insurance premiums with reasonable regularity and kept up the installments due on the mortgages but having made no payments to Katherine R. Tierney on account of her advances, on February 17, 1941, without his knowledge or consent, for a valuable and adequate consideration she conveyed the entire property to George P. Findlen, one of the defendants in this cause, who claims title to the premises as a bona fide purchaser without notice.

Under the settled rule in this jurisdiction the transaction between John R. Devine and Katherine R. Tierney constituted an equitable mortgage. *Stinchfield* v. *Milliken,* 71 Me., 567; *Bradley* v. *Merrill,* 88 Me., 319, 34 A., 160; *Norton* v. *Berry,* 120 Me., 536, 115 A., 287; *Chase* v. *West,* 121 Me., 165, 168, 116 A., 213. The mortgagor had an equitable right to redeem the premises from the mortgage upon payment of the indebtedness or liability secured. *Linnell* v. *Lyford,* 72 Me., 280; *Norton* v. *Berry,* supra. And a resulting trust arose by implication of law in his favor. *Reed* v. *Reed,* 75 Me., 264; *Burleigh* v. *White,* 64 Me., 23; *Dudley* v. *Bachelder,* 53 Me., 403. The title of a purchaser of the premises from the equitable mortgagee, if for a valuable consideration, however, could not be defeated by a trust however declared or implied by law unless the purchaser had notice thereof. R. S., c. 87, § 18. If the equitable mortgagee conveyed the property to a bona fide purchaser without notice, although as to him the right of redemption was barred, the mortgagee remained a trustee for any balance of the purchase moneys received in excess of the amount due on the mortgage. *Linnell* v. *Lyford,* supra. If the conveyance was to a purchaser with notice he took the property subject to the outstanding equity and it may be redeemed from him. *Bradley* v. *Merrill,* supra; 41 *Corpus Juris* 368 n. 99 and cases cited.

Under the statute the notice which will defeat the title of a purchaser for a valuable consideration is actual notice either of the trust or of facts which would or ought to put him upon inquiry in reference to it. Where an intending purchaser has actual notice of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that which he is about to purchase he stands charged with notice of that which inquiry would have revealed by the exercise of ordinary diligence. This, in the judgment of the law, is actual notice inferred or implied as a fact from circumstances and the equivalent of actual notice proved by direct evidence. As to what facts are sufficient to excite inquiry in such a case and

charge the purchaser with implied actual notice under the statute there is no hard and fast rule. They must be such facts as would lead a fair and prudent man with ordinary caution to make inquiry. *Knapp* v. *Bailey*, 79 Me., 195, 9 A., 122, 1 Am. St. Rep., 295; *Bradley* v. *Merrill*, supra.

The facts established by the record compel the inference that the defendant, George P. Findlen, knew that the mortgagor and not his vendor was in possession of and operating the farm which he bought, a fact which alone did not directly prove actual notice of the existence of the outstanding equity or compel inquiry concerning it but, nevertheless, is a circumstance to be considered with others in determining whether inquiry should have been made. *Porter* v. *Sevey*, 43 Me., 519, 530. Compare *Coleman* v. *Dunton*, 99 Me., 121, 58 A., 430; *Hopkins* v. *McCarthy*, 121 Me., 27, 115 A., 513. Along with this we find that the purchaser more than a year before he bought the mortgaged premises when asked by the mortgagor to loan him money was told by him that "everything I have got is in that farm." And without contradiction the mortgagor testified that the purchaser after he bought the farm came to him to see why he didn't vacate and upon being told that it was because of his equity in the property stated that his vendor, the equitable mortgagee, had told him that "the equity was all used up." And finally in the face of this evidence the defendant, George P. Findlen, remained silent and did not testify in his own defense. He had a right, of course, to rely on the denials of his pleadings and submit his case on the complainant's proof but all the facts relating to his having received notice being peculiarly within his own knowledge, from his silence we must assume that he preferred the adverse inferences which might be drawn from the complainant's evidence "to any statements he could truly give or any explanations he might make." The failure of this defendant to take the stand under these circumstances is a fact which cannot be disregarded. *Union Bank* v. *Stone*, 50 Me., 595, 598, et seq., 79 Am. Dec., 631; *York* v. *Mathis*, 103 Me., 67, 81, 68 A., 746. We are

convinced that in this case the defendant, George P. Findlen, must be charged with notice that the property which he purchased was subject to the complainant's equity of redemption.

The defendant, Katherine R. Tierney, as made known in the bill is a nonresident and although served in hand with a copy of the bill outside this state did not appear generally and defend but through her counsel moved that the proceedings be dismissed for want of jurisdiction and as a part of the decree entered dismissal as to her was ordered. In this there was no error. It is axiomatic that the courts of equity of a state have no authority to render a decree in personam against a nonresident who has not been served with process within the state or voluntarily submitted to the jurisdiction.

The contention of the defendant, George P. Findlen, that his codefendant, Katherine R. Tierney, is an indispensable party to this proceeding and in her absence no decree against him can be entered is not sustained. When the equitable mortgagee conveyed the mortgaged premises, her vendee, with notice, occupied the position of an assignee of the mortgage. *DeClerq* v. *Jackson*, 103 Ill., 658. The redemptioner had notice of the assignment which apparently was absolute. In such a case no reason is found for departing from the general rule that demand for an accounting by the mortgagor must be made upon the assignee, a bill to redeem must be brought against him and the joinder of the original mortgagee is unnecessary. *Doyle* v. *Williams*, 137 Me., 53, 59, 15 A. (2d), 65; *Beals* v. *Cobb*, 51 Me., 348; *Williams* v. *Smith*, 49 Me., 564.

Inasmuch as on the case made by the bill and proof accounting by and redemption from the defendant, George P. Findlen, is the only relief to which the complainant is here entitled and a decree consistent with equity and good conscience can be entered which will effect him alone, the absent defendant is not an indispensable party. *Lawrence* v. *Rokes*, 53 Me., 110; *Clarke* v. *Marks*, 111 Me., 218, 88 A., 718; *Hyams* v. *Old Dominion Co.*, 113 Me., 337, 93 A., 899. The joinder of the defendant, Katherine R. Tierney, as a party does not require a

dismissal of the bill as to him on that ground. *Bugbee* v. *Sargent*, 23 Me., 269; *Brown* v. *Lawton*, 87 Me., 83, 32 A., 733; *Storey Eq. Pl.* § 237. And a dismissal as to her for want of jurisdiction which is necessary for the reasons already stated will effectively terminate her status in the bill as a party. *Rucker* v. *Morgan*, 122 Ala., 308, 25 So., 242; 21 *Corpus Juris*, 638, 30 C. J. S. Equity, sec. 571.

It appearing that the decree below in so far as it relates to the rights of the complainant against the defendant, George P. Findlen, was clearly wrong the appeal is sustained and the case remanded for the entry of a decree that the bill be sustained with costs of this appeal and in that court as to that defendant and that he be ordered to render an account as mortgagee in possession and when in further proceedings the amount due on the mortgage is determined appropriate orders be made as to the payment thereof by the complainant and a reconveyance of the mortgaged premises to him, and as to the defendant, Katherine R. Tierney, that the bill be dismissed for want of jurisdiction over her person.

So ordered.

EVA M. SHAW, ADMINISTRATRIX ESTATE OF JOSEPH SHAW

vs.

MARIA PIEL.

Somerset. Opinion, July 15, 1942.

Directed Verdict. Contributory Negligence.
Trespasser, Licensee and Invitee Distinguished.

Exceptions to a directed verdict must be sustained if the evidence in the case would have warranted the jury to return a different verdict. When fairminded and unprejudiced persons may reasonably differ in the conclusions to be drawn from undisputed facts, the question is one of fact for the jury.

If a person goes upon the property of another as a traspasser, he is there without right and is bound to accept the existing situation. If he is allowed to go there for his own interest or convenience, he is a mere licensee and the

owner owes him no duty except not to cause him harm wilfully. If he is there by invitation of the owner, there is the duty of the owner to maintain the place in a reasonably safe and suitable condition.

An invitation may be express or implied. Generally, an invitation is implied in behalf of one who enters the premises of another in pursuance of an interest or advantage which is common or mutual to both him and the owner.

Whether, in the instant case, there was mutuality of interest and a recognition of plaintiff's decedent as an invitee involved questions of fact which were within the province of the jury to decide.

Under the record, in the instant case, there was also a jury question as to whether the decedent was guilty of contributory negligence.

ON EXCEPTIONS BY PLAINTIFF.

The decedent, Joseph Shaw and another, one Hinman, were on a business trip for their employer and entered upon the premises of the defendant for the purpose of selling their products. Hinman entered into negotiations with defendant's agent, one Lange, and in reply to questions by Lange, said that Shaw had the necessary data for the information requested. At that moment Shaw entered the building and, in proceeding to join Hinman and Lange, fell through an unguarded hole from which a trap door had been lifted, receiving injuries which caused his death. The presiding justice in the trial court directed a verdict for the defendant. Plaintiff excepted. Exceptions sustained. The case fully appears in the opinion.

Locke, Campbell & Reid,

James L. Reid, for plaintiff.

Berman & Berman, by *David V. Berman,* for defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

MANSER, J. On April 28, 1939, Joseph Shaw received bodily injuries by falling through a trap door in a building on premises owned by the defendant. From these injuries he died six months later. This action is brought by the Administratrix of the decedent's estate for resulting damages to him, recovery,

if any, to be first for the benefit of the North Anson Reel Co., employer of the decedent, in so far as it was entitled thereto under subrogation rights provided in the Workmen's Compensation Act, R. S., c. 55, § 24.

The case comes up on exceptions by the plaintiff to the direction of a verdict for the defendant by the presiding Justice and to the exclusion and admission of certain evidence.

If the evidence in the case would have warranted the jury in returning a verdict for the plaintiff, the exceptions must be sustained. When fairminded and unprejudiced persons may reasonably differ in the conclusions to be drawn from undisputed facts, the question is one of fact for the jury. *Patten* v. *Field*, 108 Me., 299, 81 A., 77.

The facts, which may be regarded as undisputed, are as follows:

Shaw and one Hinman were on a business trip for their employer, undertaking to procure orders for its products from such persons as might be interested therein and in need thereof. The merchandise handled by the employer included building supplies, materials and paints. The defendant owned a residential estate of considerable area with a main house, several other buildings and a greenhouse. The men drove upon the premises at about noon time, went to the house and inquired of the woman who came to the door as to the man in charge of the estate. They were informed that he was then absent but was expected to return soon. Waiting in their own car in the driveway, they saw another car enter the premises and proceed to the rear of the house. Upon renewed inquiry, they learned from the same woman that probably the arrival was the man for whom they were looking, and that he might be at the greenhouse, and they were informed as to its location. They went in that direction by a well defined path, and were again told by a workman outside the greenhouse that the man they wanted, a Mr. Lange, was inside. There was attached to the greenhouse a small wooden building, through the door of which Hinman entered, expecting that Shaw, who had stopped ap-

parently temporarily, would follow him. Hinman proceeded down a pathway in the center of the wooden building and successfully passed a square opening or hole from which a trap door had been lifted, and which was unprotected by guard rails, although such safety appliances were there and presumably available for use. Hinman engaged in conversation with Lange concerning the products he had for sale, and was asked as to some special paints for the greenhouse. To this Hinman replied that Shaw had a booklet listing many such paints and could give the necessary technical data relating thereto. At that moment Shaw entered the building, stepped forward about six feet and fell through the hole. The injury did not at first appear serious, and before taking Shaw to his home, Hinman continued his negotiations with Lange and took an order for some paint, linseed oil and turpentine, which was later delivered and payment received:

The questions involved as to liability of the defendant for the damages resulting from the injury were:

> Was Shaw a trespasser, a licensee or an invitee at the time of the accident?
>
> Was there violation of any legal duty owed to Shaw by the defendant?
>
> Was Shaw himself guilty of contributory negligence?
>
> Should a verdict have been directed for the defendant upon the ground that no liability existed as a matter of law?

As to the status of Shaw at the time of the accident, the general legal principles have been definitively applied by our Court in a succession of decisions that, if a person goes upon property of another as a trespasser, he is there without right and is bound to accept the existing situation. If he is allowed to go there for his own interest or convenience, he is a mere licensee and the owner owes him no duty except not to wilfully cause him harm. If he is there by invitation of the owner, then

it is the duty of the owner to maintain the place in a reasonably safe and suitable condition.

An invitation may be express or implied. When the owner in terms invites another to come upon his premises, the invitation is express. An invitation is implied in behalf of one who enters the premises of another in pursuance of an interest or advantage which is common or mutual to him and the owner. *Parker* v. *Publishing Co.*, 69 Me., 173, 31 Am. Rep. 262; *Dixon* v. *Swift*, 98 Me., 207, 56 A., 761; *Russell* v. *M. C. R. R.*, 100 Me., 406, 61 A., 899; *Stanwood* v. *Clancey*, 106 Me., 72, 75 A., 293, 26 L. R. A., N. S., 1213; *Patten* v. *Bartlett*, 111 Me., 409, 89 A., 375, 49 L. R. A., N. S., 1120; *Austin* v. *Baker*, 112 Me., 267, 91 A., 1005, L. R. A., 1916F, 1130; *Robinson* v. *Leighton*, 122 Me., 309, 119 A., 809, A. L. R., 1386; *Foley, Malloy* v. *Farnham*, 135 Me., 29 at 34, 188 A., 708.

The opinion in *Carleton* v. *Franconia Co.*, 99 Mass., 216, puts it thus:

> "The owner or occupant of land is liable in damages to those coming to it, using due care, at his invitation or inducement, express or implied, on any business to be transacted with or permitted by him, for an injury occasioned by the unsafe condition of the land or of the access to it, which is known to him and not to them, and which he has negligently suffered to exist and has given them no notice of."

This statement of principle is quoted with approval by our own Court in *Moore* v. *Stetson*, 96 Me., 197, 203, 52 A., 767.

In somewhat different phraseology, the rule is given in *Sweeny* v. *Railroad Co.*, 92 Mass., 368 at 374, 87 Am. Dec., 644, as follows:

> "A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for

such use, and for a breach of this obligation he is liable in damages to a person injured thereby."

More directly as to the situation here involved is the statement of principle as given in 38 Am. Jur., Negligence, ‡121:

"a person who goes upon premises for the purpose of transacting business with the owner or occupant is, in the absence of circumstances indicating the contrary, entering for a purpose which is of advantage, or at least of sufficient interest, to the owner or occupant that the entry can be said to be invited impliedly by the latter."

It has been said that precisely how far, under all circumstances, an implied invitation extends, with reference to the persons to be included in it is hardly capable of exact statement. *Plummer* v. *Dill,* 156 Mass., 427, 31 N. E., 128, 32 Am. St. Rep., 463.

Under the circumstances of the present and like cases, when the premises are not occupied as a general place of business where people may be expected to go on matters of mutual advantage to the occupier and the visitor, the rule as to implied invitation should be reasonably interpreted as of somewhat more limited application. On such premises the caller is no more than a licensee until the occupier or his representative expresses or indicates a willingness to consider, discuss or negotiate with such caller respecting matters of common interest. *Lanstein* v. *Acme Works,* 285 Mass., 328, 189 N. E., 44.

That there was mutuality of interest here, and the recognition of Shaw as an invitee, the plaintiff asserts is supplied by the evidence that Shaw and Hinman were engaged in the common purpose of selling paint and building materials, that Hinman had engaged in conversation with Lange, that the jury under the evidence would be justified in finding that Lange was in charge, for the owner, of such matters, that inquiry had been made by Lange as to some special paint for the greenhouse, that Hinman had stated Shaw had the particular

information, and a sale was consummated as a result of this visit. Further, that Shaw was known to be there and ready to furnish the information requested by the representative of the defendant.

This situation involved questions of fact, peculiarly within the province of the jury to determine. *Martin* v. *Eldridge*, 123 Me., 569, 124 A., 73.

One other question is discussed in the briefs as to the status of Shaw as affected by the directions given by the woman at the house and by a workman, concerning the whereabouts of Lange. It is urged by the plaintiff that the jury would be justified in assuming that the directions were given by persons with apparent authority to represent the owner and thereby the visitors became invitees. On the other hand, it is argued that no authority to change the status is indicated by such acts and even if authorized would not of themselves alter the legal relationship. If the case hinged on these incidents alone, the jury question, if any, would be very thin. The most that can be deduced is to negative any inference or assumption that either Shaw or Hinman were forewarned by these directions of any hazard which might lie in their pathway. The cases of *Denny* v. *Hotel Co.*, 282 Mass., 176, 184 N. E., 452, and *Lanstein* v. *Acme Works*, supra, are informative on the issue.

Upon the record in this case it cannot be held as a matter of law that Shaw was guilty of contributory negligence. The case starts with the presumption of due care in his favor. R. S., c. 96, ¶50, provides:

> "In actions to recover damages for negligently causing the death of a person, or for injury to a person who is deceased at the time of trial of such action, the person for whose death or injury the action is brought shall be presumed to have been in the exercise of due care at the time of all acts in any way related to his death or injury, and if contributory negligence be relied upon as a defense, it shall be pleaded and proved by the defendant."

Then it is not controverted in the present state of the record that in this small wooden building there was an open, unguarded trap door in Shaw's pathway, that other persons were in the building and beyond the opening, and that Shaw had no knowledge or warning of the condition as he entered. That Hinman had successfully avoided the peril, although evidential, is not necessarily controlling. It might be reasoned that, seeing him at the other end of the room, intuitively gave Shaw a sense of security. There were conditions as to light, upon the determination of which reasoning minds might differ. It is claimed that outdoor there was snow, with the sun shining thereon, while inside there was semi-darkness; that the gaping hole was within six feet of the entrance, and that this raised a question as to adjustment of vision to the changed conditions. All these constitute issues of fact which were not for the Court to decide. We have no intention of expressing any opinion thereon, but it was the province of the triers of fact to determine them. They might have found that there was an obvious, apparent condition clearly visible to one of ordinary powers of observation, to which the defense of contributory negligence would have application, but the record does not conclusively require them to do so.

It is claimed in the defendant's brief that the cases of *Dixon* v. *Swift*, 98 Me., 207, 56 A., 761, and *McClain* v. *National Bank*, 100 Me., 437, 62 A., 144, are determinative upon the point. The first of these cases, however, was before the Court upon report, which made it the duty of the Court to decide the facts as well as the law. Even so, an analogous, factual situation was not presented. In the second case, it was determined that the plaintiff was at best a mere licensee and not an invitee, and while the Court perhaps unnecessarily passed on the question of due care on the part of the plaintiff, this, too, was essentially different in the circumstances described.

It being the duty of the Court to sustain the exception to the direction of a verdict, the other exceptions as to exclusion or admission of testimony becomes innocuous and academic.

They require no determination, as in this situation they affect neither party and the plaintiff is not thereby aggrieved.

Exception to direction of verdict sustained.

PHYLLIS R. BECKWITH *vs.* SOMERSET THEATRES, INC.

Somerset. Opinion, July 20, 1942.

Automobiles. Negligence.
Trespassers and Invitees Distinguished. Facts for Jury.

If a person so surfaces and maintains his land abutting on a public highway as to indicate to the traveling public that such land is included in and is a part of such highway, with no sufficient warning to the contrary, he impliedly invites or allures travelers lawfully on the highway to drive over that land as if it were a part of such highway, provided such travelers did not know that the land was private property. In such circumstances, the travelers would not be trespassers on the land, but invitees, to whom the land owner owes the duty of keeping it in a reasonably safe condition for such travel.

Whether or not in the instant case, the land of the defendant was so surfaced and maintained as to amount to an implied invitation to such travelers to use it as if it were a part of the public highway on which it abutted, and if so, whether the owner kept the premises in a reasonably safe condition for such travel; and whether or not the plaintiff was guilty of contributory negligence in the use thereof; were all questions of fact which should have been submitted to the jury under appropriate instructions.

ON EXCEPTIONS.

Action for damages for personal injuries and damage to automobile. Defendant was the owner of a vacant lot of land on a busy corner in Skowhegan. The land was surfaced with the same material as was Court Street, on which street the land abutted. On one corner of defendant's land was a concrete block set for a marker. Plaintiff was driving along Court Street about six o'clock on the afternoon of November 23, 1940, and started to turn her automobile. In so doing her automobile struck the concrete block. She testified that, owing to the fact that defendant's land was surfaced with the same material as

the street and there was no sidewalk or anything separating defendant's land from the street, she thought while she was turning her automobile that she was in the street. The court directed a verdict for the defendant. Plaintiff excepted. Exceptions sustained. The case fully appears in the opinion.

Donald N. Sweeney, for the plaintiff.

Clayton E. Eames, for the defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

WORSTER, J. On exceptions to the direction of a verdict for the defendant.

In this action the plaintiff seeks to recover damages for personal injuries suffered by her when the automobile she was driving struck a large concrete block on the defendant's land, which abutted a highway on which she had been traveling, and also for damages for injuries to the automobile caused by that impact.

There are no buildings on this land, which is about forty feet wide, located at one of the busiest street corners in the village of Skowhegan, and bounded on the east by Court Street, on the west by the railroad tracks, and on the south by Russell Street. Automobiles are regularly parked on said land, onto which they may be driven from either Court Street or Russell Street, right over the lines and letters painted on the macadam surface. The land is surfaced with the same material as is Court Street, with which it is on a level at the line of contact, but going from Court Street toward the railroad tracks there is a slight up grade.

About six o'clock on the afternoon of November 23, 1940, the plaintiff, a resident of Presque Isle, who had been calling on a friend in Norridgewock, who had a shop on Water Street in Skowhegan, started, in that street, to go to Bangor, where she had to be that evening. There was no snow on the ground. The plaintiff said she thought it was raining or misting, but was

not positive about it. She made a left hand turn and started to drive the automobile up Court Street, traveling, according to her estimate, at about fifteen miles an hour. The automobile lights were on. She said she could not state whether or not she noticed the street light at a corner which was evidently indicated to her on a chalk on the blackboard, although the location thereof is not shown in the record, but she testified that probably she did. She had not gone more than three or four car lengths past the intersection of Water and Court Streets when she discovered that she was on the wrong road. She immediately made a sharp turn to the left, to get back onto Water Street, traveling then at an estimated speed of five to ten miles an hour. In making this turn, she drove onto said land of the defendant and struck the concrete block, of which she had no previous knowledge.

The alleged negligence complained of was the erection and maintenance, without any warning of danger, of a large, three-sided, light colored concrete block, located wholly on said dedendant's land, and marking the corner thereof at the junction of Russell Street and Court Street, thus creating what the plaintiff claims was, in the circumstances of the case, a dangerous condition.

The block had two straight sides, each of which was about five feet long. One side faced Court Street, and the other side faced Russell Street. It was about seven feet from the ends of the sides farthest from the corner, passing around the circular back of the block. The average height of the block was somewhere thirteen to fifteen inches. There was a cavity or hole inside of it, and some time in 1940, prior to November of that year, a plank, probably six feet long, stood upright therein, but it was not there at the time of the accident. At that time the block was unpainted, but it has since then been painted a bright red color, and a painted post has been erected therein.

The defendant contends that it had a legal right to erect and maintain that concrete block on its own land to mark the corner thereof.

There is not the slightest doubt but that owners of property abutting a public highway have a right to suitably mark the corners of their land with appropriate markers, so long as this right is exercised with due regard and respect to the rights of others, and especially to the rights of travelers lawfully using the highway. Such owners, however, must use reasonable care to keep their premises abutting the highway in such a condition as not to endanger travelers in their lawful use of the highway. See *Ruocco, Admr.* v. *United Advertising Corporation et al.*, 98 Conn., 241, 119 A., 48, 30 A. L. R., 1237, and cases therein cited.

But the defendant claims that this land was purely private property, of which the public was suitably warned, and that the plaintiff was a trespasser thereon, to whom the defendant owed no duty except not to wilfully or wantonly injure her.

There was evidence to the effect that there was a painted line on the macadam surface, marking the line where the defendant's land abutted Court Street, but, even after the accident, the plaintiff says that she did not see it. There was no evidence as to whether or not, at that time in late November, the line was still distinct and plainly visible, or whether it was in any way distinguishable from the ordinary street traffic lines which are frequently painted on the surface of the highway. Another painted line marked the southerly bound of the land where it abutted on Russell Street. Inside these lines, the words "Private Property" and "Keep Out" were painted on the macadam surface of this land, on the Court Street side thereof, near to the concrete block; and the words "Keep Out" were painted on the macadam surface of the land on the Russell Street side. It does not appear whether these words were then plainly readable, or whether the paint had faded. And it does not appear that they were so located as to be so visible to, or readable by the plaintiff, from the position she occupied just before the accident. Nor is there anything in the record to show whether or not she actually saw these words, unless it can be inferred from her testimony that she did not see them. She testified in part as follows:

"Q. After turning on Court Street what did you then do?

"A. I turned around in a large area there that I thought was large enough to turn in.

"Q. Was this area paved or macadamized at the time?

"A. Yes.

"Q. Was it at the same or similar level as the street?

"A. Yes.

"Q. Did you think you were turning in the street?

"A. Yes."

* * * * *

"Q. Did you at any time during your turning realize that you were not in the street?

"A. No; because I thought it was a paved way. I thought it was all street. There were no sidewalks or anything there."

If a person so surfaces and maintains his land abutting on a public highway as to indicate to the traveling public that such land is included in and is a part of such highway, with no sufficient warning to the contrary, he impliedly invites or allures travelers lawfully on the highway to drive over that land as if it were a part of such highway, provided such travelers did not know that the land was private property. In such circumstances, the travelers would not be trespassers on the land, but invitees, to whom the land owner owes the duty of keeping it in a reasonably safe condition for such travel. See *Leighton* v. *Dean*, 117 Me., 40, 102 A., 565; *Holmes* v. *Drew*, 151 Mass., 578, 25 N. E., 22; *Zetler* v. *Jame Realty Co.*, 185 Wis., 205, 201 N. W., 252; *Sears* v. *Merrick et al.*, 175 Mass., 25, 33, 55 N. E., 476, 7 Am. Neg. Rep., 58.

Whether or not this land of the defendant was so surfaced and maintained as to amount to an implied invitation to such travelers to use it as if it were a part of the public highway on which it abutted, and if so, whether the owner kept the

premises in a reasonably safe condition for such travel; and whether or not the plaintiff was guilty of contributory negligence in the use thereof; were all questions of fact which should have been submitted to the jury under appropriate instructions. *Stratton* v. *Staples*, 59 Me., 94.

The court erred in directing a verdict for the defendant.

Exceptions sustained.

CLARA BLANCHETTE, ADMRX.
ESTATE OF PAULINE BLANCHETTE
vs.
CLIFTON MILES.

York. Opinion, July 21, 1942.

Automobiles. Negligence. Damages. Powers of Referee. Special Findings of Facts.

Findings of fact by referees supported by any evidence of probative value are finally decided and exceptions do not lie.

Referees are the sole judges of the credibility of witnesses and the weight to be given their testimony.

Where one has knowledge that a bus has stopped to land passengers, due care requires that he anticipate that a passenger, having alighted, may pass to the other side of the road.

Under Sec. 50 of Chap. 96, R. S. 1930, the deceased is presumed to have been in the exercise of due care at the time of all acts in any way related to his death.

One is not bound to anticipate the coming of an unlighted car at an illegal rate of speed.

A child is bound to exercise only that degree of care which ordinarily prudent children of his age and intelligence are accustomed to use under like circumstances.

A referee under Rule XLII is not required to make special findings of fact and the failure to do so does not constitute exceptionable error.

No benefit is obtained by an exceptant unless he sets forth in his bill of exceptions enough to enable the Court to determine that the point raised is both erroneous and prejudicial. The aggrievance must be shown affirmatively.

Referees have the same powers as jurors in assessing damages under Chap. 252, P. L. 1939.

ON EXCEPTIONS TO ACCEPTANCE OF REPORT OF REFEREES.

Action for damages for death of plaintiff's intestate, a child of twelve, who was run over and killed by defendant's automobile operated by himself. The child had just alighted from a passenger bus and had passed hurriedly in front of the bus to go across the street. As she emerged in front of the bus, defendant, who had been following the bus, swung to the left to pass it and hit the child, and dragged her 75 to 100 feet before stopping. The referees decided in favor of the plaintiff and assessed damages in the sum of $1,000.00. Defendant excepted. Exceptions overruled. The case fully appears in the opinion.

Louis B. Lausier, for the plaintiff.

Armstrong & Spill,

N. B. & T. B. Walker, for the defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

HUDSON, J. On exceptions to acceptance of referees' report. This action is brought under Sections 9 and 10 of Chap. 101, R. S. 1930, as amended, known as the Death-Liability or Lord Campbell's Act.

Justifiably findable facts by the referees were: On the evening of September 29, 1939, Pauline Blanchette, aged 12, was run over and killed by the defendant's automobile, he then operating the same. She had just alighted from a passenger bus which had stopped opposite the entrance to the Webber Hospital in the city of Biddeford and passed hurriedly in front of the bus to go across the street into the hospital. As she emerged from in front of the bus, the defendant's car which had been following it swung to the left to pass and in doing so hit the child and dragged her from 75 to 100 feet before stopping. The defendant knew the bus had stopped and that passengers were to alight. He was driving from 20 to 25 miles per hour and did not see Pauline at all. He did not know whether his lights

were on or not. Those of the bus were on, inside if not outside. As to whether she stopped to look up and down the street before she entered the lane where she was hit, no witness testified.

The defense contends that the defendant was not negligent but that the child was guilty of contributory negligence.

> "In cases referred under Rule of Court under Rule XLII of the Superior and Supreme Courts, questions of fact once settled by Referees, if their findings are supported by any evidence of probative value, are finally decided and exceptions do not lie. They and they alone are the sole judges of the credibility of witnesses and the weight to be given their testimony, and their decision upon conflicting testimony is final." *Hincks Coal Co.* v. *Milan and Toole*, 135 Me., 203, 206, 193 A., 243, 245.

The defendant was bound to exercise due care commensurate with the danger to be avoided. With knowledge that the bus had stopped to land passengers, due care required that he anticipate that a passenger, having alighted, might pass to the other side of the road. The referees could have found that the defendant was oblivious to and disregardful of his duty. *Day* v. *Cunningham*, 125 Me., 328, 331, 133 A., 855, 47 A. L. R., 1229. There was ample testimony to support the finding of negligence upon the part of the defendant.

As to the claim of the child's guilt of contributory negligence, she is presumed under Sec. 50 of Chap. 96, R. S. 1930, page 1338 "to have been in the exercise of due care at the time of all acts in any way related" to her death. "She was not bound to anticipate the coming of an unlighted car at a rate of speed illegal even for a car with headlights burning." *Shaw* v. *Bolton*, 122 Me., 232, 235, 119 A., 801, 803. Pauline was only a child and was bound to exercise only that degree "of care which ordinarily prudent children of her age and intelligence are accustomed to use under like circumstnaces." *Colomb* v. *Street*

Railway, 100 Me., 418, 420, 61 A., 898, 899. The record does not reveal sufficient testimony to overcome the presumption.

The defendant filed a request for specific findings of facts by the referees. Findings of facts were found and stated by them, but it is claimed that all facts requested were not found and stated. It is insisted that this constitutes exceptionable error, but even if all facts requested were not found and stated, we do not think there is such error. In *Mitchell* v. *Mitchell,* 136 Me., 406, 423, 11 A. (2d), 898, it was held that a presiding Justice sitting without a jury is not required to make special findings of fact. Also, "No exception lies to the refusal to find a fact as requested." *People's Savings Bank* v. *Franklin R. Chesley,* 138 Me., 353, 26 A. (2d), 632, 636. While the *Mitchell* and *Chesley* cases related to hearings by a presiding Justice and this is a hearing by referees, we see no good reason for distinction requiring nonapplication of this principle. There being no legal duty to find the requested facts, the referees committed no wrong in failing to do so, if they did so fail, to which exceptions would lie.

This is not a case where the referees did not pass on "material matters in issue" where "the losing party has a legitimate grievance that may be remedied by bill of exceptions." See *Kennebec Housing Co.* v. *Barton,* 122 Me., 374, 377, 120 A., 56, 57.

Defendant also contends that the statement in the referees' report that the child was 11 years old when it had been stated and stipulated in the record that she was 12 constitutes exceptionable error. No benefit is obtained by an exceptant unless he sets forth in his bill of exceptions enough to enable the Court to determine that the point raised is both erroneous and prejudicial. The aggrievance must be shown affirmatively. It cannot be left to inference. *Bryne* v. *Bryne et al.,* 135 Me., 330, 331, 332, 196 A., 402. This record does not disclose the date of the birth of the child. The difference between Pauline's eleventh and twelfth year so far as this record shows

might have been only a matter of hours or even minutes, in which case it would be extremely improbable that it would have affected the degree of care chargeable to the child.

The remaining objection relates to the damages assessed in the sum of $1,000. It is claimed this amount is excessive. The pertinent statute (Chap. 252, P. L. 1939) provides:

> "The jury may give such damages as they shall deem a fair and just compensation, not exceeding $10,000, with reference to the pecuniary injuries resulting from such death to the persons for whose benefit such action is brought, and in addition thereto, shall give such damages as will compensate the estate of such deceased person for the reasonable expense of medical, surgical and hospital care and treatment, provided, that such action shall be commenced within 2 years after the death of such person."

Originally damages were limited by statute to the pecuniary effect of the death upon the beneficiaries. *McKay* v. *Dredging Co.*, 92 Me., 454, 458, 43 A., 29, and they now are except as to the expenses for which specific provision is made in the above amendment. As to the pecuniary damages to the beneficiaries, it is stated in the *McKay* case on pages 459 and 460 of 92 Me., on page 30 of 43 A.

> "The circumstances of the deceased and the beneficiaries are to be ascertained. The legal, family or other ties are to be considered. The age, capacity, health, means, occupation, temperament, habits and disposition of the deceased and of the beneficiaries are material to be known. . . . They would be subject, however, to acceleration, retardation, interruption and even extinction by other circumstances which may possibly, or probably, or even surely occur after the death. These inevitable, probable, and even possible subsequent circumstances are thereto be looked for and considered. Whatever result is arrived at must be reached from a careful balancing of the various probabilities."

Thus, much is left to the sound judgment of the assessor of damages. As stated in the *McKay* case, supra, they relate to the future, and as to them there can be no exact knowledge except as to "medical, surgical and hospital care and treatment." The statute makes the jury the judges of the amount of damages. Here the referees had jury powers in this respect. It has not been made to appear that there was not "any evidence of probative value" to support their assessment of damages.

Exceptions overruled.

CARLETON S. BARRETT *vs.* THOMAS H. GREENALL.

York. Opinion, July 21, 1942.

Statute of Frauds. Directed Verdict.

An oral contract for the sale of land is unenforceable when the Statute of Frauds is interposed as a bar.

Oral promises to repay money received in partial payment of an oral contract for the sale of land, or to share the profits of a sale of such land, are unenforceable when the Statute of Frauds is pleaded in defense.

One who has paid a part of the agreed purchase price of land in reliance on an oral contract for the purchase thereof may recover such payment, if not himself in fault, when the seller interposes the Statute of Frauds as a bar to the enforcement of such contract.

When the intended seller of land under an oral contract has made performance on his part impossible by divesting himself of title to the property, or when he has made statements to the intended purchaser which justify the belief that he has done so, such purchaser is not required to make a tender before seeking recovery of money paid in reliance on such contract.

The question for determination in the Law Court when the propriety of a directed verdict is in issue is whether or not the evidence presented might properly have justified a verdict for the adverse party.

Questions as to the credibility and sufficiency of evidence are for the determination of a jury.

ON EXCEPTIONS.

Action to recover money paid on account of the agreed purchase price of real property which, by oral agreement only, the

defendant had contracted to sell to the plaintiff. Plaintiff's declaration set forth that on the date agreed upon for the payment of the balance of the purchase price defendant verbally notified the plaintiff that he had sold the property to a third person. Defendant pleaded the Statute of Frauds as a bar to the action. The presiding justice in the trial court directed a verdict for the defendant. Plaintiff excepted. Exceptions sustained. The case appears fully in the opinion.

Hugh W. Hastings,

Frank S. Piper, for the plaintiff.

Willard & Willard, for the defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

MURCHIE, J. This case comes to the Court on exceptions by the plaintiff to the action of the justice presiding in the Trial Court in directing a verdict for the defendant at the close of the plaintiff's evidence, and a single exception to an evidence ruling which it is not necessary to consider.

Plaintiff's declaration, as amended, sets forth in two counts, one of which is a general omnibus count with a specification that reiterates the allegations of the other as to the sum of $300 paid by him to the defendant on named dates, that an oral or verbal contract for the sale of a cottage and lot by the defendant to the plaintiff at a price of $1200 was entered into in June, 1939, when $100 was paid as a deposit or partial payment thereon and possession taken (there being no allegation that a time was then fixed for payment of the balance); that thereafter a further payment of $200 was made to apply on the purchase price, and the expiration date fixed at "on or before September 21, 1940"; and that on said expiration date, the defendant verbally notified the plaintiff that he had sold the property to a third party and "then refused to complete" the transaction although the plaintiff was "prepared and ready to pay the balance" of the agreed purchase price.

As originally written, the count wherein the details of the alleged contract between the parties were set forth contained additional allegation that two weeks prior to the closing day aforesaid, it was orally agreed that plaintiff would relinquish his trade provided the defendant could sell the property for $1500, and would, in the event of such a sale, repay to the plaintiff that sum of $300 which represented the deposits he had theretofore made, plus $150 or one-half the difference between the two named prices. The count, as amended, is limited to a declaration seeking recovery of the $300 alleged to have been paid in partial payment of the agreed purchase price. There is no allegation that plaintiff ever made a sufficient tender of the unpaid balance to the defendant, accompanied by demand for a conveyance, but allegation is that prior to the agreed expiration date the defendant verbally notified him that the "property had been sold to others."

The pleadings are somewhat confused because the defendant, at the term when plaintiff was allowed to amend his declaration, filed a specification of defense in which the original oral agreement and the receipt of $100 as a deposit thereon was admitted, with a period of two months allowed for payment of the balance, as were the facts of an extension of time to June 1, 1940, and the later payment of $200 which, however, was asserted to have been paid after the extended expiration date, as rental, although it was to apply on the purchase price if plaintiff should still wish to purchase the property (there being no new assignment of an expiration date), whereas later, and before issue was framed, he filed amended pleadings in which he set up the Statute of Frauds as a bar to plaintiff's action on each count in his declaration as amended. While not material to the issue, his original specification carried denial that the premises had been sold to a third party and asserted that title thereto was still held by him.

It is undoubted on the record that the parties did make an oral contract for the sale of land which is unenforceable under the provisions of Paragraph IV of the Statute of Frauds, R. S.

1930, Chap. 123, Sec. 1; that the property involved was a cottage and lot with a lake frontage of 125 feet and a depth of approximately 100 feet; that the plaintiff as the intended purchaser paid $100 to the defendant as the intended seller and entered into possession of the property at the time the trade was made; and that the agreed price was $1200. It is equally clear that no written memorandum or note sufficient to satisfy the requirements of the statute was signed by the party to be charged therewith, *Williams* v. *Robinson,* 73 Me., 186, 40 Am. Rep., 352; *Kingsley* v. *Siebrecht,* 92 Me., 23, 42 A., 249. In point of fact, a sufficient memorandum was not then possible since one essential term, i.e., the time for payment of the balance and completion of the transaction, had not been agreed upon between the parties.

On these facts the agreement between the parties was unenforceable in law if defendant, as he did, should interpose the statute as a bar to action, *Lawrence* v. *Chase,* 54 Me., 196; *Farwell et al.* v. *Tillson,* 76 Me., 227; *Thurlow* v. *Perry et al.,* 107 Me., 127, 77 A., 641; and the same thing is obviously true of the subsequent agreement for cancellation of the original trade and a division of the profit to be realized in selling the property to a third party at an increased price. If plaintiff was seeking merely to collect half of that profit, or to recover the money paid by him on account of the agreed purchase price *on the basis of the defendant's verbal promise* to repay it which was alleged in the original declaration to be a part of the revised oral contract between the parties, a directed verdict would have been entirely proper. Ample authority is found to support the rule, as is stated in *Heath* v. *Jaquith,* 68 Me., 433, at 436, that:

> "if the party having the burden of proof . . . introduces no evidence which, if true, giving to it all of its probative force, will authorize the jury to find in his favor, the judge may direct a verdict against him,"

or, as later phrased:

"when it is apparent that a contrary verdict could not be sustained,"

Market and Fulton National Bank v. *Sargent,* 85 Me., 349, 27 A., 192, 35 Am. St. Rep., 376. See also *Bennett* v. *Talbot,* 90 Me., 229, 38 A., 112; *Coleman* v. *Lord et al.,* 96 Me., 192, 52 A., 645.

Such, however, is not the purport of the issue upon the amended pleadings and record of the evidence presented. The rule of law is well established that an intended purchaser of land under an oral contract which is unenforceable because of the Statute of Frauds, who has paid a part of the purchase price, when the statute is interposed by the other party as a defense and that party has breached the contract and made performance on his part impossible by divesting himself of title to the property which was the subject matter of the trade, may recover that portion of the purchase price which he has paid in reliance on the contract, *Richards* v. *Allen,* 17 Me., 296; *Greer* v. *Greer,* 18 Me., 16; *Kneeland* v. *Fuller,* 51 Me., 518; *Plummer et al* v. *Bucknam,* 55 Me., 105; *Jellison* v. *Jordan,* 68 Me., 373; *Purves* v. *Martin,* 122 Me., 73, 118 A., 892; and under this rule such a party, when his payment on account has been made in kind by the conveyance of other land, has been held entitled to recover the value of the land so conveyed, *Bassett* v. *Bassett,* 55 Me., 127. In *Purves* v. *Martin,* supra, the issue arose, as in the present case, on exceptions by the plaintiff to the direction of a verdict for the defendant by the justice presiding.

The record discloses that each and every item of proof necessary to establish the plaintiff's right to recover such part of the agreed price as he had paid in partial fulfillment of the contract is supported by evidence which, if believed by the proper trier of the fact, would be sufficient to satisfy the burden of proof resting upon him. Point was made in cross-examination of the plaintiff, and in the argument of defendant before this Court, that no demand had ever been made upon the defendant for a conveyance of the property contracted for, ac-

companied by a proper and sufficient tender of the unpaid portion of the purchase price. The plaintiff asserts in his testimony, however, in accordance with his declaration, that on the day when his right to complete the trade was to expire, he called upon the defendant, taking with him a certified check payable to the defendant for the unpaid balance. The check was not tendered but, accepting the interpretation of counsel for the defendant that even if its delivery had been offered it would not have represented a proper tender, his failure in this regard is not material if his evidence is believed, since decided cases establish the rule that neither tender nor demand is necessary when the facts disclose that either would be a useless ceremony because the party on and to whom demand and tender should normally be made has, by disposal of the property, "by his own act, deprived himself of the power of fulfilment" of his part of the trade, *Richards* v. *Allen,* supra; *Greer* v. *Greer,* supra. Such action entitles the intended purchaser to recover his payments exactly as if the non-fulfillment of the contract was due to refusal on the part of the vendor, *Kneeland* v. *Fuller,* supra; *Plummer* v. *Bucknam,* supra; *Jellison* v. *Jordan,* supra; and in the case of *Purves* v. *Martin,* supra, the fact that the seller was not possessed of full title to the property on the date when it was agreed the trade should be consummated was held to carry like effect.

The principle of law which controls the action of this Court, when exceptions are presented to test the propriety of a nonsuit or a directed verdict for the defendant in the Trial Court, is to determine only whether upon the evidence under proper rules of law "the jury could properly have found for the plaintiff," *Johnson et al* v. *New York, New Haven and Hartford Railroad et al.,* 111 Me., 263, 88 A., 988; and in determining that issue, the evidence must be considered in that light which is most favorable to the plaintiff, *Shackford* v. *New England Tel. and Tel. Co.,* 112 Me., 204, 91 A., 931. The issue here is not whether the evidence adduced is sufficient to establish the controverted facts, but whether or not it has a tendency to

establish those facts, and if this is so, although "it may not be strong in its support, and the Judge may well apprehend, that the jury will find it insufficient," the Court has no "right to weigh it, and determine its insufficiency as matter of law." *Sawyer* v. *Nichols*, 40 Me., 212. It is the province of the jury, and not of the justice presiding in the Trial Court, to judge of the testimony of the witnesses appearing in the cause and to weigh their evidence, *Sweetser* v. *Lowell et al.*, 33 Me., 446; *Blackington* v. *Sumner et al.*, 69 Me., 136. The credit to which the testimony of a witness is entitled is entirely a question of fact for decision by the jury. *Parsons* v. *Huff*, 41 Me., 410.

Examination of the reasons assigned by the justice in the Trial Court for his action in directing a verdict in the instant case discloses that he overlooked the rule of law which should here control and based his decision entirely on the assumption that plaintiff's claim was for recovery under a verbal contract, which he rightly decided was not evidenced by any memorandum in writing sufficient to satisfy the requirements of the statute which had been pleaded in bar. Plaintiff in the course of the trial introduced in evidence two writings signed by the defendant acknowledging receipt of the two sums of $100 and $200 respectively which are alleged in his declaration. Decision as matter of law that neither was sufficient to take the case without the operation of the Statute of Frauds was obviously correct, but the plaintiff was entitled to have the proper trier of the fact determine the issues as to whether or not the money paid by him to the defendant represented payments on account of the purchase price in reliance on the oral contract, and whether or not the breach of that contract originated in his failure or inability to pay the balance, or in the action of the defendant in making performance on his part impossible by divesting himself of title, or even if the latter recital is not entirely true, in making statements to the plaintiff which would justify his belief of that fact.

A directed verdict under the circumstances obviously represents reversible error, and it is therefore unnecessary, as al-

ready noted, to consider plaintiff's exception on the evidence ruling.

The mandate will be

Exceptions sustained.

ARDEN T. BUBAR *vs.* ANTONETTA BERNARDO.

Washington. Opinion, July 21, 1942.

Workmen's Compensation Act. Nonsuit.
Separate Counts in a Single Declaration.

Separate counts in a single declaration alleging (1) that plaintiff was in the exercise of due care when his injury was suffered, and (2) that defendant at the time was subject to the Workmen's Compensation Act may properly be included in one declaration.

While an employee assumes all the normal risks of his employment including those of defective machinery or equipment, the rule of assumption does not apply to such particular defects as have been called to the attention of his employer and which that employer has promised to remedy.

In considering the propriety of an ordered nonsuit, the evidence must be considered most favorably to the plaintiff.

When a defendant offers no denial of testimony tending to prove her own direct knowledge of a material fact, it is for the proper trier of the fact to determine whether or not the omission carries any implication of the truth thereof.

Issues of fact and as to the credibility and the weight of testimony are for the determination of the jury.

ON EXCEPTIONS BY PLAINTIFF.

The plaintiff alleged that his left eye was seriously injured while he was operating a jack hammer in defendant's quarry; that the injury was caused by a defective hand hammer necessarily used in his work; that the defective condition of the hammer had been called to the attention of defendant's responsible agents; and that promise of remedy had been made. Allegation was made in separate counts (1) that plaintiff was in the exercise of due care at the time of the injury, and (2) that defendant was then subject to the Workmen's Compensation

Act. The presiding justice in the trial court ordered a nonsuit. Plaintiff excepted. Exceptions sustained. The case appears fully in the opinion.

Myer W. Epstein,

Abraham Stern, for the plaintiff.

Eaton & Peabody,

Thomas L. Marcaccio of Providence, R. I. for the defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

MURCHIE, J. The plaintiff brings this case to the Court on an exception to the ruling of the justice presiding in the Trial Court in ordering a nonsuit.

On the record it would have been necessary, had the issue been submitted to a jury, for findings to have been made that the plaintiff, as an employee of defendant, on September 8, 1938, while operating a jack hammer in defendant's quarry, where six or more persons were regularly employed, suffered an eye injury from a chip of steel or iron which flew either from a hand hammer which he was wielding to remove a bit from the rod of the jack hammer or from the bit itself, or that the question as to whether it came from the one or the other was uncertain. The extent of the damage is not presently material, but as a result of the injury, the plaintiff lost the sight of his left eye where the chip struck. Necessary findings also, bearing in mind that there was no denial of any of the statements made in the plaintiff's testimony, would have been that the hammer was a home-made one; that it was defective; that the plaintiff had called the attention of defendant's foreman and general manager (described in the testimony as "the big boss") to the defect; and that undertaking had been made by an agent of the defendant, possessing authority, to fix it up or furnish another one.

Point is made by the defendant in argument that plaintiff's

action was not commenced until almost three years after the accident. The record discloses that the plaintiff quit work immediately following the injury; that he reported the injury promptly to the defendant's foreman and to her general manager; that he left the quarry shortly thereafter to secure medical attention and did not return to work for several days; and that until relieved by surgery more than a year and a half later, he was never able to stand the vibration which is a necessary incident to the operation of a jack hammer.

The declaration seeks to ground liability in negligence on the part of the defendant in furnishing an unsafe and defective hammer for the performance of a part of the plaintiff's necessary duties, when she knew or should have known of the defect. In separate counts the plaintiff alleges (1) his own due care, and (2) that defendant, in operating the quarry at the time of the injury, was subject to the provisions of the Workmen's Compensation Act, R. S. 1930, Chap. 55. In the first case brought before this Court after the enactment of that statute, where recovery was sought against an employer who was not an assenting one under its terms, on a declaration in common law form, this Court declared, although the issue was not there involved, that there was no inconsistency in joining such separate counts in one declaration. *Nadeau* v. *Caribou Water, Light & Power Co.*, 118 Me., 325, 108 A., 190. That principle we now affirm.

In any case where the propriety of an ordered nonsuit is brought up for review under an exception, the plaintiff is entitled to have this Court view the evidence presented in the cause most favorably to his claim. *Johnson et al.* v. *New York, New Haven & Hartford Railroad et al.*, 111 Me., 263, 88 A., 988; *Shackford* v. *New England Tel. & Tel. Co.*, 112 Me., 204, 91 A., 931. In *McTaggart* v. *Maine Central Railroad Co.*, 100 Me., 223, 60 A., 1027, where a case was submitted on report, it was stipulated that it was to be considered as if a verdict for the plaintiff was under review on a motion of the defendant for new trial, in which situation, as in the present one, all con-

clusions and inferences of fact which a jury would have been warranted in finding for the plaintiff must be considered by us in that beneficent light.

But for the applicability of the Workmen's Compensation Act, the issue under the count wherein the plaintiff alleges his own due care would be a very narrow one, to be controlled within the established rule that an employee assumes the risks which are incidental to his employment, *Golden* v. *Ellis et al.*, 104 Me., 177, 71 A., 649; *Cooney* v. *Portland Terminal Co.*, 112 Me., 329, 92 A., 178; as modified by the principle recognized in *Dempsey* v. *Sawyer*, 95 Me., 295, 49 A., 1035, that while he must be held to assume all normal risks, including that of defective machinery, such do not include particular defects previously reported to his employer, as to which assurance of remedy has been given. On this count, disregarding entirely the provisions of the Compensation Act, it seems apparent that the plaintiff's own testimony, if believed, might have been considered sufficient, by a proper trier of the fact, to bring his case within the exception to the rule of one hundred per cent risk assumption, and absolve him from any charge of contributory negligence. The issues as to the credibility of his testimony and the weight to which it was entitled were questions for a jury rather than for the Court under our system of jurisprudence, *Sweetser* v. *Lowell et al.*, 33 Me., 446; *Sawyer* v. *Nichols*, 40 Me., 212; *Parsons* v. *Huff*, 41 Me., 410; *Blackington* v. *Sumner et al.*, 69 Me., 136, unless decision should properly hinge on one of the controls which the defendant asserts are fundamental and which will be discussed hereafter.

The same thing is true with reference to the count which seeks to eliminate questions as to the assumption of risk and contributory negligence by allegation that the defendant is "subject to" the provisions of the Workmen's Compensation Act. There may be thought to be some confusion in the authorities, so far as this Court is concerned, as to whether or not the burden rests upon a plaintiff who seeks to recover on this basis to plead the status of his employer affirmatively. In the

Nadeau case, supra, Mr. Justice Deasy discussed this question in considering exceptions (1) to the refusal of the justice presiding in the Trial Court to instruct the jury that the plaintiff must show that the defendant had more than five workmen or operatives employed in the business in which plaintiff was employed at the time of his injury, and (2) to an instruction that it was not a defense in the case that the plaintiff was negligent. The majority of the Court declared that such burden did rest upon such a plaintiff, with the burden of allegation of the fact, but notwithstanding no such allegation was contained in the declaration, the exceptions were overruled because evidence on the point, offered by the plaintiff in the trial of the cause, had been excluded at the instance of the defendant. The opinion drew a distinction between large employers and small ones to which Mr. Justice Morrill was unwilling to subscribe and in a separate concurring opinion he construed the Act as operating to deprive a defendant employer of the common law defenses and as imposing the burden on him to allege and prove any facts on which he sought to rely which would establish his immunity from its terms.

Even under the rule declared by the majority in the *Nadeau* case, and it is unnecessary to affirm that rule upon the present facts, the plaintiff was entitled to have the issue of fact as to the defendant's negligence left for the determination of a jury, since one of the counts in his declaration did allege a status on the part of the defendant, proved by evidence that is not disputed as the record stands, that eliminated all other issues from the case unless, again, the issue was determined properly in the Trial Court on one of the more fundamental controls remaining to be considered.

In the argument addressed to this Court on behalf of the defendant there is no denial of these general principles but rather assertion is made that their operation is inapplicable to the state of facts presented because (1) the evidence adduced does not establish any negligence on the part of the defendant even under the applicable rule of consideration in the light most

favorable to the plaintiff, and (2) that, tested by the same standard, such evidence furnishes nothing more than ground for conjecture that the injury was occasioned by a metal chip, and no basis for a finding that it came in fact from the hammer, as was alleged, rather than from the bit, which was not alleged to be defective.

Reliance is also placed on assertion that the evidence offered on behalf of the plaintiff would not justify reasonable men in finding facts which would support his contentions because he did not make the injury known to his fellow workmen (other, it is to be presumed, than the blacksmith, his foreman, and the defendant's general manager, to all of whom his evidence shows that he did report it) when it occurred; or support his testimony by calling any of those fellow workmen to the stand as witnesses in his behalf, and because it would strain credulity to believe that one would suffer so grievous an injury as he alleges without seeking to remedy the condition before the lapse of so great a time, or having it definitely determined whether or not a steel chip was in his eye.

The first of these special controls is obviously untenable. The record contains evidence, uncontradicted in the present state of the case, on which a jury which believed it credible might properly have found negligence on the part of the defendant. The question as to its credibility, like that involving its weight, was, as already noted, for the jury and not for the Court. *Sweetser* v. *Lowell et al.*, supra; *Sawyer* v. *Nichols*, supra; *Parsons* v. *Huff*, supra; *Blackington* v. *Sumner et al.*, supra; *Martin* v. *Tuttle*, 80 Me., 310, 14 A., 207.

For the second of these special grounds of control the defendant relies upon the rule declared in *Smith* v. *Lawrence et al.*, 98 Me., 92, 56 A., 455, and *McTaggart* v. *Railroad*, supra, which, on widely divergent facts, stand for the rule that an allegation is not proved by evidence which furnishes ground for "surmise" or for "conjecture" only, and the admission of plaintiff in cross-examination that he did not see the chip fly from the hammer, or from the bit. Emphasis is laid upon the

statement of Mr. Justice Whitehouse in *Golden* v. *Ellis,* supra, that:

> "Even if a hammer is made of suitable material and properly tempered, it is a matter of common knowledge that when it is used with great force upon other steel implements, small chips or scales of steel are liable to break off and fly from one implement or the other."

The particular case turned on the recognized rule that the plaintiff, regardless of whether the chip came from a defective striking hammer wielded by his fellow servant or from the bull-set which he was holding, had assumed the particular risk to which his injury was chargeable. The Court later expressly declared that in considering the nonsuit which was in issue, it was assumed that the injury was caused by a chip "splintered off from a defective hammer used in a proper manner by a fellow servant."

As the record now under consideration stands, the testimony of the plaintiff shows that he was experienced in the use of a jack hammer and had removed bits therefrom over a term of years in the very manner employed on the occasion which is in question; that he had never known a chip to fly from a bit; and that his experience with the particular hammer showed that chips had frequently flown from it. Whether or not this evidence could be contradicted by the defense, and whether or not, if so contradicted, a record would be established on the basis of which the justice presiding at the trial, or this Court, might properly say that a jury finding of fact that the particular injury was in fact caused by a chip which flew from the hammer rather than from the bit, is not material at the present time. The record does not disclose whether or not the defendant, her general manager at the time of the accident, or her then foreman, was present in Court to hear the plaintiff tell his story, but the rule invoked in *Union Bank* v. *Stone,* 50 Me., 595, 79 Am. Dec., 631; *York et al.* v. *Mathis et al.,* 103 Me., 67, 68 A., 746, and *Devine* v. *Tierney et al.,* 139 Me., 50, 27 A.,

(2d), 134, would seem to be applicable and to indicate that since the defendant failed to offer any testimony, inference might properly be drawn by the appropriate trier of the fact that she preferred the adverse inferences of the testimony introduced on behalf of the plaintiff to any definite testimony available on her behalf.

As to whether or not the plaintiff's story strains credulity, the issue is whether or not the strain is so great that, as matter of law, it may be said there is no evidence in the record which would have supported a verdict in his favor if the case had been submitted to a jury and such a verdict returned. It is urged in argument that the implications carried by the abnormality of plaintiff's conduct is emphasized by what the record shows, or may be held to imply, as to conduct of the defendant after the injury by contrast with what would have been her normal action if plaintiff's testimony that his injury was promptly reported is accepted as true. This raises the query as to whether it is sufficiently well known that any employer under the circumstances would immediately, for his own protection, make certain of proper first aid treatment and medical assistance for an injured workman. Query might also be as to whether she would not have carefully preserved the hammer which was alleged to be the cause of the injury and producd it in court to shatter the plaintiff's entire case by showing that it was not in fact defective. This illustrates the kind of two-edged sword which is represented by the urging of the defendant that the plaintiff has not offered any of his fellow workmen as witnesses. On the authority of the *Union Bank,* the *York* and the *Devine* cases, supra (and particularly on that of the *Union Bank* case, where exception to an instruction given the jury that the fact the defendant did not testify was a matter which the jurors might consider and give such weight as they might think it deserved was held not to be error), plaintiff's testimony that the hammer was defective, that he had notified the agent of the defendant thereof, and received assurance of remedy, might properly, in the absence

of denial, be considered by any trier of the fact as carrying implication of support for the plaintiff's testimony that it was the hammer rather than the bit from which the chip which did the damage flew.

On the record it seems apparent that the testimony offered by the plaintiff was sufficient to make out a prima facie case, and that it was prejudicial error for the justice presiding to order a nonsuit.

Exception sustained.

GOTTESMAN & COMPANY, INC.

vs.

PORTLAND TERMINAL COMPANY.

MORTON SONE *vs.* PORTLAND TERMINAL COMPANY.

Cumberland. Opinion, July 21, 1942.

Warehousemen, Liability of. Damages; When Recoverable. Effect of Sustaining Exceptions.

A warehouseman is liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise.

Where a warehouseman is not responsible for the origin of the fire, he is not liable for the full value of the property stored, but the damages recoverable are limited to that part, if any, which may be saved after discovery of the fire upon exercise of due care.

Where damages are occasioned by different causes from each of which there is more or less damage to the property, if a portion of the damage is from a cause for which the defendant is not liable, the burden of proof is on the plaintiff to show the damage from the cause for which the defendant is liable as distinguished from other causes, and for only this part of the damage may recovery be had.

Damages are not recoverable when uncertain, contingent, or speculative. They must be certain both in their nature and in respect of the cause from which they proceed.

To authorize a recovery of more than nominal damages, facts must exist and be shown by the evidence which afford a basis for measuring the plaintiff's loss with reasonable certainty.

The effect of sustaining exceptions in cases heard by a referee rather than a jury is to restore them to the docket below for new trials both on damages and liability, either before a jury or, if agreed to, before the presiding Justice or the same or another referee.

ON EXCEPTIONS.

Two actions for breach of storage contract. The defendant, with agreed responsibility of a warehouseman, stored wood pulp received from each of the plaintiffs, the two contracts being wholly unrelated. A fire of unknown origin damaged pulp belonging to each plaintiff. It was conceded that the defendant was not at fault on account of the starting of the fire. The only question was how much of the damage was caused by defendant's negligence apart from the origin of the fire. The case was tried by a referee, who decided that because of negligence upon the part of the defendant, apart from the origin of the fire, the plaintiffs were entitled to certain sums as damages. The defendant complained that the damages assessed were not proved with reasonable certainty, and excepted to the acceptance of the referee's report. Exceptions sustained. The case fully appears in the opinion.

Nathan W. Thompson,

John D. Leddy, for the plaintiffs.

E. Spencer Miller, for the defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, JJ.

HUDSON, J. These two actions for breach of storage contracts were tried together before a referee and come up on exceptions to acceptance of his reports. Of the objections filed only those that have to do with assessment of damages need present consideration.

The defendant, with agreed responsibility of a warehouseman (Chap. 163, Sec. 21, R. S. 1930), received wood pulp from each plaintiff and stored it in box cars on three different tracks

in its Yard No. 9 in Portland. It consisted of 1875 bales delivered on March 8, 1937, by Gottesman & Company, Inc. and 2319 bales delivered on April 9, 1937, by Morton Sone. The contracts were wholly unrelated.

On April 13, 1937, a fire of unknown origin was discovered in this yard and by it some of each plaintiff's pulp was damaged. Of the 2319 bales of Sone pulp 180 bales were damaged and of the 1875 bales of Gottesman & Company, Inc. pulp 150 bales. It is conceded that the defendant is not at fault on account of the starting of the fire. Plaintiffs' counsel in his brief states: "The only question, therefore, is how much of that actual loss was caused by defendant's negligence."

The referee, having found negligence upon the part of the defendant (apart from the origin of the fire), awarded to Gottesman & Company, Inc. as damages $1,344, and to Mr. Sone $633.99. Consequently, it appears that of the total losses agreed upon, i.e., $950.98 by Sone and $2,016 by Gottesman & Company, Inc., the referee decided that the defendant was not liable for one-third of the total loss of each but only for the other two-thirds.

The defendant complains that the referee acted arbitrarily and capriciously in thus assessing the damages and asserts that they were not proved with reasonable certainty in either case. It also claims (we believe correctly) that the evidence does not reveal the identity of the box cars in which the wood pulp of either plaintiff was actually stored, the extent of the damage to the contents of any car, whether the pulp of one plaintiff or the other or both was "in the first car, the third car, the sixth car or some other car," whether the fire started in a car housing the Sone pulp or the Gottesman pulp or both, or how long the fire had been in progress when it was discovered, or, after discovery, how much damage was done to the property of either plaintiff. We do know that six cars caught afire and that one car had apparently just been ignited, while the other five were in differing stages of burning.

Dealing with these separately owned and unrelated lots of

pulp, we have a situation where we have no knowledge of the time in the progress of the fire when the defendant became at fault, if it did. It is entirely possible that the acts of negligence upon the part of the defendant, if there were such, took place at different times with reference to the Gottesman and the Sone pulp. It might well be that the damage to some of the pulp of one of the plaintiffs was occasioned quite largely before the defendant became negligent at all, but as to which plaintiff it is impossible of determination on this record.

In *Groves Co., Inc.* v. *Bangor & Aroostook Railroad Company,* 124 Me., 373, see page 376, 129 A., 823, it is held that under a bill of lading stipulating against liability unless loss or damage is due to negligence, the carrier is not liable for the full value of the shipment, but the damages recoverable are limited to that part of the shipment, if any, which may be saved after discovery of the fire upon exercise of due care.

Also this from *Chicago, B. & Q. R. Co.* v. *Gelvin,* 238 Fed., 14, on page 22, L. R. A. 1917 C, 983:

> "The record showing different conditions, ocurring subsequent to the fire, naturally affecting the gain in weight of these cattle, for which it is conceded the defendant could not be held responsible, without any proof of how much of the damage resulted from these conditions as distinguished from the damage resulting from the alleged injury, with nothing in the way of testimony of any witness pretending to even estimate the proportion of the damage resulting from either of the causes, is far short of that reasonable certainty required by law, and upon such a record a jury cannot arbitrarily apportion a part, or all, of the proven damages to the cause for which the defendant is responsible."

In *Priest* v. *Nichols,* 116 Mass., 401, it is held that when damages occasioned by different causes from each of which there is more or less damage to the property, if a portion of the

damage is from a cause for which the defendant is not liable, the burden of proof is on the plaintiff to show the damage from the cause for which the defendant is liable as distinguished from other causes, and that for only this part of the damage may recovery be had.

It is well settled law that damages are not recoverable when uncertain, contingent, or speculative. *Fogg* v. *Hall et al.*, 133 Me., 322, 325, 178 A., 56. To permit recovery they "must be susceptible of ascertainment with a reasonable degree of certainty, or, as the rule is some times stated, must be certain both in their nature and in respect of the cause from which they proceed." 15 *Am. Jur.*, Sec. 20, page 410. Also see 15 *Am. Jur.*, Sec. 22, page 413, and 25 *C. J. S.*, Sec. 26, b, page 491.

"To authorize a recovery of more than nominal damages, facts must exist and be shown by the evidence which afford a basis for measuring the plaintiff's loss with reasonable certainty." 15 *Am. Jur.*, Sec. 23, page 415.

Mere speculation, conjecture, or surmise will not suffice. Sufficient facts must appear so that they, or reasonable inferences from them, will establish proof of the damages by reasonable certainty.

We think the proven facts in these cases are insufficient to permit the establishment of damages with reasonable certainty. While absolute certainty is not required, sufficient facts must appear to afford a reasonable basis of computation in each case. *Bowley* v. *Smith*, 131 Me., 402, 406, 163 A., 539. Uncertainty exists here not only as to the extent of the damage sustained by each plaintiff but also as to the cause from which it resulted. True, stipulated is the total damage to each plaintiff, but a part of the total in each case, it is admitted, is not chargeable to the fault of the defendant. Here were two separately owned properties. Certainly neither plaintiff should be permitted to recover damages not suffered by it or him but by the other.

Hincks Coal Co. v. *Milan and Toole*, 135 Me., 203, 193 A., 243, 245, was a case where there was a joint liability in which

each defendant was chargeable for the whole loss and so is distinguishable from these cases. We adhere to the statement in the *Hincks* case, supra, that "absolute certainty is not required" and "It is enough if from the approximate estimates of witnesses a specific conclusion can be reached." But in the instant cases there were no such estimates and the evidence did not furnish a basis for reaching a specific conclusion in either case. It would seem that the referee adopted the fractions of one-third and two-thirds above referred to arbitrarily without basis therefor in factual proof. The exceptions to the acceptance of the reports must be sustained.

We should state, however, that the effect of sustaining the exceptions, these cases having been heard by a referee rather than a jury, will be to restore both cases to the docket below for new trials both on damages and liability, either before a jury or, if agreed to, before the presiding Justice or the same or another referee.

Exceptions sustained.

ARTHUR M. S. MEGQUIER *vs.* JAMES DEWEAVER.

HAROLD A. MEGQUIER, AN INFANT WHO SUES THIS ACTION BY ARTHUR M. S. MECQUIER, HIS FATHER AND NEXT FRIEND,

vs.

JAMES DEWEAVER.

Aroostook. Opinion, July 23, 1942.

Prejudicial Error. New Trial.

When it is apparent from a review of all the record that a party has not had that impartial trial to which under the law he is entitled, a motion for a new trial will be sustained.

MOTION FOR NEW TRIAL.

This was an action based on alleged injuries to a minor child by a school superintendent. The evidence was sharply con-

flicting. The jury found for the plaintiffs. The defendant filed motions for new trials. Motions sustained. New trials granted. The case fully appears in the opinion.

George B. Barnes, for the plaintiffs.

Nathan H. Solman,

Archibald & Archibald,

Cook, Hutchinson, Pierce & Connell, for the defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

THAXTER, J. There are before us here two actions, one brought by a minor, Harold A. Megquier, through his father as next friend, the other by the father to recover for loss of services of his son and for expenses incurred for medical and surgical treatment, hospitalization and nursing. The declaration in each case charges the defendant with an assault on the boy which resulted in injuries.

The defendant in September, 1940, when the assault is alleged to have taken place, was Superintendent of Schools of Weston and certain nearby towns. The minor child was a pupil in the Webster School situated in Weston. The boy had had some difficulty with his teacher, Mrs. Gillis, and the assault is alleged to have taken place while the boy, Mrs. Gillis, and the defendant were together in a room in the schoolhouse apparently discussing this trouble.

The evidence is sharply conflicting. Particularly is this true of the testimony of the boy on the one hand, and of the defendant and Mrs. Gillis on the other. The boy says that when he did not raise his head when requested to do so, the defendant forcibly forced his head back over a seat causing injury to the muscles of his neck. Both the defendant and Mrs. Gillis deny that any force was used. To sift the truth from contradictory evidence in a case of this kind requires an impartial approach and discriminating judgment on the part

of a jury. Especially is it important that they should be left free from any suggestion by court or counsel which would lead them to substitute sympathy or prejudice for an impartial consideration of the testimony.

There are before us a number of exceptions, some to rulings on evidence noted during the course of the trial, others to portions of the charge of the presiding justice. The bill calls our attention to some obvious errors. We do not regard it as necessary to discuss these in detail for the cumulative effect of all of them was in our opinion seriously prejudicial to the proper consideration by the jury of the defendant's side of the case. When it is apparent from a review of all the record that a party has not had that impartial trial to which under the law he is entitled, we have not hesitated to sustain a motion for a new trial. *Pierce* v. *Rodliff*, 95 Me., 346, 50 A., 32; *State* v. *Wright*, 128 Me., 404, 148 A., 141; *Springer* v. *Barnes*, 137 Me., 17, 14 A. (2d), 503. See also *Ritchie* v. *Perry*, 129 Me., 440, 444, 152 A., 621.

Motions sustained.
New trials granted.

CALVIN L. STINSON, APPELLANT,

vs.

JESSE W. TAYLOR, COMMISSIONER OF LABOR
IN RE WAGE BOARD.

Kennebec. Opinion, July 23, 1942.

Proceedings Necessary to Enforce Wage Rates Established by Wage Board.

When the Commissioner of Labor fails to comply with the statutory provisions in regard to the enforcement of wages established by a Wage Board, the Justice of the Superior Court is without jurisdiction in the case.

ON APPEAL.

An action was brought by the Commissioner of Labor to enforce wage rates established by the Wage Board acting for

the establishment of wages in the Industry of Packing of Fish and Fish Products. The Commissioner failed to follow the procedure provided by statute as a condition precedent to the maintenance of such action. Decision by the Justice of the Superior Court was for the Commissioner. Defendant appealed. Held that because of such failure by the Commissioner the Justice of the Superior Court was without jurisdiction. Appeal was sustained and the case remanded for dismissal for want of jurisdiction. The case fully appears in the opinion.

Blaisdell & Blaisdell, for petitioner-appellant.

Frank I. Cowan, Attorney General,

John S. S. Fessenden, for the Commissioner of Labor.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

PER CURIAM.

Appeal from the decision of a Justice of the Superior Court in an action brought by the Commissioner of Labor and Industry of this State to enforce the minimum fair wage rates established by the Wage Board for women and minors employed in the Industry of Packing of Fish and Fish Products.

Under Section 12 of Chapter 289 Public Laws, 1939, by which this proceeding is authorized, it is provided that the Commissioner of Labor and Industry as conditions precedent to the maintenance of an action to enforce minimum fair wage rates established for this Industry shall file in the office of the clerk of the Superior Court for Kennebec County the record of hearing before the Wage Board, together with its report, findings and determinations as filed with the Commissioner and his certificate of service thereof on each employer in this state of whom he has information or record. Here neither the record of hearing before the Wage Board nor the certificate of service on employers by the Commissioner of Labor and Industry have been filed. For this failure to comply with the statute the

Justice of the Superior Court from whose decision appeal is taken was without jurisdiction and the proceeding before him was a nullity. *Stinson, Apl't.* v. *Commissioner of Labor,* 137 Me., 332, 334, 17 A. (2d), 760.

On this record without a consideration of other questions raised by the appeal the mandate is

Appeal sustained.
Case remanded for dismissal for want of jurisdiction.

JENNIE M. JORDAN, ADMRX. ESTATE OF ROY E. JORDAN, JR.

vs.

MAINE CENTRAL RAILROAD COMPANY.

Penobscot. Opinion, July 25, 1942.

Railroads. Negligence. Questions for Jury. Doctrine of "last clear chance."

When there is a collision between a train and a truck and the truck driver is killed, the defendant railroad is liable if there was a time prior to the collision when the driver of the truck could not and defendant's trainmen could, by the exercise of due care, have prevented the accident.

In the instant case, it was for the jury to determine whether the truck was in fact out of control as it approached the crossing, whether the fireman of the train knew, or should have known, of this fact, whether he was negligent in not notifying the engineer at once and whether, if such notification had been given, the train could have been stopped or slowed so as to have avoided the accident.

ON EXCEPTIONS.

This action was brought by the plaintiff as Administratrix of the estate of Roy E. Jordan, Jr., a minor of the age of nineteen, to recover damages for his instantaneous death caused by the alleged negligence of the defendant. The defendant alleged negligence on the part of the decedent as the cause of the accident. At the conclusion of the testimony for the plaintiff, the

defense rested without offering any evidence and moved for a directed verdict, which motion was granted. The plaintiff excepted. Exceptions sustained. The case fully appears in the opinion.

Stern & Stern, for the plaintiff.

Perkins, Weeks & Hutchins, for the defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, JJ.

THAXTER, J. This is an action brought by the plaintiff as administratrix of the estate of Roy E. Jordan, Jr., a minor of the age of nineteen, to recover damages for his instantaneous death caused, as is alleged, by the negligence of the defendant. The defendant pleaded the general issue with a brief statement setting up the negligence of the deceased as the cause of the accident. At the conclusion of the testimony for the plaintiff the defense rested without offering any evidence and moved for a directed verdict. The presiding justice ruled that there was not sufficient evidence to warrant submission of the case to the jury and directed a verdict for the defendant. The case is before us on the plaintiff's exceptions to these rulings.

The issue presented is a narrow one involving solely the application of the "last clear chance" doctrine, for the plaintiff concedes that the deceased was himself negligent.

The law governing this question has been set forth in a number of cases in this jurisdiction and there seems to be no need for further extended discussion of it. *O'Brien* v. *McGlinchey,* 68 Me., 552; *Atwood* v. *Bangor, Orono & Old Town Railway Co.,* 91 Me., 399, 40 A., 67; *Butler* v. *Rockland, Thomaston & Camden Street Railway Co.,* 99 Me., 149, 58 A., 775, 105 Am. St. Rep., 267; *Kirouac* v. *The Androscoggin & Kennebec R'y Co.,* 130 Me., 147, 154 A., 81; *Collins* v. *Maine Central Railroad Co.,* 136 Me., 149, 4 A. (2d), 100. In the *Kirouac* case which involved, as does the instant case, a collision on a grade crossing, the rule was expressed as follows: "The plaintiff may

still recover in spite of his agent's negligence, if there came a time prior to the collision, when his driver could not, and the defendant's motorman could, by the exercise of due care, have prevented the accident. *Atwood* v. *Bangor, Orono & Old Town Railway Co.*, 91 Me., 399, 40 A., 67; *Dyer* v. *Cumberland County Power & Light Co.*, 120 Me., 411, 115 A., 194." "If the negligent operation of the truck continued to the moment of the collision, or for such a period of time that the motorman could not thereafter by the exercise of due care have stopped his car before the crash, there can be no recovery. *Butler* v. *Rockland, Thomaston & Camden Railway Co.*, 99 Me., 149, 58 A., 775." The *Collins* case involved also a collision on a grade crossing and the opinion, discussing fully the rule of law now before us, reaffirms the principle laid down in the *Kirouac* case.

The real difficulty comes not so much with the rule as with its application. In the instant case there is no dispute as to what happened, although we feel that varying inferences could permissibly have been drawn from the uncontroverted facts. The case really hinges on the testimony of the fireman of the defendant's train. This train proceeding easterly toward Bangor at a speed of forty to forty-five miles per hour was approaching the Odlin Road crossing near Bangor. It was 11:28 A.M. on a bright, cold, winter's day. The plaintiff's intestate was driving a light truck southerly along the Odlin Road toward the railroad crossing at a high rate of speed estimated at from fifty-five to sixty miles per hour. In spite of the fact that the engineer of the train commenced whistling for the crossing when about a thousand feet away and continued whistling until almost the moment of the collision, the driver of the truck appeared oblivious to the oncoming train until he was about five hundred feet from the crossing. At this time the train was approximately the same distance away. The fireman is apparently the only person who saw the accident and the only one who has any direct knowledge of what happened immediately preceding it. According to his testimony, as the

train approached the crossing he was at his station on the left of the engine cab and was able to see the stretch of the Odlin Road on his side for a considerable distance. The road was snowy and icy. His attention was called to the truck when it was about a quarter of a mile from the crossing. It was travelling at a high rate of speed and he continued to watch it. When it was about five hundred feet from the crossing, the driver applied his brakes and the snow commenced to fly. When it was within a hundred and fifty feet of the crossing and the train was about an equal distance away, the fireman called to the engineer, who from his position was unable to see the truck, to "plug her." The emergency brakes were promptly applied and the train was brought to a stop within six or seven hundred feet. The locomotive struck the truck with great force and completely demolished it.

In determining the issue now before us, the evidence and inferences therefore must be considered in the light most favorable to the plaintiff. *Shackford* v. *New England Tel. & Tel. Co.*, 112 Me., 204, 91 A., 931. The question is not how we might decide the case but only whether the jury, if the issue had been left to them, "could properly have found for the plaintiff." *Johnson* v. *New York, New Haven & Hartford Railroad,* 111 Me., 263-265, 88 A., 988, 989; *Barrett* v. *Greenall,* 139 Me., 75, 27 A. (2d), 599.

Negligence of the defendant can be based only on the theory that the truck was out of control as it approached the crossing and that this fact was either known or should have been known to the fireman who could have reported it to the engineer in sufficient time so that the train could either have been stopped before the impact or slowed down sufficiently to permit the truck to pass over the track in safety. The case is, we think, governed by the rule laid down in the *Kirouac* and the *Collins* cases, *supra*. The assumption in the *Kirouac* case was that the truck was stalled on the track of the defendant and that the plaintiff's driver could not extricate it. Whether the vehicle is stopped or moving is not, however, the deciding factor. The

question is whether it is beyond the power of the operator to control it so as to avoid the accident. In the *Kirouac* case it is said at page 149 of 130 Me., page 82 of 154 A.: "If we accept the plaintiff's version of what happened, it may well be true that his son, after the truck had stopped on the track or even after it had started to slide on the icy ground, was powerless to have prevented the accident."

We feel that in the case now before us it was a question for the jury to determine whether the truck in question was in fact out of control as it approached the crossing, whether the fireman knew or should have known of this fact, whether he was negligent in not notifying the engineer at once, and whether, if such notification had been given, the train could have been stopped before reaching the crossing, or at least slowed down sufficiently so that the accident would have been avoided.

Exceptions sustained.

BERT C. HURD

vs.

MAINE MUTUAL FIRE INSURANCE COMPANY.

Androscoggin. Opinion, July 27, 1942.

Insurance. Mutual Insurance Companies. Temporary Insurance. Authority of Agent. Test of Membership in Mutual Insurance Company. Oral Contract for Insurance Question for Jury.

As a general rule, in the absence of statute or charter provision to the contrary, a contract for insurance may be made orally even although the statute or charter expressly provides that the *policies* shall be signed by designated officers.

The above rule applies in mutual insurance cases in the absence of any statutory or charter provision to the contrary.

A promise by an applicant for insurance in a mutual insurance company to pay his assessments is a sufficient consideration to support the undertaking of the insurance company, through its agent, in covering designated property with temporary insurance, pending decision on the application.

By statute, agents of insurance companies shall be regarded as in place of the company in all respects regarding any insurance effected by them. This includes agents of mutual companies.

If, in the instant case, the agent covered the plaintiff with temporary insurance, then insurance was effected by him within the meaning of the statute.

The test of membership in a mutual assessment fire insurance company is not whether a policy has been issued, but whether or not the applicant was insured at the time in question.

A policy of insurance is merely evidence of the fact that the person to whom it has been issued is insured. One may be insured in a mutual assessment fire company even before a policy is made out.

Whether or not, in the instant case, an oral contract for temporary insurance was made was a question of fact for the jury.

In an action on an alleged oral contract of temporary insurance pending decision on application for policy, a pamphlet containing instructions to agents, of which there was no evidence that the applicant had knowledge, was properly excluded.

It was for the jury to decide whether the agent's action and his statement at the time of the fire amounted to admission by him that he had covered the plaintiff with temporary insurance; and, considering the evidence in the instant case, it cannot be said that the verdict of the jury was manifestly wrong.

ON EXCEPTIONS AND MOTION FOR A NEW TRIAL.

This was an action of assumpsit against a domestic mutual assessment fire insurance company on an alleged contract to insure the plaintiff against loss by fire or lightning. The plaintiff had made written application through defendant's agent for insurance on specified property, which application was mailed on the same day as made, to the defendant company, by its agent. Before the application was received by the defendant at its home office, the property burned and therefore no written policy covering the property was ever issued to the plaintiff. The plaintiff alleged that, through the agent, his property was orally insured from the time the application was signed. The defendant denied that its agent so covered the property with temporary insurance, and further, that, even if he did make such a contract, it was not binding on the defendant. The jury rendered a verdict for the plaintiff and assessed

damages. The defendant brought the case to the Law Court on exceptions and on a motion for a new trial. Exceptions overruled. Motion for new trial denied. The case fully appears in the opinion.

Morris Greenberg,

Wilfred A. Hay, for the plaintiff.

Pattangall, Goodspeed & Williamson, for the defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

WORSTER, J. On motion and exceptions by the defendant.

This is an action of assumpsit against a domestic mutual assessment fire insurance company, on an alleged contract to insure against loss by fire or lightning, where no policy had been issued.

Verdict was rendered for the plaintiff in the sum of $2,220. No question is raised as to the proof of loss, or the amount of the verdict.

The motion for a new trial and the exceptions to the refusal to direct a verdict for the defendant present the same question and will be considered together.

It appears that on August 14, 1939, the plaintiff, a resident of Webster Plantation, made a written application to the defendant, through Mr. Campbell, its agent at Kingman, for insurance for a term of three years from said date, against loss by fire or lightning, on the plaintiff's dwelling house, ell, shed and furniture, all of which is hereinafter, for the sake of brevity, called property. The application and the assessment note, with authority to the defendant's secretary to fill the blanks in the note, were both signed by the plaintiff, and were mailed that day by Mr. Campbell to the defendant, at Lisbon Falls, where it has its home office.

The property was burned August 17, 1939. The application was not received by the defendant at its home office until

August 18, 1939, when it was rejected, and so no written policy covering this property was ever issued to the plaintiff.

It is the contention of the plaintiff, briefly stated, that the defendant, through its agent, Campbell, orally insured said property against loss by fire or lightning, from the time the application was signed until such time as the plaintiff should be notified by the defendant that it had accepted or rejected the application. The defendant denies that Campbell so covered the property with temporary insurance, and, going further, it contends that even if he did make such a contract, it is not binding on the defendant. Although there are several counts in the writ, yet apparently the case was in fact tried below on the issues just stated.

As a general rule, in the absence of statute or charter provision to the contrary, a contract for insurance may be made orally, even although the statute or charter expressly provides that the policies shall be signed by certain designated officers. *Walker* v. *Metropolitan Insurance Company*, 56 Me., 371; See, also, *The City of Davenport* v. *The Peoria Marine and Fire Insurance Company*, 17 Iowa, 276, 284.

It is provided in one of the defendant's bylaws that

> "The conditions of the policy or contract between this Company and the assured shall consist of the By-Laws of the Company, the application for insurance, the Maine Standard Policy and all riders and endorsements attached or detached."

Oral contracts are plainly not included in this bylaw. "Or" is used in the sense of "to wit," and the word "contract" is only interpretive or expository of the word "policy" and means the same thing. *Commonwealth* v. *Grey*, 2 Gray (Mass.), 501, 502, 61 Am. Dec., 476; *The People ex rel.* v. *Nordheim*, 99 Ill., 553, 560; *Blumenthal* v. *Berkshire Life Ins. Co.*, 134 Mich., 216, 96 N. W., 17, 18; *Bryan* v. *Menefee*, 21 Okla., 1, 95 P., 471, 475.

And so that bylaw did not deprive the defendant of its common law right of making an oral contract of insurance, any

more than was the Metropolitan Insurance Company (56 Maine, 371, supra) deprived of that right by the statute which provided that "all policies of insurance shall be signed" in a certain manner by certain designated officers. Neither that by-law nor that statute were concerned with oral contracts of temporary insurance, but only with formal policies of insurance.

The mere fact that an application was made for a policy of fire insurance, does not preclude the applicant from showing that at the time he signed the application he was temporarily insured pending acceptance or rejection of his application. *Koivisto* v. *Bankers' & Merchants' Fire Ins. Co.*, 148 Minn., 255, 181 N.W., 580; *Nertney* v. *National Fire Ins. Co.*, 199 Iowa, 1358, 203 N.W., 826.

And the same rule applies in mutual insurance cases, in the absence of any statutory or charter provision to the contrary. *Brown* v. *Franklin Mutual Fire Insurance Company*, 165 Mass., 565, 43 N. E., 512, 52 Am. St. Rep., 534; *Zell* v. *Herman Farmers' Mut. Ins. Co.*, 75 Wis., 521, 44 N.W., 828.

Whether or not an oral contract for temporary insurance was made, was a question of fact for the jury (1 Cooley's Briefs on Insurance, page 560) and, since such contracts are usually of a very informal nature (32 C. J., page 1100) all of the facts and surrounding circumstances must be taken into consideration in determining that question.

The record here discloses that Mr. Campbell had been representing mutual fire insurance companies for about thirty years. At the time in question he was, and previous thereto had been, an agent of the defendant company. As such agent he was not intrusted with policy blanks to be filled out and delivered but was furnished by the defendant with application forms and assessment note forms, to be forwarded by him to the defendant for approval or rejection when signed by the applicant. Mr. Campbell was also agent of the York Mutual, in which the plaintiff's barn was insured, and of the Oxford Mutual, a Grange company, in which the plaintiff had been carrying in-

surance on his dwelling house. That insurance expired August 10, 1939, and Campbell, who had been doing the plaintiff's insurance business for quite a number of years, was instructed by the latter to renew his policy in the Oxford Mutual, but that company refused to renew it because the plaintiff was not then a Granger in good standing, which is required of all persons insured in that company, and Campbell so notified the plaintiff. Thereupon the plaintiff went at once to see Campbell, to obtain other insurance on the house, which Campbell knew was then uninsured.

There is a sharp conflict in the testimony as to what was said at that interview. Mr. Campbell claims that the plaintiff sat near him while the answers to the questions in the application were typed by Campbell. This is denied by the plaintiff and his son. They testify, in substance, that the son drove the plaintiff into Campbell's dooryard in an automobile; that the plaintiff then had a broken leg, which was in a cast, and that he did not get out of the car; that Campbell came up to the car and talked with the plaintiff; that they agreed the risk should be placed with the defendant company, and, thereupon, Campbell went into the house for an application which he afterward brought out to the plaintiff, having already typed in the required answers. The plaintiff says that he was not then wearing his glasses, which he was accustomed to wear; that he did not read the papers, but signed them as directed by Campbell, and passed them back to him. With reference to that occasion, the plaintiff testified:

> ". . . When I passed him back the application, I passed him the application and asked him what there was to do, and he says, 'It is all done now.' I says, 'When am I covered?' He says, 'Just as soon as you sign that, and I will take it now and put it in the post-office.' "

While neither the phrase "temporary insurance" nor "insurance pending decision on the application" nor preliminary insurance" was used, yet the significant word "covered" was

used. And whenever that word is used in the fire insurance business, to describe a factual condition, as distinguished from a mere expression of opinion, it means that the property described is temporarily insured for a reasonable length of time, according to the terms of policies usually issued on such property, until the applicant is notified of the rejection of his application or the acceptance thereof followed by delivery of a proper policy. See 32 C. J., page 1101; *McQuaid* v. *Aetna Insurance Company*, 226 Mass., 281, 284, 115 N. E., 428. See, also, *Barrette* v. *Casualty Co. of America*, 79 N. H., 59, 104 A., 126; *Michigan Idaho Lumber Co.* v. *Northern Fire & Marine Ins. Co.*, 35 N. D., 244, 160 N. W., 130.

That temporary insurance, however, would terminate upon the delivery and acceptance of the policy applied for. *Carleton* v. *Patrons' Androscoggin Mutual Fire Insurance Company*, 109 Me., 79, 82 A., 649.

Whether the word "covered" was used in a conversation relative to fire insurance to express the fact that the applicant was then temporarily insured, or only as an expression of the speaker's opinion, is a question of fact for the jury. It makes no difference whether the word was used by the insurance agent, or was used by the applicant and assented to by the agent.

But Campbell denies that anything was said about being "covered," and it was for the jury to say whether that word was used or not. If it was used, then it was for the jury to decide whether the word "covered" was used to assert or state the fact that the property specifically described in the application was then insured against loss by fire or lightning for the amounts stated in the application, until the applicant was notified by the insurance company that the application was rejected, or accepted and policy delivered. See *Koivisto* v. *Bankers' & Merchants' Fire Ins. Co.*, supra; *Nertney* v. *National Fire Ins. Co.*, supra.

The distinction above made was not considered in *Allen* v. *Massachusetts Mutual Accident Association*, 167 Mass., 18, 44 N. E., 1053, relied on by the defendant. Moreover, the

court was not there considering fire insurance or the effect of temporary coverage pending delivery of the policy, which the courts of Massachusetts recognize may lawfully be done. See *Brown* v. *Franklin Mutual Fire Insurance Company*, supra; *McQuaid* v. *Aetna Insurance Company*, supra.

But the defendant claims that if Campbell did purport to then cover said property with temporary insurance pending the defendant's decision on the application, yet there can be no recovery here, even if Campbell had authority to make such a contract, for the reason that that undertaking was not supported by any consideration. That contention cannot be sustained.

The plaintiff testified, relative to his conversation with Campbell, as follows:

> "And I asked him afterwards when I should pay, and he said, 'As soon as I receive the policy they would send it and send the bill and I could pay him or pay the company and they would return his fee to him.' "

In those circumstances, the jury could have found an implied promise on the part of the plaintiff to pay all reasonable charges for such insurance coverage. See *Walker* v. *Metropolitan Insurance Company*, supra.

Moreover, the plaintiff had signed and delivered to Campbell an assessment note to be used by the defendant if it should accept the risk and issue the policy applied for. That note contained the plaintiff's promise to pay his assessments, which take the place of the premiums charged by stock companies. And a promise to pay the premium upon delivery of the policy, or the assessments which may be made on an assessment policy, if and when issued, is a sufficient consideration to support the undertaking of an insurance company, through its agent, in covering the designated property with temporary insurance pending decision on the application. *J. C. Smith etc. Co.* v. *Prussian Nat. Ins. Co.*, 68 N. J. L., 674, 54 A., 458; *Nertney* v. *National Fire Ins. Co.*, supra.

This is especially so where, as here, it may be fairly inferred that the applicant relied on such temporary insurance, and did not seek insurance elsewhere. *Nord Deutsche Ins. Co.* v. *Hart*, 230 F., 809; *Massachusetts Bonding & Ins. Co.* v. *R. E. Parsons Electric Co.*, 61 F., 2d, 264, 92 A. L. R., 218.

Furthermore, it does not appear from this record that the assessment note signed by the plaintiff and payable to the defendant has ever been returned by it.

The defendant, contending further, argues that Campbell had no authority to bind the defendant by such a contract for temporary insurance, and says that the plaintiff was so warned in the application. It was there stated that:

> "This application is binding only on the approval of the Home Office."

In *Koivisto* v. *Bankers' & Merchants' Fire Ins. Co.*, supra, the application for insurance for three years contained a clause to the effect that the application was subject to the approval of defendant's secretary or general agent, yet the court held that the defendant was bound by a contract for temporary insurance pending decision on the application, made by a local soliciting agent.

In that case, as in the case at bar, it was the practice of the insurance company to date back its policies when issued, to the date of the application, and the court said:

> "We are of the opinion that defendant's practice in dating policies furnished a sufficient basis for a finding that Mattson had authority to enter into a preliminary verbal contract for present insurance, binding upon the defendant until plaintiff was notified that his application had been rejected. It is not important whether we call his authority apparent or implied."

See, also, *Nertney* v. *National Fire Ins. Co.*, supra.

The defendant further claims that there was another clause in the application which sufficiently warned the applicant of

the agent's limited authority, which reads as follows:

> ". . . that the company shall not be bound, by any act done or statement made, to or by any agent or other person, not contained in this application."

It is apparent that both of these restrictions on the agent's authority are limited to acts or statements of the agent in securing the application for a formal poilcy, which, in the instant case, was to cover a term of three years. They have no bearing on the issue, whether or not the agent had apparent authority to cover the property with temporary insurance, pending decision on the application.

Nearly the same words as those last above quoted were incorporated in the application considered by the court in *Nertney* v. *National Fire Ins. Co.*, supra. And it was there held that a soliciting agent, without authority to issue policies, could bind the insurance company by a contract for present temporary insurance, although the application itself could be accepted only by the company. See, also, the cases cited in that opinion.

But, whatever may be the common law rule, it is provided by statute in this state that agents of insurance companies "shall be regarded as in the place of the company in all respects regarding any insurance effected by them" (R. S., Maine, 1930, Chap. 60, Sec. 119). This language is exceedingly broad and comprehensive, and, as has been said, "is best construed by interpreting it just as it reads" (*LeBlanc* v. *The Standard Insurance Company*, 114 Me., 6, 95 A., 284, quoted in *Bradbury* v. *The Insurance Company of the State of Pennsylvania*, 119 Me., 417, 111 A., 609) and includes agents of mutual companies as well as stock companies (*Zell* v. *Herman Farmers' Mut. Ins. Co.*, supra).

The application of that statute is not made to depend upon the issuance of an insurance policy, but upon the question whether insurance has been "effected" by the agent. And if, in the instant case, Campbell, as such agent, covered the plaintiff

with temporary insurance on this property, then insurance was "effected" by him, within the meaning of the statute.

The undoubted purpose of that statute is to make it as safe for persons seeking insurance to "deal with the agents, with whom alone they ordinarily transact their business, as if they were dealing directly with the companies themselves." *LeBlanc* v. *The Standard Insurance Company*, supra.

In the case last cited, the court said:

> "To the insured the agent is for all practical purposes the company. Good public policy then requires that the companies that appoint these agents and hold them out as their representatives shall be bound by what they do, and that if an agent acts without authority, or in excess of authority, his principal should bear the consequences, rather than the insured who trusted him."

See, also, *Bradbury* v. *The Insurance Company of the State of Pennsylvania*, supra.

In the instant case there is no question but that in making out the plaintiff's application and transmitting it to the defendant, Campbell acted as the defendant's agent (R. S., Maine, 1930, Chap. 60, Sec. 38). Indeed, there is not the slightest contention to the contrary. And, after a careful consideration of all of the circumstances, we cannot say as a matter of law that Campbell did not have apparent authority to cover the plaintiff with such temporary insurance on said property. Neither the bylaws nor the statute relative to membership prohibited it.

It is stated in Article III of the defendant's bylaws that:

> "All persons, firms or corporations who are policyholders in this Company shall be members of the Company during the continuance in force of their respective policies and no longer."

And R. S., Chap. 60, Sec. 35, provides that:

> "Every person insured by such company . . . is a member of the company during the term specified in his policy, and no longer."

While that bylaw and the statute just quoted make all policy holders members, yet they do not require that all members must be policy holders at the time of the destruction of the property by fire. A policy of insurance is merely evidence of the fact that the person to whom it has been issued is insured. But one may be insured in a mutual assessment fire insurance company even before a policy is made out. In *Greenlaw* v. *Aroostook County Patrons Mutual Fire Insurance Company*, 117 Me., 514, 105 A., 116, the court, speaking with reference to the applicant for renewal insurance, said:

> "From the moment that his application was accepted, plaintiff had insurance protection, effective from the expiration of the first policy. Not evidenced by a policy, for the policy had not been made."

So, the test of membership in a mutual assessment fire insurance company is not whether a policy has been issued, but whether or not the applicant was insured at the time in question. The length of time for which he was insured, or the manner in which the insurance had been effected is immaterial, if he was then in fact insured.

There is nothing in this case inconsistent with the rule laid down in the case last cited. The point involved here was not presented there. In that case, the application had been accepted, and it was not necessary for the court to decide whether or not an agent could effect valid temporary insurance pending decision on an application for a policy covering a period of years.

Carleton v. *Patrons' Androscoggin Mutual Fire Insurance Company*, supra, is not in point. Although the question of liability pending decision on the application, based upon the assurance of protection made by the secretary of the company,

was raised, yet it was pointed out in the opinion that that question was not before the court. There the application had been accepted, and the policy had been issued, before the fire.

In returning a verdict for the plaintiff in the instant case, the jury must have found that at the time of the fire he was temporarily insured in the defendant domestic mutual assessment fire insurance company. And since he was then insured therein, it necessarily follows, in applying the test above laid down, that he was, at the time of the fire, a temporary member of that company.

So, conceding that in order to recover against such a company on a fire loss, the plaintiff must show that at the time of the fire he was a member of that company, yet he brought himself within that rule by proving that at that time he was a temporary member thereof.

On the facts presented here, we cannot adopt the rule laid down in *Bracken County Ins. Co.* v. *Murray*, 166 Ky., 821, 179 S. W., 842. Decision there, based upon a statute of that state and the bylaw there considered, is to the effect that one cannot become a member of such a company until his application is accepted *and the policy granted.* By that we presume it was meant that the policy must at least have been made out if not actually delivered, for the court there said:

> ". . . the general rule seems to be that one does not become a member of a mutual fire insurance company until he receives his policy."

In the light of the Maine statutes and the bylaws of the defendant in the case at bar, we hold otherwise, for reasons already stated. Moreover, such a rule is contrary to the views expressed by this court in the above quotation from the last cited Maine case, to the effect that the company might be liable *even although* the policy had not been made.

After considering all of the evidence, we cannot say that the verdict of the jury in the instant case was manifestly wrong.

Exceptions.

The defendant takes nothing by its exceptions.

The testimony as to the conversation relative to the plaintiff being "covered" was admissible. See the decisions above referred to. The cases cited by the defendant to the effect that oral testimony is not admissible to contradict the terms of a written instrument are not in point. So far as *Allen* v. *Massachusetts Mutual Accident Association,* supra, holds that an agent cannot accept an application which provides that the defendant should not be liable before the receipt and acceptance of the application by the secretary in Boston, it is not contrary to the views expressed here. In the instant case, Campbell did not accept or purport to accept the plaintiff's application for a three-year policy. He only undertook to cover the property with insurance pending the decision on the application by the defendant. Certainly a collateral undertaking to cover property with fire insurance pending decision of the insurance company on an application for a formal policy, is not contradictory of, or inconsistent with, such application. See cases cited above.

As bearing on the question whether or not Campbell in fact covered this property with temporary insurance, it was admissible to show that, on receiving notice of the fire, he went to the scene, made some investigation, said something relative to the extent of the loss, and notified the defendant of the fire by telegram. It was for the jury to consider whether or not Campbell's statements and actions at that time had reference to that property, and, if so, whether they amounted to a tacit admission by him that he had covered the plaintiff with temporary insurance, as the latter contends — it not appearing that the plaintiff had any other insurance thereon.

The defendant takes nothing by its exceptions to the refusal to instruct the jury that the plaintiff was charged with knowledge of limitations of the agent's authority, printed in the application, which the plaintiff, not having on his glasses, did not

read. For even if he were so charged, which we find it unnecessary to decide, that would not affect the situation here. The limitations therein mentioned had nothing to do with an agent's authority to cover the property with temporary insurance, but only pertained to his authority in securing the application for the formal three-year policy sought by the plaintiff.

The letter Campbell wrote to the defendant and enclosed with the application, unknown to the plaintiff, and questions asked Campbell with reference thereto, were properly excluded. Letters written by a contradicted witness to his employer, unknown to the other interested party, and offered in evidence by the employer who called the witness to testify, are not admissible although they coincide with the testimony of the witness at the trial. *Pulsifer* v. *Crowell*, 63 Me., 22.

In such circumstances, the contents of the letters are but the declarations of the witness himself, and are inadmissible to bolster up his own testimony. They are entitled to no greater respect than his oral declarations to others at other times and places, which are clearly inadmissible. *Ware* v. *Ware*, 8 Me., 42; *Scott* v. *Blood*, 16 Me., 192, 198; *Powers* v. *Carey*, 64 Me., 9, 19.

The pamphlet containing instructions issued by the defendant to its agents, of which it does not appear the plaintiff had any knowledge, was properly excluded.

An applicant for insurance is not bound by instructions given by the insurance company to its agents, of which the applicant had no actual knowledge, where he was not charged with such knowledge. *The Commercial Mutual Marine Insurance Company* v. *The Union Mutual Insurance Company of N. Y.*, 19 How., 318, 15 Law ed., 636; *Brown* v. *Franklin Mutual Fire Insurance Company*, supra; 1 Cooley's Briefs on Insurance, page 565; *Nertney* v. *National Fire Ins. Co.*, supra, and cases therein cited.

In *Gilmore* v. *Bradford*, 82 Me., 547, 20 A., 92, the court said:

"... It is well settled that an oral contract of insurance, made with an agent, is binding on the company (*Walker* v. *Ins. Co.*, 56 Me., 371), even if the agent in making it disobeyed his instructions (*Packard* v. *Fire Ins. Co.*, 77 Me., 144)."

There is no merit in the defendant's exceptions relative to the question of consideration, for reasons stated in this opinion.

None of the other exceptions can be sustained. Although they have all been carefully examined, the views above expressed render a discussion of them unnecessary.

The mandate is

Motion for a new trial denied.
Exceptions overruled.

FRANCIS O. MERCHANT,
PETITIONER FOR WRIT OF HABEAS CORPUS,
vs.
MARGARET BUSSELL.

York. Opinion, July 28, 1942.

Parent and Child. Custody of Minor Child. Authority of the State. Writ of Habeas Corpus.

A writ of habeas corpus is ordinarily a proper remedy for a parent who claims to have been unlawfully deprived of the custody of a child. Generally speaking, the object of a writ of habeas corpus is to release one from an illegal restraint.

The right of a parent to the custody of a minor child is not an absolute right, though the right of a parent to the care and custody of a child should be limited only for urgent reasons.

In all cases involving the custody of a minor, the welfare of the child is the controlling consideration.

The authority of the state in determining the custody of a minor child supersedes all authority conferred by birth upon a parent and it has the power and right to dispose of the custody of children as it shall judge best for their welfare.

ON EXCEPTIONS.

The petitioner filed a petition for a writ of habeas corpus to obtain the custody of a minor daughter, aged four years, who, from the time of her birth, had been under the care and custody of her maternal grandmother, with the consent, either express or implied, of her father. During the four years that the child had been in the care and custody of her grandmother, who had given the child devoted care, the father saw little of the child and had contributed but little to her support. As to these facts there was not any real dispute and the only question involved was whether the father could as a matter of right claim the custody of the child. The writ was issued, and after hearing on it, the sitting justice dismissed the writ and ordered the child restored to the custody of her grandmother. The petitioner excepted to this ruling. Exceptions overruled. The case fully appears in the opinion.

Joseph E. Harvey, for the petitioner.

John P. Deering, for the respondent.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

THAXTER, J. September 25, 1941, Francis O. Merchant filed a petition for a writ of habeas corpus to recover custody of his minor daughter, Nancy Ann Merchant, aged four years. The writ issued and the child was produced in court. After a hearing the sitting justice dismissed the writ and ordered the child restored to the custody of the respondent. The case is before us on exceptions to this ruling.

The petitioner was the husband of Mary Luella Bussell, who was the daughter of the respondent. The marriage took place March 6, 1936, and the child was born March 3, 1937. The mother died a few hours after the birth. Shortly after the funeral there was a conference at the home in Saco of Dr. Clarence E. Thompson, a brother-in-law of the respondent. There were present Mrs. Bussell, her two daughters, and the petitioner. At the hearing Mrs. Bussell testified that at this family

conference, in response to her inquiry as to whether she could have the child, the petitioner said: "Yes, she is your child. You may bring her up." The daughter, Catherine, corroborated her mother. Dr. Thompson testified that on the same day he had a talk with the petitioner who said: "I have given the child to Mother Bussell to remain with her as long as she lives." It is obvious that the reference is to the life of the grandmother. The petitioner admits that there was talk about the future of the child but denies that he ever agreed that the grandmother during her life could have custody of his daughter. The important fact, however, is that with the father's consent the child did remain with the grandmother who a year later moved to Rochester, N. Y., where she lived with her daughters and brought up the child. In June, 1941, the respondent's sister, Mrs. Thompson, died and since then the respondent has made her home with her brother-in-law, Dr. Thompson, in Saco. The grandmother has given the child devoted care, has watched over her during all the vicissitudes of babyhood, has given of her time and money that her grandchild might have the same kind of home life that the respondent was able to give to her own daughters, until today there is the same devotion between grandmother and grandchild as there would have been between mother and daughter. During all this time the father has seen but little of his child, has contributed in a relatively small way to her support, has given her but little personal attention, and apparently has been quite willing that the normal ties which bind together parent and child should be severed. In 1939 he remarried and the following year a son was born to his second wife. His daughter visited him and his wife in the summer of 1940 and on bringing her back to the respondent there was not the slightest intimation that he intended to end the arrangement which had been established on the death of his first wife. In fact, he at all times seemed perfectly satisfied with the child's bringing up and desirous that things should go on as they were, until the spring of 1941 when he requested that the child be returned to him.

The question before us is whether on these facts, about which there is not any real dispute, the father can as a matter of right reclaim the custody of his child.

A writ of habeas corpus is ordinarily a proper remedy for a parent who claims to have been unlawfully deprived of the custody of a child. Generally speaking, the object of a writ of habeas corpus is to release one from an illegal restraint. In the case of an adult, who may go his own way, no more is required. An infant of tender years must, however, be in the custody of someone, and to do no more than order a release would as a rule be a futility. In such cases courts have accordingly gone farther and have entered orders providing for custody. *Rex* v. *Delaval,* 3 Burr., 1434; *Richards* v. *Collins,* 45 N. J. Eq., 283, 17 A., 831, 14 Am. St. Rep., 726; *In the matter of Margaret Eliza Waldron,* 13 Johns., 418; *In the matter of Kottman* (So. Car. 1833) 2 Hill, 363, 27 Am. Dec. 390. See *In re Barry,* 42 Fed. 113, and the cases cited in *State* v. *Smith,* 6 Me., 462, 20 Am. Dec., 324.The basis on which the sovereign acting through its judicial officers exercises this right is well stated in *In re Barry,* supra, at page 118 as follows: "The state thus acting upon the assumption that its parentage supersedes all authority conferred by birth on the natural parents, takes upon itself the power and right to dispose of the custody of children as it shall judge best for their welfare. *People* v. *Chegary,* 18 Wend. (N. Y.), 642, 643; *Blissets' Case,* Lofft, 748. The cases before cited show that the English and American courts act in this behalf solely upon the assertion of the right of the sovereign whose power they administer to continue or change the custody of the child at his discretion, as *parens patriae,* allowing the infant, if of competent age, to elect for himself; if not, making the election for him." Where the writ is dismissed and control of a child remains where it is, there may be no need of an order providing for custody; but we see no objection in providing, as was done in the instant case, that custody shall remain in the respondent.

No rigid rule can be laid down to guide the court in questions

of custody. The natural right of a parent to the care and control of a child should be limited only for the most urgent reasons. At the same time it has long been recognized that such right of a parent is not absolute. It is dependent to a very considerable extent on the reasonable performance by the parent of those duties which are owed to the child, and in case of a wilful failure of a father and a mother to fulfill the obligations which parenthood has cast upon them, the sovereign acting as parens patriae may itself assume the responsibility. Where the interest of the child requires, the state may take over such obligation even though the failure of the parent is due solely to misfortune. In all cases involving custody of minors, whether the issue is presented at the instance of the state itself or by individuals calling on the sovereign power to settle a dispute between them, the welfare of the child is the controlling consideration. *Kelsey* v. *Green,* 69 Conn., 291, 37 A., 679, 38 L. R. A., 471; *Berkshire* v. *Caley,* 157 Ind., 1, 60 N. E., 696; *Chapsky* v. *Wood,* 26 Kan., 650, 40 Am. Rep., 321; *State* v. *Smith,* supra; *Ex parte Bush,* 240 Mich., 376, 215 N. W., 367; *Richards* v. *Collins,* supra; *In the matter of Margaret Eliza Waldron,* supra; *Clark* v. *Bayer,* 32 Ohio St., 299, 30 Am. Rep., 593; *Hoxsie* v. *Potter,* 16 R. I., 374, 17 A., 129; *In the matter of Kottman,* supra; *Bellmore* v. *McLeod,* 189 Wis., 431, 207 N. W., 699; *United States* v. *Green,* 3 Mason, 482; 25 Am. Jur., 205, Fed. Cas. No. 15256. See also the remarks of Judge Hoar in a hearing on a petition for a writ of habeas corpus *In the matter of Jeremiah O'Neal* reported in 3 Am. Law Rev., 578.

The principle which has been almost uniformly followed by courts for more than a century is well stated by Judge Story in *United States* v. *Green,* supra, 485, as follows: "As to the question of the right of the father to have the custody of his infant child, in a general sense it is true. But this is not on account of any absolute right of the father, but for the benefit of the infant, the law presuming it to be for its interest to be under the nurture and care of his natural protector, both for maintenance and education. When, therefore, the Court is asked to lend its

aid to put the infant into the custody of the father, and to withdraw him from other persons, it will look into all the circumstances, and ascertain whether it will be for the real, permanent interests of the infant; and if the infant be of sufficient discretion, it will also consult its personal wishes. It will free it from all undue restraint, and endeavor, as far as possible, to administer a conscientious, parental duty with reference to its welfare. It is an entire mistake to suppose the Court is at all events bound to deliver over the infant to his father, or that the latter has an absolute vested right in the custody."

The statement of Chief Justice Shaw in the case of *Pool* v. *Gott,* 14 Monthly Law Rep., 269, quoted in the opinion of *Hoxsie* v. *Potter,* supra, 16 R. I., 374, 376, is peculiarly applicable to the facts before us: "Although there is no agreement proved, yet the conduct of the father, during nearly the whole life of the child, furnishes reason for supposing that he surrendered his rights over the child, by a tacit understanding, if not by an express agreement. He has, for eight years or more, been able to retake the child, and has made no offer to do so. No demand or offer has been made on either side, that he should contribute to her support. His present assertion of his right is in consequence of what he deems an unreasonable refusal of a different request. By his own acquiescence he has allowed the affections on both sides to become engaged in a manner he could not but have anticipated, and permitted a state of things to arise which cannot be altered without risking the happiness and interest of his child. He has allowed the parties to go on for years in the belief that his legal rights were waived, and this relation of adoption sanctioned and approved by him. Under such circumstances I do not think that the petitioner is in a position to require the interference of the court in favor of a controlling legal right on his part, against the rights, such as they are, the feelings, and the interests of the other parties."

In the case now before us the petitioner bases his claim solely on his supposed right as father of the child, a right which he

seems to feel is absolute. The judge below ruled against him. It is unnecessary to decide whether there has been a technical emancipation of the child by the father. The sitting justice found that there was. The decisive consideration, however, which governed his decision in dismissing the writ and directing that the child be given into the custody of the respondent, was clearly the welfare of the child. In his decision we heartily concur.

This petitioner for a period of more than four years showed not much more than a formal interest in his child. Circumstances were such that perhaps this was inevitable. He knew that the child was well cared for and was content to let the natural ties which bound him to his offspring grow very tenuous. Since the death of his wife there is little evidence that he has had any great yearning to have his child with him, to sacrifice for her, or to lavish on her the affection which would have meant so much to her in her tender years. Instead he surrendered this high privilege to the grandmother, who with the help of her unmarried daughters has given to this child the same devotion as it would have received from its own mother. Now having permitted all this to happen he claims the right, because he is the father, to sever the ties which bind this child to the respondent. In this instance the welfare of the child is paramount. The dictates of humanity must prevail over the whims and caprice of a parent.

Exceptions overruled.

EUZEBE MICHAUD *vs.* LESLIE H. TAYLOR

Aroostook. Opinion, July 28, 1942.

Negligence. Contributory Negligence. Jury Verdict.

A jury verdict should not be set aside unless clearly and unmistakably wrong.

The issue as to whether or not a particular injury was suffered by a plaintiff because he had placed himself in a position of peril is for jury determination.

While one who rides on a vehicle in an exposed situation assumes the risk incident to such situation, he does not thereby assume the risk of negligence on the part of defendant or his servants.

The issue as to whether a particular set of facts creates the relationship of employer and employee, or constitutes the one doing the work an independent contractor, is for jury determination.

Whether or not an employer owes such a duty to an employee, or an independent contractor, riding home from work on the employer's truck at the close of the day, when such employer was present and either observed or should have observed what was going on, as to be answerable for the negligence of the driver of the truck is for the jury.

ON MOTION FOR NEW TRIAL.

The plaintiff was injured in a fall from the defendant's truck, which was driven by an employee of the defendant, while riding from a potato field, belonging to defendant, in which the plaintiff and a crew employed by him had been digging potatoes for the defendant on a bushel basis, to defendant's potato house. There was conflicting evidence as to the speed of the truck but plenary proof that there was a jerk when the truck turned from the highway and that plaintiff's fall from the truck was coincidental with the jerk. Verdict of the jury was for the plaintiff. Defendant moved for a new trial. Motion overruled. The case fully appears in the opinion.

Arthur J. Nadeau, for the plaintiff.

Doherty & Brown by *Scott Brown,* for the defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

MURCHIE, J. The defendant herein, following a jury verdict of $2,552 for the plaintiff, seeks new trial on a general motion containing the usual allegations. Several exceptions to rulings on evidence were taken during the trial below but they are not pressed here, nor is the allegation of the motion that the damages awarded were excessive. Decision must rest upon determination that the evidence did, or did not, justify jury findings (1) that the servant of the defendant was negligent,

and (2) that no negligence of the plaintiff contributed in a causative way to produce the accident, as well as that the plaintiff was neither an employee of defendant nor one who was riding upon the truck by consent only of a servant of defendant who had no authority to permit him so to do.

Defendant employed plaintiff to pick a crop of potatoes, to assemble a crew for the purpose, board that crew, and supervise its work, and defendant, by his own labor or that of his regular employees, was to do, and did, the digging, and provide transport for the potatoes from the field to the place of storage. The compensation of plaintiff, which was on a per bushel basis, was to cover the work and board of plaintiff and his crew, and there was no undertaking by the defendant to carry the crew to and from the potato field, although the defendant did send his truck to transport plaintiff and his goods from home to the farm where the work was to be performed.

The accident occurred at the close of the first day's picking. At that time defendant's truck was loaded, not quite fully, with approximately 27 barrels of potatoes, and the plaintiff and his crew climbed aboard before it started out of the field. It is not claimed that plaintiff had any work to perform in connection with unloading the potatoes and placing them in storage, but the truck was to proceed along the route which plaintiff would take in going to his living quarters and the work stopped early that the men might fix up their beds and meals. Plaintiff took a position on the right hand side of the truck a few feet back of the cab and stood on a narrow ledge (8 or 9 inches wide) outside the barrels and astride a chain which passed around them about 15 inches above the floor of the truck. The distance traveled to the main highway and along that highway is not entirely clear on the record, and there is a very definite conflict in the evidence as to the speed of the truck during the several parts of the journey — particularly at the turn into the potato house — but it is entirely established that the barrels were not securely and compactly bound in by the chain, that there was a "jerk" when the turn

was made, that a particular barrel, to which the plaintiff was holding, tilted or tipped as the jerk occurred, and that it was at this particular point where he fell, or was thrown, from the truck and suffered a broken leg when the right rear wheel of the truck passed over it. It is not in dispute that the defendant was close enough to the truck when the plaintiff and his crew climbed aboard for their ride so that they were in plain view (had he looked) and within the sound of his voice, but he denied that he saw them do so. The plaintiff testified that the defendant assented to the early stoppage of work.

Consideration must be given to the case within the well established rules (1) that a jury verdict should not be set aside unless it is "clearly and unmistakably wrong," *McNerney* v. *Inhabitants of East Livermore,* 83 Me., 449, 22 A., 372; *Searles* v. *Ross et al.,* 134 Me., 77, 181 A., 820; *Marr* v. *Hicks,* 136 Me., 33, 1 A. (2d), 271; *Plante* v. *Canadian National Railways et al.,* 138 Me., 215, 23 A. (2d), 814; and (2) that in the absence of exceptions to the charge given to the jury, or to the refusal of particularly requested instructions, it must be assumed that proper charge was given on each and every point necessary to a proper determination of the case. *Frye* v. *Kenney,* 136 Me., 112, 3 A. (2d), 433.

Allegation in the declaration is that defendant's servant was negligently driving the truck at the time of the accident at an excessive and immoderate rate of speed, and that in turning from the public highway into the driveway leading to the defendant's storehouse, he suddenly shifted the gear lever in an abrupt and jerky manner and negligently caused the truck to be jerked and reduced in speed, by reason whereof the plaintiff was thrown to the ground. Evidence as to speed, both at the point where the accident occurred and during the time when the truck was traveling along the highway, was sharply conflicting, but proof was plenary that there was a jerk at the point of turning and that the plaintiff's fall from the truck was coincidental with that jerk.

There was considerable evidence in the case, introduced

through witnesses presented by the plaintiff, that the speed of the truck when the turn was made was 20 miles an hour or more, but one of these witnesses admitted on cross-examination that he had earlier estimated it at only half that rate. Defendant relies on the claim that the evidence of the greater rate of speed was so inherently impossible, in view of the proved location of the potato warehouse with reference to the point of turning, as to bring the case within the rule declared in *Blumenthal* v. *Boston & Maine Railroad,* 97 Me., 255, 54 A., 747, and asserts, without any citation of authority, that "estimates" of speed which are inconsistent with established facts should be "disregarded." If decision of the cause in favor of the defendant could properly be grounded on determination that the turn was made at a speed of from 10 to 15 miles per hour, as was estimated by the single defense witness who testified on the question, and not at 20 miles an hour or more, as the fact was fixed in all of the testimony offered on behalf of the plaintiff (except the one witness whose direct testimony on the point was shattered in cross-examination), there would be sound reason to urge the application of the principle declared in the *Blumenthal* case, supra, that, since plaintiff's testimony could not "by any possibility be true," it did not "raise an issue of fact which should have been submitted to the jury." The potato house, as is clear from all the testimony in the case, was located so close to the highway at the point of turning that it is apparent the speed estimates of the plaintiff and his witnesses must represent exaggerations. The issue, however, is not the rate of speed but whether the actual speed, whatever it may have been, was so excessive and immoderate, "having regard for the circumstances and conditions" attending, as to constitute actionable negligence in view of the "jerk" which undoubtedly occurred. The jury found this issue of fact in favor of the plaintiff, and on the record presented there is no occasion for this Court to say that the finding is "clearly and unmistakably wrong."

Defendant relies also upon the declaration of Chief Justice

Peters in *Nelson* v. *Sanford Mills,* 89 Me., 219, 36 A., 79, recognizing that there is a class of cases wherein "a plaintiff is debarred from recovering for an injury because he has contributed in causing the injury by his own unjustifiable and foolhardy conduct," notwithstanding the defendant might also have been guilty of negligence which cooperated with his in producing the result. The opinion in that case does not purport to define the class with any definiteness, but it is there stated that there are quite a number of cases in this State which directly or indirectly support the rule, and citation is made to three of them. The particular case involved the right of an elevator operator to recover for injuries suffered when a heavily loaded carriage came down suddenly on his hand, as he was jerking a misplaced chain, to throw it back into place. Two of the cited cases involve (1) a railway brakeman injured when leaning out from the steps of a moving car to look at the wheels, *Walker, Admr.* v. *Redington Lumber Co.,* 86 Me., 191, 29 A., 979, and (2) a workman falling from a box onto which he had climbed in an attempt to open a sliding door which he knew to be resting on a defective truck, *Conley* v. *American Express Co.,* 87 Me., 352, 32 A., 965. *Wormell* v. *Maine Central Railroad Co.,* 79 Me., 397, 10 A., 49, where a machinist in a railway shop was injured while coupling cars (work which was no part of his employment and with which he was not familiar) was declared to be somewhat typical of the class.

We cannot hold, as matter of law, that plaintiff's position in this case, in standing on the narrow ledge of the truck outside the barrels and straddling the chain which passed around them had placed himself so clearly in a position of peril as to bring his case within the rule of foolhardy conduct adverted to in *Nelson* v. *Sanford Mills,* supra. The record discloses that he maintained the position while the truck traversed the distance from its point of loading across the potato field and along the main highway, whatever the speed of the truck may have been, until the jerk occurred in making the turn. In *Webb, Adm'r.* v. *Portland & Kennebec Railroad Co.,* 57 Me., 117, this Court

recognized the rule stated in *Patterson* v. *Wallace,* 28 Eng. Law and Eq. 48, that in a case in which the only question was:

> "whether a certain result was to be attributed to negligence on the one side or rashness on the other, the judgment of the court below was reversed because the judge had withdrawn the case from the jury, and it was held in the House of Lords to be a pure question of fact for the jury."

It had earlier been decided, in *Keith* v. *Pinkham,* 43 Me., 501, 69 Am. Dec., 80, that although a passenger in a stage-coach might properly be held to assume the peculiar risks incurred in riding in an exposed situation outside the coach, he could not be held thereby to have assumed risks "resulting from the negligence of the defendant or those in his employ." It was there declared, in sustaining the refusal of a requested instruction that would have taken the issue from the jury that the fact that the plaintiff took his position outside "was a circumstance proper for the consideration of the jury in determining whether his negligence contributed in any way to the production of the injury." This principle underlies in part the rule applicable in cases when a passenger on a street railway car suffers injuries while riding upon the car platform rather than in a seat, *Watson* v. *Portland & Cape Elizabeth Railway Co.,* 91 Me., 584, 40 A., 699, 44 L. R. A., 157, 64 Am. St. Rep., 268; *Blair, Adm'r.* v. *Lewiston, Augusta and Waterville Street Railway,* 110 Me., 235, 85 A., 792. In the latter case Mr. Justice King declared that the issue as to whether the plaintiff's position constituted such negligence as would bar his recovery was "clearly one that should have been submitted to the jury."

Additional questions involved in the case might be said to be whether or not the situation of the plaintiff was such, either because of his status as an employee of defendant, or because he was riding on defendant's truck only by the consent of a servant who had no authority to permit him so to do, that he must be held to have assumed the risk which caused the in-

jury or, in the first named contingency, to be barred from recovery because the negligence with which defendant is charged was that of a fellow servant. As to the existence of the employer-employee relationship, there can be no doubt that the factual finding for the plaintiff, implicit in the verdict, that such did not exist, has competent support in the record. On the other point, we recognize that the New Jersey Courts draw a careful distinction as to the duty of care of a motor vehicle owner between passengers traveling by invitation and those riding "at their own solicitation," as appears by two cases decided in the Supreme Court of that State, which are cited by the defense, *Faggioni et al.* v. *Weiss,* 99 N. J. L., 157, 122 A., 840; *Rose* v. *Squires et al.,* 101 N. J. L., 438, 128 A., 880, 881. The latter was affirmed in the Court of Errors and Appeals (102 N. J. L., 449, 133 A., 488) by "a majority of the quorum" only, it being expressly stated in a Per Curiam opinion that no principle of law applicable to the case had received the sanction of a majority of the nine members of the Supreme Court. The New Jersey rule has never been adopted in this State and the factual proof before us offers little reason to urge it in the present case. In *Hoar, Adm'x.* v. *Maine Central Railroad Co.,* 70 Me., 65, 35 Am. Rep., 299, a declaration was held bad which sought to ground liability on the defendant as a common carrier in favor of a plaintiff who was injured while riding gratuitously on a hand-car at the invitation of the section foreman who had it in charge. Decision was based, however, not on the fact that the rider was a mere trespasser or licensee, but rather on the ground that where the risk of a particular mode of conveyance is greater than normal, he who adopts it assumes "the extra risks arising therefrom, and must be held to abide the unfortunate consequences." This is part and parcel of the principle declared in *Keith* v. *Pinkham,* supra.

We must give our consideration to the case on the assumption that the members of the jury were properly instructed on this last point as on every other; that their verdict is predicated on findings that defendant's servant was negligent while plain-

tiff was not, so far as cause contributing to the accident is concerned; and that the negligence of the servant infringed that duty of care which the defendant owed to the plaintiff under the particular facts of the case. On the record no one of these findings should be disturbed.

Motion overruled.

CALVIN S. LANE

vs.

ALBERT E. ANDERSON ET AL.,
EXECUTORS OF THE ESTATE OF JOHN KERN.

Cumberland. Opinion, August 1, 1942.

Jury Verdict.

In the instant case, the issue was one for jury determination on proper instruction, and nothing in the record justified interference with the jury finding.

ON MOTION FOR NEW TRIAL.

The plaintiff brought action in assumpsit to recover for services allegedly rendered to defendants' decedent. There was no question that the services were rendered but there was a conflict of evidence as to whether the services were rendered for the defendants' decedent, to be paid for by him. Verdict was for the defendant. Plaintiff filed a motion for a new trial. Motion overruled. The case fully appears in the opinion.

Milan J. Smith, for the plaintiff.

Albert E. Anderson,

Wilfred A. Hay, for the defendants.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

PER CURIAM.

The plaintiff herein, after jury verdict against him, seeks

new trial on general motion. The process is assumpsit to recover for services allegedly rendered to defendants' decedent in his lifetime.

On the record it cannot be said to be in dispute that plaintiff did render the services set forth in his account or that the charges made therefor were reasonable, but there is a clear conflict in the evidence as to whether such services were rendered for the decedent and at his request or for a corporation which was organized, or intended to be organized, to take title to the particular property to which the services directly related and as to whether or not the plaintiff was interested with the decedent in that corporation and property. The verdict must be construed as importing a finding by the jury that when the services were rendered it was not contemplated that defendants' decedent should pay for them personally.

The sole basis on which the plaintiff can assert that the verdict is against the law and the evidence is the testimony of one of the sons of the decedent that his parent declared in his lifetime that the bill ought to be paid and that he proposed to take steps to see that it was. The issue was properly presented to the jury and it is not for this Court to say that its finding on this control point was manifestly wrong.

Motion overruled.

COREY STAIRS *vs.* FREDERICK QUINCY.

Penobscot. Opinion, August 4, 1942.

Automobiles. Negligence. Jury Verdict.

It not appearing in the instant case that the finding of the jury was manifestly wrong, the finding should not be interfered with.

ON MOTION FOR NEW TRIAL.

Action alleging negligence on the part of the defendant. The jury found for the plaintiff. The defendant moved for a new

trial. Motion overruled. The case fully appears in the opinion.

Fellows & Fellows, by *Oscar Fellows,* for the plaintiff.

Benjamin W. Blanchard, for the defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

PER CURIAM.

General Motion for a new trial in an action of negligence.

The evidence brought forward warrants the finding that as plaintiff, on February 6, 1941, drove his automobile along the right lane of State Street in Bangor, the defendant, although he observed his approach, entered the highway with his car from a connecting private road without yielding the right of way as required by Section 8, Chapter 29, R. S. It not being made to appear that the finding of the jury, indicated by their verdict, that the negligence of the defendant was the sole proximate cause of the collision which resulted was manifestly wrong or that the damages were excessive the mandate is,

Motion overruled.

FRED STANLEY STROUT *vs.* MARK I. POLAKEWICH.
WALTER B. STROUT *vs.* MARK I. POLAKEWICH.

Cumberland. Opinion, August 4, 1942.

Automobiles. Negligence.
Construction of Section 35, *Chapter* 29, *R. S.* 1930.

There are two divisions to the above named statute. The first part relates to that class of cases where the owner of a motor vehicle causes or permits it to be operated by a minor under the age of eighteen; under the provisions of the second part, liability of the owner does not depend upon his consent, but upon the answer to the question whether or not the motor vehicle used by the minor was given or furnished to him by the person whose liability is sought to be established.

Whether or not, in the instant case, the minor driver, at the time of the accident which is the basis of the suit, was furnished by the defendant with the motor vehicle involved in the accident was a question of fact for the jury.

ON EXCEPTIONS.

Two actions were tried together. In one action Fred Stanley Strout, a minor, by his father and next friend, sought to recover damages for personal injuries sustained in an automobile accident alleged to have been due to the negligence of the driver, a minor under the age of eighteen, an employee of the defendant, while he was driving an automobile owned by the defendant. In the other action, Walter B. Strout sought to recover for expenses incurred for medical treatment for his son, Fred Stanley Strout. The plaintiffs based their claims on the provisions of Section 35, Chapter 29, R. S. 1930. A nonsuit was ordered in each case. Plaintiffs excepted. Exceptions sustained in both cases, Manser and Murchie, JJ., dissenting. The case fully appears in the opinion.

Jacob H. Berman,

Edward J. Berman,

Sidney W. Wernick, for the plaintiffs.

Forrest E. Richardson,

John D. Leddy, for the defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

WORSTER, J. On exceptions.

Two actions were tried together. In one action, Fred Stanley Strout, a minor, by his next friend and father, Walter B. Strout, seeks to recover damages for personal injuries sustained in an automobile accident on a public highway, alleged to have been caused by the negligence of one Hunt, a minor under the age of eighteen years, while he was driving the defendant's automobile, in which said Fred Stanley Strout was riding as an invitee of Hunt. In the other action, Walter B. Strout seeks to

recover for expenses incurred and to be incurred for medical aid and treatment of his son, said Fred Stanley Strout.

The plaintiffs' actions are based on the provisions of R. S., Maine, 1930, Chap. 29, Sec. 35, which reads as follows:

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

A nonsuit was ordered in each case, and both cases are brought here on exceptions.

There was evidence from which a jury might have found that the accident was caused by Hunt's negligence; that there was no contributory negligence on the part of Fred Stanley Strout; and that the defendant knew that Hunt was under eighteen years of age. We do not understand counsel for the defendant to contend otherwise. But it is contended for the defendant that the nonsuits were properly ordered, because, it is claimed, the evidence presented for the purpose of establishing liability of the defendant under that statute was insufficient to warrant the submission of the cases to the jury. We think otherwise.

Fred Stanley Strout and Hunt were employed by the defendant as guides, to show visitors places of interest on a scenic tract in Freeport, called the Desert of Maine. A watchman was also employed on the premises. The defendant himself lived in Portland and commuted back and forth. For that purpose he used, during a part of the time, his Ford coupe, in which the boys were riding at the time of the accident. Once in a while the defendant's employees at the Desert used the same coupe to go on errands for the defendant, and before the watchman left, Hunt had used it twice for such a purpose.

On Monday or Tuesday preceding Friday, October 25, 1940, the watchman being absent, Hunt testified that the defendant

> ". . . asked me if I would stay there till the watchman returned, and that he was going to leave the coupe there for my use, and to keep the keys in my pocket when I wasn't using the car."

Hunt assented, and the keys to the coupe were given to him by the defendant. From that time until the ensuing Friday night, Hunt acted as guide in the daytime, and watchman at night. In the meantime the coupe was kept at the Desert when not in use, Hunt retaining the keys. It does not appear that the defendant drove the coupe at all during that time, or that he even asked for it or for the keys.

No meals were served at the Desert, and, without ever asking or obtaining any permission of the defendant other than that given as aforesaid, Hunt, with the knowledge of the defendant, used this coupe to go some distance for his meals, and twice used it to go home for clothing.

While Hunt was eating in a Freeport restaurant on Friday, October 25, 1940, he was requested by the defendant over the telephone to call for him at a service station in Freeport, and take him to the Desert. This Hunt did, and about six o'clock that night, accompanied by Fred Stanley Strout, drove the defendant from the Desert back to the service station in Freeport, and left him there. Then Hunt and Strout had their supper, after which they went back to the Desert. On their arrival there at about seven o'clock, they found that the night watchman had returned in their absence, and, Hunt testified:

> "Well, everything seemed to be in control, and it had been cold that day, and I thought I might like some gloves to use the next day, so I asked Fred if he wanted to go to Brunswick with me."

Strout consented, and they left for Brunswick about 7:30 that evening, but on their arrival there found the stores closed,

and went to a moving picture theatre, after which they went to a restaurant, where Hunt drank two glasses of beer. Then, at Strout's suggestion that he might stay home if his folks were up, and that he might have some gloves there, they drove to his home in Topsham, but the lights were out, the house locked up, and Strout had no key, so they returned to Brunswick. About midnight they left to return to the Desert of Maine, and while on their way to that place the accident happened.

Apparently the defendant did not know that Hunt was going to Brunswick that night. Nothing was said about it, and it does not appear that Hunt decided to go until after the night watchman had returned.

Hunt admitted on cross-examination that it was a fair inference that he was not to use the coupe for his own pleasure; but the record does not disclose that the defendant expressly told him that he could not. And it is significant that at a conversation between Hunt and the defendant, about a week after the accident, the latter said nothing to the effect that Hunt had no right to take the coupe to go to Brunswick that night. And Hunt testified that at that conversation the defendant "asked me if I was willing to forget everything."

The defendant now claims that the coupe was being used by Hunt at the time of the accident without his consent, and contends that proof of consent or permissive use by the defendant is essential to the maintenance of these actions.

In support of that contention he cites: *Union Trust Co.* v. *American Commercial Car Co.*, 219 Mich., 557, 189 N. W., 23; *Mooney* v. *Canier*, 198 Iowa, 251, 197 N. W., 625; *Maine* v. *James Maine & Sons Company*, 198 Iowa, 1278, 201 N. W., 20, 37 A. L. R., 161; *Seleine* v. *Wisner*, 200 Iowa, 1389, 206 N. W., 130; *Atwater* v. *Lober*, 233 N. Y. S., 309; *Fluegel* v. *Coudert*, 244 N. Y., 393, 155 N. E., 683; *Psota* v. *Long Island R. R. Co.*, 246 N. Y., 388, 159 N. E., 180, 62 A. L. R., 1163; *Chaika* v. *Vandenberg*, 252 N. Y., 101, 169 N. E., 103; *Arcara* v. *Moresse et al.*, 258 N. Y., 211, 179 N. E., 389; *Smith* v. *Tompkins*, 52 R. I., 434, 161 A., 221.

Those cases do hold that the owner is not liable for the negligent operation of his motor vehicle by another unless it appears that at the time of the accident it was being driven with the consent of the owner. And *Arcara* v. *Moresse et al.*, supra, goes so far as to hold that consent to go to one place cannot be construed as consent to go to another place, although it is there conceded that lack of consent could not be shown by proof of a mere deviation from the designated route.

But those cases are not decisive here. The statutes there construed require proof of such consent by the owner, or knowledge on his part of facts from which consent might be implied, as is plainly disclosed by a brief reference to such statutes.

The Michigan statute makes the owner liable for the driver's negligence only where it appears that the vehicle was being driven with "the express or implied consent or knowledge of such owner."

The Iowa statute requires it to appear that the car was "driven by consent of the owner."

The New York statute makes the owner liable if his motor vehicle was being operated in the business of such owner or otherwise, by a "person legally using or operating the same with the permission, express or implied, of such owner." And permission is here used in the sense of consent. *Atwater* v. *Lober*, supra.

And the Rhode Island statute imposes liability on the owner for the negligent operation by the user of the motor vehicle, only when it is operated with the consent of the owner, express or implied.

The statutes just mentioned are not limited to cases where the drivers of the automobiles are minors, whereas the Maine statute is limited to cases where the operator of the motor vehicle is a minor under eighteen years of age.

There are really two divisions in our statute.

The first division includes that class of cases where the owner of a motor vehicle causes or permits it to be operated by such a minor, thus making liability of the owner depend upon

proof of his consent to the operation of such vehicle on the highway by such minor, as held in the cases cited above.

It is, however, unnecessary to determine whether Hunt actually went to Brunswick that night for gloves to be worn while discharging his duties as an employee of the defendant, or whether the defendant expressly or impliedly consented to Hunt's use of the coupe for that purpose, within the meaning of that part of the statute just considered, if the case falls within the other provision therein.

It is also expressly provided in the statute that "any person who gives or furnishes a motor vehicle to such minor" shall be liable for damages caused by the negligent operation thereof on the highway by such minor. Liability under this clause is not made to depend upon proof that such minor was operating the motor vehicle at the time of the accident, with the consent of the owner, but rather upon the question whether or not the vehicle then used by such minor had been given or furnished to him by the person whose liability is sought to be established.

Apparently this part of the statute was added because the legislature mistrusted the judgment and sense of responsibility of minors under eighteen years of age, in the use of motor vehicles upon the highway. For that reason, those persons who were responsible for such use, by giving or furnishing such vehicles to such minors, are made liable for damages caused by the negligent operation of such vehicles on the highway by such minors. But whether or not that was the reason for the enactment of the statute as written, the fact remains that this clause was inserted in the statute, and must be construed as written.

It is unnecessary to determine whether the word "gives" was used by the legislature to indicate only those cases where presents of motor vehicles had been made to minors, or was used loosely to indicate a mere delivery of possession, because the word "furnishes" is also used. Now furnishes is used here in the sense of supply or provide. So one who supplies or provides such a minor with a motor vehicle comes within the meaning

of this part of the statute, although he did not consent to the use to which the vehicle was put by the minor.

In *Shrout* v. *Rinker et al.*, 248 Kan., 820, 84 P., 2d, 974, the phrase "gives or furnishes," as used in a statute similar to ours, except for the lower age limit, was considered by the court. It was there said: "The statute fixes the liability upon 'any person who gives or furnishes a motor vehicle to such minor.' " And the Court held that once the defendant permitted such minor to drive the motor vehicle, she brought herself under the terms of the statute, even although it appeared that the minor, after going to the place to which she was authorized to go, went also to another place, from which she was returning when the accident happened.

Was Hunt, at the time of the accident, furnished by the defendant with this coupe? That is a question of fact, and should have been submitted to the jury, under appropriate instructions from the court. It was error to grant the nonsuits.

The view we have taken of the cases renders it unnecessary to consider the other exceptions.

Exceptions sustained in both cases.

MURCHIE and MANSER, JJ., dissent.

DISSENTING OPINION.

MURCHIE, J. I am unable to concur in the opinion in these cases, and since it represents the first interpretation of the law now under consideration, it seems advisable that I state the reasons for my personal view that the construction declared makes the statute operative over a far more liberal field than was contemplated by the Legislature.

The statute construed, R. S. 1930, Chap. 29, Sec. 35, was originally enacted as P. L. 1929, Chap. 327, Sec. 10. It is quoted in the majority opinion, as is the language of the defendant, which it is held factually may support the plaintiffs' claims if jury judgment interpets that language as the opinion almost directs. It is applicable to the negligent operation of motor

vehicles by "minors" under eighteen years of age, that word being used hereafter with that limited meaning.

The two most fundamental rules for the construction of statutes are (1) that judicial interpretation shall give effect to legislative intention, *State* v. *Howard,* 72 Me., 459; *Lyon* v. *Lyon et al., Ex'rs.,* 88 Me., 395, 34 A., 180; 59 C. J., 948, Par. 568-(2a); 25 R. C. L., 960, Par. 216; and (2) that a statute which creates a liability unknown to the common law shall be strictly construed, 59 C. J. 1124 at 1126, Par. 665-(7a), and 1129, Par. 668-(8); 25 R. C. L., 1056, Par. 281; *Flynn* v. *The American Banking and Trust Company et al.,* 104 Me., 141, 69 A., 771, 19 L. R. A., N. S., 428, 129 Am. St. Rep., 378. The rule of strict construction is expressed by the writer of the text in Corpus Juris as requiring that any established rule of law changed by statute should be considered "no further abrogated than the clear import of the language necessarily requires." The text in R. C. L. says "clearly and necessarily requires." Chief Justice Emery in the *Flynn* case, supra, declared that when such a statute is "susceptible of more than one construction it should receive that imposing the lightest burden," which is to the same effect as the earlier statement of Mr. Justice Libbey in *Wing* v. *Hussey,* 71 Me., 185, that "no statute is to be construed as altering the common law, farther than its words import."

To determine legislative intention, the purpose sought to be accomplished by the Legislature should be given consideration; *State* v. *Howard,* supra, 59 C. J., 958, Par. 570-(2); 25 R. C. L., 970 at 971, Par. 223, and 1013, Par. 253; and the entire enactment construed, rather than a particular part thereof; *Campbell* v. *Rankins,* 11 Me., 103, 59 C. J., 995, Par. 595-(b); 25 R. C. L., 1004, Par. 246.

At common law one was liable for his own negligence, and for that of a servant in a limited field, but no more. The statute enlarges the earlier defined boundaries of agency law in the field of negligence. The Legislature attempted to delimit the boundaries of the enlarged field by the use of four definitive

words or phrases of control, two applicable to motor vehicle owners who caused or knowingly permitted its operation by a minor and two to any person (whether or not the owner of such a vehicle) who gave or furnished it to a minor.

The statutory words are "causing or knowingly permitting," and "gives or furnishes." At the outset it seems apparent that the careful phraseology of the statute, using changed forms of the two pairs of verbs, connotes some definite intention with reference to their meanings. "Causing or knowingly permitting" normally relates to one time or occasion, or to a particular class or kind of use. "Gives or furnishes" speaks also in present tense, but it would not strain construction to hold that it was ordinarily operative only where a vehicle was made available for the use of another with no particularity as to the time or kind of use.

The outstanding thing about the doublets is that each combines a word of definite import with one of wide signification. One cannot cause his motor vehicle to be operated without permitting its operation, even without knowingly doing so. One cannot give without furnishing. On the other hand, one may permit and not cause, or furnish and not give, in the common meaning of the latter word. In seeking to determine legislative intention, we face the problem as to whether there was a purpose to be served in contemplation of the legislative mind by the choice of words, or by their grouping and divergent form. There is an obvious distinction between "causing" and "knowingly permitting," and a corresponding one between "gives" and "furnishes." There must be implication of one in the fact that the definitive controls were paired. There can be no doubt that distinction was drawn between what might be done by the owner of a vehicle and some other person. Liability is not imposed by legislative mandate upon an owner by what his wife, or some other person, causes or knowingly permits; but under the all-inclusive interpretation of the four words of the statute "any person who . . . furnishes," it may well be that one can be held to have furnished who has authorized his wife

to permit or, without stretching imagination too far, who has merely failed to forbid his wife to permit.

Statutory words, unless technical, are to be construed according to their common meaning. R. S. 1930, Chap. 1, Sec. 6, Par. I. The dictionaries are not particularly helpful in searching out the intent properly inferable from the words "causing," "gives" and "furnishes," but they are convincingly so as to the word "permitting," because of the carefully expressed qualification thereon. The common meaning of "causing" is plain. Consolidating the definitions declared in three dictionaries, it involves initiative on the part of him who causes, best expressed in a secondary meaning noted in Funk & Wagnall's Standard Dictionary — "to compel (one to do something)." There, as in the Century Dictionary, "give" and "furnish" are declared to be synonymous, but the primary meaning of "give" is stated as delivering or handing over or as transferring title or possession, in either case gratuitously or without compensation. If we construe "give" so broadly that no transfer of title is involved, it is squarely synonymous with "furnish," and either or both would involve general availability to the donee of the thing given. The definitions of "give" in Webster are legion. "Furnish" is there defined somewhat restrictively — to supply or fit up (with what is wanted or necessary or proper), but there is support for the two concepts of the word on which emphasis is laid in the majority opinion — "to supply or provide."

So far as these words are concerned, there is no guide within the statute to indicate whether the intent was to cover the broadest reasonable scope, or otherwise, but that properly inferable from the word "permitting" is plain. Permit, unqualified, covers a wide range. According to Webster it carries a dual meaning, importing either express consent or failure to prohibit. The other authorities define it with like effect, without drawing so clear a distinction between affirmative allowance and failure to negate. Legislative intent to limit its effectiveness within the former and narrow field is shown by the

qualifying word "knowingly." The majority opinion reads that word out of the statute.

By curious coincidence, the facts furnish definite instances (1) when this defendant *caused* the minor to operate a motor vehicle, and (2) when he *knowingly permitted* such operation. The factual situation is clear. Among the employees of defendant, on property so isolated that the services of a watchman were essential, were the minor, a watchman, and others. Confronted, on the day when the defendant spoke the words quoted in the seventh paragraph of the majority opinion to the minor, with the emergency of the watchman's indefinite absence, the real purpose of the conversation was to secure the services of the minor as temporary watchman, in addition to his other duties. The reference to the car was incidental. It was maintained upon the property for business use. It had already been used twice by the minor for defendant's business purposes. It was so used by defendant's employees generally.

The minor was the principal witness for the plaintiffs. He freely and frankly admitted on cross-examination that he had no permission to use the car for pleasure; that it was not left with him for personal use; that there was no contemplation between him and the defendant that he should so use it; and that while he performed the duties of his regular employment and of watchman, he had a virtual 24-hour-a-day assignment with no time for pleasure riding. Working a 24-hour day where no meals were available, it was essential that he travel home and back occasionally to obtain sustenance and, perhaps, to change his clothing. Nothing could be plainer, as I view it, than that his authority to use the car was for those limited purposes only. Such is the clear import of the words used by the defendant, under all the circumstances. That they were so understood by the minor is manifest from his admissions, already enumerated, from his statement on redirect-examination that the reason he bought the gas and oil for the joy-ride he was taking when the accident litigated occurred was because the defendant had been "good enough" to let him use the coupe

"for his [the defendant's] work," and from the obviously artificial attempt to set up a business purpose as reason for the joy-ride. Had the explanation been true, it would have been clearly proper to use the defendant's gas and oil.

The interpretation declared ignores the rule requiring construction of any statute as a whole. The word "furnishes" is given so wide a connotation that just as it is impossible to give without furnishing, so it is equally impossible, so far as a motor vehicle owner is concerned, to either cause or permit its use without furnishing it. The intendment of the Act is taken as if the sole legislative control had been stated in the words *whoever furnishes*. This finds no support in legislative intention unless it is arbitrarily assumed that the long statutory recital of the limits of the new field of liability rests solely in a legislative tendency to verbiage. Such construction is impossible if recognition is given to the restriction which the word "knowingly" by any reasonable interpretation must impose upon the word "permitting." There is equivalent lack of support when resort is had to known purpose in seeking to determine intention, which is susceptible of rather definite measurement. It is common knowledge among members of our Courts, our Bar, and citizens generally, that with the advent of the automobile and its widespread use, the strict principles of agency law resulted in much damage through negligent operation of motor vehicles by the minor children of their owners without recovery of compensation. The situation was nationwide. It clamored for remedy. In some states reform was accomplished by judicial legislation adopting the "family use doctrine." This never became effective in Maine. *Farnum* v. *Clifford,* 118 Me., 145, 106 A., 344; *Pratt* v. *Cloutier,* 119 Me., 203, 110 A., 353, 10 A. L. R., 1434. In others legislative action imposed liability on the owners of motor vehicles for damages caused by any person operating by express or implied consent. In Maine and Kansas liability was limited to operation by minors and the application of the Act was defined by the words already discussed.

The principle that an entire legislative act should be considered in the construction of any part thereof requires that we refer back to P. L. 1929, Chap. 327, and in that Act, we find two sections dealing with the operation of motor vehicles by minors, Sections 9 and 10. The Act under consideration traces back to Section 10. The preceding section, which is the preceding section in the particular session law, points clearly to the fact that the right of control, as to whether minors should be permitted to become licensed motor vehicle operators, was vested in parent or guardian, if the minor had any such. It was necessary, if minors were not to be barred from all employment which involved the operation of motor vehicles, that provision be included authorizing the employer of a minor to assent to his licensing when there was no father, or mother, or guardian.

The majority opinion lays no emphasis on the employer-employee relationship but the complete picture of the legislation is of importance to demonstrate its purpose. The opinion reaches its result by the broadest possible interpretation of the word "furnishes." It cites no authority except a single Kansas case, hereafter referred to, the facts of which are clearly distinguishable from the present ones. It cites, only to ignore, a considerable line of cases decided under those statutes where the admeasurement of the enlargement of agency law is to be construed from the words "the consent of the owner . . . expressed or implied." To refer to a single one of those cases, *Smith* v. *Tompkins*, 52 R. I., 434, 161 A., 221, the employer of a chauffeur, whose employment placed him in possession of motor vehicle and key, was not held to have impliedly consented to the operation of his motor vehicle when the chauffeur took friends for a ride. The case discloses that the defendant therein had expressly forbidden the chauffeur to use the vehicle except on defendant's business or under instruction from defendant's wife, and the jury verdict denying recovery to the plaintiff must have been based on factual finding either that implied consent was negatived or that no implied consent could

be assumed. The formula of words is unimportant, since in the present cases it is clear on the record that the minor about whom the issue revolves clearly understood that this defendant had given him no authority to use the car for personal pleasure.

The decision can find no support in the case *Shrout* v. *Rinker et al.*, cited in the majority opinion. There the accident litigated occurred on the very occasion when a minor was either furnished the family car or knowingly permitted to use it, to travel from home to a ball-game and return, the defense offered being that the return trip did not follow the exact course prescribed by the parent. Whether the case be considered to turn on the car having been furnished or merely that its use was knowingly permitted, the Court thought it necessary, or at least worth while, to mention not only its recognition that children often thought the longest way 'round the shortest way home, but that the purpose of the attempted limitation on the use of the car rested in time rather than course, because the car was wanted for family use immediately after the close of the ball-game.

I believe that proper construction of the statute would limit its application on the facts presented so that this defendant would be liable only if he might be held to have knowingly permitted the minor to operate the motor vehicle on the trip when the negligence occurred; that the evidence adduced in the cases would not justify a finding that he did so; that the evidence rulings, if assumed to be erroneous, were not prejudicial under such a construction of the statute; and that the mandate in each case should be

Exceptions overruled.

BURDEN MCBURNIE

vs.

JOHN H. NORTHRUP and HAROLD UMPHREY.

Aroostook. Opinion, August 4, 1942.

Master and Servant. Certain Limitations to the Duty of Employer to Warn his Employees of Dangers Incident to Employment.

The employment of one as a temporary employee is attended with all the legal consequences usually pertaining to the relation of master and servant.

The duty of an employer to warn his employee of dangers to which he is or may be subjected is not absolute. It depends upon the age, understanding and experience of the employee and the character of the danger.

In order to create a duty of warning and instruction by the employer the danger must be known to the employer and unknown to the employee as there is no duty of giving warning and instruction if the danger is obvious or if the employee has knowledge of the risk to which he is subjected.

Furthermore, an employee is presumed to see and understand all dangers that a prudent and intelligent person of the same age and experience and with the same capacity for estimating their significance would see and understand and if he neglects to observe the patent perils of his employment the fault is his own and not that of his employer.

It is common knowledge that the tires of rapidly revolving motor vehicle wheels pick up and throw back and upward with great force dirt and oftentimes rocks of substantial size.

It must be assumed, in the instant case, that the employee possessed average intelligence and mental capacity and the danger of injury from flying dirt and rocks thrown back by the spinning wheel of the mired truck behind which he took his stand was so patent that knowledge and full appreciation of it could have been avoided only by gross incapacity and inattention.

Although this employee may not have appreciated the exact degree of his danger ordinary prudence on his part ought to have made him avoid without warning the risk to which he exposed himself.

On the most favorable view of the evidence which can be taken for the plaintiff the failure of his temporary employers to warn him of the danger incident to his work was not the proximate cause of his injuries.

ON EXCEPTIONS.

Action for damages from injuries sustained by the plaintiff while temporarily employed by the defendant Umphrey, one

of the partners of the firm of Northrup & Umphrey, to assist in hauling a truck out of a ditch. The plaintiff, while so employed, joined with others in an attempt to move the truck forward, and went behind it, and, in pushing it, stood behind the right rear wheel. The spinning wheel dislodged a rock which struck the plaintiff and broke his leg. The plaintiff alleged negligence on the part of the defendant Umphrey in not warning him of the special dangers incident to his employment. A nonsuit was ordered in the trial court. Plaintiff excepted. Exceptions overruled. The case fully appears in the opinion.

Donald N. Sweeney,

George B. Barnes, for the plaintiff.

Granville C. Gray, for the defendants.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

STURGIS, C. J. Exceptions to an order of nonsuit in an action of negligence tried in the Superior Court at Houlton in and for Aroostook County.

The plaintiff, Burden McBurnie, employed at Presque Isle by one W. L. Christie, on November 10, 1939, was borrowed by Harold Umphrey, one of the partners of the firm of Northrup & Umphrey, to assist in hauling a truck out of a ditch into which it had slid from a wood road. McBurnie was about sixty years old, a farm hand and teamster apparently of ordinary intelligence and understanding and although he had never driven a truck he had worked around them and seen them operated.

When he reached the truck he joined with others there in an attempt to move it forward, and then went in behind it and pushing on the corner stood directly back of and in line with the right rear wheel which, as he had observed and knew, spun rapidly whenever the power of the truck was applied and was softening up the surface of the rocky road. After work-

ing there a few minutes he was struck in the left leg by a rock dislodged from the road bed and thrown back by the spinning wheel which broke both bones of his leg at the junction of the middle and lower thirds. Medical and hospital expenses paid or incurred, loss of wages and pain and suffering endured are the elements of his damages which resulted.

Although as drawn the declaration of the plaintiff had a broader scope, here and apparently in the court below he has relied on his allegations that as a temporary employee of the defendant firm, Northrup & Umphrey, their negligent failure to warn him of the special dangers and risks incident to his employment was the sole proximate cause of the injuries which he received. As the exception is presented the only question to be determined is whether the case should have been submitted to the jury.

Upon the record it may be found that the plaintiff was temporarily an employee of the defendant firm when he received his injuries. If so this employment was attended with all the legal consequences usually pertaining to the relation of master and servant. *Wyman* v. *Berry,* 106 Me., 43, 75 A., 123, 20 Ann. Cas., 439; *Pease* v. *Gardner,* 113 Me., 264, 268, 93 A., 550; *Frenyea* v. *Steel Products Co.,* 132 Me., 271, 274, 170 A., 515.

Under certain circumstances it is the duty of an employer to warn his employee of dangers to which he is or may be subjected but the duty is not absolute. Its existence depends upon the age, understanding and experience of the employee and the character of the danger. In order to create a duty of warning and instruction the danger must be one that is known to the employer and unknown to the employee, there being no duty of warning and instruction if the danger is obvious or if the employee possesses knowledge of the risk to which he is subjected. Furthermore, the employee is presumed to see and understand all dangers that a prudent and intelligent person of the same age and experience and with the same capacity for estimating their significance would see and understand and

if he neglects to observe the patent perils of his employment the fault is his own and not that of his employer. *Ward* v. *Railroad Co.*, 132 Me., 88, 166 A., 826.

In this case the danger of injury from flying dirt and rocks thrown back by the spinning wheel of the mired truck behind which the injured employee took his stand was so patent that we are convinced that knowledge and full appreciation of it could have been avoided only by gross incapacity and inattention. Assuming, however, as we must, that the employee possessed average intelligence and mental capacity, to hold that he did not see or appreciate that he was incurring danger is to hold that he was too unthinking and inattentive to be in the exercise of due care. It is common knowledge that the tires of rapidly revolving motor vehicle wheels pick up and throw back and upward with great force dirt and oftentimes rocks of substantial size. Although this employee may not have appreciated the exact degree of his danger, ordinary prudence on his part ought to have made him avoid without warning the risk to which he exposed himself. *Jones* v. *Manufacturing Co.*, 92 Me., 565, 43 A., 512, 69 Am. St. Rep., 535.

On the most favorable view of the evidence which can be taken for the plaintiff it was not the failure of his temporary employers to warn him of the dangers incident to his work which was the proximate cause of his injuries for which he here seeks to recover. The order of nonsuit in the trial court was not error.

Exceptions overruled.

STATE OF MAINE

vs.

LINWOOD LOUIS SABA and STANLEY J. KORBETT.

Oxford. Opinion, August 5, 1942.

Criminal Law. Indictment. Principal. Accessory. Error in Quoting Charge to Jury.

An exception alleging error in a charge will be considered on the merits of the charge actually given notwithstanding the exact words are not accurately quoted.

Proof that a crime was committed on the exact day alleged in an indictment is not essential.

To constitute one as a principal in the commission of a felony, he must be proved to be present, either actually or constructively, at the time and place of its commission.

One who watches at a proper distance from the scene of a crime to prevent surprise or aid escape may be considered as constructively present, aiding and abetting it.

One who procures another to commit a theft and is not present when it is committed is an accessory to the crime only and not a principal in it at common law.

In prosecutions under R. S. 1930, Chap. 143, Sec. 8, the indictment must charge the crime of procuring, or other acts sufficient to establish the status of accessory, and not the offense procured.

When the only evidence to connect a respondent with breaking, entering and larceny rests in the presumption arising from his possession of the goods stolen subsequent to the break and the defense offered is that he was at a place distant from the crime at the time of its commission, instruction to the jury is erroneous which would permit a verdict of guilty notwithstanding acceptance of the alibi testimony as true.

ON EXCEPTIONS AND APPEALS.

Respondents alleged error (1) in the admission of evidence, (2) in misdirection to the jury and (3) in the refusal to give a requested instruction. Respondents, being convicted, excepted and appealed. Appeals and exceptions sustained. Verdicts set aside. New trials ordered. The case fully appears in the opinion.

Theodore Gonya, County Attorney, for the State.

Arthur L. Thayer for respondent Linwood Louis Saba.

Gordon Stewart for respondent Stanley J. Korbett.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, JJ.

MURCHIE, J. This case presents separate appeals by two, out of four, persons charged with crime in a single indictment who were tried together, it not appearing whether the other two have been either apprehended or tried. The appeals were taken from the refusal of the justice presiding in the Trial Court to set the verdicts aside on separate general motions for new trial. Two of the exceptions relate to the charge. One of these alleges a misdirection to the jury; the other, erroneous refusal to give a requested instruction. A third exception involving an evidence ruling requires no consideration in view of the result.

The indictment alleges a breaking, entering and larceny at Rumford in the night-time on September 29, 1940. The breaking and entering and larceny were adequately proved but there was no eye-witness to the crime and the only way in which the respondents were connected with it was by evidence showing that they had access to, or possession of, goods answering the description of some of those stolen in the break some time thereafter, including a particular cigarette carton which was definitely proved to have been in the warehouse when the break was made, and that they had been heard at an earlier time discussing a proposed trip to Rumford where, it is stated in evidence, the respondent Saba told the respondent Korbett "that he had a place to go."

The exceptions relative to the charge may be considered together. Respondents requested an instruction, in substance, that to convict the respondents it would be necessary for the State to prove that one or both of them "were present at Rum-

ford on the night alleged in the indictment, and took an active part in the breaking and taking." The stated exception to the charge was to the use of the words "they would not have to be found physically present at that time," i.e., at the time of the breaking and taking. The quoted words do not appear in the charge, but the justice presiding at the trial did instruct the jury that the question to be considered was "whether or not these two respondents or either of them participated, not necessarily by actual presence, but were they a party to the breaking and entering and larceny," and again "whether or not these two men, or either one of them participated, not by physical presence necessarily, but did they participate in this breaking and entering and larceny in any degree."

It would be highly technical to hold that this misquotation should defeat the right of the respondents to relief if the instruction intended to be complained of was erroneous in law. The exception was "noted before the jury," as required by Rule 18 of the Rules of Court. Opportunity was given to the justice presiding to correct the error in his charge, if it was error, and was inadvertent, to satisfy the purpose of the Rule as declared in *McKown* v. *Powers et al.*, 86 Me., 291 at 295, 29 A., 1079, and the issue is herein determined as if the words actually used in the charge were properly recited in the exception.

The requested instruction was properly refused regardless of the question as to whether proof of the physical or actual presence of the respondents at the breaking and taking was a necessary part of the crime alleged. The definiteness of the time requirement alone justified the refusal. The law is clear that while a definite time must be alleged in any indictment, proof need not be that the crime charged was in fact committed on the particular day named. *State* v. *Baker,* 34 Me., 52; *State* v. *Williams,* 76 Me., 480. Disregarding the time element, however, the requested instruction raises the identical question intended to be raised by the exception alleging the charge to be er-

roneous in authorizing the jury to find the respondents guilty although not actually or physically present at the time and place of the crime, and decision of the cause must rest in the propriety or impropriety of such instruction.

The proper rule of law is that to constitute one as a principal in the commission of a felony, he must be proved to be present either actually or constructively at the time and place it was committed. The issue of actual presence is necessarily simple. The limits of constructive presence are more or less uncertain. In *Commonwealth* v. *Knapp,* 9 Pick., 496, 20 Am. Dec., as in 16 C. J. 126, Par. 114-b, and 22 C. J. S. 154, Par. 86-b, illustrations are given which indicate that one who is watching at a proper distance and station "to prevent a surprise" or "to favor, if need be, the escape of those . . . immediately engaged" may properly be considered as constructively "*present, aiding and abetting.*" The instruction requested on behalf of the respondents was too favorable to their defense in eliminating the right to convict on a finding of constructive presence by its stated requirement that the respondents must be proved to have taken an "active" part in the "breaking and taking." That actually given to the jury was too favorable to the State in its implication that not even a constructive presence was requisite.

The defense offered by the respondents, in addition to their own denial of participation in the crime, was by way of alibi asserting that they spent all of the time from the evening of Saturday, September 28, 1940, until after the break was discovered at approximate noon on the following day in Bangor, many miles from the scene of the crime. Notwithstanding the flexibility of the time rule declared in *State* v. *Baker* and *State* v. *Williams,* both supra, the proof was such that the alibi evidence placed the respondents far from the scene of the crime at the only time when it could have been committed, and it would have been a complete defense, if believed, against finding that they were either actually or constructively present.

Under the instruction given the jury verdict might have been returned even if the alibi testimony was accepted as true since it eliminated the necessity of any presence, either actual or constructive, and stated the issue of guilt to be determined by whether or not they had participated in the crime "in any degree," regardless of the common law rule that one who procures another to commit a theft and is not present when it is committed is an accessory to the crime only and not a principal in it. 36 C. J. 797, Par. 212. R. S. 1930, Chap. 143, Sec. 8 constitutes participation in a felony as an accessory a substantive offense, which can be prosecuted without reference to the conviction of the principal in the particular crime. This provision, originally enacted as Chap. 504, Sec. 1 of the Public Laws of 1831, represents a distinct change from the common law rule which authorized the prosecution of an accessory to a felony only after, or in connection with, the conviction of his principal. The statute was first interpreted in *State* v. *Ricker*, 29 Me., 84, where the facts alleged and proved were sufficient to constitute the respondent an accessory before the fact to the crime charged. In accordance with that interpretation, which remains unchanged to the present day, when the State seeks to prosecute one who has counseled or procured the commission of a felony, without the conviction of his principal, he must be charged with the statutory crime of procuring, and not with the offense procured. The statute, and rule, are applicable also to acts constituting one an accessory after the fact to a felony, but the indictment now under consideration was not drawn against these respondents as accessories to the felony charged, and the distinction between their participation therein as principals, on a finding that they were either actually or constructively present, and their more remote connection with it was not called to the attention of the jury. The instruction given would have been appropriate in the prosecution of a misdemeanor where "all who knowingly participate in the commission of the offense are deemed principals and may be

indicted and convicted either jointly or severally." *State* v. *Bass et al.*, 101 Me., 481, at 484, 64 A., 884, 885. See also *State* v. *Ruby et al.*, 68 Me., 543. It has never been applicable to felonies. The exception alleging misdirection in the charge must be sustained.

The result on the appeals from the denial of the general motions for a new trial would be the same. The case is barren of direct evidence linking the respondents with the actual breaking and taking or even of such proximity to the scene of the crime as would warrant a finding of their constructive presence, and even of presumptive evidence of that nature except so far as within established rules of law the possession of stolen goods subsequent to the theft creates inference of guilt, not only of larcency, *State* v. *Merrick*, 19 Me., 398; *State* v. *Russo*, 127 Me., 313, 143 A., 99, but also of the breaking and entering when larceny is a part of such greater crime, *Commonwealth* v. *McGorty*, 114 Mass., 299; *State* v. *Wright et al.*, 6 Pennewill (Del.), 251, 66 A., 364; 9 C. J., 1082, Par. 145-(3), and cases there cited. Under proper instruction it would have been competent for the jurors upon the record before us to have found these respondents guilty of the crime of breaking and entering and larceny in the night-time on the basis of the inference properly carried by their possession of the stolen property and such inference alone, had it been made clear to them in the charge that such a verdict could be returned if they believed, notwithstanding the alibi evidence, that the respondents were at the scene of the crime at the time of its commission or sufficiently close thereto to be considered as constructively present. In the absence of such instruction, or of a verdict found thereafter, it would be necessary for this Court on the record to hold that the evidence was not sufficient to prove beyond a reasonable doubt that either of these respondents participated as a principal in the crime charged in the indictment. Under the instruction given, the verdict can mean no more than that the jury found them to have participated in the crime in *some* degree, which degree might obviously have been that they were

accessories before the fact, because of the planning, or after the fact, because of the possession of the stolen goods.

Appeals and exceptions sustained.
Verdicts set aside.
New trials ordered.

WORSTER, J., having retired, did not join in this opinion.

MOTOR FINANCE CO. *vs.* WARREN F. NOYES.

Kennebec. Opinion, August 29, 1942.

Automobiles: Conditional Sales, Right of Conditional Vendee to Settle Claim.

A conditional vendee of a motor vehicle is answerable to the vendor to the extent of the interest of the latter in the vehicle, but does not occupy such a trust relationship as to prevent him from making settlement by compromise with a tort feasor without the sanction of the vendor.

The general rule established by the great weight of judicial authority is that either the conditional vendor or vendee can prosecute an action for injury to the property by a third party and a judgment secured by either is a bar to an action by the other. If, in the instant case, the plaintiff has not received what it is entitled to from the conditional vendee, its remedy is against him.

The fact that the conditional sales contract was duly recorded is without legal effect upon the right of the tort feasor to make settlement with the conditional vendee. Such tort feasor is liable to any person lawfully in possession of the chattel. He is not put upon inquiry as to the actual title thereto.

The statute is for the benefit and protection of all persons who have any interest in examining the record title to property of which they may thereafter become owner, either in whole or in part, absolutely or otherwise.

ON EXCEPTIONS.

Action by the plaintiff to recover for damage to an automobile which it had sold to a third person under a conditional sales contract. The conditional vendee and defendant Noyes were involved in an automobile accident. It was conceded that Noyes was legally responsible, and the referee to whom this case was referred so found. Noyes was insured against such accident, and after investigation, his insurance carrier settled

with the conditional vendee by paying him $650.00 and was given a general release by him. Later the plaintiff informed the insurance carrier that it held a conditional bill of sale on the injured car and wished to be recognized in the settlement and brought this action to enforce its claim. The case was referred. The referee filed a report in favor of the plaintiff. Defendant objected to the report, the presiding Justice upheld the objection and the report was not accepted. The plaintiff excepted to the ruling. Exceptions overruled. The case fully appears in the opinion.

Robinson & Richardson,

John D. Leddy, for the plaintiff.

William B. Mahoney,

James R. Desmond, for the defendant.

SITTING: STURGIS, C. J., THAXTER, MANSER, MURCHIE, JJ.

MANSER, J. This case was heard by a Referee with right of exceptions reserved. To his report, filed in Superior Court, in favor of the plaintiff, objection was made by defendant that the correct legal principles governing the factual situation were not applied. The presiding Justice upheld the objection, and the report was not accepted. The case then came forward upon exceptions by the plaintiff to the ruling of the presiding Justice. Neither side disagrees with the Referee's findings as to facts.

The case arose out of an automobile accident involving a truck operated by the defendant, Noyes, and an automobile operated by one Lloyd Hersom. Noyes was insured against liability of this character. His insurance carrier made an investigation, negotiated with Hersom, and arrived at a settlement by payment of $650. In the instant case the Referee found, and it is conceded that the defendant was legally responsible for the damages arising from the accident, and was accordingly in the position of a tort feasor. Hersom executed a general release

from all causes of action and especially as to the particular automobile accident. The settlement was completed November 8, 1937. Almost a month later, on December 3, 1937, the present plaintiff telegraphed the insurance carrier that it held a conditional bill of sale on the Hersom car and desired to be recognized in any settlement. Upon the evidence, the Referee found that neither the defendant nor his insurance carrier had any actual knowledge of the conditional sales contract at the time of the settlement.

It appears that Hersom purchased a new Ford car in the spring of 1937, receiving credit of $250 for a used car taken in exchange. A conditional sales agreement was entered into, requiring payment by Hersom of $491 in monthly installments of $25 each. These payments were regularly made for the four months intervening up to the time of the accident. The Referee found that Hersom, the conditional sales vendee, was then lawfully in possession of the automobile, but ruled that the release executed by Hersom, although intended to cover all damages to the automobile, did not constitute a defense in this action brought by the assignee of the conditional sales contract. There is no claim of fraud, collusion or bad faith in the transaction.

The issue, therefore, is whether, in the absence of fraud, a settlement with and release by a conditional vendee in lawful possession of an automobile, which settlement and release cover all damages occasioned to such automobile by a tort feasor, operates as a full discharge of the liability of the latter and bars a subsequent recovery by the conditional vendor.

The Referee ruled that the conditional vendor, not being a party to the release, was not bound thereby; that while the tort feasor had no actual knowledge of the conditional sale, he was charged with constructive notice thereof because the sales agreement had been properly recorded; that the conditional vendor, under the rule in Maine, held title to the automobile and occupied, in legal effect, the relationship of mortgagee so far as the rights of the third parties were concerned; that a

mortgagee, although not in possession, is entitled to recover to the extent of his interest in the chattel, and such right is superior to that of the conditional vendee and is not affected by his settlement with the tort feasor.

Starting with Chancellor Kent, the general rule is stated thus:

> "As every bailee is in the lawful possession of the subject of the bailment, and may justly be considered, notwithstanding all the nice criticisms to the contrary, as having a special or qualified property in it for the protection of that possession; and as he is responsible to the bailor in a greater or less degree for the custody of it, he, as well as the bailor, may have an action against a third person for an injury to the thing; and he that begins the action has the preference; and a judgment obtained by one of them is a good bar to the action of the other." 2 Kent Comm., 585.

This is practically the universal doctrine and has been uniformly followed by our Court. In *Little* v. *Fossett,* 34 Me., 545, 56 Am. Dec., 671, it was held that a bailee is entitled to damages commensurate with the injuries sustained to the subject of the bailment, and holds the balance beyond his own interest in trust for the general owner. *Vining* v. *Baker,* 53 Me., 544; *Kerr* v. *Tea Co.,* 129 Me., 48, 149 A., 618; *Harrington* v. *King,* 121 Mass., 269; *Thayer* v. *Hutchinson,* 13 Vt., 504, 37 Am. Dec., 607; 6 Am. Jur., Bailments, §§302-304.

The Referee recognized the rule as thus adjudicated, but appears to have been of opinion that it was without application to the status of a conditional vendee. This presents the question: Is a bailee without a shadow of title in a better position than a conditional sales vendee, who has a special property interest in the chattel which entitles him to full and complete title by the payment of the balance of the sale price?

Our Court held in *B. & M. R. R. Co.* v. *Warrior Co.,* 76 Me., 251 at 259:

"It is true that an action cannot be maintained unless the plaintiff has an interest in the subject matter of the suit, but he may do so when he is not interested to the full extent of the damages to be recovered. Such are the familiar cases of injury to property in which there is a general and special owner, as bailor and bailee, consignor and consignee, principal and factor. In such cases the action may not be brought in the names of the two jointly, but may in the name of either." . . .

"as the injury was the result of a single wrongful act to the whole property the damage could not be apportioned but must all be recovered in that one action, the judgment in which would be conclusive against any suit by the general owner."

In *Stotts* v. *Puget Sound Co.*, 94 Wash., 339, 162 P. 519, L. R. A., 1917 D, 214, the reason that the rules governing conditional vendees and bailees are the same in this connection is well stated as follows:

"While having no element of title, the conditional sales vendee is bound to keep the property secure, and to pay its value to the vendor. The *quantum* of the title is the same in the vendor as in the bailor, and the want of title is the same in the vendee as in the bailee. The liability of the trespasser is the same, his only concern being that he shall not be put to the hazard of two recoveries."

The general rule established by the great weight of judicial authority is that either the conditional vendor or vendee can prosecute an action for injury to the property by a third party and a judgment secured by either is a bar to an action by the other. In case of damage to a motor vehicle sold under a conditional contract of sale, the vendee has the right to maintain an action against a third person for injuries to the machine. The position of the vendee is certainly no less than that of a bailee who, having possession of a motor vehicle, though with-

out title thereto, may maintain such an action, as a presumption of ownership attends the possession, and a tort feasor cannot dispute the ownership so presumed. The right of the conditional vendee to sue authorizes him to make a compromise settlement, in good faith, so as to preclude a recovery by the conditional vendor. The vendee is answerable over to the vendor to the extent of the interest of the latter in the vehicle, but does not occupy such a trust relationship as to prevent him from settlement by compromise without the sanction of the vendor. It is only when he obtains a recovery, by suit or compromise, that he becomes trustee for the vendor to the extent of the latter's interest. Huddy, Automobile Law, Vol. 11-12, §§ 136, 137; *Downey* v. *Bay State Ry.*, 225 Mass., 281, 114 N. E., 207; 14 C. J. S., Chattel Mortgages, § 227; *First National Bank* v. *Union Ry.*, 153 Tenn., 386, 284 S. W., 363; *Ryals* v. *Seaboard Air-Line*, 158 Ga., 303, 123 S. E., 12; *Harris* v. *Seaboard Air Line*, 190 N. C., 480, 130 S. E., 319; *Barnes* v. *United Rys. & Electric Co.*, 140 Md., 14, 116 A., 855; *Craig* v. *Lee*, 81 Ind. App., 319, 142 N. E., 399; W. C. Block case, 71 F. (2d), 682.

While the Referee further recognized that this is the weight of authority, he construed the case of *Donnell* v. *Deering Co.*, 115 Me., 32, 97 A., 130, 132, as contra and therefore as controlling decision in this jurisdiction, unless overruled. But that case is not in conflict with the foregoing statment of principles. There the mortgagee of a vessel made settlement with a tort feasor for damages thereto. After the mortgage had been foreclosed, the mortgagor, Donnell, brought suit against the Deering Co., mortgagee, to recover the amount collected as damages upon the ground at the time of the injury the mortgagor was in possession of the vessel. The opinion recognizes that the mortgagor and mortgagee each might have a right of recovery from a tort feasor, stating that the mortgagor,

"may maintain trespass for an injury to his right of possession, and in such action he may be permitted to recover, by way of aggravation, damages for injuries to the property itself by defendant's acts, yet the right to recover such damages to the property itself in such an action by the mortgagor is only incidental to his right of action for the injury to his possession."

The cited case was not a suit against a tort feasor or an undertaking to make him pay a second time, but was an action by the mortgagor to recover for money had and received by the mortgagee upon the contention that part or all of the proceeds should be turned over to him. Under the particular circumstances of that case as they existed at the time of the suit, it was held that the mortgagee was not liable to account to the mortgagor. The case does not hold that the mortgagee had exclusive right to maintain an action against a tort feasor.

In *Grand Rapids & I. R. Co.* v. *Resur,* 186 Ind., 563, 117 N. E., 259, in upholding the right of the owner to bring an action, the Court declares that the rule that a bailee was entitled to sue would not preclude the owner from bringing action in his own name, but ends with the apt statement "either might recover but not both."

Neither does the case of *Belli* v. *Forsyth,* 301 Mass., 203, 16 N. E. (2d), 656, relied upon by the plaintiff, actually support his position. There an automobile had been loaned and was being operated by a bailee. The bailee had sued the defendant for personal injuries, but made no claim for damages to the automobile. Under such circumstances, the Court held that a general release to which the bailor was not a party was not a bar. The Court, however, says:

"At least therefore it would seem that the defendant must show that the settlement money was in truth paid and received in full satisfaction for all the damage done to the automobile and not merely in satisfaction for the personal injury and property claims of the bailees."

In the present case the defendant did show that he had made full settlement, both for personal injuries and for damage to the automobile.

The fact that the conditional sales contract was duly recorded is without legal effect upon the right of the tort feasor to make settlement with the conditional vendee. Such tort feasor is liable to any person lawfully in possession of the chattel. He is not put upon inquiry as to the actual title thereto.

Our recording statute as to conditional sales (R. S., c. 123, § 8) provides that no conditional sale shall be valid except as to the original parties thereto unless properly recorded. The record is necessary to establish its validity. The statute is for the benefit and protection of all persons who have any interest in examining the record title to property of which they may thereafter become owner, either in whole or in part, absolutely or otherwise. *Banton* v. *Shorey*, 77 Me., 48; *Jordan* v. *Keen*, 54 Me., 417; *Trust Co.* v. *Buck*, 137 Me., 172, 16 A. (2d), 258. See also annotation in 92 A. L. R., 205.

As said in *Harris* v. *Seaboard Air Line R. Co.*, 190 N. C., 480, 130 S. E., 319, 49 A. L. R., 1452:

> "Registration affects the rights only of purchasers for value from or creditors of the mortgagor. . . . A tort feasor is neither a purchaser for value nor a creditor."

The case of *Motor Mart* v. *Miller*, 122 Me., 29, 118 A., 715, cited by the Referee in this connection does not reach the question regarding registration as here involved. That was a determination as to the priority of liens upon the same chattel and the respective rights of the holder of a Holmes note which had been recorded and of the Company which furnished repairs upon an automobile after the note had been recorded. Both of these parties were creditors of the conditional vendee and the sole question was as to which of the two had the superior lien upon the chattel. The conditional vendee was not asserting a claim against anyone. He was debtor to both, and because of

his failure to pay, the question of priorities between the two creditors arose.

It is, therefore, our conclusion that the plaintiff has no cause of action against this defendant, who has made full and complete settlement of all damages to the automobile in question with the conditional vendee, as he had a right to do. If the plaintiff has not received what he is entitled to from the conditional vendee, its remedy is against him.

Exception overruled.

HUDSON, J., did not participate.

WORSTER, J., having retired, did not join in this opinion.

SARAH E. COX *vs.* METROPOLITAN LIFE INSURANCE COMPANY.

Kennebec. Opinion, September 1, 1942.

Insurance. Suicide Claim. Burden of Proof.
Error of Law in Judge's Charge. Questions for Jury.

In trial of a civil case to recover the face amount of an accident insurance policy because of the death of the insured by alleged accident, the defense being suicide, not covered by the policy, an instruction to the jury that, where the evidence is only circumstantial, the "circumstances must exclude everything else except the fact that they bring about suicide" is erroneous.

In a civil case circumstantial evidence need not exclude every reasonable conclusion other than that arrived at by the jury. Where two equally plausible conclusions are deducible from the circumstances, the jury is left to decide which shall be adopted.

Where the defense is suicide, the presumption that death was not suicidal obtains and the defendant has the burden of going ahead with the evidence to overcome the presumption. Finally, however, the burden of proof as distinguished from the burden of going ahead with the evidence rests upon the plaintiff.

Manifest error in law in a judge's charge to the jury where as a result thereof injustice results may be examined on a motion for a new trial, as against the law, even though better practice demands that the point be raised in a bill of exceptions.

The giving of the instruction in the instant case, invoking the rule as to burden of proof (where evidence is circumstantial) that is applicable only in criminal cases constituted an error in law that was highly prejudicial to the rights of the defendant and was well calculated to result in injustice.

ON EXCEPTIONS AND MOTION FOR NEW TRIAL.

Action for indebitatus assumpsit on account annexed by plaintiff to recover face amount of an accident insurance policy in which she was the named beneficiary.The defendant claimed that the deceased committed suicide, which was not covered by the policy. The jury found for the plaintiff. Defendant brought the case to the Law Court on motion for new trial and on exceptions. New trial granted. The case fully appears in the opinion.

Locke, Campbell & Reid, for the plaintiff.

Pattangall, Goodspeed & Williamson, for the defendant.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, JJ.

HUDSON, J. This is an action of indebitatus assumpsit on account annexed (Sec. 40, Chap. 96, R. S. 1930) brought by the plaintiff to recover the face amount of an accident insurance policy because of the death of the insured by alleged accident. The defendant pleaded that the deceased committed suicide, not covered by the policy. The case was tried to the jury and it determined the cause of death to be accident. The defendant brings the case up on motion and exceptions.

At the close of the charge certain requests of instruction were made, among which was this by plaintiff's counsel:

> "Where the defendant relies upon circumstantial evidence to prove suicide it is the consensus of opinion that to establish death by suicide the party making the averment must prove it by facts which exclude every reasonable hypothesis of natural or accidental death."

The Justice said:

> "Now I give that in substance. I give it in my own words. In this case the plaintiff contends that there is nothing but circumstantial evidence to rebut his presumption of death not by suicide. He says there being nothing but circumstantial evidence here, that it must be clear and convincing *and that those circumstances must exclude everything else except the fact that they bring about suicide. I give that as an instruction. . . .*" (Italics ours.)

Thus the jury was given the rule that applies only in criminal cases where proof is by circumstantial evidence.

> "In civil cases the rule of criminal law that where circumstantial evidence is submitted the facts proved must be such as to preclude every other hypothesis except the guilt of the accused does not apply. In a civil case circumstantial evidence need not exclude every reasonable conclusion other than that arrived at by the jury. The rule as to circumstantial evidence in a civil case is that a party will prevail if the preponderance of the evidence is in his favor. Where two equally plausible conclusions are deducible from the circumstances, the jury is left to decide which shall be adopted." 20 Am. Jur., 1043, sec. 1189.

The defense being that of suicide, the presumption that death was not suicidal obtained and upon the defendant rested the burden of going ahead with the evidence to overcome the presumption. Finally, however, the burden of proof as distinguished from the burden of going ahead with the evidence rested upon the plaintiff, who would be entitled to recover only if she established that burden of proof by a fair preponderance of the evidence. The burden of proof never shifts, but the burden of evidence, so-called, may shift.

> " 'Burden of proof' and 'burden of evidence' are often confused. The phrase, burden of proof, is in fact more philosophical than practical. It means generally that a plaintiff, however often the evidence shifts, must upon the whole, persuade the jury, by legal evidence, that his contention is right. The risk of non-persuasion is all the time upon him. If he fails to persuade, he loses his case. This risk of non-persuasion is the burden which he must assume." *Foss* v. *McRae*, 105 Me., 140, 143, 73 A., 827.

The defendant, having accepted the burden of going ahead with the evidence tending to establish suicide, introduced only circumstantial evidence for that purpose. The instruction to the jury required the defendant to produce evidence not only "clear and convincing" but which would "exclude everything else except the fact that they bring about suicide."

Where the evidence in a civil action is only circumstantial and "two equally plausible conclusions are deducible from the circumstances," the jury may decide which it shall adopt (see 20 Am. Jur., Sec. 1189, page 1043, supra, and 97 American State Reports, 802, Note b) and "every other reasonable conclusion than the one arrived at need not be excluded in civil actions." Note b, supra.

Ellis v. *Buzzell*, 60 Me., 209, 11 Am. Rep., 204, was an action of slander for charging one with adultery.The defendant pleaded truth and so undertook establishment of the adultery. The Court, in considering whether the defendant had to establish it beyond reasonable doubt, stated on page 211:

> "The burden, however, of proving that what he has said is true, rests rightfully enough upon the defendant, not only because he holds the affirmative according to the pleadings, but because of the presumption of innocence. This presumption, as well as whatever testimony the plaintiff may offer to repel the charge, the defendant must be prepared to overcome by evidence.

"But when he has done this by that measure and quantity of evidence which is ordinarily held sufficient to entitle a party upon whom the burden of proof rests, to a verdict in his favor in a civil case, shall he be required to go further, and in order to save himself from being mulcted in damages for the benefit of the plaintiff, free the minds of the jury from every reasonable doubt of the plaintiff's guilt, as the State must in the trial of a criminal prosecution?

"We see no good reason for thus confounding the distinction which is made by the best text-writers on evidence, between civil and criminal cases with regard to the degree of assurance which must be given to the jury as the basis of a verdict."

Camden v. *Belgrade*, 75 Me., 126, 46 Am. Rep., 364, cites *Ellis* v. *Buzzell*, supra, makes the distinction between civil and criminal cases, and states on page 131:

"In the latter class" (meaning criminal cases) "it must be such as shall exclude all reasonable doubt of guilt, while in the former, where it comes collaterally in question, it suffices if there is a preponderance of evidence, which satisfies the jury of the fact."

Also see *Campbell* v. *Burns*, 94 Me., 127, on pages 136 and 137, 46 A., 812, and Note III in 124 A. L. R., on page 1380, and many cases cited therein, including *Ellis* v. *Buzzell*, supra.

By reason of this erroneous instruction, the defense was denied the jury's application of the proper rule in deciding whether or not the defendant had sustained its burden to overcome the presumption of non-suicidal death. Rightly instructed, the jury had the right to accept and adopt the hypothesis of suicide rather than accident if it found that the defendant had overcome the presumption, although the evidence did not exclude the hypothesis of accident. Because of this instruc-

tion, the defendant was compelled to produce proof beyond legal necessity and was prejudiced by it.

Defendant's counsel admits that no specific exception was taken to this instruction, but argues strongly that nevertheless it may be considered under its Exception III, "which was intended to place the final burden of proof where it belonged, and raises the same question as the instruction which was actually given." This requested instruction denied by the presiding Justice was:

> "If the jury, after careful consideration of all the evidence, are unable to say how Harvey Cox met his death, whether by suicide, murder or accident, and the evidence does not preponderate in their minds in favor of either of these methods, in other words, if the issue remains in doubt, then their verdict should be for the defendant."

But it is unnecessary to determine whether the given instruction is assailable under Exception III, because we think it may be considered under the motion for a new trial as against law. In *Pierce* v. *Rodliff*, 95 Me., 346, 50 A., 32, the Court held that "while the practice of raising questions of law upon a motion is not to be encouraged, in cases where manifest error in law has occurred, and injustice would otherwise inevitably result, the law of the case may be examined upon a motion, and if required, the verdict be set aside as against law," citing *Berry* v. *Pullen*, 69 Me., 101, 31 Am. Rep., 248. In *State* v. *Wright*, 128 Me., 404, 148 A., 141, 142, *Pierce* v. *Rodliff*, supra, was cited with approval and consideration given to an alleged error not raised by exception but reached upon the motion for a new trial on the ground that the verdict was against the law. In the Wright case, in which the respondent was indicted for involuntary manslaughter, the presiding Justice in his charge did not distinguish between civil and criminal negligence, "instructing the jury to measure the respondent's guilt by the rules of negligence applicable only to civil cases." While that alleged error, better practice required, should have been raised

in a bill of exceptions, yet it was considered on the general motion and the appeal sustained.

In *State of Maine* v. *Mosley*, 133 Me., 168, 175 A., 307, the Court, in speaking of the Wright case, supra, said on page 172: ". . . the instruction was so plainly wrong and the point involved so vital that a new trial was ordered on the ground that the verdict must have been based upon a misconception of the law. . . ."

In *Trenton* v. *Brewer*, 134 Me., 295, 186 A., 612, this Court said on page 299: "There may, on occasion, be review of questions of law, on a new trial motion, though this is not compatible with best practice."

Very recently this Court has stated in *Springer* v. *Barnes*, 137 Me., 17, on page 20, 14 A. (2d), 503, on page 504:

> "A general motion ordinarily does not reach a defect in the judge's charge. Where, however, manifest error in law has occurred in the trial of a case and injustice inevitably results, the law of the case may be examined on a motion for a new trial on the ground that the verdict is against the law."

We feel that the giving of this instruction invoking the rule as to burden of proof (where evidence is circumstantial) that is applicable only in criminal cases constituted an error in law that was highly prejudicial to the rights of the defendant and was so well calculated to result in injustice, that it is our duty without consideration of the motion on its merits and of the other exceptions to order a new trial.

New trial granted.

WORSTER, J., having retired, does not join in this opinion.

MARY B. ROSSIER *vs.* HELEN G. MERRILL.

ALBERT P. ROSSIER *vs.* HELEN G. MERRILL.

HELEN ROSSIER, PRO AMI, *vs.* HELEN G. MERRILL.

Kennebec. Opinion, September 1, 1942.

Automobiles. Doctrine of Last Chance.

It is altogether too much to ask of mind and hand to formulate a decision and to execute it in the space of two seconds or less of time which, according to the plaintiff's measurement of distance, in the instant case, was all the time which defendant had in which to make a decision.

ON EXCEPTIONS AND MOTIONS FOR NEW TRIALS.

There are involved three actions growing out of a collision between the automobile of plaintiff Albert P. Rossier and the automobile of the defendant. The steering gear of the Rossier automobile gave way, causing the automobile to go out of control and swerve to the left side of the road. About the time the car came to a stop, it was struck by the defendant's automobile which was traveling on its own side of the highway. According to the plaintiff's estimate of the distance traveled, not over two seconds of time elapsed between the time the plaintiff's car swerved from its own side of the road and the time when the collision occurred. The jury found for the plaintiffs. Defendant filed exceptions and made motions for new trials. Motions sustained and new trials granted. The case fully appears in the opinion.

F. Harold Dubord,

Ralph W. Farris, for the plaintiffs.

Locke, Campbell & Reid, for the defendant.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, JJ.

THAXTER, J. There are involved here three cases each of which after a verdict for the plaintiff is before us on a general motion for a new trial and on exceptions. The damages claimed arose out of an automobile collision caused as is alleged by the defendant's negligence. We shall consider only the motions.

On July 2, 1940, the plaintiff, Albert P. Rossier, was driving his Studebaker automobile in a southerly direction over the Oakland Belgrade highway. This road was sixteen feet wide with gravel shoulders one foot wide on each side. He had with him as passengers the other two plaintiffs, Mary B. Rossier, his wife, and Helen Rossier, his stepdaughter, also his son and a lady who was visiting them. Mrs. Rossier was in the front seat, the others in the rear. The only persons who could give direct testimony as to what happened were the occupants of the two cars which collided, but neither the son nor the other lady was available to testify at the trial. Mr. Rossier's story is in its important aspects corroborated by his wife and his daughter.

He was travelling on his right-hand side of the road at a speed of between thirty-five and forty miles an hour, the wife says between thirty and thirty-five, the daughter says thirty-five. When he was at a point about abreast of the Johnson farm, so called, his steering gear let go, caused as was afterwards discovered by a broken tie rod. The steering wheel turned in his hands but he had no control over the course of the car. He shut off the ignition; the car swerved to the left, crossed the road to the easterly side, and when struck by the defendant's automobile was partly on and partly off the surfaced portion of the highway. The decisive factors in the record about which there is no dispute among the plaintiffs' witnesses are, firstly that the collision took place on the easterly side of the highway at a point twenty-seven feet in a southerly direction on the highway from the point where Mr. Rossier knew that there was something the matter with his car, secondly that he did not at any time apply his brakes, and thirdly that the collision occurred either just before his car came to a stop or

within a split second of the time after it came to a stop depending on whether you take his version or that of his wife as to what happened. As a matter of fact, Mrs. Rossier says that she can't tell whether the car "was stopped or still may have been moving a little bit."

If we measure twenty-seven feet southerly on the highway from the point where trouble first developed and draw a line at right angles across the highway to the shoulder on the easterly side, we find the point according to Mr. Rossier's version where the cars came together. The hypotenuse of this triangle, which is approximately the course which the automobile must have followed, would measure approximately thirty-two feet. This distance the Rossier car without any application of the brakes travelled in the interval of time between the breaking of the tie rod and the collision. Assuming a rate of speed of but twenty miles an hour, this would be an interval of but a little over one second. The three plaintiffs all assert that at the time Mr. Rossier lost control of his car there was no automobile approaching northerly on the road, that there was a clear view of approaching cars for a distance of one-tenth of a mile, and that when the defendant's car, approaching from the opposite direction on its own side of the highway, became visible over the rise over five hundred feet away, their car was either well across the road or had actually reached the other side. The plaintiffs must be mistaken on this point for if we accept their estimates of distances the defendant's car would have been travelling at a rate of speed which is incredible. As a matter of fact there is no evidence by anyone with the possible exception of Mrs. Rossier that the defendant's speed was in any respect unreasonable, and Mrs. Rossier's testimony as to speed is indefinite and carries little weight in the light of her obvious but easily understood confusion with respect to many of the circumstances of the accident.

What we regard as the jury's misconception of what happened in this case is due we think to their failure to appreciate the very short space of time during which all the events under

consideration occurred. The case has been presented on the theory that there was time for reflection and action by the parties involved, and particularly by the defendant. It is claimed that the defendant could have stopped or could have swerved to her left so as to have avoided the Rossier car. If these contentions could be substantiated we should have facts analogous to those considered by us in the case of *Jordan, Admx.* v. *Maine Central Railroad Co.*, 139 Me., 99, 27 A. (2d), 811, recently decided by this court, which involved the doctrine of "the last clear chance." But the present case is utterly unlike that. Whatever the speed of the defendant may have been, all that happened occurred while the Rossier car was travelling a distance of slightly more than thirty feet and in a space of time of not more than two seconds.The plaintiffs claim that Mrs. Merrill, the defendant, was negligent, in that during that period of time she did not realize that the Rossier car was out of control, and because she did not either swerve to the left or stop her car before the impact. The fact is that the defendant had no opportunity whatsoever to avoid this accident after she knew or should have known that the Rossier car was out of control. It is altogether too much under these circumstances to ask of mind and hand to formulate a decision and to execute it in two seconds or less of time.

On the plaintiffs' own evidence we see nothing here to indicate the negligence of the defendant. Rather we think that the plaintiffs' figures as to space and time support the testimony of Mrs. Merrill. She says that, as she was proceeding in a northerly direction on her own side of the road near the Johnson farm, she saw the Rossier car approaching on its own right-hand side of the road about three or four telephone poles away, that suddenly as they neared each other it swerved to the left, that she jammed on her brakes and pulled her car as far as possible to the right almost into the ditch but could not avoid the accident. That she pulled far to the right is evident, for it is not disputed that it was the left front end of each car which received the force of the impact.

The record in this case satisfies us that the accident was caused by the breaking of the steering gear of the Rossier car which swerved to the left directly into the path of the oncoming car of the defendant who was herself without fault.

Motions sustained.
New trials granted.

WORSTER, J., having retired, does not join in this opinion.

ELLEN FLOOD ET AL., APPELLANTS FROM DECREE OF JUDGE OF PROBATE ALLOWING WILL OF MICHAEL J. MORAN, JAMES A. GARTLAND ET AL. LIKEWISE APPELLANTS, ETHEL WRIGHT ET AL. LIKEWISE APPELLANTS, PETER GARTLAND ET AL. LIKEWISE APPELLANTS.

York. Opinion, September 8, 1942.

Wills. Testamentary Capacity. Undue Influence. Evidence. Findings of Fact.

Findings of fact by the Trial Court are conclusive and not to be reversed by the Law Court if the record shows any reasonable and substantial evidence to support them.

It will be presumed that the ruling of a Judge receiving or rejecting evidence was right unless the exceptions show affirmatively that it was wrong.

Previous declarations of a testator, offered to prove the mental facts involved, are competent.

The influence of kindness is not undue influence.

Whether evidence tending to show the insanity of a testator is too remote from the time of the execution of the will is a matter resting very largely in the discretion of the trial court.

A lack of testamentary capacity is not indicated by the failure of a testator to make collateral kin the objects of his bounty.

In the absence of any showing that a testator surrendered his own judgment, it is proper for the presiding justice to disregard the advisory finding of undue influence.

ON EXCEPTIONS.

Collateral relatives contested the will of Michael J. Moran, alleging undue influence and lack of testamentary capacity. The Supreme Court of Probate allowed the will. The contestants appealed and brought exceptions. Exceptions overruled, decree affirmed and case remanded. The case fully appears in the opinion.

Titcomb & Siddall,

Daniel E. Crowley, for appellants Ellen Flood, Annie Renick, Peter Gartland and Bernard Flood.

Willard & Willard, for appellants Ethel Wright and Marion G. Wright.

Thomas F. Sullivan, for appellants James A. Gartland and Peter J. Gartland.

Louis B. Lausier,

William P. Donahue, for appellee.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, JJ.

MANSER, J. These cases come forward on exceptions to the decree of the Supreme Court of Probate allowing the will of Michael J. Moran, and further exceptions as to restrictions upon admission of two exhibits offered by contestants. The will was contested upon the grounds of lack of testamentary capacity and of undue influence.

Michael J. Moran was a native of Biddeford, Maine, where he lived during his entire life. He died March 14, 1941, at the age of approximately seventy-three years. The will admitted to probate was dated November 14, 1940, and revoked a former one made September 17, 1937, in which two of the contestants, Ethel Wright and Marion G. Wright, second cousins, of a younger generation, were the principal beneficiaries. The other contestants were first cousins and heirs at law.

The case was heard by a jury which returned its advisory verdict that the testator was of sound mind, but that the will

was procured by the undue influence of Thomas Simpson, who was the principal beneficiary. The presiding Justice, however, made a decree affirming the decision of the Probate Court allowing the will.

The record amply supports the decree. It portrays a man who never married, whose parents, brothers and a sister had predeceased him, whose heirs at law were cousins, having no contacts with him, although four of them lived in the same city. So far as disclosed, they paid no attention to him, either in sickness or in health.

His brothers, both older, were physicians. Dr. William Moran lived in Portland. Dr. Thomas Moran and the testator lived together for more than ten years in their own house in Biddeford and until the Doctor's death. All the brothers were bachelors.

The testator is shown to have been a man of good habits, always neat and trim in appearance, a regular church attendant, having no intimate friends but many acquaintances. He was not talkative but not taciturn.

Both brothers died within a few months of each other in 1936. As their heir at law, he received in 1937 and 1938 an aggregate of $43,000. His own estate was appraised at $55,870.

After the death of his brothers, it is shown that he managed his own affairs in prudent fashion. His house consisted of two tenements, in one of which he lived, renting the other. He was on good terms with his tenants, kept the premises in repair, paid taxes and all other bills promptly, procured supplies, kept records for and made income tax returns, kept a checking account upon which, during the last year of his life, he made at least a dozen deposits aggregating over $1000. Four of these, amounting to $296.70, were made in December and January after the execution of his will. On occasion, he sold small amounts of stock. Except for legal advice as to income taxes and as to reorganization proceedings of a concern in which he held stock, he was unassisted, acted of his own volition, without error, and without dispute or disagreement in any of the

transactions. He displayed conservative judgment in his financial affairs as shown by the fact that, when inventoried, his assets consisted of deposits in local banking institutions of over $20,000 and practically the entire balance in good securities. In the winter seasons, following the death of his brothers and until 1940, he went, unaccompanied, to Florida. Although uniformly careful in expenditure of money, he explained to an acquaintance any seeming extravagance by the statement he saved the expense of winter clothing and of fuel. He also said he liked the climate and the people, and it seemed to be good for his health.

He sent from there a basket of fruit to his tenant in recognition of his accommodation in driving him to the railroad station on his departure. He also sent fruit to the Wright sisters, who are contestants and they produced at the hearing as indication of his interest in them, a short note inquiring as to receipt of one package which they had failed to acknowledge. He also made them a present of $50 when, in 1939, he received a letter conveying the information that one had been out of work and the other had been sick for a considerable period.

On the issue of testamentary capacity, the contestants relied, in part, upon alleged eccentricities, as indicative of an unsound mind. The principal witness in this connection was a man who had lived across the street for approximately a dozen years. He testified that he never saw any lights in the house; that the windows were always kept closed; that storm windows remained on all the year around; that tenants would stay one or two months and then move out; that there had been but four or five tenants there in eleven years. He asserted that these conditions also obtained while the brother, Dr. Thomas Moran, was living. He estimated, however, that the tenement was vacant probably four or five weeks in all. He further averred that the testator used to dust the building, lawn and steps with a feather duster; that the door and steps were painted in several noticeable colors different from the house; that at times the testator would come out without a coat, and wearing a

white apron with little strings, such as a waitress would use; that the testator was accustomed to opening the front door slightly, look up and down the street, and then close the door.

Whatever weight this evidence might have had was largely dissipated by the testimony of a tenant of the testator, also called by the contestants. He said the feather duster was used solely to brush off dust from door, windows and sills; that a broom with long handle was used to brush lawn and walks at mowing time; that the steps were painted in two colors, one for the treads and the other for the risers, and that a lighter color than the house was used on window sills. He saw nothing unusual in their appearance. This tenant lived in the house from September 1937 to May 1939. He said the testator used kerosene lamps while he lived there, but he noticed electric lights afterwards. He further testified that he himself put on and took off double windows and saw none remaining on into the summer season except in 1939.

A second claim as to testamentary incapacity was the allegation that the testator suffered a paralytic shock on September 15, 1940, which affected his mental faculties. At the time mentioned, he was found lying on the floor in his home. It was evident that he had been there for at least two days. His left leg was affected. He was taken to a hospital where he remained until November 10th, when he was transferred to a nursing home where he stayed about a month. The nurse at the hospital testified that he remained unconscious for nearly a week.

Dr. O'Sullivan, however, who was called to the testator's home and who attended him for some weeks, testified that he had suffered what is commonly called a heart attack. He was then semi-conscious, but roused up and volunteered the information as to where the house key would be found. He was never unconscious after arrival at the hospital. As to the condition of the left leg, the explanation given by the Doctor was that it was caused by the temporary numbing of the reflexes by pressure from lying so long on the leg, which also produced sores on the hip and knee; that there was no cerebral involve-

ment, and the patient progressed to convalescence satisfactorily. He talked with him daily. He was in a wheel chair in eight days and a little later was able to walk with the assistance of a nurse.

The theory of paralytic shock affecting the brain may well have been negatived in the minds of Court and jury by the medical testimony which was unchallenged by any other expert opinion.

It was further in evidence from another witness who assisted in removing the testator from the house, that he told Mr. Simpson to look after things for him, and told the witness to open a cupboard door and take from money he would find there two dollars for his trouble.

Contestants further sought to introduce certain records upon the ground that they established as a fact that the testator was once committed to the Insane Hospital at Augusta. A paper purporting to be a part of the hospital records was offered through its present Superintendent. The Court admitted a portion reading, "Michael Moran, Biddeford, admitted November 7, 1892. Native of Biddeford, Age 25." and the final portion reading, "January 25. Ad. Thos. Moran Fa. Biddeford. Home." The remainder of the record was excluded. It was shown that the witness had no personal knowledge of the record, nor who made it. The part admitted was upon the ground that it was a public record coming from proper custody, even though not required by statute to be kept, and it would be left to the jury to determine whether it was of and concerning the testator. The excluded portion read as follows:

> "Single. Melancholia, hereditary — Had short attack one year ago — Recovered at home; has been depressed — About six weeks and wants to wander about: Has given a great deal of trouble coming here."

Later contestants offered an exhibit of a commitment by the Board of Mayor and Aldermen of Biddeford under date of November 7, 1892, of a Michael Moran, declared to be insane, and

which was directed to the Superintendent of the Insane Hospital. The record was admitted but not as proof of itself that the person committed was the testator.

To these limitations the contestants excepted and the exceptions are presented for consideration by the Court. No other proof was offered as to identity. Not a single witness testified to personal knowledge of the fact as to whether the testator had ever been in the insane asylum. There are rules of law and evidence, unnecessary here to discuss, which would make it doubtful whether the records were admissible at all, but the contestants certainly received all the benefit to which they were entitled. The general rule whether evidence tending to show the insanity of a testator is too remote from the time of the execution of the will is a matter resting very largely in the discretion of the trial court. No general rule can be given on the subject. Each case must depend upon its particular circumstances. *Re Baker,* 176 Cal., 430, 168 P. 881; Annotation 7 A. L. R., 571.

> "The circumstances of each case, in the very nature of things, ought to control, and the discretion of the trial judge, though reviewable for abuse, ought to have weight." *Taylor* v. *Taylor,* 174 Ind., 670; 93 N. E., 9.
>
> "It will be presumed that the ruling of a Judge receiving or rejecting evidence was right unless the exceptions show affirmatively it was wrong." *Hill* v. *Finnemore,* 132 Me., 459, 473; 172 A., 826, 833.

The contestants cannot here complain that there was abuse of discretion. Assuming proof of identity and giving full effect to the observations of the maker of the hospital record, which could not have been within his own knowledge, yet the exhibits might have been excluded in toto. To say that a young man who temporarily suffered from melancholia forty-eight years before, with no evidence of continuation or recurrence of the difficulty, with a history of normal exercise of judgment, not shown to have suffered from any delusions, with no impair-

ment of mental faculties, cannot make a valid will because of a presumption of insanity continuing through nearly five decades is to magnify the probative value of such evidence beyond the limits of credence.

Another claim put forward by the heirs at law is that lack of testamentary capacity is indicated by failure of the testator to take into account the natural objects of his bounty. The mere incidence of collateral kinship is all that is shown to support this claim. There is no evidence of affectionate regard, of services rendered, of concern for his welfare, but instead a complete lack of actual friendly relationship for a long period of time. About two years before the testator made his last will, he told his attorney that there were certain relatives he didn't care for.

> "So it is uniformly held that the previous declarations of the testator, offered to prove the mental facts involved are competent." *Jones* v. *McLellan,* 76 Me., 49. See also *Hogan, Appellant,* 135 Me., 249, 194 A., 854; 113 A. L. R., 350.

The testator was under no obligation to these relatives.Their lives were as separate and apart as that of the merest casual acquaintances. The former will, made September 17, 1937, disclosed a definite purpose to dispose of his estate without benefit to them. This was three days after he had received over $16,000 as his distributive share of the estate of his brother, Thomas, and when he knew he was to receive a further sizeable sum from the estate of his deceased brother, William. The record discloses no interest shown by these collateral heirs in the testator during his lifetime, but only the desire to enrich themselves after his death by asserting through the mouths of others that he was of unsound mind.

Undue Influence. The presiding Justice, notwithstanding the finding of the jury to the contrary, decided that the contention of undue influence was not sustained. This question is not before this Court for original determination. Findings of fact by the trial court are conclusive and not to be reviewed by the

Law Court if the record shows any reasonable and substantial evidence to support them. *Trust Co.* v. *Baker,* 134 Me., 231, 184 A., 767; *Goodale* v. *Wilson et al.,* 134 Me., 358, 186 A., 876; *Mitchell et al, Exceptants,* 133 Me., 81, 174 A., 38; *Chaplin, Appellant,* 133 Me., 287, 177 A., 191.

> "This Court sits to determine whether or not there was sufficient evidence (any evidence is the common expression) to justify the findings and decree of the appellate Probate Court." *Eastman et al. Appellants,* 135 Me., 236, 194 A., 586, 588.

That the presiding Justice acted with careful deliberation is evidenced by the fact that, faced with the acceptance or rejection of the jury finding, he came to the conclusion that he must take the responsibility of regarding it as unwarranted. This was his duty. *Eastman et al. Appellants,* 135 Me., 233, 194 A., 586.

Thomas Simpson, a relative and neighbor, and principal beneficiary under the will, is charged with undue influence. The basis of the claim as culled from the evidence by counsel for contestants is that he had been interested in the testator for some time, and during the last few months had practically sole access to him. He found the testator lying on the floor of his home in the fall of 1939. He arranged for his hospitalization, and later his removal to a nursing home. He took him to the office of the attorney when the will was made. He secured a reduction of five dollars in his taxes. He visited him in the hospital and talked with him in a low tone of voice. He took him for automobile rides during convalescence and afterward. He collected rent from a tenant one winter when the testator was in Florida. By direction of the testator, he paid two or three bills with the testator's money. He did not notify the Wright sisters of the illness of the testator. Simpson did not testify. Thus is summed up the basis of the charge of undue influence.

On the other hand, the record is devoid of any evidence of fraud or coercion, of any solicitations or importunities, of any

attempt to control the conduct of the testator, of any domination, of any assiduous attention, of any fiduciary or confidential relationship, of any attempt to alienate the testator from the beneficiaries under the former will.

Whatever hope Mr. Simpson may have had of benefit to be gained, his conduct was consistent with that of a kindly friend and neighbor toward a lonely, elderly man, who had lost a brother with whom he had lived for a generation; who was growing physically infirm, and who needed some care and attention. The testator appreciated it. He told others so.

> "The influence of kindness is not undue influence."
> *Eastman et al. Appellants,* 135 Me., 233, 194 A., 586, 589.

But he continued to control his own affairs. He discharged his physician when he felt himself to be convalescent, and the Doctor agreed that there was no further actual need for his services. He still made his own bank deposits, and the slips were written with his own hand. Nowhere does it appear that he surrendered his own judgment to that of Simpson.

As to the substantial change he made in his last will, it is needless to hunt for a reason, so long as there is nothing to show he was deprived of the power to act as a free agent, was morally coerced, or subjected to importunities which he was too weak to resist.

There is naught to show that the testator desired to see the Wright sisters, who had not seen him but once in ten or twelve years, and then only at the funeral of his brother. Nor to show that Simpson intrigued to prevent them from knowing of his illness. There were five other relatives in Biddeford and they sent them no word. It does appear of record that on January 6, 1939, he wrote Ethel Wright of his intention to call on them on his way home from Florida. A little later he received from her a letter setting forth, at least impliedly, their need of financial aid. He replied on March 23, 1939, as follows:

> "I am not going to stop at Salem. I am sending a Check to you and you can give Marion some."

The fact finding tribunal might draw reasonable inferences from this change of mind, although it was not necessary to ascribe a reason for his acts.

The statement of legal principles, both as to the issue of undue influence and testamentary capacity, as laid down by our own Court, together with factual situations therein considered, in our opinion not only warranted the conclusion reached by the presiding Justice but compelled it. Reference may be had to the following: *Rich* v. *Gilkey*, 73 Me., 595; *O'Brien, Appellant*, 100 Me., 156, 60 A., 880; *Rogers, Appellant*, 123 Me., 459, 123 A., 634; *Chandler Will case*, 102 Me., 72, 66 A., 215; *Randall et al., Appellants*, 99 Me., 396, 59 A., 552; *Hall* v. *Perry*, 87 Me., 569, 33 A., 160, 47 Am. St. Rep., 352; *Martin, Appellant*, 133 Me., 422, 179 A., 655.

The mandate will be

Exceptions overruled.

Decree of Supreme Court of Probate affirmed.

Case remanded to Probate Court.

No counsel fees or disbursements allowed to Contestants accruing subsequent to decree below.

WORSTER, J., sat, but having retired, did not participate.

RUTH CAMPBELL *vs.* PATRICK LANGDO.
MALORY I. CAMPBELL *vs.* PATRICK LANGDO.

Kennebec. Opinion, September 21, 1942.

Automobiles. Negligence. Contributory Negligence.

When the record discloses sufficient credible evidence to justify the finding of the jury, their verdict will not be overturned.

ON MOTIONS FOR NEW TRIALS.

Actions for damages for personal injuries arising out of an automobile accident suffered by Mrs. Campbell and damages to her husband for resultant expenses and for loss of his wife's services. The cases were tried together and the jury returned verdicts in favor of the plaintiffs. Defendant brought motions for new trials. Motions overruled. The case fully appears in the opinion.

Ralph W. Farris, for the plaintiffs.

Gordon F. Gallert,

Charles N. Nawfel,

Pattangall, Goodspeed & Williamson, for the defendant.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, JJ.

PER CURIAM.

These actions, arising out of an automobile accident, were brought to recover damages for personal injuries to Mrs. Campbell, the driver of one of the cars involved, and damages to her husband for resultant expenses of hospital, medical and nursing care of the wife and for loss of her services. No claim is included for damage to the automobile.

The cases were tried together and the jury returned verdicts in favor of the plaintiffs of $5200 for the wife and $1875 for the husband. Motions for new trials bring the cases forward.

The accident occurred after dark on November 17, 1941, on the state highway, a short distance south of the State House in Augusta. Mrs. Campbell started out from the driveway of her home on the easterly side of the highway, intending to drive southerly toward Hallowell. The defendant was driving northerly and thus had the right of way over a car entering the public highway from a private way. R. S., c. 29, § 7.

There was a sharp conflict of testimony. The driveway curved toward the north as it entered the highway. The defendant asserts that Mrs. Campbell cut sharply to her left and

directly in front of him, and that he had no opportunity to avoid the accident.

On the other hand, the testimony for the plaintiff was that Mrs. Campbell waited for two cars to pass and then as she came to the highway she saw the defendant's car at a distance which, gauged by physical objects, was shown to be 192 feet away. She had 25 to 30 feet to go before she would be safely beyond the approaching car.

The section was within the built-up or compact portion of the city where speed is limited to 25 miles an hour. R. S., c. 29, § 69. There was testimony that the defendant was driving at an excessive rate of speed, and by his own admission to officers at 35 miles per hour; that the left wheels of his car were two feet over the medial line, indicated by a yellow stripe; that the Campbell car was struck at its left rear wheel after Mrs. Campbell had crossed the dividing line in a diagonal direction and as she was straightening out the car in the right hand lane going south. The defendant admitted that he didn't see the Campbell car until he was from ten to twenty feet therefrom, although headlights of both cars were on and a street light was suspended over the center of the highway at the locus of the accident. The defendant's car was severely damaged by the force of the impact.

The evidence was ample to sustain the claim of negligence on the part of the defendant.

The only real questions as to liability were whether Mrs. Campbell negligently contributed to the accident; whether she was justified in assuming that there was sufficient time for her to cross safely; or whether the negligence of the defendant constituted the sole and proximate cause of the accident. There appears to be credible evidence which would justify the jury in reaching the last conclusion, even though other reasoning minds might reach a different result.

As to the objection that the awards were excessive, the personal injuries sustained by Mrs. Campbell, and their existing and probable future effect, as well as the expenses of approxi-

mately $1000 already incurred, with the continued probable invalidism of the wife for a considerable period, justify the amounts of the verdicts.

Motions overruled.

BERTHA E. MCNAMEE, ADMINISTRATRIX

vs.

GROVER D. LOVEJOY.

Kennebec. Opinion, September 26, 1942.

Damages for Pain and Suffering when Death not Instantaneous.

The assessment of damages for pain and suffering is for a jury under our system of jurisprudence, but an appellate court has jurisdiction to correct jury error when factual decision is clearly wrong, or a damage award is manifestly excessive.

There can be no question that the Supreme Judicial Court should and will grant relief to a defendant whenever it seems apparent that a jury has made an excessive award influenced by prejudice, passion or corrupt motives.

The true measure of damages, in such a case as the present, is compensation for the conscious suffering both physical and mental of the decedent, and nothing more except expenses for care and nursing and the loss of earnings between the time of injury and death.

ON MOTION TO SET ASIDE VERDICT.

Action by plaintiff for damages for injuries to decedent resulting in death after three-quarters of an hour of conscious suffering, followed by a coma which lasted a few hours. The only issue in the case was whether the jury verdict should be set aside as excessive. Motion overruled. The case fully appears in the opinion.

Harvey D. Eaton, for the plaintiff.

Locke, Campbell & Reid, for the defendant.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, JJ.

MURCHIE, J. This case presents the single issue whether a jury verdict, rendered on facts which demonstrated the liability of the defendant with such clarity that there was no attempt to contest that issue, should be set aside as excessive.

The injuries to plaintiff's decedent caused him approximately three-quarters of an hour of conscious suffering, and death following a coma which lasted but a few hours. The jury assessed damages at slightly more than $3,250. Defendant brings the case forward on general motion, but while point is made that the verdict is against the charge given to the jurors (a conclusion dependent upon finding the money figure entirely too large), his chief reliance is that the case falls within the principle declared in *Ramsdell, Adm'x.* v. *Grady,* 97 Me., 319, 54 A., 763. In that case, an award of $3,000 for mental anguish and bodily pain suffered over a period of five days, with only a strong probability that there was some apprehension of death at times, was reduced to $1,500, or $300 per day.

There can be no question on the authorities either that this Court should, and will, grant relief to a defendant whenever it seems apparent that a jury has made an excessive award "influenced by prejudice, passion or corrupt motive" or that the true measure of damages, in such a case as the present, is compensation for the conscious suffering, both physical and mental, of the decedent, and nothing more, except out-of-pocket expense for care and nursing and the loss of earnings between the times of injury and death, both of which are here negligible. The measure of damages cannot be increased because a life has been lost, because decedent was a breadwinner, actually or potentially, or because of any sentimental consideration. *Ramsdell, Adm'x.* v. *Grady,* supra; *Baston, Adm'x.* v. *Thombs,* 127 Me., 278, 143 A., 63.

Application of the principle declared in *Ramsdell, Adm'x.* v. *Grady,* supra, has been curtailed or restricted by decisions in *Stone, Adm'x.* v. *Lewiston, Brunswick & Bath Street Railway,* 99 Me., 243, 59 A., 56, and *Baston, Adm'x.* v. *Thombs,* supra, in both of which careful distinction was drawn between cases

where all the suffering compensated could be traced to the negligence of a defendant, and those where an indeterminate part of it would necessarily have been suffered notwithstanding such negligence. In the *Baston* case, attention is called to another basis of distinction, even more vital today than when the decision was written, namely, that the purchasing power of the dollar, as of the date of decision in the *Ramsdell* case, was greater than at the time then current. This of necessity means that it was very substantially greater than at present.

"Damages for conscious physical pain and mental suffering are exceedingly hard for any jury to determine satisfactorily," as Mr. Justice Dunn stated in the *Baston* case, supra. The charge of the Justice presiding in the Trial Court discloses that the jurors were properly instructed on the applicable law, and his comment, that counsel for the respective parties, in their arguments, had "fairly, ably and correctly stated the rule," carries earnest that the whole case was conducted on that plane best calculated to eliminate prejudice or any motive that would control calm and dispassionate judgment.

It is recognized, in our system of jurisprudence, as Chief Justice Wiswell declared in *Blumenthal* v. *Boston & Maine Railroad,* 97 Me., 255, 54 A., 747, that it is the right of a litigant to have certain issues "submitted to the tribunal created by the constitution and the laws" for their determination. This comment was made in a case where exceptions to the ordering of a non-suit were overruled, but it is equally applicable to such a question as the measurement of damages in terms of money. An appellate court has jurisdiction to correct jury error, when factual decision is clearly wrong, or a damage award is manifestly excessive.

The verdict under review is a large one, measured with reference to the sharply restricted time interval which covered the conscious life of the injured party following the negligent act, but it is meaningless to compute, as the defendant does, what it would represent, on the basis of an hourly rate, for a longer interval. In *Stone, Adm'x.* v. *Lewiston, Brunswick & Bath*

Street Railway, supra, Mr. Justice Spear, upholding a verdict for $5,000, in a case where the deceased lived for five or six hours following injuries perhaps more shocking and more painful than those under consideration, remarked that the decedent "suffered about all that man can suffer in this world including death itself."

If one may suffer "about all that man can suffer in this world" in the span of that five or six hour interval which represented all of the lifetime of the decedent following injury in the *Stone* case, supra, it does not seem proper for this Court to declare that the present award, fixing an approximate $3,250 (current dollars) as the fair measure of compensation for what was suffered by Rex McNamee as the direct result of this defendant's negligence, is so excessive as to justify intervention.

Motion overruled.

WALLACE W. ROBINSON ET AL.

vs.

THE GREAT ATLANTIC & PACIFIC TEA COMPANY.

Cumberland. Opinion, September 29, 1942.

Lessor and Lessee. Estoppel. Constructive Eviction. Question of fact for Referee.

The extension or renewal of the lease, in the instant case, was a matter of contract between the parties and could not be abrogated or changed by the lessee without the consent of the lessors.

Where a person with knowledge induces another to believe that he acquiesces in or ratifies a transaction or will offer no objection to it and the other, in reliance on that belief, alters his position, such person is estopped to repudiate the transaction to the other's prejudice.

The resolving of conflicts in and the weight to be given to the evidence on the issue of estoppel and on other questions of fact are for the referee and his finding, when based on any credible evidence, is final.

To constitute a constructive eviction it must appear that by intentional and wrongful acts the landlord has permanently deprived the tenant of the

beneficial use and enjoyment of the premises and that the tenant in consequence thereof has abandoned the premises.

ON EXCEPTIONS.

Action of assumpsit for rent. The owner of a store in Portland, to whose title to the same the plaintiffs succeeded, leased said store to the defendant. A provision in the lease provided that any occupancy beyond the term of the lease or any extension thereof should be deemed to be the exercise of the lessee's option to renew the lease for the current year. The lessee continued to occupy the premises beyond the expiration of the original term of the lease and notified the plaintiffs, the then lessors, that it would not renew the lease but would be glad to continue to occupy the premises on a month to month basis, and would assume that this arrangement was approved unless it heard from them to the contrary. The lessors made no reply. The lessee continued to occupy the premises, paying the rent stipulated in the lease, for seven months; but, before the expiration of the term of a renewal, and after thirty days' notice, vacated the premises and refused to pay further rent. The plaintiffs, lessors, claimed that when the lessee held over after the expiration of the original term of the lease, the lease was thereby extended. The lessee claimed that by virtue of its letter stating that it would not renew the lease but would continue as a month to month tenant, and the failure of the lessors to reply or disapprove of its proposal, it became a tenant at will; and it also interposed the defense of estoppel. It also claimed constructive eviction because of the failure of the lessors to repair the premises. The case was referred, and the referee found in favor of the plaintiffs. The defendant, having reserved the right to except as to questions of law, filed exceptions. Exceptions overruled. The case fully appears in the opinion.

Cook, Hutchinson, Pierce & Connell, by *Fred C. Scribner, Jr.,* for the plaintiffs.

Locke, Campbell & Reid, by *James L. Reid,* for the defendant.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, JJ.

STURGIS, C. J. This action of assumpsit for rent having been referred under Rule of Court with right to except as to questions of law reserved, the Referee allowed a recovery of the rent charged in the account annexed and the case comes forward on exceptions to the acceptance of his report in the trial court.

In the Bill of Exceptions only questions of law raised by the written objections filed in the trial court pursuant to Rule XXI of the Supreme Judicial and Superior Courts are open for consideration. *Staples* v. *Littlefield,* 132 Me., 91, 167 A., 171; *Leavens* v. *Insurance Co.,* 135 Me., 365, 197 A., 309. Regardless of their importance, questions outside the scope of the bill of exceptions must be treated as waived and will be disregarded. *Harwood* v. *Siphers,* 70 Me., 464; *Verona* v. *Bridges,* 98 Me., 491, 57 A., 797; *Lenfest* v. *Robbins,* 101 Me., 176, 179, 63 A., 729; *State* v. *Chorosky,* 122 Me., 283, 287, 119 A., 662.

The record, in its parts material to this review, discloses that on June 30, 1938, the owner of a store in Portland, Maine, leased it to the Great Atlantic & Pacific Tea Company for a term ending July 31, 1940, at a monthly rental of $75 per month and with an agreement for extension or renewal of the following tenor:

> "The Lessee, at its option, shall be entitled to the privilege of five successive extensions of this lease each extension to be for a period of one year and on the terms and conditions and at the rental herein stated. Occupancy beyond the term of this lease or any extension hereof shall be deemed the Lessee's exercise of this option for the current year."

The Lessee entered and occupied the store under the lease and upon the death of the original Lessor the plaintiffs in this action became the Lessors.

It further appears that on July 31, 1940, the day the term ended, the Lessee did not vacate but sent a letter which was not received until three days later notifying the then Lessors that it would not renew the lease but would be glad to continue to occupy the premises at the same rental on a month to month basis and should assume that this arrangement was approved unless it heard from them to the contrary. Although this letter was not answered the Lessee paid the rent as provided in the lease and continued in possession of the demised premises until just before February 1, 1941, when having previously given thirty days' notice of its intention to quit on that date, it moved out of the store and has since refused to pay rent.

The Lessors, whose present ownership of the lease for the purposes of this case is conceded, contend that when the Lessee held over the lease was extended to August 1, 1941, and they are entitled to recover the unpaid rent reserved for the six months following February 1, 1941, when the tenant vacated the premises. The Lessee insists that as a result of its notice that it would not renew the lease but would remain on a month to month basis and the failure of the Lessors to reply or otherwise expressly disapprove the proposals there advanced, it became a tenant at will, effectively terminated that tenancy by its notice to quit and is not liable thereafter for the rent of the demised premises. It also interposes the defense of estoppel. And finally it claims a constructive eviction by reason of the Lessors' failure to repair the demised premises.

The extension or renewal of the lease taken by the Great Atlantic & Pacific Tea Company was a matter of contract between the parties and it is elementary that the Lessee could not without the consent of the Lessors abrogate or change that agreement. That consent in the form of waiver or otherwise is not to be found as a matter of law in the record. As the case is presented the Lessee at the end of the term by its own acts extended its lease for another year. *Hildreth* v. *Adams*, 229 Mass., 581, 118 N. E., 876; *Torrey* v. *Adams*, 254 Mass., 22, 149 N. E., 618, 43 A. L. R., 1447.

There was no exceptionable error in the ruling below that the Lessors were not estopped to enforce the provisions of their lease. The doctrine of equitable estoppel which is invoked is said to be that where a person with knowledge of the facts induces another to believe he acquiesces in or ratifies a transaction or will offer no objection to it and the other in reliance on that belief alters his position such person is estopped to repudiate the transaction to the other's prejudice. *Holt* v. *New England Tel. & Tel. Co.*, 110 Me., 10, 85 A., 159; 19 *Am. Jur.*, 676 et seq.; 31 *C. J. S.*, p. 362 and cases cited.

The claim advanced here is that after the Lessee had asserted that it had not renewed its lease and was occupying the premises on a month to month basis and had given its notice to quit one of the Lessors, speaking for both, admitted that change in tenancy had been made and was satisfactory and on the strength of this statement the tenant vacated. This admission is categorically denied by the Lessor charged with its utterance. Whether it was made or not is purely a question of fact. So too, it was exclusively for the trier of fact to determine, if it was found that the admission was made, whether the Lessee was thereby induced or influenced to and did in fact act to its prejudice. *Tower* v. *Haslam*, 84 Me., 86, 90, 24 A., 587. The resolving of the conflicts in and the weight to be given the evidence on this issue was for the Referee and as it cannot be held that his finding on this point was not based on any credible testimony it is final. *Brann et al.* v. *City of Ellsworth*, 137 Me., 316, 19 A. (2d), 425.

The lease did contain a covenant for repair and apparently there was a breach of it to some extent but it cannot be held that there was a constructive eviction which relieved the Lessee from liability to pay rent according to the terms of its lease. To constitute a constructive eviction it must appear that by intentional and wrongful acts the landlord has permanently deprived the tenant of the beneficial use and enjoyment of the premises and the tenant in consequence thereof has abandoned the premises. *Furniture Co.* v. *Inhabi-*

tants of Cumberland County, 113 Me., 175, 93 A., 70; *Taylor* v. *Finnigan,* 189 Mass., 568, 76 N. E., 203; *Skally* v. *Shute,* 132 Mass., 367; *Royce* v. *Guggenheim,* 106 Mass., 202, 8 Am. Rep., 322. These facts cannot be found in this case.

Exceptions overruled.

HERBERT F. MILLIGAN *vs.* MAURICE WEARE.

York. Opinion, September 29, 1942.

Automobiles. Due Care. Negligence. Rights of Pedestrians.

In the absence of statutory or municipal regulations, a pedestrian has equal rights in the streets with the operators of automobiles and he is not guilty of negligence as a matter of law in attempting to cross a street at a place where there is no crosswalk, although one is provided elsewhere.

But wherever a pedestrian crosses, he must make such use of his senses as the situation demands, and cannot walk into a danger that the observance of due care would have enabled him to avoid. He cannot be deemed to be in the exercise of due care, if, without exigency, he suddenly emerges from a position of safety, but of obscurity, and presents himself directly in the path of an approaching automobile and so near to it that a collision cannot be avoided.

He cannot justify such action on his part by showing that he looked for danger, which was apparent, but did not see it. Mere looking will not suffice. A pedestrian in such a situation is bound to see what is obviously to be seen.

ON EXCEPTIONS AND MOTION FOR NEW TRIAL.

Action on the case for negligence to recover damages for personal injuries. The plaintiff was attempting to cross U. S. highway Number One, at Wells Corner when he was struck and seriously injured by defendant's automobile driven by defendant's employee. The controlling question in the case was whether the plaintiff was exercising due care when he was injured. Defendant moved for a directed verdict, which motion was denied. The jury returned a verdict for the plaintiff. The defendant filed motion for a new trial, and also excepted. Exceptions overruled. Motion for new trial sustained, verdict set

aside and new trial granted. The case fully appears in the opinion.

Waterhouse, Spencer & Carroll, by *Lincoln O. Spencer* and *Harold D. Carroll,* for the plaintiff.

William B. Mahoney,

Willard & Willard,

Hiram Willard, for the defendant.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, JJ.

STURGIS, C. J. In this action on the case for negligence at the close of the evidence a motion for a directed verdict for the defendant was denied and an exception reserved. The jury to whom the case was then submitted having returned a verdict against him, the defendant filed a general motion for a new trial. As the exception and motion raise the same questions for review the exception must be regarded as waived.

In the late afternoon of August 8, 1941, but in the broad daylight of a clear day, the plaintiff, as he attempted to cross U. S. Highway No. 1 or Route 1, as it is called, at Wells Corner, Maine, was struck and seriously injured by an automobile driven by the defendant's employee who was on his way to a nearby railroad station to bring back a visiting guest. Route 1, a concrete three lane main highway running practically north and south at Wells Corner, is intersected there by a road coming in from the west known as the "Sanford Road" and the travel through this intersection is constant and heavy. Cross walks for pedestrians are plainly marked off by yellow lines on the surfaces of the ways and traffic is regulated by automatic electric signal lights of the usual type. The center lane of Route I for a distance of about three hundred feet southerly of the intersection is designated and marked by yellow lines as a "Left Turn Lane" for the use of vehicles turning left at the intersection into the Sanford Road. Left turns, however, are subject to regular light signals.

The transcript of the evidence discloses that the plaintiff, accompanied by his fiancee, had driven to Wells Corner, parked his automobile on the westerly side of Route I just beyond and southerly of the intersection, crossed alone to a drug store on the opposite side and begun a return trip to his waiting companion and car. When he reached the highway the signal on it regulating traffic had flashed red and cars traveling in opposite directions in the outside lanes had come to a standstill and as one in the easterly lane had stopped on the cross walk, instead of going around in front of that and crossing in the place set apart for pedestrians he moved back, walked in between two cars and out into the middle lane and was immediately hit and knocked down by the defendant's car which was coming up that lane for a left turn into the Sanford Road.

The controlling question in this case is whether the plaintiff was exercising due care when he was injured. Regardless of the conduct of the defendant's employee if the plaintiff's own negligence was the sole or a contributing proximate cause of his injuries he is not entitled to a verdict and a new trial must be granted.

In the absence of statutory or municipal regulations which do not exist here, a pedestrian has equal rights in the streets with the operators of automobiles and he is not guilty of negligence as a matter of law in attempting to cross a street at a place where there is no cross walk although one is provided elsewhere. But wherever he crosses he must make such use of his senses as the situation demands and cannot walk into a danger that the observance of due care would have enabled him to avoid. *Hill* v. *Finnemore*, 132 Me., 459, 172 A., 826; *Bechard Adm'x.* v. *Lake*, 136 Me., 385, 11 A. (2d), 267. He cannot be deemed to be in exercise of due care if without exigency he suddenly emerges from a position of safety but of obscurity and presents himself directly in the path of an approaching automobile and so near to it that a collision cannot be avoided. *Cooper & Company* v. *Can Company*, 130 Me., 76, 153 A., 889, and cases cited. And he cannot justify such action on his part

by showing that he looked for danger which was apparent but did not see it. Mere looking will not suffice. A pedestrian in such a situation is bound to see what is obviously to be seen. *Clancy* v. *Power & Light Co.*, 128 Me., 274, 147 A., 157.

By his own admission the plaintiff without warning walked through a line of cars which, until he emerged, obscured his movements and stepped out into the center lane of a main highway in front of a rapidly moving automobile which must have been in plain view but was not seen by him. He did not follow the cross walk which was established for the use of pedestrians but came into the center lane at a place where it could not be reasonably anticipated he would appear. It is not controverted that the oncoming automobile which hit him was not then more than ten or twelve feet away and being driven at a more or less rapid speed. He says he took one step into the middle lane, looked to his left and saw no automobile, looked to his right and across the highway, started to take another step when out of the corner of his eye he saw the automobile a few feet away and was hit before he could retreat. We are convinced that he either did not look at all to his left or if he did he was so inattentive that he failed to observe the danger which threatened him and take available precautions for his own safety. He gave the driver of the approaching car no time or opportunity to avoid the collision. It was his own negligence which was the proximate cause of his injuries.

The facts in this case are not seriously in dispute and the controlling principles of law, it must be assumed, were stated and fully explained to the jury. It is entirely possible that these rules and their application to the proven facts were misunderstood. We shall assume that this is why the erroneous verdict was returned. It must, however, be set aside and a new trial granted.

Exception overruled.
Motion sustained.
Verdict set aside.
New trial granted.

IN THE MATTER OF PETITION FOR HABEAS CORPUS BROUGHT BY PERCY P. KING.

Hancock. Opinion, October 12, 1942.

Habeas Corpus. Extradition. Demand.

The demand mentioned in Section 3 of Chapter 150, R. S. 1930 (Uniform Criminal Extradition Act), as amended by Section 1, Chapter 10, Public Laws 1939, is that made by the Governor of the demanding state upon the Governor of the asylum state.

Whether a petitioner for habeas corpus in extradition proceedings for his discharge before the Supreme Judicial Court is guilty of the crime alleged by the demanding state is not for the Court to consider but for the courts of the demanding state to determine.

One may set up in defense of extradition, when on trial on a writ of habeas corpus, that he is not a fugitive from justice.

Under the United States Constitution, the federal laws and our own statute, there can be no extradition of one as a fugitive from justice without proof of the flight.

One who, separated from his family, furnishes adequate support while he remains in the state where they are, but later removes to another state, and then fails to continue the support, is not, with respect to the offense of non-support, a fugitive from the justice of the state where the deserted family remains and is not subject to extradition as a fugitive from justice.

When a complaint has been made against one charging him under Section 6, Chapter 10, Public Laws 1939, with being a fugitive from justice and a warrant has been issued, the fact that there has been no hearing on the warrant does not bar extradition, since the purpose of the statute is to secure the person of the accused for future arrest under the governor's warrant. In the instant case, there was no necessity for such hearing to effect the purpose of the statute.

Where there is a defective allegation in an indictment as to the time of the commission of the offense for which extradition is demanded, it does not necessarily constitute a defense to extradition.

In habeas corpus proceedings in a case of a demand for extradition, the indictment need not conform to the standard required, judged as a criminal pleading, but it must show satisfactorily that the accused has been charged with commission of a crime in the demanding state.

ON EXCEPTIONS.

Proceedings by petition for habeas corpus by Percy P. King. The Governor of Maine had honored the requisition of the Governor of Massachusetts for King's surrender as a fugitive from justice. King then applied to a justice of the Superior Court for the issue of a writ of habeas corpus and, upon hearing, he was denied discharge. He excepted to the ruling. Certain of his exceptions were sustained and he was discharged. The case fully appears in the opinion.

Norman Shaw, for the petitioner.

Edward J. Harrington, Assistant Dist. Atty., New Bedford, Mass., for the Commonwealth of Massachusetts.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, JJ.

HUDSON, J.

HABEAS CORPUS. On April 4, 1942, the Governor of Maine honored the requisition of the Governor of Massachusetts for the surrender of the petitioner, Percy P. King, as a fugitive from justice of that Commonwealth and issued a warrant for his delivery to an agent thereof. On the 22nd of said April the petitioner applied to a justice of our Superior Court for the issue of a writ of habeas corpus. Upon hearing, he was denied discharge. Exceptions were taken to "the various rulings of the presiding Justice" which the petitioner now presents to us.

EXCEPTION 1. Sec. 3 of Chap. 150, R. S. 1930 (Uniform Criminal Extradition Act) was amended by Sec. 1, Chap. 10, P. L. 1939, to read in part as follows:

> "No demand for the extradition of a person charged with crime in another state shall be recognized by the governor unless in writing alleging, except in cases arising under section 6, that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter he fled from the state...."

This exception is based on the petitioner's claim that the

demand contained no such allegation. Unquestionably the demand mentioned in the statute is that made by the governor of the demanding state upon the governor of the asylum state and this was not made a part of the record. So the petitioner has failed to prove lack of such an allegation.

EXCEPTIONS 2, 3, and 4 are related so closely that they may be considered together. They are that the evidence failed to show that the petitioner was "present in the demanding state at the time of the commission of the alleged crime and thereafter fled," that "the Petitioner was not a fugitive from justice," and that he "could not be a fugitive from justice according to the evidence as he could not have committed the crime alleged in the indictment."

It appears that at a term of the probate court held at Fall River, Massachusetts, on the first day of November, 1935, a divorce from the bond of matrimony was decreed to the petitioner's wife, Eva E. King, to wit, Eve E. King, that she was given the care and custody of their three minor children, and that he, the libellee, was ordered to pay her the sum of $35.00 each and every week thereafter for her support and that of their three minor children until further order.

The Kings were married in Massachusetts in 1920. Afterwards they lived in Rhode Island and in Massachusetts. He was born in Steuben in this State. Following the divorce he returned to his native town, where he now resides. Both before and since leaving Massachusetts he paid in accordance with the order until March, 1941. Only once since the divorce, however, until his default in March, 1941, was he in that State, namely, on January 15, 1941, when he made a special trip to Fall River to confer with his former wife's attorney in regard to a possible reduction of the amount ordered to be paid. Remaining there not more than two days, he immediately returned home.

At a term of the Superior Court holden at Fall River on the first Monday of November, 1941, the petitioner was indicted. The indictment contained two counts, the first alleging that

the accused, "on or about the twelfth day of March in the year of our Lord one thousand nine hundred and forty-one, did, without just cause, desert his wife, Eve E. King, and minor children, Orlando King, Harold King, and Frances King by going into another state and leave them without making reasonable provision for their support," and the second, that he, "being of sufficient ability, did unreasonably neglect and refuse to provide for the support and maintenance of his wife, Eva E. King and minor children. . . ."

This indictment was based on Chap. 273, Sec. 1, in General Laws of Massachusetts, which read in part:

> "Any husband or father who without just cause deserts his wife or minor child, whether by going into another town in the commonwealth or into another state, and leaves them or any or either of them without making reasonable provision for their support, and any husband or father who unreasonably neglects or refuses to provide for the support and maintenance of his wife or minor child, and any husband or father who abandons or leaves his wife or minor child in danger of becoming a burden upon the public, . . . shall be punished by a fine of not more than two hundred dollars or by imprisonment of not more than one year, or both. . . ."

Whether the petitioner committed the crime alleged in the indictment by desertion of his children without making reasonable provision for their support and whether, being of sufficient ability, he did unreasonably neglect and refuse to provide for their support, we neither consider nor pass upon. The charge is that he did. Whether he did or not is for the Massachusetts court to determine. Under our statute, Chap. 150, Sec. 2, R. S. 1930, ". . . it is the duty of the governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any person *charged* in that state with treason, felony, or other crime, who has fled from justice and is found in this state." (Italics ours.) The truth of

the charge is not for us. "It is not the function of the courts, upon the return of a writ of habeas corpus, to try out the actual guilt of the accused." *People of the State of New York ex rel. John Gottschalk, Respt.*, v. *Charles E. Brown, Sheriff of Chautauqua County, Appt.*, 237 N. Y., 483, 143 N. E., 653, 32 A. L. R., 1164, 1166; *Ex parte Quint*, 54 N. Dak., 515, 209 N. W., 1006, 1007. However, he may set up in defense of extradition as a fugitive from justice that he is not. *Ex parte Roberson*, 38 Nev., 326, 149 Pac., 182, L. R. A. 1915 E, 691.

"A person cannot be said to have fled from a state in which he is charged with the commission of a crime when he was not within that state at the time the crime is alleged to have been committed." *Ex parte Heath*, 87 Mont., 370, 287 Pac., 636, 637. Therein it is also stated on page 637:

> "The courts of this country are in accord in holding that where a person is accused of the crime of child or wife desertion, he is not a fugitive from justice within the meaning of the United States Constitution and the federal statutes relating thereto and subject to interstate extradition, if it appears that he was not in the demanding state at the time when the crime is alleged to have been committed."

The annotator in 32 A. L. R. states on page 1167:

> "A man who, being separated from his family, furnishes adequate support to them while he remains in the state where they are, but later removes to another state, and then fails to continue the support, is not, with respect to the offense of nonsupport, a fugitive from the justice of the state where the deserted wife or child remains, and is not subject to extradition."

Cited to support this statement are *Taft* v. *Lord*, 92 Conn., 539, 103 Atl., 644; *Re Kuhns*, 36 Nev., 487, 137 Pac., 83; and *People ex rel. Plumley* v. *Higgins*, 178 N. Y. Supp., 728.

To repeat, while it is unnecessary to establish in the asylum

state the commission of the crime charged, it is necessary to prove the flight, for without it, under the Constitution, the federal laws, and under our own statute, there can be no extradition of one as a fugitive. No such flight has been established in this case. Flight denotes action, movement from one place to another, and in extradition proceedings the flight must take place subsequently to the commission of crime as alleged. Since the petitioner has never returned to Massachusetts since he first defaulted, it is impossible for him to have fled from justice after the alleged commission of a crime therein.

EXCEPTION 5. This is that "there had been no hearing on the Complaint and therefore hearing should be had on the Complaint before the Governor or the Court." We assume that the complaint referred to in Exception 5 is that which was made to the Western Washington County Municipal Court in this State on March 26, 1942, charging the petitioner with being a fugitive from justice and based on Sec. 6 of Chap. 10, P. L. 1939. That there was no hearing upon the warrant which issued on said complaint is not denied; but had there been a hearing and the petitioner had not been discharged, the judge or magistrate so holding him, as expressly provided by Chap. 150, Sec. 15, R. S. 1930, could have only committed him to jail for such a time specified as would have enabled his arrest on a warrant of the governor on a requisition of the executive authority of the state having jurisdiction of the offense, unless he gave bail or until he should be legally discharged. Clearly, the issue of such a warrant is not to protect him from extradition but simply to secure his person for future arrest under the governor's warrant. In this case the purpose of the statute was accomplished without the necessity of such a hearing. This petitioner has no grievance on this exception.

THE SIXTH AND LAST EXCEPTION is that the indictment found by the grand jury in Bristol County, Massachusetts, was defective, as also the said complaint, in that they did not allege any certain date when the alleged crime was committed. The allegation as to time is that "*on or about* the twelfth day of

March in the year of our Lord one thousand nine hundred and forty-one, did" etc. (Italics ours.)

The matter of the sufficiency of the indictment as a criminal pleading in extradition proceedings was fully considered and determined by the United States Supreme Court in *Henry Clay Pierce, Appt.*, v. *Edmund P. Creecy, Chief of Police of the City of St. Louis,* 210 U. S., 387, 28 S. Ct., 714, 52 Law Ed., 1113. The Court stated on page 1120 of 52 Law Ed.:

> "The only safe rule is to abandon entirely the standard to which the indictment must conform, judged as a criminal pleading, and consider only whether it shows satisfactorily that the fugitive has been in fact, however inartificially, charged with crime in the state from which he has fled." (See many cases there cited.)

The allegations in both the indictment and complaint herein meet the test established by the Supreme Court in the Pierce case, supra. Also see Par. 8, page 1125, Vol. 2, in Honnold's Supreme Court Law and cases there cited.

It should be noted that we have another statute that does not require the establishment of flight under certain circumstances. See Sec. 3 of Chap. 10, P. L. 1939, amending Sec. 6 of Chap. 150, R. S. 1930. As amended this section reads:

> "The governor of this state may also surrender, on demand of the executive authority of any other state, any person in this state charged in such other state in the manner provided in section 3 with committing an act in this state, or in a third state, intentionally resulting in a crime in the state whose executive authority is making the demand, and the provisions of this act not otherwise inconsistent, shall apply to such cases, even though the accused was not in that state at the time of the commission of the crime, and has not fled therefrom."

But the fact is, as shown by the documentary evidence in the case as well as by the testimony, that the petitioner

was not charged with the commission of any act in this state intentionally resulting in a crime in the Commonwealth of Massachusetts. His surrender was demanded on the ground that he was a fugitive from justice of that Commonwealth and he was ordered to be surrendered for that reason only.

Exceptions 2, 3, and 4 sustained.
Petitioner discharged.

NEWTON EDWARDS, PETITIONER,

vs.

ESTATE OF HORACE WILLIAMS.

Kennebec. Opinion, October 20, 1942.

Decree of Judge of Probate Considered by Supreme Court of Probate. Review by Supreme Judicial Court.

The jurisdictional basis for the consideration by the Supreme Court of Probate of a petition to appeal from the decree of the judge of probate after the expiration of the statutory time for appeal must be set forth in the petition as a condition precedent but need not set forth the specific grounds upon which the appeal is based. That is a matter of proof.

In matters coming before the Supreme Judicial Court for review of the ruling of the presiding justice in the court below, it is a necessary requirement that the Court have before it the testimony upon which the presiding justice arrived at his conclusion.

The findings of a Justice of the Supreme Court of Probate in matters of fact are conclusive if there is any evidence to support them.

ON EXCEPTIONS.

The petitioner was a beneficiary under a testamentary trust. He claimed to be aggrieved by the allowance of the trustee's account, but failed to appeal within the statutory time for appeal. Later, he petitioned the Supreme Court of Probate for leave to enter such appeal under the provisions of R. S. 1930, Chapter 75, Section 33. His petition was granted. The trustee brought exceptions. Exceptions overruled. The case fully appears in the opinion.

Sewall, Varney & Hartnett, Portsmouth, N. H., for the petitioner.

John E. Wilson, for the trustee.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, JJ.

MANSER, J. This case comes up on exceptions to a ruling granting the petitioner leave to enter his appeal from a decree of the Judge of Probate for Kennebec County. The petitioner was a beneficiary under a testamentary trust. The Probate Court allowed the Sixth Account of the Trustee under said trust. The petitioner claimed to be aggrieved by the allowance of the account, but did not appeal within the twenty days allowed by R. S., c. 75, § 31. Later, he presented to the Supreme Court of Probate a petition for leave to enter such an appeal under the provisions of R. S., c. 75, § 33, which read as follows:

> "If any such person from accident, mistake, defect of notice, or otherwise without fault on his part, omits to claim or prosecute his appeal as aforesaid, the supreme court of probate, if justice requires a revision, may, upon reasonable terms, allow an appeal to be entered and prosecuted with the same effect, as if it had been seasonably done; but not without due notice to the party adversely interested, nor unless the petition therefor is filed with the clerk of said court within one year after the decision complained of was made; and said petition shall be heard at the next term after the filing thereof."

The petition was set forth in ten numbered paragraphs. Counsel for the Trustee in opposing the petition filed a demurrer to the last six paragraphs and admitted the allegations of the first four.

These pleadings were followed with a motion to dismiss. The long and well established practice of raising the questions presented for consideration to the Supreme Court of Probate as to whether or not the petition can be maintained, is by motion to

dismiss. The somewhat technical pleading in this case has the same effect. In *Gurdy, Appellant,* 101 Me., 73, 63 A., 322, the Court said of a motion to dismiss:

> "This is in effect a demurrer."

and in *Carter et als, Petitioners,* 110 Me., 1, 85 A., 39, 40:

> "The motion to dismiss was equivalent to a demurrer."

The jurisdictional basis for the consideration of a petition must be alleged therein. It was set forth in the present petition. As said in *Carter et als, Petitioners,* supra:

> "These requirements are conditions precedent to any further inquiry."

But as enunciated in *Ellis, Petitioner,* 116 Me., 462, 102 A., 291, 293:

> "It was not necessary, we think, that the petition should aver wherein it would appear that the petitioner's omission to enter or prosecute his appeal was from accident, mistake, defect of notice, or otherwise without fault on his part. That is a matter of proof and it need not be specifically alleged."

The statute expressly provides for hearing and thus enables the parties to produce evidence in support and elaboration of the issues raised.

This brings us to the question of the sufficiency of the exceptions because of their failure to include the entire record. The bill sets forth only an exception to the ruling of the presiding Justice and adds:

> "The petition, demurrer, decree and docket entries are hereby referred to and made a part of this bill of exceptions."

The Court is thus without the benefit of the facts testified to at the hearing. No copy of the evidence was submitted. It is

asserted by the petitioner in his brief, and conceded by the Trustee, that a hearing was actually held.

The petitioner says:

> "The Supreme Court of Probate at the hearing heard the testimony and facts of the case."
>
> "In the case at bar it was understood and agreed between counsel at the time of the submission of the case to Judge Atkins (of the Probate Court) that the Court would notify both parties of any decision, inasmuch as there was a large amount of money at stake and both parties had previously expressed their intention to appeal any decree of the probate court. This fact was brought out in the Supreme Court of Probate and was not disputed by the trustee's attorney."

In other words, it is asserted this element was developed at the hearing, although not alleged in the petition.

If this fact was substantiated by testimony before the presiding Justice below, and the Judge of Probate had assented and agreed to notify the parties of his decision, then the presiding Justice would certainly have been justified in his ruling, if he also concluded that justice required a revision.

This Court, however, cannot speculate upon what the record might have shown, if presented. It was the duty of the Trustee, as exceptant, to produce it.

Whether the hearing was formal or informal, or whether the testimony was reported and transcribed, does not appear. The exceptant cannot now be heard to say that there was no record made. Such record was necessary to the preservation of his rights. In matters which come to this Court, a record of the evidence, as a result of which the Justice below made his ruling and decision, is essential.

It is a uniformly necessary requirement that the reviewing tribunal should have before it the testimony upon which the presiding Justice arrived at his conclusion. The reason for this

is cited in the case *In Re. Hooper's Estate,* 136 Me., 451, 12 A., (2d), 417, as follows:

> "The findings of a Justice of the Supreme Court of Probate in matters of fact are conclusive if there is any evidence to support them. It is only when he finds facts without evidence that his finding is an exceptionable error in law."

This Court cannot determine whether the presiding Justice below was in error when the evidence upon which the claim is based is not presented for consideration. To bring such a case forward without the evidence is as futile a gesture as it would be to omit the record of the testimony on a motion to set aside a jury verdict as against the evidence.

The bill of exceptions must be drawn as prescribed and must contain the requisites so often and patiently laid down by this Court. This is not arbitrary and the reasons for the rules have been reiterated until there is no excuse for noncompliance. Such reasons are patent in the present case. *McCann's Sons* v. *Foley,* 129 Me., 486, 149 A., 837; *State* v. *Taylor,* 131 Me., 438, 163 A., 777; *Atkinson* v. *Connor,* 56 Me., 546; *Harvey* v. *Dodge,* 73 Me., 316; *Carleton* v. *Lewis,* 67 Me., 76; *Gerrish, Ex'r.,* v. *Chambers,* 135 Me., 70, 189 A., 187; *Bronson, Appellant,* 136 Me., 401, 11 A. (2d), 613.

The mandate must be

Exceptions overruled.

WORSTER, J., participated, but, having retired, does not join in the opinion.

ALVIN I. PERRY *vs.* IDA M. COOSE and ROSS L. COOSE.

Waldo. Opinion, October 21, 1942.

Breach of Contract. Trusts. Decision of Presiding Justice.

The decision of a single justice on questions of fact will not be reversed unless it clearly appears that such decision is erroneous; but, when not supported by any evidence, is clearly erroneous and will be reversed on appeal.

ON APPEAL.

The plaintiff and his deceased wife had conveyed real estate to the defendants on agreement by defendants to give care and assistance to the plaintiff and his wife if such were ever needed. The house on the property conveyed burned. Defendants collected the insurance. Defendants refused to pay to the plaintiff, upon his request, the insurance money. The plaintiff brought a bill in equity asking that defendants be declared to be trustees of the money to the amount plaintiff had paid for the property conveyed and be ordered to pay the same to the plaintiff. The presiding justice found for the plaintiff. Defendants appealed. Appeal sustained. Case remanded for a decree that the bill be dismissed. The case fully appears in the opinion.

Charles A. Perry, for the plaintiff.

H. C. Buzzell, for defendants.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, JJ.

THAXTER, J. There is before us here an appeal from a decree sustaining a bill in equity.

The defendant, Ida M. Coose, was the daughter of the plaintiff and his wife, Nettie, who died before the filing of the bill in equity. The defendant, Ross L. Coose, is the husband of Ida. On December 16, 1936, the mother and father conveyed to their daughter and son-in-law a farm located in Searsmont

which had cost the parents $1200 when they had bought it in 1929. Accompanying the conveyance was the following agreement:

"Hope Maine December 15, 1936

To Mr. and Mrs. R. L. Coose
Searsmont Maine

Dear Ida and Lin:

Knowing well the uncertainty of life, especially at our age, and wanting you to have the farm on which you now live, without possible litigation or bother we have decided to give you two, a joint deed to the place subject to the following provisions, which we may never use but which will be our legal right if we wish to do so. That the farm and home shall never be sold or mortgaged during our lifetime without our consent. We shall stay in our own home as long as possible but if one or both want to come to your home to be cared for it shall be our right and privilege to do so. Or if in our own home we need your care or assistance you shall give them as freely as possible. That you will help with any small jobs which are beyond our failing strength.

If you agree to carry out these things to our mutual satisfaction then the farm is yours with the lasting love of father and mother.

ALVIN I. PERRY
NETTIE M. PERRY

Witness CHAS. CUNNINGHAM

Signed ALVIN I. PERRY
NETTIE M. PERRY

Witness CHAS. CUNNINGHAM

We agree to the above:
IDA M. COOSE
ROSS L. COOSE"

After the conveyance, the buildings burned and the defendants collected $1300 in insurance.

The bill alleges that at the request of the plaintiff the defendants failed to pay to the plaintiff the $1200 which he had advanced, that the plaintiff had asked for help but that the defendants had refused to give him any and had failed to carry out their agreement. The bill prays that the defendants may be declared to be trustees of the money collected by them to the extent of $1200 and be ordered to pay the same to the plaintiff. The presiding justice found that there had been a breach of the agreement by the defendants, charged $700 of the money collected by the defendants for insurance with a trust, and ordered this paid to the plaintiff.

A careful reading of the record discloses no breach whatever of the agreement by the defendants. All that the plaintiff asked for was that the insurance money be paid to him, and the evidence is very clear that he made no demand that the agreement be performed according to its terms. The only evidence in the case bearing on the question of performance by the defendants indicates that they were ready and willing to carry out the agreement according to its terms and that the plaintiff did not desire to accept the assistance provided for in the agreement.

The defendants were under no obligation to pay over the money collected for insurance and, as there was clearly no breach of the agreement, we are at a loss to understand on what basis the bill can be sustained. Counsel for the plaintiff calls our attention to the well known rule that in equity the decision of a single justice on questions of fact will not be reversed unless it clearly appears that such decision is erroneous. In this case the ruling being unsupported by any evidence clearly is erroneous.

Appeal sustained.
Case remanded for a decree that the bill be dismissed.

EDWARD C. LUNT

vs.

THE FIDELITY & CASUALTY COMPANY OF NEW YORK.

GEORGE A. CONSTANTINE

vs.

THE FIDELITY & CASUALTY COMPANY OF NEW YORK.

Penobscot. Opinion, October 24, 1942.

Equity. Insurance. Master and Servant.

The doctrine which requires that a contract of insurance be construed most strongly against the insurer is not applicable unless there is some ambiguity in the terms of the policy.

Whether or not the employer-employee relationship exists when there is no doubt as to the facts is an issue of law and does not come within the principle that the finding of a justice sitting in equity should not be disturbed unless manifestly wrong.

The employer-employee relationship arises by mutual agreement that one person is to labor in the service of another. It is not material that no compensation is to be paid for the labor.

An insurer who secures the agreement of his assured that he may later contest the issue of coverage, prior to assuming the defense of a negligence action, is not precluded from raising that issue in an action in which the issue of coverage is involved, at least in a case where the plaintiff in the original action had knowledge of the reservation.

ON APPEAL.

The defendant had insured one, Small, as to the operation of his automobile, under a policy which excluded coverage for bodily injuries to Small's employees. The plaintiffs were injured by Small's automobile and had recovered judgments against him for such injuries. In the instant cases, they sought by bills in equity to reach and apply insurance money to the payment of their awards in the judgments against Small. The only issue in the cases was whether they were employees of Small at the time of the accident in which they were injured

occurred. The Justice of the Superior Court, sitting in equity, ruled for the plaintiffs. The defendant appealed. Appeals sustained. Cases remanded to the sitting Justice for decrees dismissing the bills.

Clinton C. Stevens, for plaintiff Edward C. Lunt.

Fellows & Fellows, for plaintiff George A. Constantine.

James E. Mitchell, for the defendant.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, JJ.

MURCHIE, J. These two cases present appeals by the defendant from decrees of a Justice of the Superior Court, sitting in equity, awarding $5,000 to the plaintiff Lunt and $2,950 to the plaintiff Constantine. The plaintiffs are judgment creditors of one Joy C. Small, holding executions against him for the amounts of their awards, recovered in actions at law alleging personal injuries caused by his negligent operation of a motor vehicle. The defendant is the insurer of Small, under a policy of insurance issued to indemnify him against all claims originating in the operation of the particular vehicle, with certain stated exceptions. The proceedings were brought pursuant to the provisions of R. S. 1930, Chap. 60, Sec. 178, and the plaintiffs are entitled to reach and apply insurance money to the extent of their respective awards unless they were employees of Small when the negligence occurred. The policy coverage excludes bodily injury to employees of the insured sustained while engaged in his business.

Small was a dealer in potatoes, buying the goods he handled over a considerable area, accepting delivery at the farms or warehouses of his vendors, and providing all necessary handling in connection with the loading, transport and delivery thereof to merchants. The plaintiffs, at an earlier time, had regularly furnished some of the labor incident to the loading of the potatoes handled by Small, but their regular relationship

with his business, whatever it may have been, had been terminated prior to the issue of the policy of insurance which is in question, and their only connection with it, after the issue of that policy, was on January 15, 1941 when, at the solicitation of Small, and because his then regular employees were not available, they traveled with him from Brewer to Lincoln or Enfield, performed there the same kind of labor which they had been wont to perform during the earlier period of relationship, and were riding back to Brewer with him in the insured vehicle when the negligence and resulting accident occurred.

While regularly engaged in the business of Small the plaintiffs had traveled to and from the places where delivery of potatoes was accepted in an automobile owned by the plaintiff Lunt. The exact basis on which their compensation during that period was computed is not clear on the record, but it definitely appears that their work was performed, as was the case on the day in question, under the direction of Small, and that they were paid for their labor weekly, on Saturday night. When the accident occurred, they had collected no compensation for the work, performed earlier in the day, nor had they asked, or been offered, any.

Decision of the cases below was based upon a finding or ruling that the plaintiffs were not employees of Small, notwithstanding that counsel for the plaintiff Lunt contended there, as in this Court, that the defendant was precluded from raising the question of insurance coverage because its counsel had assumed control of the defense of Small in the actions at law wherein the executions sought to be satisfied out of the insurance money were obtained. Counsel interprets the decision in *Colby, Pro Ami et al. v. Preferred Accident Insurance Company of New York*, 134 Me., 18, 181 A., 13, as establishing such a principle, not merely when there was no reservation whatsoever, but when none was assented to by the execution creditor. He relies on the statement in the opinion that "no notice was given the plaintiffs," but the case cannot be said to enunciate

a broader principle than that defending *without* reservation is "entirely inconsistent with non-coverage." The cited case is clearly distinguishable from the present ones. There, counsel for the insurer stated at the trial of the action at law that "as far as the coverage was concerned it was all right." There, liability was contested and there was no intimation, pending determination of it, that the coverage issue would ever be raised in any proceedings. Here, prior to assuming the defense of the action at law, the insurer secured the agreement of his assured that participation therein would not waive his right to deny coverage, as plaintiffs and counsel were fully aware, and the judgments sought to be enforced were secured by agreement. The Exhibits disclose a writing subscribed by both plaintiffs in which each asserted that he would not seek to enforce his judgment "if a court of proper and final authority . . . decides that there was no insurance coverage on . . . Small." More than this, counsel himself signed an undertaking that the agreement for judgment should not be used in any way "by anyone in any later proceedings on the question of the insurance coverage . . . on the automobile of . . . Joy C. Small." Upon him who seeks equity are enjoined strict requirements that he do equity, and that he keep faith with his own engagements. The technical ground urged is not a tenable one for either the plaintiff Lunt or for his counsel. The Lunt case, like that of Constantine, must be determined on the merits of the issue of the legal relationship with Small at the time the injuries were suffered.

The cases were heard before the sitting Justice together and were so argued in this Court, but the only common ground on which counsel for the respective plaintiffs meet in asserting that the appeals should be dismissed is reliance upon the principle declared in *Young* v. *Witham*, 75 Me., 536, that the decision of a single justice sitting in equity should not be disturbed unless it is clearly erroneous. The principle is undoubted, and has frequently controlled decisions in this State, but it is applicable only to factual findings and not to decisions or rulings of law. To refer only to the case relied on and two of the numer-

ous decisions rendered upon its authority as a precedent, Chief Justice Peters expressly declared in the *Young* case that the evidence "was very conflicting"; a Per Curiam opinion in *Paul* v. *Frye et al.*, 80 Me., 26, 12 A., 544, recites that questions "of fact only" were presented by the appeal; and Mr. Justice Fogler in *Sidelinger* v. *Bliss, Adm'r.*, 95 Me., 316, 49 A., 1094, made it clear that the issue "was purely of fact."

In the instant cases there is no dispute about the facts. The issue is one of law as to whether the status of employer and employee was, or was not, created upon the undoubted facts. This seems to have been recognized by the Justice below at the hearing. Small replied in the negative to an inquiry (by the Court) as to whether the plaintiffs were in his "employ." Defense counsel insisted that the question involved "a conclusion of law," and the comment of the Court was:

"I realize that. I just wanted his contention, that is all."

His contention, obviously, as to the relationship in law which the facts created. It seems apparent that this realization was still present with him when he wrote the memorandum on the two cases which underlies his separate decrees. In that memorandum he does not purport merely to find, but declares "I find and rule." It seems obvious that he was finding, as an issue of fact, that the plaintiffs labored on the particular day gratuitously (such was the clear implication of the evidence of both of them, and of Small, although neither he nor either of them testified that the labor was sought on that basis or rendered with an express waiver of compensation), and ruling, as a matter of law, that the plaintiffs should not, therefore, be considered employees of the person insured "within the term of exclusion stated in the policy." Such a decision, on the legal relationship created by undoubted facts, does not come within the principle established in *Young* v. *Witham*, supra.

Counsel for the plaintiff Constantine asserts the claim that the decision should be sustained upon the principle, especially applicable to insurance contracts, that when language impos-

ing a contractual obligation is ambiguous, or susceptible of interpretations differing in import, construction should be most strongly against the party responsible for the phraseology. *Barnes* v. *Dirigo Mutual Fire Insurance Company,* 122 Me., 486, 120 A., 675; *Johnson, Pro Ami* v. *American Automobile Insurance Company,* 131 Me., 288, 161 A., 496. The principle is undoubted, but as was stated in the last cited case, there is a safeguard against its abuse in the limiting rule that when there is no ambiguity, the terms of a contract or of an insurance policy "are to be taken and understood, as a usual thing, according to their plain and ordinary sense." There is no ambiguity in the policy under consideration. Injuries to employees of the insured are excluded from its coverage. The exclusion relates to any and all damage suffered by an employee "in an accident arising out of the maintenance or use of the automobile in the business of" the insured.

The determinative issue is whether or not the legal relationship of employer and employee existed between Small and the plaintiffs when they were riding home with him in his vehicle, after performing labor incidental to his business, both at his request and under his direction. This depends on the relationship when the work was in progress, since the principle is too thoroughly established to require the citation of authority that when an employee is transported to and from his work by the employer, injuries suffered *en route* arise out of, and in the course of, his employment.

Some authority can be found indicating that the relationship of master and servant, which is identical with that of employer and employee so far as the present cases are concerned, is a contractual one, and that the agreement of the alleged master to pay compensation, or his liability to pay it without express agreement, is an element for consideration, although not an important one, in its determination. The better rule is that a sufficient contract of employment is created by a mutual agreement that one is to labor in the service of another, *Wormell* v. *Maine Central Railroad Company,* 79 Me., 397, 10 A.,

49; and that the question of compensation is not material, *Barstow, Adm'r.* v. *Old Colony Railroad Company,* 143 Mass., 535, 10 N. E., 255; *Houston* v. *Keats Auto Co.,* 85 Ore., 125, 166 P., 531; *Napier* v. *Patterson et al.,* 198 Iowa, 257, 196 N. W., 73; *Tucker* v. *Cooper,* 172 Cal., 663, 158 P., 181.

The rule is well stated in 39 C. J., 36, Par. 6-d, citing the *Houston, Napier* and *Tucker* cases, supra, with others, in the words:

> "The receipt of a stated wage is not essential to create the relation of master and servant, and it may exist, although the servant neither expects, nor is entitled to, any compensation."

Mr. Justice Deasy in *Flaherty* v. *Helfont,* 123 Me., 134, 122 A., 180, quoting 18 R. C. L., 490-1, declared that the relationship exists:

> " 'Whenever one person stands in such a relation to another that he may control the work of the latter. . . . The essential elements are . . . control and direction . . . of the employment . . . , and . . . the right to employ . . . and . . . discharge. . . . If these elements are wanting, the relation does not exist.' "

Conversely it does exist when these named elements are present, as under the instant facts.

Appeals sustained.
Cases remanded to sitting Justice for decrees dismissing the bills.

WORSTER, J., was one of the sitting Justices when these cases were argued, participated in conference, but having retired, does not join in the opinion.

A. W. REED, to wit ALFRED W. REED

vs.

WILBUR H. HARRIS and McKENDREE HARRIS, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF ISAAC HARRIS, DECEASED, TRUSTEE.

Piscataquis. Opinion, October 27, 1942.

Statute of Limitations. Acknowledgment of Debt.

It is generally true that when different inferences may be drawn from the act of payment by a debtor, the issue is one of fact.

An unqualified part payment made by a debtor of an existing debt is held to be an acknowledgment by the debtor of the debt, and from such payment there arises an implied promise to pay the balance which is sufficient to take the case out of the limitation imposed by statute.

A creditor's application to a debt of the proceeds from property sold under a mortgage is not such a payment as leads to an inference that the debtor intended to renew his promise.

In the instant case, the consent of the defendant to the repossession of the automobile was merely a recognition of the right of the creditor to retake it. There can thereby be no implication of a new promise to pay the debt.

ON EXCEPTIONS.

Action on a promissory note. The note was given in part payment of the purchase price of an automobile. The defendant pleaded the statute of limitations as a bar to the maintenance of the action. The sole issue in the case was whether the repossession of the automobile with the consent of the vendee, the sale of it and the application of the proceeds from the sale in part payment of the note tolled the statute. The referee to whom the case was referred made certain findings of fact, to which no objection was taken, and reported to the Superior Court the question of law involved in such facts. The Presiding Justice, ruling on the question of law, gave judgment against the plaintiff. The plaintiff excepted. Exceptions overruled. The case fully appears in the opinion.

John P. White, for the plaintiff.

Matthew Williams, for the defendant.

C. W. & H. M. Hayes, for the trustee Wilbur H. Harris.

SITTING: STURGIS, C. J., THAXTER, MANSER, MURCHIE, JJ.

THAXTER, J. This is an action on a promissory note. The sole question is whether the Statute of Limitations which was pleaded is a bar to the maintenance of the action. The case was heard before a referee who made certain findings of fact, and in accordance with the provisions of Rule XLII reported to the Superior Court the question of law whether on such facts certain partial payments credited on the note were sufficient to suspend the operation of the statute. The presiding justice accepted the report, and on the question submitted ordered that judgment be entered for the defendant. No objection to the findings of fact was noted and they must be taken as correct. The case is here on exceptions to the ruling of the Superior Court.

The referee found that on June 20, 1931, the plaintiff sold an automobile to the defendant and took in part payment of the purchase price the defendant's note for $570 payable $47.50 per month with interest at six per cent. The note set forth a conditional sale contract to the effect that the automobile should remain the property of the plaintiff until the principal and interest on the note should be paid. The entire amount of the note was to become due if there should be default in any payment. Two payments were made by the defendant on the principal of the note, one in May and the other in August, 1932, and interest in the amount of $30 was paid in July of the same year. The defendant made no further payments. The referee then made the following findings:

> "I find as a fact that the car for which the note was given was repossessed by the plaintiff on Nov. 7, 1935 with the consent of the defendant and after his delivery of

the car key to the plaintiff or his agent. I find as a fact that there was an understanding between the parties, although there was no express agreement to that effect, that the plaintiff should sell the car for what it was worth and give the defendant credit on his indebtedness for the proceeds of the sale. I find that the plaintiff did sell the car for fifty dollars, which was a fair price at the time, and did endorse the same on the note as he received it from the buyer, as follows: $25 on April 9, 1936, $15 on May 22, 1936 and $10 on Sept. 7, 1937. I find that the defendant did not specifically authorize or consent to any of these three endorsements, or even have knowledge of them at the times they were made but he did expect at the time of the repossession of the car by Mr. Reed that he, the defendant, would be given credit on his indebtednes to Reed for the proceeds of the sale of the car. I find that there was no express promise in writing by the defendant to pay the note in action at any time after its execution and delivery."

The present suit was commenced January 28, 1941 and the issue before the court is whether the repossession of the car by the plaintiff or the payments received by him on its sale which he endorsed on the note were sufficient to toll the Statute of Limitations.

Rev. Stat., Ch. 95, Sec. 104, provides that no acknowledgment or promise takes a case out of the operation of the six year limitation within which an action must be commenced "unless the acknowledgment or promise is express, in writing, and signed by the party chargeable thereby." Sec. 107, however, makes the following exception: "Nothing herein contained alters, takes away or lessens the effect of payment of any principal or interest made by any person; . . . ." The old rule therefore applies with respect to the effect of a payment.

What is this rule?

An unqualified part payment voluntarily made by a debtor of an existing debt is held to be an acknowledgment by the

debtor of the debt, and from such payment there arises an implied promise to pay the balance which is sufficient to take the case out of the limitation imposed by the statute. *Haven* v. *Hathaway*, 20 Me., 345; *White* v. *Jordan*, 27 Me., 370; *Pond* v. *Williams*, 1 Gray, 630; *Roscoe* v. *Hale*, 7 Gray, 274; *Campbell* v. *Baldwin*, 130 Mass., 199; *Taylor* v. *Foster*, 132 Mass., 30; *Strong* v. *State, Ex Rel. The Attorney General*, 57 Ind., 428; *Lang* v. *Gage*, 65 N. H., 173, 18 A., 795; 37 C. J., 1146-1148, 1150, 1154-1155; 34 Am. Jur., 266-267. The mere fact of a payment is not alone sufficient as a matter of law to toll the statute. *White* v. *Jordan*, supra. As is said in *Campbell* v. *Baldwin*, supra, at page 200: "To have this effect, it must be such an acknowledgment as reasonably leads to the inference that the debtor intended to renew his promise of payment." Or, as our own court has said, the question is whether the "payment was made under such circumstances, that it amounted to an admission, that the debt was then due; . . . ." *White* v. *Jordan*, supra, 380.

It is well settled that the creditor's application to a debt of the proceeds of property sold under a mortgage is not such a payment as leads to an inference that the debtor intended to renew his promise. *Campbell* v. *Baldwin*, supra; *Holmquist* v. *Gilbert*, 41 Col., 113, 92 P., 232, 14 L. R. A. N. S., 479; 37 C. J., 1154. And it is generally true that where different inferences may be drawn from the act of payment by a debtor, the issue is one of fact. *White* v. *Jordan*, supra; *Strong* v. *State, Ex Rel. The Attorney General*, supra.

In the case now before us the plaintiff retook possession of the car as he had a legal right to do. His application of the money received from its sale to the indebtednes of the defendant cannot be held to imply a new promise by the defendant to pay the balance of the debt. The mere fact that the defendant expected the money to be so applied is not controlling for it was the duty of the creditor so to apply it. Nor is the fact of importance that the defendant consented to the repossession of the car by voluntarily giving the key to the plaintiff. By so

doing he merely recognized the right of the creditor to retake it; there can be thereby no implication of a new promise.

The plaintiff cites two cases which it is claimed are controlling. *Haven* v. *Hathaway*, supra, and *Egery* v. *Decrew*, 53 Me., 392. Each involves the sale of collateral by a creditor who in making the sale and the application of the payments to the indebtedness is regarded under the particular facts there involved, as acting as the agent of the debtor. It is also important to note that the Haven case came before the court on exceptions to the granting of a non-suit, and the Egery case on report. The basis for the distinction between these cases and the one now before us is clearly pointed out in *Buffinton* v. *Chase*, 152 Mass., 534, 25 N. E., 977, 10 L. R. A., 123.

Exceptions overruled.

HUDSON, J., not participating.

MRS. ELLA DAVIS *vs.* LESTER F. BAKER.

Cumberland. Opinion, October 28, 1942.

Automobiles. Negligence.

An automobile driver is bound to see seasonably that which is open and apparent and govern himself suitably. He is charged with seeing that which in the exercise of reasonable care he ought to have seen.

ON EXCEPTIONS.

Action to recover compensation for personal injuries and property damage resulting from a collision between the automobile of plaintiff and that of defendant. The plaintiff, while riding along Baxter Boulevard in Portland, without warning, turned her automobile to the left and attempted to drive it into an intersecting road. Although the view was unobstructed, she did not see defendant's approaching car until it collided with hers. In the trial court, the jury were instructed to return

a verdict for the defendant. Plaintiff excepted. Exception overruled. The case fully appears in the opinion.

Udell Bramson, for the plaintiff.

Robinson & Richardson and *John D. Leddy,* for the defendant.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, JJ.

STURGIS, C. J. Action of negligence to recover compensation for personal injuries and property damage. In the trial court at the close of the evidence, on motion, the jury were instructed to return a verdict for the defendant. An exception to this ruling brings the case forward for review.

In the afternoon of October 7, 1939, the plaintiff, while riding along Baxter Boulevard in Portland, without warning turned her automobile to the left and attempted to drive it across and into an intersecting road. At this time the defendant's automobile was approaching from the opposite direction undoubtedly in plain view, traveling at a reasonable rate of speed on its own side of the road and so close at hand as to make a collision inevitable. Although the plaintiff had an unobstructed view ahead, she did not see the defendant's approaching car until it collided with the one in which she was riding and the damages to her person and property sued for resulted.

The driver of an automobile intending to cross a street or highway in front of another car approaching from the opposite direction is charged with the duty of so watching and timing the movements of the other car as to reasonably insure himself of a safe passage either in front or to the rear of such car and even to the point of stopping and waiting if necessary. A failure to comply with this rule spells negligence. *Fernald* v. *French,* 121 Me., 4, 115 A., 420; *Reid et al.* v. *Walton et als.,* 132 Me., 212, 168 A., 876; *Erswell* v. *Harmon,* 139 Me., 47, 27 A. (2d), 107. It is equally well settled that in order to charge the driver

coming from the opposite direction with negligence in pursuing his course in such a situation, it is the duty of the operator of the car making the crossing to make known his intention to cross. Unless and until the car coming on its own right of way has such notice, its driver cannot be charged with negligence because of his failure to cease his advance. *Fernald* v. *French,* supra. The application of these rules is not avoided by the failure of the driver making the crossing to see the car approaching from the opposite direction if its presence and approach are obvious. An automobile driver is bound to use his eyes to see seasonably that which is open and apparent and govern himself suitably. He is charged with seeing that which in the exercise of reasonable care ought to have been seen. *Callahan* v. *Bridges,* 128 Me., 346, 147 A., 423.

It clearly appearing upon this record that the negligence of the plaintiff was the proximate cause of the collision upon which she bases this action, it was the duty of the Justice presiding in the trial court to direct a verdict for the defendant. The exception reserved is without merit.

Exception overruled.

ALICE T. BUNKER *vs.* ARTHUR R. MAINS.

Sagadahoc. Opinion, October 29, 1942.

Parent and Child. Right of Mother in Regard to Child Born out of Wedlock. Seduction.

In the case of a child born out of wedlock, where no one has ever been legally adjudicated to be the father, all the obligations of care, nurture and support, and the correlative rights to services and earnings, devolve upon the mother; and she has a right of action for the seduction of a minor child.

MOTION FOR NEW TRIAL.

An action by the mother of a minor child who was born out of wedlock to recover damages for her seduction. Defendant claimed that such an action could be maintained only by the

father of the child. In the instant case, no one had ever been legally adjudicated as the father of the child. Verdict was for the plaintiff. Defendant filed a motion for a new trial. Motion overruled. The pertinent facts appear in the opinion.

Charles T. Small,

Edward W. Bridgham, for the plaintiff.

Eugene F. Martin,

John P. Carey, for the defendant.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, JJ.

MANSER, J. This is an action brought by the mother of Marjorie Bunker, a minor, to recover damages for her seduction. Verdict was for the plaintiff.

On the defendant's brief, the right of the particular plaintiff to maintain the action is challenged. It was not raised specifically by the pleadings, no request for instructions to the jury on the point is indicated by the record and no exceptions were reserved. The case comes forward solely on a motion for a new trial upon the usual grounds that the verdict was against the law and the evidence. But when contention is that an action would not lie in behalf of the plaintiff, it strikes at the very foundation of the case and will be considered upon the ground that the verdict was against the law. *Berry* v. *Pullen,* 69 Me., 101, 31 Am. Rep., 248; *Bigelow* v. *Bigelow,* 93 Me., 439, 45 A., 513; *Pierce* v. *Rodliff,* 95 Me., 346, 50 A., 32; *Simonds* v. *Maine T. & T. Co.,* 104 Me., 440, 72 A., 175, 28 L. R. A. N. S., 942.

The basis of the claim is that an action for seduction of a minor can be maintained only by her father. Marjorie Bunker was born out of wedlock. It appears that no proceedings were ever taken to determine the parentage, and no one was ever legally adjudicated to be her father. When Marjorie was over a year old, her mother, the plaintiff, married and Marjorie appears to have been brought up in the household. There is noth-

ing in the record which discloses whether the husband of the plaintiff ever assumed parental rights or obligations or placed himself in loco parentis to her child. The stepfather of an illegitimate child is not under any obligation to support it. Such is the common law rule as laid down in most jurisdictions. 39 Am. Jur., Parent & Child, § 62; *Parker* v. *Nothomb*, 65 Neb., 315, 93 N. W., 851, 60 L. R. A., 699, 57 C. J., Seduction, § 24; *Taylor* v. *Daniel*, 98 S. W., 986.

By statute an illegitimate child is the heir of its mother, R. S., c. 89, § 3. It has the settlement of its mother. R. S., c. 33, sec. 1, sub div. III. This form of action is based upon the legal fiction of loss of service and the relation of master and servant must exist. Ordinarily, in the case of a minor daughter, such relation is presumed to exist between her and her father. *Beaudette* v. *Gagne*, 87 Me., 534, 33 A., 23. Here on the record there was no father, in legal contemplation, and all the obligations of care, nurture and support and the correlative rights to service and earnings devolved upon the mother, and she took the place ordinarily belonging to the father. This is the rule universally adopted unless otherwise provided by statute. 7 Am. Jur., p. 668, § 61. As such, she has a right of action for the seduction of her minor child. *Furman* v. *Van Sise*, 56 N. Y., 435, 15 Am. Rep., 441; see also annotation to *Coon* v. *Moffet* in 4 Am. Dec., 392, at 405. The verdict was not against the law.

It would serve no useful purpose to discuss the facts. Suffice it to say, a careful review of the record discloses that all the elements necessary to entitle the plaintiff to a verdict were supported by evidence, credible, reasonable and consistent with the circumstances and probabilities of the case, and which as a whole preponderated in favor of the finding of the jury, so no ground exists to require a new trial. There was no claim that the damages awarded were excessive.

Motion overruled.

EDWARD F. DEOJAY *vs.* KENNETH E. LYFORD.

Androscoggin. Opinion, November 13, 1942.

Negligence. Law Governing in Respect to the Operation of Airplanes. Doctrine of Res Ipsa Loquitur.

There being no applicable statute governing the liability of the owner or operator of aircraft under such circumstances as obtained in the instant case, the rules of the common law as to negligence and due care control.

The rule of *res ipsa loquitur* applies only when an unexplained accident is of a kind which does not, according to the common experience of mankind, occur if due care has been exercised.

The doctrine of *res ipsa loquitur* does not apply to cases of accidents in air transport to the same extent as to accidents on highways.

The reasons which justify the application of the doctrine of *res ipsa loquitur* to the case of an unexplained accident in which an automobile leaves the highway do not apply to the case of an airplane which in landing swerves from the hard surfaced portion of the runway.

MOTION FOR NEW TRIAL.

Action to recover damages for personal injuries suffered by the plaintiff by being struck by an airplane operated by the defendant. The defendant in landing veered from the hard surfaced strip of runway to where the plaintiff was stationed in the performance of his duties as a flagman to warn off trucks if an airplane was about to land. The plaintiff alleged negligence on the part of the defendant in not so operating his airplane as to keep it on the macadamized part of the runway and contended that the doctrine of *res ipsa loquitur* applied. The verdict was in favor of the plaintiff. Defendant excepted and also filed a motion for a new trial. Only the motion for a new trial was considered by the Law Court. Motion sustained. The case fully appears in the opinion.

Brann, Isaacson & Lessard,

Frank T. Powers, for the plaintiff.

John G. Marshall,

George C. & Donald W. Webber,

Frank W. Linnell, for the defendant.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, JJ.

THAXTER, J. After a verdict for the plaintiff, this case is before us on the defendant's motion for a new trial and on exceptions. We shall consider only the motion.

The plaintiff was an employee of the Works Progress Administration which was doing certain construction work at the Lewiston & Auburn Airport. Stationed at the junction of two runways, he was charged with the duty of flagging trucks operating there if an airplane was about to land. The defendant was the operator of an airplane which in landing struck the plaintiff who received severe injuries for which he seeks to recover in this action. The negligence of the defendant is set forth in the writ in the following language:

> "6. That while your said plaintiff was in the exercise of due care and caution, in the performance of his duties as such flagman, stationed in a position of safety, the said defendant, unmindful of his duties aforesaid, did carelessly, negligently and recklessly guide and operate said aeroplane; did carelessly, negligently and recklessly fail to have said aeroplane under proper control so as to be able to keep the same on the macadamized part of said runway; and did further carelessly and negligently fail to have the same under such control as to be able to bring the same to a stop without colliding with persons or objects on, or in the vicinity of, said runway; whereby said aeroplane collided with the person of your said plaintiff."

The essential facts are not in dispute. The accident took place at or near the intersection of runways 3 and 4. Runway 3 ran northeast and southwest, runway 4 at right angles to it

northwest and southeast. Trucks loaded with gravel were crossing the runways at this intersection and the plaintiff with a red flag signalled them to stop when a plane was about to alight. He was stationed beside a barrel located about twenty-five feet southerly from the intersection of the macadam part of each runway. He was on what was known as the safety band. Each runway was 500 feet wide, and consisted of a hard surface strip 100 feet wide, on each side of which was a gravel strip 200 feet in width, the purpose of which was to give additional room to aviators in landing and taking off. The width of 500 feet is a standard set by the Civil Aeronautics Authority. Milton V. Smith, an experienced aviator, testifying for the defense, said that it was quite common for airplanes in landing to go off the hard surface of the runway onto the safety bands. The defendant was a student pilot who had had several hours of solo flying. At the time in question he was flying alone. Preparing to land on No. 3 runway, he approached from the northeast against a gentle southwest wind which was then blowing. The record does not indicate that his speed was excessive or that there was anything wrong about his handling of the plane at the time of landing. He struck the macadam portion of No. 3 runway about 200 feet northeasterly of the intersection and about 300 feet from where the plaintiff was standing. The plane bounced several times, and on the last bounce veered toward the place where the plaintiff was stationed. As it approached him, he turned and attempted to run away from it in a southwesterly direction. It is not altogether clear that he ran toward the macadam portion of the No. 3 runway, as testified to by the defendant, or that if he had remained where he was the defendant could have avoided him. In any event, the jury were warranted in finding as they did that he was not negligent in his attempt to escape from what seemed to him an imminent danger. The defendant testified that in the effort to avoid the plaintiff he did a ground loop swinging sharply to the left. As the plane swung, however, the plaintiff was struck by some part of the tail assembly and severely injured.

The action is based on negligence. There being no applicable statute governing the liability of the owner or operator of aircraft under such circumstances as these, the rules of the common law as to negligence and due care control. *Wilson* v. *Colonial Air Transport, Inc.*, 278 Mass., 420, 180 N. E., 212, 83 A. L. R., 329; *Greunke* v. *North American Airways Co.*, 201 Wis., 565, 230 N. W., 618, 69 A. L. R., 295. It is claimed that the defendant was negligent in landing his airplane at a point on runway No. 3 where men were at work, and secondly that the doctrine of *res ipsa loquitur* is applicable to the facts here involved.

As to the first point, every inference to be drawn from the evidence is that the defendant was landing at the particular place where he was supposed to land. He did not have latitude in picking any particular spot. He was restricted by the position of the runways, by their condition, and above all by the direction of the wind. The position of the flagman at the particular intersection is strong circumstantial evidence that planes were expected to cross there as they might alight. There is no affirmative evidence that any other place was available or that conditions elsewhere would have been any safer.

The fundamental contention of the plaintiff pressed in oral argument is that the doctrine of *res ipsa loquitur* applies and that this case is governed by the decision in *Chaisson* v. *Williams*, 130 Me., 341, 156 A., 154. This is clearly indicated by the following statement in the plaintiff's brief:

> "The plaintiff at the time of the accident had no means of knowing what occurred to cause the defendant to operate the plane off the runway on to the safety band in his direction. Under these facts and circumstances, after the plaintiff had presented all of the evidence of which he had knowledge concerning the occurrence of the accident, it became necessary for him to invoke and claim to recover under the doctrine of re ipsa loquitur."

The mere fact of the happening of an accident is not evi-

dence of negligence. In certain classes of cases, however, the character of the accident may be such as to impose on a defendant the burden of an explanation. This is the doctrine of *res ipsa loquitur,* the thing speaks for itself. *Chaisson* v. *Williams,* supra; *Winslow* v. *Tibbetts,* 131 Me., 318, 162 A., 785; *Shea* v. *Hern,* 132 Me., 361, 171 A., 248. The limitations of the rule are set forth in *Winslow* v. *Tibbetts,* at page 322 as follows: "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."

The doctrine was held applicable in *Chaisson* v. *Williams* where the evidence showed that an automobile ran off a highway and into a tree. "Automobiles," said the court, page 346, "when operated by prudent persons, with reasonable care, do not usually leave the highway, and run headlong into the woods, until stopped by the stump of a tree. When they do, it is the extraordinary, and not the ordinary, course of things."

And in *Shea* v. *Hern* on a similar state of facts it is said, page 366: "If the jury discovered no specific act of negligence, they had the right to infer it from the circumstance that the car was driven off the road."

Counsel in their brief assume that the facts in the present case require the application of the same doctrine. They say: "If we accept the theory as laid down in *Wilson* v. *Colonial Air Transport,* Inc. (supra) it would seem that the rule governing cases in which automobiles leave the road are analagous to the present situation. We must, therefore, conclude that the macadam portion of a runway is similar to the macadam portion of a highway."

We cannot accept counsels' conclusion. The reasons which justify the application of the doctrine of *res ipsa loquitur* to the case of an unexplained accident in which an automobile leaves

the highway do not apply to the case of an airplane which in landing swerves from the hard surfaced portion of the runway. The very fact that safety bands 200 feet in width are a part of the runway is a recognition that deviations from the 100 foot strip in landing are incidental to the operation of such aircraft. To a certain extent an airplane as it glides to its landing place is out of control. It is subject to the law of gravitation and more or less to the caprice of wind and weather. Variations from what might be called a perfect landing are common. An automobile driven along the highway is, except in exceptional instances, within the control of the driver. He may reduce speed or he may stop altogether with no untoward results. To say that the same rules are applicable to an airplane landing on a runway as to an automobile being driven on the highway is to ignore the well known differences between the two instrumentalities. The expert who testified in the instant case says that it is a common occurrence for an airplane in landing to go off the hard surface of the runway even when handled by an experienced pilot. The justification for applying the doctrine of *res ipsa loquitur* to the case of an automobile which leaves the highway is because such a happening, to reiterate the language of the opinion in *Chaisson* v. *Williams,* is "the extraordinary, and not the ordinary, course of things."

We do not mean to lay down any generalization that the doctrine of *res ipsa loquitur* does not apply to airplane accidents. It has been held that it is applicable to a collision of airplanes in mid air where both machines are operated by the same agency. *Parker* v. *James Granger, Inc.*, 4 Cal. (2d), 668, 52 P. (2d), 226. And negligence was held a question for the jury where the operator of a plane before landing did not wait for another plane which had just alighted to be removed from a runway and a collision resulted. *Greunke* v. *North American Airways Co.*, supra. Neither of these cases is in point. An airplane can be so guided that a collision in mid air does not ordinarily happen without fault, and the operator of the plane involved in the Greunke case did not have to land until the run-

way had been cleared. For a case analogous to the Greunke case, see *Read* v. *New York City Airport*, 259 N. Y. S., 245, 145 Misc., 294.

In spite, however, of the vast advances which have been made in air transport it is still recognized that in all such operations there is a wide element of chance which the ingenuity of man has not yet overcome; and we accordingly cannot apply the doctrine of *res ipsa loquitur* to the same extent as we do to accidents on highways. *Wilson* v. *Colonial Air Transport, Inc.*, supra; *Herndon* v. *Gregory*, 190 Ark., 702, 81 S. W. (2d), 849, 82 S. W. (2d), 244; *Cohn* v. *United Air lines Transport Corporation*, 17 Fed. Supp., 865.

In 83 A. L. R., note at page 369, we find the following statement with respect to the case of *Stoll* v. *Curtiss Flying Service* (1930; N. Y. Supreme Ct. N. Y. County, Trial Term, Part VI): "Where any one of a number of reasons may have been responsible for an aeroplane accident, for some of which defendant carrier would be liable, and for others of which it would not be liable, the jury is not at liberty to guess which caused the accident and attribute it to defendant carrier, but must find for it." This case was affirmed without opinion. *Stoll* v. *Curtiss Flying Service*, 257 N. Y. S., 1010, 236 App. Div., 664.

And in 99 A. L. R., 192, in discussing the case of *State use of Beall* v. *McLeod* (1932; Md. Super. Ct.) we find the following: "The mere happening of an accident raises no presumption of negligence in the operation of the plane; and the burden is upon the plaintiff to establish, by a preponderance of the affirmative evidence, that negligence on the part of the defendant caused the accident."

The truth of the matter is that the facts of each case must be carefully considered, and in the days to come tested in the light of the advances in this art which we are certain to see. A discussion of this subject will be found in Hotchkiss, The Law of Aviation (2 ed.), Sec. 41. The author seems to argue for a wider application of the doctrine of *res ipsa loquitur* than courts have so far seen fit to give. At the same time he admits

that it is beyond the province of the courts to extend the doctrine. He says: "This would change a rule of evidence into a rule of public policy. If the latter is deemed necessary the better way would be to shift the burden by statute."

As there is in the case now before us no direct evidence of any negligence on the part of the defendant, and as no inference of a want of due care arises merely from the happening of the accident, the action cannot be maintained.

Motion sustained.
New trial granted.

SARAH STEARNS SMITH ET AL. *vs.* WILLIAM H. FARRINGTON.

Cumberland. Opinion, November 17, 1942.

Husband and Wife. Antenuptial Contracts. Statute of Frauds.

Sec. 8 of Chap. 74, R. S. 1930, is not exclusive. There may be valid antenuptial contracts independently of this statute which are enforceable in courts of equity.

An antenuptial contract, where it is made without fraud or imposition and is not unconscionable, will be enforced in equity although it does not conform to the statute above cited.

Our statute of frauds (see Sec. 1 of Chap. 123, R. S. 1930) does not prevent specific performance of an oral antenuptial agreement where there is some subsequent memorandum or note thereof made in writing during coverture.

The statute of frauds above cited does not make the oral contract void but simply prevents the maintenance of an action on the same if thereafter before action is brought there be no sufficient memorandum or note thereof in writing.

Such memorandum or note does not constitute a new contract; it simply makes enforceable the original contract, although oral.

The memorandum or note may be made during marriage.

It is only necessary that the written evidence, namely, the memorandum or note in writing, necessary to satisfy the statute of frauds, be in existence at the time the action is brought.

ON REPORT.

Bill in equity by the executrix, devisees and legatees under the will of Avis A. Farrington, deceased wife of the defendant,

seeking specific performance of an antenuptial agreement. The defendant, a widower, and Avis A. Stearns, a widow, intermarried. Each had children by former marriages. Before their marriage, they made a verbal agreement which, after their marriage, was reduced to writing, signed by each, and executed before two witnesses, and acknowledged before a notary public, by the terms of which it was provided that upon the death of either, the survivor should not share in or partake of the estate of the other; but that each should dispose of his or her estate in such manner as he or she saw fit. The wife, Avis A. Farrington, predeceased her husband. The husband refused to abide by the agreement, interposed a general demurrer and contended that the agreement violated the statute of frauds. Bill sustained. Case remanded to the court below for entry of a decree in accordance with the prayers in the bill. The case fully appears in the opinion.

Lauren M. Sanborn, for the plaintiffs.

Edgar F. Corliss, for the defendant.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, JJ.

HUDSON, J. On report. In this bill in equity the plaintiffs (executrix, devisees, and legatees under the will of Avis A. Farrington, deceased wife of the defendant) seek specific performance of an alleged antenuptial agreement. The defendant filed a general demurrer which joined raises the issue whether the bill sets forth facts justifying relief in equity. *Whitehouse Equity Practice,* Sec. 331, page 363.

The facts alleged in the bill may be stated briefly. On December 16, 1931, the defendant, a widower, married Avis A. Stearns, a widow, each having living children by former marriages. Following their engagement but before marriage they made a verbal agreement providing that neither should share in nor partake of the estate of the other but that each should

dispose of his or her respective estate by giving or devising the same to his or her respective children by former marriage or in such other manner as each party might see fit. On December 21, 1939, during coverture they signed a written agreement, executed before two witnesses and acknowledged before a notary public. In this it was stated:

> "Whereas we, the parties hereto, prior to our marriage, verbally agreed that upon our respective deaths, neither should share in, nor partake of, the estate of the other, but that each should dispose of his or her respective estate by giving or devising the same to his or her respective children by a former marriage, or in such other manner as each party hereto might see fit; and whereas we are desirous of reducing our said agreement to writing that the same may be evidence of our said agreement," (meaning the verbal agreement before marriage) "now therefore:—"

Then followed mutual releases in accordance with the verbal antenuptial agreement.

Mrs. Farrington predeceased her husband, who now refuses to abide by and carry out the terms of the antenuptial agreement. First he contends (and we think rightly) that the antenuptial agreement did not conform to the provisions of Sec. 8 of Chap. 74, R. S. 1930, namely:

> ". . . but a husband and wife, by a marriage settlement executed in presence of two witnesses before marriage, may determine what rights each shall have in the other's estate during the marriage, and after its dissolution by death, and may bar each other of all rights in their respective estates not so secured to them."

But this Court has held that that statute is not exclusive and that there may be valid antenuptial contracts independently of it which are enforceable in courts of equity. *McAlpine* v.

McAlpine, 116 Me., 321, 101 A., 1021. This Court said on page 325:

> "In nearly all the courts of this country where the validity of agreements similar to the agreement in this case has been passed upon, it has been held that the statute was not exclusive, but simply a statutory declaration that parties about to be married could, by executing a contract as prescribed by statute, bar the woman's interest in her husband's estate, and that statutes similar to ours do not deprive her of the power to bar her rights in her husband's estate by her ante-nuptial agreements, that the statute is but a declaration of the effects of the settlement in that class of cases."

In the McAlpine case, supra, distinction is drawn between actions at law and suits in equity where enforcement of the oral contract is sought. Thus, therein on page 325 were distinguished the decisions in *Littlefield* v. *Paul*, 69 Me., 527, *Wentworth* v. *Wentworth*, 69 Me., 247, and *Pinkham* v. *Pinkham*, 95 Me., 71, 49 A., 48, 85 Am. St. Rep., 392. The McAlpine case holds clearly that an antenuptial contract, where it is made without fraud or imposition and is not unconscionable, will be enforced in equity although it does not conform to the statute above cited.

Here there is no pretence of any fraud or imposition in procuring the antenuptial contract. Their mutual promises were sufficient consideration. The terms of the contract were not unreasonable and both parties were competent to contract. The agreement was conscionable, fair, and proper, confirmed and abided by during the marriage, and now that death has taken one of the contracting parties, the wife, it would be most inequitable to permit the surviving husband to violate his contract.

> "Almost any *bona fide* antenuptial contract made to secure the wife, either in the enjoyment of her own prop-

erty or a portion of that of her husband, either during coverture or after his death, will be enforced in equity." *Wentworth* v. *Wentworth*, supra, on page 252.

"Such family arrangements, in many instances, reconcile differences and avoid unpleasant disputes. Where they are free from fraud, there is no reason why they should not be enforced." *Tiernan* v. *Binns et al., Executors*, 92 Penn. St., 248, 253.

Judge Cardozo said in *De Cicco* v. *Schweizer et al.*, 221 N. Y., 431, 117 N. E., 807, on page 810:

"The law favors marriage settlements, and seeks to uphold them. It puts them for many purposes in a class by themselves. . . . It has enforced them at times where consideration, if present at all, has been dependent upon doubtful inference. . . . It strains, if need be, to the uttermost the interpretation of equivocal words and conduct in the effort to hold men to the honorable fulfillment of engagements designed to influence in their deepest relations the lives of others."

Secondly, the defendant contends that the oral antenuptial agreement violates the statute of frauds. Our statute of frauds (see Sec. 1 of Chap. 123, R. S. 1930) provides:

"No action shall be maintained in any of the following cases:

* * *

"III. To charge any person upon an agreement made in consideration of marriage;

"IV. Upon any contract for the sale of lands, tenements or hereditaments, or of any interest in or concerning them;

* * *

"Unless the promise, contract, or agreement, on which such action is brought, *or some memorandum or note thereof*, is in writing and signed by the party to be charged

> therewith, or by some person thereunto lawfully authorized; but the consideration thereof need not be expressed therein, and may be proved otherwise." (Italics ours.)

The defendant claims that this antenuptial agreement was in consideration of marriage and not being in writing is void. Whether this agreement was actually made in consideration of marriage we do not find it necessary to decide, since for the purpose of our consideration it will be assumed that it was. That being so, does the statute constitute a defense in this action? We think not. We regard the written agreement of December 21, 1939, an entirely sufficient memorandum or note to comply with the statute.

In the case of *McAnulty* v. *McAnulty*, 120 Ill., 26, 11 N. E., 397, 60 Am. St. Rep., 552, relied upon by the defendant, there was no such provision as to a memorandum or note. Therein the statute provided only that "no action shall be brought . . . to charge . . . any person upon any agreement made upon consideration of marriage," unless the promise or agreement shall be in writing. The Court said, ". . . the statute requires the *contract* itself to be in writing."

The defendant also relies on *Rowell* v. *Barber*, 142 Wis., 304, 125 N. W., 937, 27 L. R. A., N. S., 1140, in which it was held that an "oral agreement entered into before marriage by being reduced to writing and signed after marriage" did not become "a valid antenuptial contract." The Court based its decision on the ground that the oral agreement was absolutely void and that that which was void could not be validated by a writing made during coverture. The Court distinguished its statute from the "English statute and those of most of the other states of the Union" which did not make the oral contract void but simply provided that "no action shall be brought . . . ." Our statute, as above noted, does not make the oral agreement void but instead provides that "no action shall be maintained. . . ." Thus, the cited case and the instant case are distinguishable.

A checking of our statute back through the revisions to the original enactment in 1821 (see Chap. LIII) shows that no such agreement has ever been declared to be void. In the original enactment the statute provided (see Sec. 1 of Chap. LIII):

> "That no action shall be brought whereby . . . to charge any person upon any agreement made upon consideration of marriage, . . . and no action shall hereafter be maintained upon any contract for the sale of land, tenements or hereditaments, or any interest in, or concerning the same, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

Thus, for 121 years our statute in this regard has remained the same in effect as it now is. Our statute does not pretend to invalidate the original oral contract but only prevents maintenance of an action upon it unless it is in writing or unless there is some memorandum or note thereof in writing.

The memorandum or note does not constitute a new contract; it simply makes enforceable the original contract, although oral. In discussing the statute of frauds which had to do with the sale of goods, Judge Peters said in *Bird* v. *Munroe*, 66 Me., 337, on page 341, 22 Am. Rep., 571:

> "The point raised is, whether, in view of the statute of frauds, the writing in this case shall be considered as constituting the contract itself or at any rate any substantial portion of it, or whether it may be regarded as merely the necessary legal evidence by means of which the prior unwritten contract may be proved. In other words, is the writing the contract, or only evidence of it; we incline to the latter view."

This language he used even though in that statute the language was: "No contract for the sale of any goods, wares, or mer-

chandise . . . shall be valid, unless . . . some note or memorandum thereof is made and signed by the party to be charged thereby, or his agent." The Court held that the words "shall be valid" meant, however, that no such contract without memorandum shall be maintained.

Likewise, in *Weymouth* v. *Goodwin,* 105 Me., 510, 75 A., 61, 63, following *Bird* v. *Munroe,* supra, it is stated: "It is settled, too, that the note or memorandum is not the contract, but is evidence of it. The language of the statute implies that an oral contract may be made first, and a memorandum of it given afterwards." In *Upton & Co.* v. *Colbath,* 122 Me., 188, 119 A., 384, it is said on page 197: "Its purpose is to express the terms of the original trade and is evidence by which that trade can be proved." In the instant case Mr. and Mrs. Farrington over their own signatures to the agreement subsequently made to the antenuptial agreement confirmed it, stated what its original terms were, and in effect said that the purpose of making the subsequent memorandum was to reduce the oral agreement to writing, not that the memorandum should be the contract itself but that it might be "evidence of our said agreement," meaning the antenuptial oral agreement.

The memorandum may be made during the marriage. ". . . it is generally held that a verbal antenuptial contract may be reduced to writing or be evidenced by a written memorandum after the marriage so as to render it, when properly signed, valid and enforceable as between the parties and persons claiming under them." 27 C. J., Sec. 312, page 264. *Moore* v. *Harrison,* 26 Ind. App., 408, 59 N. E., 1077, 1078; *Kohl* v. *Frederick,* 115 Iowa, 517, 88 N. W., 1055; and *Browne on the Statute of Frauds,* Fifth Edition, Sec. 224, on page 296. It is necessary only that the written evidence of the contract necessary to satisfy the statute of frauds must be in existence at the time the action is brought. *Bird* v. *Munroe,* supra; *Purdom Naval Stores Co.* v. *Western Union Tel. Co.,* 153 F., 327, 330.

In conclusion we hold that the bill in this case did set forth facts that would justify the relief sought in equity, and that

the demurrer was not sustainable. The parties in reporting the case to this Court stipulated ". . . that if the demurrer is overruled, the bill may be sustained and decree entered below in accordance with the prayers contained in the bill."

Bill sustained. Case remanded to the court below for entry of a decree in accordance with the prayers contained in the bill.

MOOSE-A-BEC QUARRIES CO., INC.

vs.

EASTERN TRACTOR AND EQUIPMENT CO.

Washington. Opinion, November 23, 1942.

Master and Servant. Negligence. Doctrine of Res Ipsa Loquitur. *Nonsuit. Evidence.*

The relationship of employer and employee is not necessarily created when the employee of one person is directed to do work for another.

The principle of *res ipsa loquitur* is inapplicable when damage may be traced either to negligence for which the defendant is chargeable, or to accident or other cause for which he could not be held. Conjecture is not proof.

Upon the particular facts, in the instant case, the fire might have originated in the negligence of a servant of the defendant, in spontaneous combustion, or from a burning cigarette carelessly discarded by a person having no connection with the defendant.

A finding that the damage resulted from the negligence of a servant of the defendant could be based only on conjecture.

A nonsuit is properly ordered when a verdict for the plaintiff could not be allowed to stand.

ON EXCEPTIONS.

Action to recover for loss of building and machinery belonging to plaintiff, by fire claimed to have been due to the negligence of defendant's employee. Trouble had developed in a Diesel engine belonging to the plaintiff. Upon its request, defendant sent one of its employees to overhaul the engine and

put it in running condition. During the period when defendant's employee was in control of this work and while he and the employees of the plaintiff who were assisting him were absent from the building where the work was being done, fire broke out in the building and the building and its contents were destroyed. A nonsuit was ordered in the trial court. Plaintiff filed exceptions. Exceptions overruled. The case fully appears in the opinion.

Eaton & Peabody,

Oscar H. Dunbar,

Thomas L. Marcaccio, Providence, R. I., for the plaintiff.

Clinton T. Goudy,

Wesley E. Vose, for the defendant.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, JJ.

MURCHIE, J. This case is brought to the Court on exceptions by the plaintiff following a nonsuit ordered in the Trial Court. The bill of exceptions challenges not only the action of the Justice below in directing the nonsuit, but also his evidence ruling in admitting testimony offered to lay the foundation for a claim that the action was barred under the principle of *res judicata.* As we view the case, however, it is unnecessary to decide whether or not this established principle of law is applicable.

The plaintiff corporation, prior to December 24, 1940, operated a granite quarry on Hardwood Island within the limits of the Town of Addison. In the course of its operations, it maintained and operated a Diesel engine, housed in one of several closely-grouped buildings of wood and wood-frame and sheet-metal construction. Some days prior to the date aforesaid, trouble with the engine developed and the defendant was requested by telephone to provide a competent workman to overhaul the engine and to supply whatever parts were neces-

sary to put it in good operating condition. On or about December 22, an employee of the defendant examined the engine and ordered the necessary parts, and thereafter, as deposed by plaintiff's representative and as alleged in the declaration, that employee of defendant was given possession and exclusive charge and control of the engine, of the building in which it was housed and of its contents, for the purpose of doing the work for which the defendant was employed. Simultaneously the plaintiff's principal officer instructed two of its regularly employed servants to act as helpers for defendant's employee, and so advised the latter.

It is the contention of the plaintiff, and it is supported in the evidence, that the prevailing temperature was such that repair of the engine was impossible in an unheated building, and on the record it would have been proper for a jury to determine that the defendant's undoubted employee and plaintiff's two loaned servants built and constructed an unusual, and perhaps an unsafe, heating appliance, to supply the necessary heat. On December 24th, while the three were eating their noon-day meal at a camp maintained by plaintiff a few minutes walk from the scene, fire of undetermined origin started in the building where this appliance was located and destroyed the buildings, with the engine and other machinery and equipment located therein. The plaintiff seeks recovery of its money damage caused by the burning.

The record is entirely void of evidence indicating any act of negligence on the part of either defendant's employee or plaintiff's loaned servants other than the act, already referred to, of constructing an unsafe heating appliance (assuming its character to be such). The plaintiff bases its claim to recovery on the rule of *res ipsa loquitur* and the assumption that the fire originated either from the operation of the heating appliance itself, or from a blow-torch which the evidence discloses was used in connection with the repair work and was found after the fire in the pit beneath the engine. Either of these theories, however, presents nothing more than conjecture, and con-

jecture is not proof. *Smith* v. *Lawrence et al.*, 98 Me., 92, 56 A., 455; *McTaggart* v. *Maine Central Railroad Company*, 100 Me., 223, 60 A., 1027; *Edwards* v. *American Railway Express Company*, 128 Me., 470, 148 A., 679; *Loring* v. *Maine Central Railroad Company*, 129 Me., 369, 152 A., 527; 45 C. J., 1210, Par. 778 (e).

If it is assumed that the fire originated in the act of a servant of the defendant, working upon the engine, in negligently leaving a blow-torch when he went to lunch so that fire would spread from it, the defendant might be responsible because the act of negligence would have been committed in the course of his agent's employment. Again, if it is assumed, as the only other alternative, that the fire originated in the operation of the emergency heating appliance or in the failure to guard appropriately against the spread of fire therefrom when the employees departed at the lunch hour, the same thing might be true, if heating the building to make it possible to do work on the engine fell within the scope of the work defendant was employed to do. It is not necessary to a decision of the case, however, to determine either whether such heating fell within the scope of the employment of defendant's employees or whether the plaintiff's loaned servants became such, but it may be noted that the relationship of employer and employee is not necessarily created when the servant of one person is directed to do work pointed out to him by another. *Wilbur* v. *Forgione and Romano Company et al.*, 109 Me., 521, 85 A., 48; *Frenyea* v. *Maine Steel Products Co.*, 132 Me., 271, 170 A., 515; *Driscoll* v. *Towle*, 181 Mass., 416, 63 N. E., 922.

Equally plausible assumptions are that the fire was caused by spontaneous combustion, since the record discloses clearly that there were oil-soaked rags on the premises and that oil-soaked surfaces were present in abundance, or that it might be traced to a burning cigarette dropped on the premises by defendant's undoubted employee, by either of plaintiff's loaned servants, or by a stranger who visited with the three workmen shortly before the start of the fire.

The mere statement of these several, and contradictory, possibilities as to the origin of the fire is an answer to the plaintiff's present contention. A definite limitation on the applicability of the principle of *res ipsa loquitur* is well stated in *Ridge* v. *R. R. Co.*, 167 N. C., 518, 83 S. E., 762, L. R. A., 1917 E, 215, quoted with approval in *Edwards et al.* v. *Cumberland County Power & Light Co.*, 128 Me., 207, at 213, 146 A., 700, at 703:

> " 'This maxim of the law extends no further in its application to cases of negligence than to require the case to be submitted to the jury upon the facts in issue.' "

Such submission, obviously, should be made only when the evidence presented is such that a finding of fact that the damage resulted from a cause for which the defendant was answerable could be sustained. It is not error in law to direct a verdict (or order a nonsuit) when the testimony is such that a contrary verdict could not be allowed to stand. *Coleman* v. *Lord et al.*, 96 Me., 192, 52 A., 645; *Johnson* v. *Terminal Co.*, 131 Me., 311, 162 A., 518; *Winslow* v. *Tibbetts*, 131 Me., 318, 162 A., 785. The principle of *res ipsa loquitur* is inapplicable when the damage might be traceable either to an act of negligence for which the defendant would be chargeable, or to accident or other cause for which he could not be held. 38 Am. Jr., 1000, Par. 303.

> "A proposition is not proved so long as the evidence furnishes ground for conjecture only, or until the evidence becomes inconsistent with the negative." *McTaggart* v. *Maine Central Railroad Company*, supra.

There is nothing in the record to negative the possibility, equally good with any other, that the particular fire was the result of spontaneous combustion or of a burning cigarette carelessly discarded by a person having no connection with the defendant.

Exceptions overruled.

HARRY L. ELLIS *vs.* NATIONAL CASUALTY CO.

Penobscot. Opinion, November 23, 1942.

Referee's Report. Findings of Fact.

Findings of fact by referee will not be disturbed if there is any evidence to support them.

ON EXCEPTION TO ACCEPTANCE OF REPORT OF REFEREE.

Action on a health insurance policy. The policy excluded from the insurance coverage any disability from any cause which had its inception previous to the date of the policy or within fifteen days thereafter. Defendant claimed that the disability of the plaintiff for which compensation was sought had its inception before the issuance of the policy. The referee found for the plaintiff. Defendant excepted. Exceptions overruled. The case fully appears in the opinion.

Charles P. Conner, for the plaintiff.

Fellows & Fellows, for the defendant.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, JJ.

PER CURIAM.

This defendant, alleging exception to the acceptance of a referee's report awarding $270.55 to the plaintiff under a policy of insurance issued to indemnify him for loss due to hospitalization, relies on the claims (1) that the record contains no evidence to justify a finding of the exact amount named, and (2) that the disability of the plaintiff for which recovery is sought was traceable to a condition existing prior to the making of the insurance contract. The terms of coverage were restricted to sickness beginning after the policy had been maintained in force for not less than 15 days and excluded disability

resulting from any cause having its inception prior to the date of issue. The rule of reference reserved the right of exceptions on matters of law.

The "rule is too well established to require more than passing mention that if there is any evidence to support the findings of fact by Referees, exceptions will not lie." *Staples* v. *Littlefield,* 132 Me., 91, 167 A., 171. The amount of the money award comes clearly within this rule, since the item of $250 "due under Policy," as declared in the account annexed, represents the policy limit for hospital charges ($5 per day for not exceeding 40 days) and a surgical fee of $50, the amount stated in a rider fixing surgical fees for numerous operations, for "removal of entire prostate." The balance of the amount is interest on this principal item.

There is no merit in the claim that the disability resulted from a cause antedating the issuance of the policy. There is authority for the principle that when insurance coverage against sickness excludes illness contracted prior to the effective date of a policy, the issue as to the date of inception of any particular illness is a factual one, *Aetna Life Insurance Co.* v. *Millar,* 113 Md., 686, 78 A., 483; *Turner* v. *Columbia National Life Insurance Co.,* 100 S. C., 121, 84 S. E., 413; *Hilts* v. *United States Casualty Co.,* 176 Mo. App., 635, 159 S. W., 771, but it is not necessary on the particular facts to rely on that rule. There is nothing in the record that would justify a finding that the plaintiff was suffering from disease or sickness of any kind when the policy was written. The record discloses clearly that the first pain resulting from his prostate condition was felt or suffered on the night of September 23-24, or roughly 30 days after the date of the policy.

The plaintiff was 61 years of age when the policy was written. The medical evidence shows that prostate enlargement is quite common with men over 60, yet notwithstanding enlargement, that it may cause no trouble for a great many years. Defendant's reliance is on testimony that plaintiff's prostate was probably enlarged when the insurance contract was made

and an answer given by the plaintiff's medical witness in cross-examination as to whether disease "was a deviation from any normal condition of any of the functions of the body — functions or tissues of the body," that such would come nearer to a definition than anything else, and this, in substance, is one of the definitions given in 27 C. J. S., 142. In direct examination, however, he had stated categorically that enlarged prostate was not a disease, and the decision of the referees that enlargement of the prostate prior to the issue of the policy, there being no evidence to indicate that it was other than such normal enlargement as would be expected at his age, did not bring the disability in question within the terms of exclusion was obviously correct.

Exceptions overruled.

MARTIN EATON *vs.* ESTELLA T. MARCELLE.

ESTELLA T. MARCELLE *vs.* MARTIN EATON.

Sagadahoc. Opinion, November 24, 1942.

Automobiles. Negligence. Findings of Fact. Burden of Proof.

Where there is sufficient evidence upon which reasonable men may differ in their conclusions, the Court has no right to substitute its own judgment for that of the jury.

To obtain a new trial the movant has the burden of proving that the jury's verdict is manifestly wrong.

MOTIONS FOR NEW TRIALS.

These are cross actions, each party alleging negligence on the part of the other. The evidence was conflicting. The jury found for Mr. Eaton in both actions. Miss Marcelle presented a motion for a new trial in each action. Motions overruled. The cases fully appear in the opinion.

Edward W. Bridgham,

Harold J. Rubin, for Martin Eaton.

John P. Carey, for Estella T. Marcelle.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, JJ.

PER CURIAM.

These are two cross actions of negligence growing out of an automobile collision on August 16, 1941, at the intersection of High and Oak Streets in the city of Bath. The jury found for Mr. Eaton in both actions. Miss Marcelle presents motions based on the usual grounds for a new trial in each action. No exceptions were taken and so it must be assumed that proper instructions as to the applicable law were given to the jury. *Frye* v. *Kenney,* 136 Me., 112, 115, 3 A. (2d), 433.

The parties presented to the jury conflicting facts and theories as to the cause of the collision. Mr. Eaton contended that as he was approaching the intersection with due care, when some six feet therefrom, he saw Miss Marcelle's automobile coming northerly on High Street "two or three car lengths back"; that with knowledge of the stop sign on High Street he assumed that she would stop, and so he, having reached the intersection first, proceeded into it; but that she, without stopping, continued on and collided with his car when he was about two-thirds across. On the other hand, Miss Marcelle, without denial of not stopping but claiming that she slowed down and changed gears, contended that Mr. Eaton, driving at a high rate of speed, came into the intersection after she had entered it and negligently collided with her car.

The jury heard the evidence and determined the facts. It must have adopted as true Mr. Eaton's version. Where there is sufficient evidence upon which reasonable men may differ in their conclusions, the Court has no right to substitute its own judgment for that of the jury. *Frye* v. *Kenney,* supra, on page 115. To obtain a new trial the movant has the burden of proving that the jury's verdict is manifestly wrong. *Marr* v. *Hicks,* 136 Me., 33, 34, 1 A. (2d), 271; *Dube* v. *Sherman,* 135 Me.,

144, 146, 190 A., 809. Miss Marcelle has not sustained this burden.

". . . when two arguable theories are presented, both sustained by evidence, and one is reflected in a jury verdict, this Court is without authority to act. It is only when a verdict is plainly without support that a new trial on general motion may be ordered." *Mizula* v. *Sawyer et al.*, 130 Me., 428, 430, 157 A., 239; *Young* v. *Potter*, 133 Me., 104, 108, 174 A., 387. These verdicts plainly had evidential support.

Motions overruled.

SOLOMON NICHOLS *vs.* SAMUEL J. KOBRATZ.

Penobscot. Opinion, November 30, 1942.

Negligence. Res Ipsa Loquitur. *Damages.*

When that which has caused the injury for which damages are sought is shown to be under the management of the person charged with negligence and the accident is such as in the ordinary course of events does not happen if those having the management use proper care, the accident itself, in the absence of any explanation of the cause, affords reasonable evidence that it was caused by lack of proper care by the party charged with negligence.

ON REPORT.

Action by the plaintiff for personal injuries. The plaintiff, an invitee in defendant's store, was struck by a meat hook which rolled out of a refrigerator, and was seriously injured. There was no evidence as to what caused the meat hook to roll out of the refrigerator into the store. Plaintiff alleged negligence on the part of the defendant. Case remanded to the Superior Court for entry of judgment for the plaintiff. The case fully appears in the opinion.

Merrill & Merrill, by *Folsom Merrill*, for the plaintiff.

A. M. Rudman, for the defendant.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE. JJ.

THAXTER, J. This action, seeking damages for personal injuries suffered by the plaintiff and caused as is alleged by the negligence of the defendant, is before us on report for final determination. The facts are not in dispute.

The defendant, a wholesale and retail meat dealer, operated a store located on Broad Street in Bangor. The plaintiff, a customer in the store, went with the defendant into the refrigerator to select a piece of beef. The meat there was hung on hooks suspended on travellers which extended into the main part of the store. Having made his selection, the plaintiff went back into the store with the defendant who started to bone the meat. As they came out, the door of the refrigerator was left open, and, while the plaintiff was standing waiting for his purchase to be made ready, one of the hooks on which apparently hung a piece of beef ran out on its track into the store and struck the plaintiff injuring his eye. It does not appear what caused it to move from its place in the refrigerator into the store. With the exception of one witness who merely identified a model of the track, the defendant offered no evidence.

The plaintiff relies on the doctrine of *res ipsa loquitur*. We have so often and so recently discussed this principle that we do not think it is necessary to do so again. See *Chaisson* v. *Williams*, 130 Me., 341, 156 A., 154; *Winslow* v. *Tibbetts*, 131 Me., 318, 162 A., 785; *Shea* v. *Hern*, 132 Me., 361, 171 A., 248; *Deojay* v. *Lyford*, 139 Me., 234, 29 A. (2d), 111. The facts of this case are similar to those in *Leighton* v. *Dean*, 117 Me., 40, 102 A., 565, L. R. A., 1918 B, 922. There an awning of the defendant on the front of a building fell and injured the plaintiff who it was held was an invited licensee while looking in at the shop window of the defendant. The case was reported. In entering judgment for the plaintiff, the court held that it was the duty of the defendant, to such an invitee, to see that the premises were in a reasonably safe condition. The court said, page

44: "The very circumstances of this accident seem to establish the plaintiff's claim that the awning was insecure and that the defendant failed to use proper care to make it reasonably safe." As applicable to such facts, the court quoted the following language from the case of *Chicago Union Traction Co.* v. *Giese,* 229 Ill., 260, 82 N. E. 232: " 'When the thing which has caused an injury is shown to be under the management of the party charged with negligence, and the action is such as in the ordinary course of affairs does not happen if those who have the management use proper care, the accident itself affords reasonable evidence, in the absence of an explanation (by the party charged), that it was caused by lack of proper care by the party charged with negligence.' "

The defendant relies on the case of *Mahoney* v. *The Great Atlantic & Pacific Tea Co.,* 269 Mass., 459, 169 N. E., 424. All that that case holds is that injury to a customer by the mere falling of a sled which apparently had been safely placed against a radiator in a store was not evidence of negligence. That presents a very different state of facts from those before us.

The hook on which the meat was suspended struck the plaintiff in the eye and almost tore off his right eyelid. At least a dozen stitches were necessary. The plaintiff was in the hospital a week and at the time of the trial had an eyelid which drooped. The doctor called by the plaintiff testified that the eye was improving but that a further operation might be advisable. The doctor's bill was $150.00 with an estimated expense of $25.00 for further treatment provided there was no operation. There was a hospital bill of $50.00. The plaintiff had had considerable pain and at the time of the trial suffered some discomfort from the drooping of the eyelid. We feel that on the facts shown by the record the plaintiff is entitled to $750.00.

Remanded to the Superior Court for entry of judgment for the Plaintiff for $750.00.

In re Will of Ruth M. Cox,

Ada B. Robinson, Appellant.

Cumberland. Opinion, December 1, 1942.

Wills. Statutory Requirements. Signature. Attesting Witnesses. Testamentary Capacity. Undue Influence.

The statutory requirements as to the execution of a will are intended as safeguards and to prevent fraud and deceit. They are to be sanely interpreted for the purpose intended. When compliance by word or act is found upon credible evidence, specious objections will not be allowed to thwart the validity of the instrument.

The general statutory rule regarding signatures does not create an absolute alternative that the signature must be written unassisted or else appear by mark only. The signature is not rendered invalid by the fact that another guided the hand of the testatrix. It is not necessary that an express request for assistance be shown. It may be inferred from the circumstances of the case. The extent of the aid does not affect the validity of the signature if the signing is in any degree the act of the testatrix, acquiesced in and adopted by her.

When, at the request of the testatrix, the attesting witnesses are present and both the testatrix and the witnesses understand the purpose for which they are present, failure of the testatrix verbally to request the witnesses to attest the will does not invalidate the instrument as a will.

When, at the request of the testatrix, the attesting witnesses were present, the instrument signed by her was actually her will, both the testatrix and the witnesses were aware of that fact and that the testatrix wished them to attest it, there was a sufficient compliance with statutory requirements as to publication of the will without the necessity of the testatrix making a verbal publication thereof.

All exceptions as to failure to comply with statutory reqiurements as to the execution of a will must fail when substantial and sufficient compliance by words or conduct is credibly proven.

Want of capacity, when urged as a ground for invalidating a testamentary act must relate to the time of the act. Incompetency may exist before or after and still the will be valid.

The true test as to undue influence is the effect on the testatrix' volition, which must be sufficient to overcome free agency, so that what is done is not according to the wish and judgment of the testatrix.

On exceptions to allowance of will.

The will of Ruth M. Cox was allowed, after a contest, in the Probate Court. Appeal was taken to the Supreme Court of Probate by which Court, after hearing, the appeal was dismissed. The case came forward to the Law Court on exceptions. The exceptions alleged (1) that the statutory requirements as to the execution of the will were not complied with; (2) that there was lack of testamentary capacity on the part of the testatrix at the time of its execution and (3) that the will was procured by undue influence. Exceptions overruled. The case fully appears in the opinion.

Elton H. Thompson,

Robert A. Wilson,

Walter F. Murrell, for the appellant.

Charles H. Shackley, for appellee.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, JJ.

MANSER, J. The will of Ruth M. Cox was allowed after a contest in the Probate Court. Appeal was taken to the Supreme Court of Probate, and following an extended hearing, the appeal was dismissed, thus affirming the action of the Probate Court. The case comes forward upon exceptions which are grouped in three categories:

1. That the statutory requirements as to the execution of the will were not complied with.
2. That there was lack of testamentary capacity on the part of the testatrix at the time of its execution.
3. That the will was procured by the undue influence of Thomas Downs, the principal beneficiary.

There were eighteen exceptions. They are not taken up seriatim, but will all be considered.

As to failure to comply with statutory requirements, exceptions set out that the testatrix never declared the alleged in-

strument to be her will; that she never requested the signatures of the attesting witnesses; that the will was not actually signed by her but by the scrivener without her request for assistance; that there was no signature on the will when two of the witnesses signed it, and that these two witnesses never saw the alleged signature; that none of the witnesses identified their own signatures, the signature of the testatrix, or the will itself.

The testimony of the scrivener, a lawyer of experience as shown by the record, was, in effect, that he was called to the house for the purpose of drafting the will early in the morning, that the testatrix greeted him as he entered and told Mr. Downs and Mrs. Perry (who are beneficiaries) to leave the room, which they did. She said that she had been very negligent about making her will and wanted it attended to. She gave explicit directions and he drafted the will in accordance with her instructions; read it to her and asked her if it was just as she wanted it, and she said it was. He asked if there were any persons in the house who could act as witnesses. She said there were, and at her request they were called in. Upon their appearance, he took a book, laid the will upon it and held it in front of her. He then testified: "She was lying flat on her back, and she took the pen to write her name and I took hold of her hand with my right hand and assisted her with writing her name. Then Mrs. McAfee and Mrs. Ridley and I signed as witnesses."

Later, after testimony developed that there were certain pen scratches over which the name of the testatrix was written, the scrivener, upon being recalled to the stand, testified that they were made by the testatrix with his pen before he took hold of her hand to guide it.

As to the other attesting witnesses, Mrs. McAfee testified in direct examination that she was called down to "sign Mrs. Cox's will"; that she saw Mrs. Cox sign it, or as she later said, "I saw Mr. Gould help her sign the will." She also testified that she, Mr. Gould, Mrs. Ridley and Mrs. Cox were all in the room at the same time.

Mrs. Ridley testified that she was called to sign the will; that Mr. Gould, Mrs. McAfee, Mrs. Cox and herself were the only ones in the room; that she saw the testatrix sign her name, and all three were there when she signed it; that she had to wait a little while until Mr. Gould finished up his writing; that she signed her name and Mrs. McAfee signed hers, too.

It is true that the two women witnesses, after having given the testimony summarized above, were further examined at length, principally in cross examination, and there appears to be some confusion in their testimony as to the order of events. For illustration, Mrs. McAfee was asked whether she and Mrs. Ridley signed the will, and after answering affirmatively, was asked as to what then happened and said, in effect, that when the witnesses had signed the will, she saw Mrs. Cox sign, and then went up to her own apartment. Mrs. Ridley, in cross examination, testified that she waited for Mr. Gould to finish up his writing; that he then gave her the pen and she signed the will and Mrs. McAfee signed it. The question was then asked her:

"Q. Then what did he do?
A. Well, I couldn't tell you.
Q. Did he take it to the bed for her to sign?
A. He did."

It appears evident that the presiding Justice did not agree that the literal import of the questions and answers should be accepted as negativing the previous testimony.

Whether the cross examination was artful or sincere, whether these old ladies,— one eighty-three and the other in her seventies,— became confused or did not apprehend that they were being interrogated as to the sequence of events,— if that was the actual purpose of the examiner,— still inferences and conclusions from their entire testimony are to be drawn by the fact-finding tribunal, apparent contradictory evidence must be reconciled, if possible, and the resultant decision will

be sustained if there is credible evidence to support it. *Rogers, Appellant,* 123 Me., 459, 123 A., 634.

The underlying purpose of the statute is to grant to a person of sound mind the right to dispose of his real and personal estate by will, in writing, signed by him, or by some person for him at his request, and in his presence, and subscribed in his presence by three credible attesting witnesses, not beneficially interested under said will. R. S., c. 88, § 1. The requirements as to the execution of a will are safeguards. They are intended to prevent fraud and deceit. They have been sanely interpreted by our Court for the purpose intended. They are facts to be proved. When compliance by word or act is found upon credible evidence, specious objections will not be allowed to thwart the validity of the instrument.

Concerning the alleged omission on the part of the testatrix to request the witnesses to attest the will, it does not appear that she actually made a verbal request after she had signed the will herself. There can be no dispute, however, that she sent for the witnesses, that she recognized them when they came in, that both she and the witnesses understood the purpose for which they were in attendance, and that they were acting in accordance with her desire.

This also has application to the alleged failure of the testatrix to make formal publication of the will. Such formality of declaration is not necessary when the attendant circumstances demonstrate that the business of the moment was the making and execution of a will; that by the request of the testatrix the necessary parties were present; that the instrument which the testatrix signed was actually her will; that she knew they were aware of the fact and wished them to attest it. As said in *Goodridge, et als.,* 119 Me., 371, 111 A., 425:

> "It is sufficient under the statutes of this State if it appears that she did sign her name to the instrument as her will, that she by words or acts acknowledged it as her instrument in the presence of the subscribing witnesses

either already signed by her, or signed it in their presence, and that the witnesses at her request subscribed to it in her presence."

In *Cilley* v. *Cilley*, 34 Me., 162, our Court said:

"To publish a will requires no set form of words. It is sufficient if it be made to appear, by competent testimony, that the testator was at the time of executing the instrument fully apprised of its contents, that he knew it to be his will, and intended it as such."

The exception based on the ground that there was no testimony that the two women witnesses saw the actual will is also without merit as there is testimony from each one that they actually saw the testatrix sign the will. The law does not require that witnesses shall be cognizant of its contents. The exhibit shows that the will and the attestation were not written on the same sheet of paper, but considering the phraseology "the within will was signed by Ruth M. Cox," there can be no assumption that there had been an intentional or inadvertent removal of the will, without evidence to support it.

In *Dewey* v. *Dewey*, 1 Metcalf 349, 35 Am. Dec., 367, the Court held that it is not required that the testator should sign his name to the will in the presence of the attesting witnesses or that the witnesses should see the very act of signing. The opinion continues:

"The only inquiry, therefore, as it seems to us, is, whether upon the evidence, in the present case, it may be reasonably inferred that the testator signed his name to the instrument, as and for his will, and that he acknowledged that fact to the witnesses, either directly, or by acts equivalent to an acknowledgment."

"The purpose of procuring the attestation of the witnesses was to give effect to the instrument as a valid will. It can hardly be supposed that the testator, who was by

> his own active agency procuring the authentication of the instrument by the requisite witnesses, would have omitted the first step necessary to its due execution, viz. the signature by himself."

In the present case, all the witnesses saw the act of signing by the testatrix and the entire situation disclosed acts equivalent to an acknowledgment and to a request for attestation. In *Deake, Appellant,* 80 Me., 50, 12 A., 700, our Court adopts the rule as stated above.

With relation to the claim that the will was not actually signed by the testatrix but by the scrivener, the contestant first cites the general statutory rule of construction, R. S., c. 1, § 6, XX:

> "When the signature of a person is required, he must write it or make his mark."

It does not appear that counsel flatly contends that this presents an absolute alternative and that the signature must be written unassisted or else appear by mark only. If so, it runs counter to universal legal procedure and custom in such matters.

The contestant proceeds to challenge the statement of the scrivener that he came to the aid of the testatrix when it appeared that she failed in her endeavor to write her name unassisted. Counsel introduced testimony from a handwriting expert to the effect that the dominant characteristics of the signature were those of the scrivener and she discovered none of the testatrix herself. This witness did not undertake to say, as asserted by counsel, that the signature was without the mental volition of the testatrix. Inspection of the will shows that there was an attempt to form letters and that superimposed thereon appears the name of the testatrix. The characteristics of the handwriting of the scrivener are evident, but the signature definitely does not present the precision and firmness of the chirography of the scrivener as it appears in

the body of the will. The Court below may well have concluded that it was a characteristically assisted signature. The cases cited by the contestant to this point, and particularly *In re. Kearney's Will*, 74 N. Y. Supp., 1045, 69 App. Div., 481, and *Whitsett* v. *Belue*, 172 Ala., 256, 54 So., 677, do not support the contention made, but are in accord with the general line of authority.

The applicable rules are well stated in 68 C. J., Wills, § 291, as follows:

> "Signing with Assistance of Another. The signature is not rendered invalid by the fact that another guided the hand of the testator when he signed the will. This is not in violation of a statute requiring the will to be signed at the end thereof, and the extent of the aid does not affect the validity of the signature if the signing is in any degree an act of the testator, acquiesced in and adopted by him. Such act is the testator's own, performed with the assistance of another, and not the act of another done under the authority of the testator; and in consequence a statute providing that every person who shall sign the testator's name to any will by his direction shall subscribe his own name as a witness to such will, and state that he subscribed the testator's name at his request, has no application, and a noncompliance therewith does not affect the validity of the will. In order to uphold the validity of such signature it is not necessary that an express request for the assistance be given. It may be inferred from the circumstances of the case. It is necessary, however, that it should appear that the testator, at the time of requesting or receiving the aid in the signing of the instrument, had the present volition to affix the signature, and was aware and fully cognizant of the details of the instrument of will or testament to which he, by the aid of the other, was affixing his signature. A will is not legally executed if the testator's signature is procured by some one else holding

his hand, and if he is not in a condition to know what is being done."

Judged by these rules, this exception is without merit.

Testamentary Capacity

Upon the issue of testamentary capacity, there is no claim of general unsoundness of mind, but that the will was made at a time when the testatrix was in a state of extreme debility, was comatose, was near the termination of life and was not able to fully comprehend what she was attempting to do.

The record would warrant the following findings: The testatrix realized that she was in her last sickness. Her physician had arranged for her removal to a hospital. Going to the hospital symbolized to her the final transition stage. She had firmly decided that before such final step became imperative, she would make provision for the distribution of her property as she wanted it to go. She had a fixed purpose to make a will, but in her thought will, hospital and death represented immediate successive steps. The human instinct to cling to life caused her to defer the actual first step as long as possible. Faced with the necessity of being removed to the hospital, she took action. She insisted on first doing what she had in mind. She requested the attendance of a trusted lawyer of her acquaintance in New Hampshire. Failing to procure his services, she of her own volition selected and sent for a nearby attorney who had attended to some legal matters for her over a period of fifteen years. When he arrived, she banished everyone else from the room. According to the narration of the scrivener, she told him exactly what she wanted to do, clearly and intelligently, without suggestion on his part. She was careful even about the spelling of the name of a beneficiary. She had in mind the nature and location of her property. She spoke of cousins whom she did not intend to make beneficiaries.

She had keyed herself to the task and her determination of purpose carried her through to its completion. At the time

the will was drafted and executed, she had taken neither drug nor stimulant. She sent out word to roomers in the house to come and act as attesting witnesses. They related incidents which demonstrated that when the will was being prepared and became ready for signature and attestation, she was mentally alert. She waved to one, recognized both, and spoke of compensation for the service. She tried to write her own name and was apparently relieved to find that she could have the assistance of the scrivener. That she possessed the animus testandi, a mind with intention to properly execute a will, is fairly disclosed. After the attestation of the witnesses, and the task was over, her mind, spirit and body relaxed, and she soon thereafter sank into a semi-coma. She was immediately removed to the hospital, made some conversation on the way and after arrival, but soon lapsed into unconsciousness and died within twenty-four hours. The graphic story of events surrounding the execution of the will tends to establish the testamentary capacity of the testatrix at the time when it was essential that it should be exercised, and warrants the conclusion reached by the Court below.

> "The want of capacity, when urged as a ground for invalidating a testamentary act, must relate to the time of the act. Incompetency may exist before or after, and still the will be valid." *Martin, Appellant,* 133 Me., 422 at 428, 179 A., 655, 659.

Undue Influence

Was there undue influence on the part of Thomas Downs, the principal beneficiary? The situation requires summation. Mrs. Cox had been in failing health for some time and had been regularly visited by a physician for a year, although she continued to manage and direct her affairs until practically the end of her life. She operated a rooming house in Portland. She left no lineal descendants, her nearest relatives being cousins. Thomas Downs, the principal beneficiary, had lived with her for a considerable period of years at Bartlett, N. H., and in

Maine. Both were elderly people, she being sixty-nine at the time of her death, and while the age of Downs is not definitely stated in the record, it appears to approximate hers. Their relationship is not definite. There is no affirmative evidence to show that it was illicit. Downs was not, however, a mere boarder. He looked after the furnace, did household chores and attended to other matters under her direction. A witness for the contestant testified that the testatrix told him she paid Downs regular wages. Another said that from information received from Mrs. Cox, she paid household bills and gave Downs half of the net proceeds. He was evidently more than a mere janitor, but there is no evidence of a fiduciary relationship.

There was some testimony that Downs was more or less addicted to intoxicating liquor; that at such times he was ill tempered and indulged in argument; that the testatrix was averse to such conditions, was somewhat in fear of him on those occasions and expressed the wish to get rid of him. Evidence is lacking that she ever took any affirmative action in that direction, or that the conditions testified to commonly and usually existed.

Arthur Gray, a cousin who was an object of her sympathetic regard because he had experienced financial misfortune and was an invalid, testified for the contestant. He said that his relations with Mrs. Cox had always been friendly, that he had corresponded with her frequently and particularly in the last few years; that he had known of her relationship with Downs for a long time; that he had visited her both at her home in New Hampshire and at her residence in Portland, the last visit being at the Christmas season preceding her death. During that visit she discussed the situation as to Downs and said they had "little spats," that he used to drink quite often, and at times was hard to get along with. This evidence, coming from a man who might well be disappointed when he found he was not a beneficiary, would justify a finding by the presiding Justice that it presented a truthful and unbiased version.

Taken altogether, there is justification for the version that

the two had lived together as long-time members of a household between whom there was some affectionate regard; that Downs at least remained by her consent and volition; that he did not dominate her affairs; that notwithstanding criticism of one by the other at times, yet they got along well enough together; that he was the servitor rather than the master; that he was not the one who insisted upon her making a will. Various relatives expressed concern because she had not done so, and his expressions to them were, in effect, that she would do it only when she felt compelled by circumstances. The record shows little, if anything, even by way of inference, that he undertook to advise her to do so. Neither does it establish fraud, coercion or deception. When she finally made her own decision, he acted under her direction in procuring the attendance of a scrivener. She had in mind Downs as a natural recipient of her bounty after her death, as he had been in her lifetime.

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. The conclusion of the presiding Justice that the contestant failed in her contention in this respect is sustained. *Barnes* v. *Barnes*, 66 Me., 286; *O'Brien, Appellant*, 100 Me., 156, 60 A., 880; *Wells, Appellant*, 96 Me., 161, 51 A., 868; *Rogers, Appellant*, 123 Me., 459, 123 A., 634.

The will was properly allowed.

Exceptions overruled.

STATE OF MAINE *vs.* CARL ROBERTS.

STATE OF MAINE *vs.* WILLIAM C. HOWARD.

Kennebec. Opinion, December 24, 1942.

Automobiles. What Constitutes Operation of a Motor Vehicle.

The application of power to the driving wheels of a motor vehicle constitutes operation of the vehicle under the statute, notwithstanding the wheels which control the steering gear are suspended above the ground by a chain attached for towing purposes.

The "operation" of an automobile by an intoxicated person, which is forbidden by the statute, is not required to be either complete or extended.

ON EXCEPTIONS.

The respondents were convicted of operating a motor vehicle while under the influence of intoxicating liquor. That they were intoxicated was not refuted but it was claimed that they were not operating a motor vehicle. The automobile in which they were seated was being towed by a truck and the front wheels were suspended in the air. The towed vehicle was put in gear and power applied by first one and then the other of the respondents for the purpose of aiding progress. The issue turned on whether or not this was operating the vehicle within the meaning of the statute. The respondents each moved for a directed verdict in his favor, which motion was in each case denied. Respondents excepted. Exceptions overruled. The case fully appears in the opinion.

William H. Niehoff, for the State.

Edward W. Bridgham, for the respondents.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

MURCHIE, J. These two cases, tried together, are brought to the Court on exceptions by the respondents to the denial of

motions for directed verdicts and the refusal of the Justice below to give three requested instructions. The issue presented is well stated in respondents' brief, as follows:

> "Is one who sits behind the steering wheel of an automobile with the motor running and the car in gear and the rear wheels spinning and slewing slightly from side to side, while the front end of the motor vehicle is suspended in the air five or six inches so that the turning of the steering wheel cannot control the direction or course of the motor vehicle and the front end of the motor vehicle chained to the rear of a truck ahead being towed by the vehicle ahead, guilty of operating a motor vehicle under this Statute?"

This recital aptly describes the factual situation presented to the jury as applicable to both respondents, but it may be noted in addition with reference to the respondent Carl Roberts that while he was occupying the driver's seat in the towed car, the two vehicles jackknifed to some slight extent. The record makes it clear that at the time of the alleged offenses the operator of the truck was attempting to tow the automobile occupied by the respondents up an icy grade, and that power was applied to the driving wheels of the towed vehicle, at separate times by the respective respondents, for the purpose of aiding progress.

Under the particular circumstances, counsel's inquiry must be answered in the affirmative. Respondents' counsel does not challenge the factual findings that at the pertinent times his clients were "intoxicated" or "under the influence of intoxicating liquor," the two tests of the applicability of R. S. (1930), Chap. 29, Sec. 88, as amended. The record contains more than ample evidence to sustain such findings. The recitals in the quoted query carry recognition that the facts which the Justice presiding instructed the jury would constitute operating a motor vehicle within the contemplation of the statute were covered by the evidence:

> "It has been argued to you that they were not operating. I instruct you, . . . as a matter of law . . . that if you believe the evidence of the State that . . . one of these respondents was behind the wheel and put the motor in motion, had placed the car in gear, that the rear wheels, because of the motor being in motion, were whizzing, or something, and that the rear of that car swayed sideways when that was going on, . . . that the respondent who was doing that was operating that car."

This instruction given to the jury is a correct statement of the law. There is no point in quoting at length the requested instructions which were refused. They were at exact variance with the instruction given and were based upon a construction of the statute that one could not be held to be operating a motor vehicle within its terms unless his movement of the steering wheel would guide, control or manage the course or direction of the automobile in which he was riding.

The case is one of first impression, but there is ample precedent for holding that the "operation" intended to be curtailed by the statute is not either complete or extended. In *People* v. *Domagala,* 123 Misc., 757, 206 N. Y. S., 288, it was held that the mere starting of the motor of a vehicle was sufficient to constitute its operation, notwithstanding it was parked with front wheels against the curb and never put in motion. To the same effect was the decision in *State* v. *Webb,* 202 Iowa, 633, 210 N. W., 751, 49 A. L. R., 1389, where a motor was started and permitted to idle with the gear in neutral; and in *Commonwealth* v. *Clarke,* 254 Mass., 566, 150 N. E., 829, the manipulation of the gear lever of a car standing on a grade so that it moved slightly through the operation of the law of gravity, although the motor was not started, was held operation within the statute. In *Commonwealth* v. *Uski,* 263 Mass., 22, 160 N. E., 305, the Court declared that one might be held to be operating a motor car if he intentionally did any act or made use of "any mechanical or electrical agency which alone

or in sequence" would set the motive power in motion. There was evidence in the case that the automobile had moved four or five feet, but the instruction complained of was that manipulation of "the machinery of the motor" was sufficient.

In the *Uski* case, supra, the charge laid some emphasis on the fact that the respondent was in a position to "control" the movement of the vehicle, and respondents call attention to the decision of the Ontario Supreme Court in *Rex* v. *Higgins*, 63 Ont. L. Rep., 101 (1929), 1 D. L. R., 269, where conviction before a magistrate was set aside by the decision of a single justice with the declaration that the operation of the statute "must be confined to a motor vehicle which is either being driven or is capable of being driven, and cannot apply to a car which is out of commission and cannot be operated under its own power."

In the instant cases the motor was in operation and the power was not only being applied but was actually taking effect. It is not important whether the course or direction of either the towed car or the towing vehicle was affected by the application of its power. As a general rule it is recognized that penal statutes should be strictly construed, 25 R. C. L., 1081, Par. 301, but it has become increasingly apparent with the passing years that gasoline and alcohol make a dangerous mixture, and construction of statutes designed to punish those who operate motor vehicles while under the influence of intoxicating liquor should, and properly may, be in the interest of reducing the hazard of such operation to a minimum. So far as the decision in *Rex* v. *Higgins*, supra, may be considered a precedent for limiting the operation of the statute to those cases where one occupying the driver's seat in a motor vehicle has full control over its direction and speed, we are not inclined to follow it.

Exceptions overruled.

RINALDO A. L. COLBY *vs.* JESSE TARR

Sagadahoc. Opinion, January 4, 1943.

Pleading. Exceptions. Trespass. Evidence.

The joinder of assumpsit and tort is improper.

To raise the question of improper joinder a special demurrer is necessary.

The remedy available to a party claiming that the bill of exceptions is not in accordance with the record is, in the first instance, to present objections to the presiding justice, and failing in that contention, his remedy then is, by objection to the Supreme Judicial Court, to establish a proper bill of exceptions.

In trespass to real estate by entering plaintiff's close and cutting down growing trees, where defendant introduced a check to prove that the trees were purchased, testimony that at time of delivering check defendant's secretary stated that the check was in payment for logs purchased and not for the damage to other trees, although inadmissible as an admission of a trespass committed by defendant, was admissible to show what the check was given for.

ON EXCEPTIONS.

Action of trespass alleging that the defendant entered on land of the plaintiff and cut growing trees. Defendant claimed that the plaintiff had sold the trees to him. He offered in evidence a check payable to the plaintiff and cashed by him as going to prove the sale. Plaintiff joined the allegation of trespass and a claim on money counts. As defendant disregarded the misjoinder, the money counts were treated as surplusage. A verdict was returned for the defendant. Plaintiff excepted to the exclusion of evidence offered by him tending to show that the check offered by the defendant as tending to prove a sale was not given or accepted as consideration for a sale. Exceptions sustained. The case fully appears in the opinion.

McLean, Southard & Hunt, for the plaintiff.

Edward W. Bridgham,

Harold J. Rubin, for the defendant.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

CHAPMAN, J. This action comes to the Court on exceptions to rulings by the Justice of the Superior Court excluding evidence presented by the plaintiff. The plaintiff in his writ alleged that the defendant broke and entered the plaintiff's close and there committed trespass and damaged the real estate by cutting trees thereon growing. To this count he added the money counts. The joinder of assumpsit and tort was improper. *Chitty on Pleading*, 1, 199; *Allen* v. *Ham*, 63 Me., 532. To raise such question a special demurrer was necessary. *National Bank* v. *Abell*, 63 Me., 346. But the defendant disregarded the misjoinder and pleaded the general issue to the trespass. Issue was joined on the plea and trial had thereon. The money counts were properly treated as surplusage. A verdict was returned for the defendant.

Motion of the plaintiff to set aside the verdict, filed by the plaintiff, has been abandoned.

No transcript of the evidence was filed and the Court will found its judgment as to the relation of the excluded testimony to the subject matter of the suit, upon examination of the quotations and statements of the substance of the testimony set forth in the bill of exceptions.

The defendant complains that the plaintiff has not supported the statements contained in his bill of exceptions by a transcript of the testimony. This is not necessary. The bill must state on its face the evidence concerning the exclusion of which complaint is made and enough of the contentions or issues in the case to show that it was relevant, material or competent, as the case may be. If the defendant would claim that the contents of the bill were not in accordance with the record, his remedy is, in the first instance, to present objections before the Judge presiding. Failing in his contention before the presiding Judge, his remedy is by objection to this Court to establish a proper bill of exceptions. *Atwood* v. *New England T. & T. Co.*, 106 Me., 539, 76 A., 949. Although the bill of ex-

ceptions was not signed by defendant's attorneys, the record does not show any objections made thereto.

For the purposes of our consideration of the case, the following is a sufficient statement of the subject matter thereof, as it appears from the record presented. The plaintiff owned a tract of land upon which there were two groves of oak trees. Negotiations were had between the plaintiff and defendant relative to the purchase of the trees. There was evidence on the part of the plaintiff that he offered for sale to the defendant the trees included in one of the groves only, and that no agreement was consummated between them for the sale of any of the trees; that the matter was held for further consideration. Evidence in behalf of the defendant was to the effect that an agreement was reached for the purchase by the defendant of the trees in both groves, in pursuance of which agreement the defendant entered upon the lands and cut trees in both groves. Thereupon the plaintiff brought this action.

The first exception arises out of the introduction, in evidence of a check, by the defendant. The check was signed by one Blanche Stevens, the secretary and bookkeeper of the defendant, and by her delivered to the plaintiff. It was for the sum of One Hundred Forty Dollars, twenty-five cents ($140.25), was payable to the plaintiff and bore his endorsement upon the back. On the lower part of the face of the check were the figures "14,025 ft." There was evidence that the defendant had told the plaintiff that a check would be so delievered to him by Mrs. Stevens, and there had been conversation between them as to what purpose the check was to be given for. The following question was asked of Miss Knute, a witness for the plaintiff, who was present at the delivery of the check:

"Q. [By Mr. Hunt] — Was there any other conversation at this particular time which you haven't yet mentioned regarding the check?

A. Yes. When she passed the check to Mr. Colby — she came into the room of course — Mr. Colby said, 'This check is only for the logs and not for the damage.'

She said, 'Yes, this is only in payment for the logs. The damage will be settled later' or words to that effect.

MR. BRIDGHAM: I move that last be stricken out.
[Ordered stricken out by Court. Exception]."

The statement by the witness was not admissible as an admission upon the part of the defendant. There is nothing in the case that shows that Mrs. Stevens was the agent of the defendant to the extent that she was authorized to make admissions of a trespass by him. However, the defendant introduced the check, contending that the giving and acceptance thereof tended to prove a sale of the trees. It had probative force in this respect and the plaintiff had a right to rebut such evidence by showing what the check was given for by testimoney as to what took place upon the delivery of the check. The understanding between the parties as to the purpose for which a check is given may be shown. *Wellington* v. *Trotting Park Co.*, 90 Me., 495, 38 A., 543; *Bell* v. *Doyle*, 119 Me., 383, 111 A., 513. Statements made at the time of a payment are admissible. *Wigmore on Evidence*, Sec. 1777; *Barber* v. *Bennett*, 58 Vt., 476, 4 A., 231, 56 Am. Rep., 565. The exception must be sustained.

The first exception having been sustained, it is not necessary to discuss the second exception presented by the defendant.

Exceptions sustained.

EDMUND M. SWEENEY, ADMINISTRATOR OF THE ESTATE OF FELIX LACOMBE, DECEASED

vs.

CATHERINE LEBEL, ALIAS CATHERINE LABEL.

Kennebec. Opinion, January 5, 1943.

Evidence. Jury Verdict.

The determination as to fact is for the jury.

ON EXCEPTIONS AND MOTION FOR A NEW TRIAL.

Action of trover for the alleged conversion of a diamond ring. The defendant took possession of a diamond ring from the finger of the deceased shortly before his death claiming that the deceased had given it to her as an engagement ring. Certain evidence was admitted and certain other evidence excluded, to which admission and exclusion defendant excepted. Verdict was for the plaintiff. Defendant brought the case to the Law Court on a motion for a new trial, and on exceptions. Motion overruled. Exceptions overruled. The case fully appears in the opinion.

Edmund M. Sweeney,

William H. Niehoff, for the plaintiff.

Clayton E. Eames, for the defendant.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

PER CURIAM.

This is an action of trover brought by the administrator of the estate of Felix Lacombe for the conversion of a diamond ring. After a verdict for the plaintiff, the case is before us on a general motion for a new trial and on exceptions.

THE MOTION

The ring had been worn by the deceased, and the defendant claims that he gave it to her in his lifetime as an engagement ring. There was some evidence to corroborate her story. On the other hand the ring was in his possession just prior to his death and the evidence shows that he was wearing it then. The defendant, a few hours before Mr. Lacombe died and after he had had a shock, removed it from his finger. The question whether the deceased gave the ring to the defendant was peculiarly one for the jury and their finding against the contention of the defendant cannot be disturbed.

THE EXCEPTIONS

The first exception is to the admission in evidence of a conversation of the defendant relating to the gift of a stick pin. It appears that the conversation concerned both the gift of the ring in question and the stick pin. The presiding justice admitted it only in so far as it related to the gift of the ring. With that limitation, which was explained to the jury, it was admissible.

The second exception is to the admission of certain statements by the defendant as to the value of the ring. These were admitted by the court on the question of the credibility of the defendant, it being contended that she had made contradictory statements. Whether the evidence was admissible on this specific ground it is unnecessary to decide, for we cannot see anything prejudicial to the defendant in the ruling.

The third exception is to the refusal of the presiding justice to permit a witness, Orel J. Richards, to state what reason Mr. Lacombe gave for going to the office of the plaintiff, Mr. Sweeney, on a certain date. As there is no indication what the purpose of the question was, or what the answer would have been, we have nothing before us to determine whether the exclusion was proper or not.

The fourth and fifth exceptions are to the admission of evidence on the cross-examination of Orel J. Richards relating to a check given by the deceased to the defendant. It is not altogether clear whether this evidence was admitted on the ground that it affected the credibility of the witness or whether it was thought that the gift of money had some bearing on the gift of the ring. It is rather difficult to understand how it was relevant on either question. At the same time we cannot see that the ruling was in any way prejudicial to the defendant.

Motion overruled.
Exceptions overruled.

INHABITANTS OF THE TOWN OF ASHLAND *vs.* JOHN C. WRIGHT.

Aroostook. Opinion, January 6, 1943.

Taxation. Statutes.

It is fundamental that in the construing of a statute the purpose for which it was enacted be considered and that a construction which leads to a result clearly not within the contemplation of the lawmaking body be avoided. Above all an interpretation which leads to an absurd result should be avoided even though by so doing, the strict letter of the enactment be disregarded.

ON EXCEPTIONS BY THE DEFENDANT.

An action to recover possession of certain real property in the Town of Ashland. Taxes had been assessed against the property and tax liens placed on it which the plaintiff claimed had ripened into a title. Defendant claimed that the tax was invalid. Judgment was for the plaintiffs. Defendant excepted. Exceptions overruled. The case fully appears in the opinion.

Francis W. Sullivan, for the plaintiff.

Donald N. Sweeney, for the defendant.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

THAXTER, J. In this real action the plaintiff seeks to recover possession of twenty-eight parcels of land situated in the Town of Ashland. The case was heard on an agreed statement of facts by the justice presiding at the April Term of the Superior Court for the County of Aroostook who entered the following order: "Judgment for Plaintiff. Writ of possession to issue." From this ruling the case is before us on exceptions by the defendant.

The issue is the validity of a tax assessment of the plaintiff town of April 1, 1939. Certain taxes were assessed against this defendant on the land here in question. In accordance with the

provisions of Public Laws 1933, Ch. 244, liens were placed on the real estate which the plaintiff claims have ripened into a title. It is agreed "that all matters, laws and requirements statutory and otherwise, pertaining to the town meeting, election of officers, assessment of taxes, commitment for collection, placing of liens have been complied with and the only issue in this case is as to whether or not the assessors and Tax Collector of the Town of Ashland were legally in office during the year 1939 and whether or not they could assess and collect a legal tax which will result in a forfeiture."

The ground on which the defendant claims that the assessors were not legally qualified to hold office is that they were not sworn as the statute prescribed. The defendant calls attention to the provisions of Priv. & Sp. Laws 1935, Ch. 12, which provides for a form of government for the Town of Ashland. Section 13 of this act provides as follows:

> "*Officers to be sworn.* All town officers elected or appointed shall be sworn by the town clerk to the faithful performance of the duties of their respective offices."

The town clerk of Ashland was in fact sworn by the moderator of the town meeting held on March 29, 1939, and the defendant contends that, not having taken the oath of office as required by Section 13 quoted above, the clerk was himself never duly qualified and that the oath which he in turn administered to the assessors was of no effect to qualify them.

The plaintiff on the other hand calls our attention to Rev. Stat. 1930, Ch. 5, Sec. 19, which provides generally for the qualification of town clerks. This section reads as follows:

> "*Clerk to be sworn; form of oath. R. S., c. 4, sec.* 19. The town clerk, before entering on the duties of his office, shall be sworn before the moderator, or a justice of the peace, truly to record all votes passed in that and other town meetings during the ensuing year and until another clerk is chosen and sworn in his stead, and faithfully to discharge all the other duties of his office."

The plaintiff claims that this provision is applicable and that the town clerk of Ashland was therefore properly sworn.

If we confine ourselves merely to the wording of these two statutory provisions we should have to concede that they are inconsistent and that in so far as the Town of Ashland is concerned the later act would amend the provision of the general law. But we are not required to construe statutes so abstractedly. Rather it is fundamental that we look to the purpose for which a law is enacted and that we avoid a construction which leads to a result clearly not within the contemplation of the lawmaking body. Above all, we should seek to avoid an interpretation which leads to a result which is absurd, even though to do so we may have to disregard the strict letter of the enactment. *Holmes* v. *Paris*, 75 Me., 559; *Landers* v. *Smith*, 78 Me., 212, 3 A., 463; *Carrigan* v. *Stillwell*, 99 Me., 434, 68 L. R. A., 386, 59 A., 683; *State* v. *Day*, 132 Me., 38, 165 A., 163; *Perkins* v. *Kavanaugh*, 135 Me., 344, 196 A., 645. This general principle is well stated in *State* v. *Day*, supra, at page 41, as follows:

" 'It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute because not within its spirit nor within the intention of its makers.' *Holy Trinity Church* v. *United States*, 143 U. S., 457, 12 S. Ct., 511, 36 L. Ed., 226; *Reiche* v. *Smythe*, 13 Wall., 162, 20 L. Ed., 566; *Silver* v. *Ladd*, 7 Wall., 219, 19 L. Ed., 138. The rule that these cases illustrate is valuable. It rescues legislation from absurdity. It is the dictate of common sense. It is not judicial legislation; it is seeking and enforcing the true sense of the law notwithstanding its imperfection or generality of expression. There is danger in extending a statute beyond its purpose, even if justified by strict adherence to its words. 'The letter killeth but the spirit giveth life.' "

The presiding justice in his findings has clearly pointed out the mischievous and absurd results which would follow if the plaintiff's construction of the 1935 act should prevail. If a vacancy should happen to occur in the office of town clerk, the

one who might be elected to fill the vacancy could never be sworn in, or if a town clerk were reelected he would have to administer the oath of office to himself.

It is apparent that the legislature never intended any such result and there is no reason why we must so construe the statute. It seems obvious that, though the act says that all officers must be sworn by the town clerk, there was excluded from such category the town clerk himself who was expected to qualify in the usual manner as provided by Rev. Stat. 1930, Ch. 5, Sec. 19.

Exceptions overruled.

REGINALD W. RUSSELL *vs.* WALTER C. NADEAU.

GRACE RUSSELL *vs.* WALTER C. NADEAU.

Penobscot. Opinion, January 13, 1943.

Automobiles. Public Service Vehicles Given Right of Way. Duty of Due Care by Public Service Vehicles. Negligence.

In answering emergency calls a fire department vehicle having the right of way under Revised Statutes 1930, Chapter 29, Section 13, is exempt from the operation of regulations controlling the movement of traffic by signal lights or other means or devices.

The right of way given to public service vehicles by the statute and their exemption from traffic regulations, however, do not relieve their operators from the duty of exercising due care to prevent injury to themselves and others lawfully upon the ways. The measure of their responsibility is due care under all circumstances.

MOTIONS FOR NEW TRIALS BY DEFENDANT.

Actions to recover for damages to plaintiffs' automobile and for personal injuries to the plaintiff Grace Russell by reason of a collision between plaintiffs' automobile and a hook and ladder fire truck belonging to the City of Bangor and driven by Walter C. Nadeau, one of its regular firemen. The collision occurred at an intersection, and the decision turned on the question of which party was responsible. Verdicts were for the

plaintiffs. The defendant moved for new trials. Motions overruled. The cases fully appear in the opinion.

A. M. Rudman,

E. Donald Finnegan, for the plaintiffs.

B. W. Blanchard, for the defendant.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, JJ.

STURGIS, C. J. In the evening of November 26, 1940, a large hook and ladder fire truck belonging to the City of Bangor and driven by the defendant Walter C. Nadeau, one of its regular firemen, collided with an automobile owned and operated by the plaintiff Reginald W. Russell in which his wife, the plaintiff Grace Russell, was riding as a guest passenger. In these actions of negligence based on this collision and tried together the verdicts were against the defendant. The cases come forward on his general motions for new trials.

The collision took place in or just beyond the intersection of Union and Main Streets in Bangor. The fire truck, answering a still alarm, had started up Union Street, and although as it reached Main Street the automatic light there regulating traffic showed red for a stop the driver disregarded the signal and proceeded at a moderate rate of speed through the intersection. The plaintiffs, the Russells, the husband driving, were coming up Main Street in his car and having a green light signal to go he started into the intersection, saw the fire truck almost upon them and in an attempt to avoid a collision swung his automobile sharply to the right around into and up Union Street and stopped against the curb. The fire truck hit the automobile however, damaged it and the plaintiff Grace Russell was injured by the impact.

In this jurisdiction fire apparatus and other enumerated emergency vehicles when operated in response to calls have the right of way in the streets and other public ways and on

their approach it is the duty of the driver of every other vehicle to immediately draw it as near as practicable to and parallel with the right hand curb and stop until the public service vehicle has passed. R. S., Chap. 29, Sec. 13. And in answering emergency calls a fire department vehicle, having the right of way, is exempt from the operation of traffic regulations. This rule with particular reference to statutory provisions as to speed limitations was adopted in *McCarthy* v. *Mason,* 132 Me., 347, 171 A., 256. Reason and authority dictate that the exemption should be extended to regulations controlling the movement of traffic by signal lights or other means or devices. *Leete* v. *Griswold Post,* 114 Conn., 400, 158 A., 949; *Ferraro* v. *Earle et al,* 105 Vt., 243, 164 A., 886.

The right of way given to public service vehicles and their exemption from traffic regulations, however, do not relieve their operators from the duty of exercising due care to prevent injury to themselves and others lawfully upon the ways. Although it is generally recognized that firemen driving to a fire, when the safety of lives and property are at stake, are in many instances duty bound to proceed at a rate of speed greater than that which any ordinary driver could justify and cannot be required to stop for red lights or other traffic signals, they must include in the care they are bound to exercise reasonable precautions against the extraordinary dangers of the situation which duty compels them to create. They must keep in mind the speed at which their vehicle is traveling and the probable consequences of their disregard of traffic signals and while they have a right to assume in the first instance that the operators of other vehicles will respect their right of way at an intersection they are warned by a red light flashing against them that other vehicles on the intersecting way are invited to proceed by a green light and may do so. Even if the driver of the other vehicle through negligence disregards their right of way they must still use due care to avoid a collision. The measure of their responsibility is due care under all the circumstances. *McCarthy* v. *Mason,* supra; *Ferraro* v. *Earle et al,*

supra; *Balthasar* v. *Pacific Elec. Ry. Co.*, 187 Cal., 302, 202 P., 37, 19 A. L. R., 452; *Farrell* v. *Fire Ins. Salvage Corps*, 179 N. Y. S., 477, 189 App. Div., 795; *Waddell* v. *City of Williamson*, 98 W. Va., 547, 127 S. E., 396; *Hanlon* v. *Milwaukee Electric Ry. & Light Co.*, 118 Wis., 210, 95 N. W., 100; 5 *American Jurisprudence* 666 et seq.; 42 *Corpus Juris* 1027 and cases cited.

As to the statutory duty of the driver of every other vehicle to immediately draw it to the right hand curb and stop until a public service vehicle responding to a call has passed, we approve the rule that to impose upon such a driver the duty of yielding the right of way he must know or in the exercise of ordinary prudence should have known that a public service vehicle was approaching in response to a call and he must have a reasonable opportunity to draw to the curb and stop. *Balthasar* v. *Pacific Elec. Ry. Co.*, 187 Cal., 302, 202 P., 37; 5 *American Jurisprudence* 666. Regardless of the statute, however, he must make use of his senses, hear and see that which in the exercise of reasonable care ought to be heard and seen and in all ways exercise that degree of care which an ordinarily prudent person would use under similar circumstances. At an intersection a green light favoring his advance does not warrant him in proceeding regardless of conditions or consequences. If a favored vehicle has the right of way regardless of the light and he may be charged with knowledge of its approach he must yield the right to advance given him by the light. In no event may he proceed without due regard for the safety of others lawfully on the way. Common law rules applicable to negligence are not abrogated by regulations establishing traffic control by lights or otherwise.

An examination of the transcript in this case discloses that upon conflicting evidence the jury were warranted in finding that at the time this collision took place the bell or gong on the fire truck had not been rung, no sirens or other alarms were being sounded in the streets and in the glare of headlights it not being clearly apparent, until it was close at hand, that a fire

department vehicle was approaching, the plaintiffs Reginald W. and Grace Russell were not chargeable with knowledge that a public service vehicle was approaching in response to a call or have a reasonable opportunity to yield the right of way, and were not guilty of contributory negligence in failing to more promptly turn their vehicle to the curb and stop or by other means avoid a collision. That the jury made these findings is indicated by their verdicts. We find no ground in fact or law for holding that the jury were manifestly wrong in reaching the conclusion that the plaintiffs exercised due care under all the circumstances.

It is clearly apparent, however, that the defendant Walter C. Nadeau did not exercise that degree of care in the operation of his fire truck which is required of the driver of fire apparatus when responding to a call and his negligence was a proximate cause of the collision from which these actions arise. He says that he shifted into second gear at the cross walk at the entrance to the intersection of Union and Main Streets, looked down to the right and not seeing any traffic approaching from that direction forged ahead. He admits that it was not until his companion shouted a warning that he noticed that the plaintiffs and their car were almost, if not actually, in front of the fire truck and then although he applied the brakes and swung to the left the vehicles were so close together a collision was inevitable. We are convinced that if he had looked down Main Street when his view was clear of obstructions he could not have failed to have seen the approaching automobile, realized that it was advancing on a green light and might not yield the right of way, and by the exercise of reasonable care in the operation of his fire truck in the situation which he in part had created, could have avoided a collision. Apparently he drove through the intersection in blind reliance upon his right of way under the statute and with little if any regard for the safety of other travelers upon the streets. This was negligence for the results of which, on a finding that the plaintiffs themselves were in the exercise of due care, the jury properly award-

ed damages. The mandate in each of these cases therefore must be

Motion overruled.

ALVERDA P. MONK *vs.* JASON MORTON.

Kennebec. Opinion, January 19, 1943.

Contracts.

It is fundamental, in construing written contracts, that valid intention, as deduced from the language of the whole instrument, interpreted with reference to the situation of the parties at the time the contract was made, must prevail.

The intention of the parties must be gathered from the writing, construed in respect to the subject matter, the motive and purpose of making the agreement, and the object to be consummated.

An ambiguous contract will be construed most strongly against the party who used the words concerning which doubt arises.

Where the language of a contract is contradictory, obscure or ambiguous, or its meaning is doubtful, the more natural, probable and reasonable interpretation should be adopted.

ON EXCEPTIONS BY DEFENDANT.

Action in a plea of land to regain possession of certain real estate occupied by the defendant under the provisions of a bond for a deed. The defendant made certain payments but plaintiff held that the defendant was in default in regard to one payment. The defendant contended that he had fulfilled his obligations under the terms of the bond. Judgment was for the plaintiff. Defendant excepted. Exceptions sustained. The case fully appears in the opinion.

Perkins, Weeks & Hutchins, for the plaintiff.

Paul S. Woodworth, for the defendant.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

CHAPMAN, J. The plaintiff seeks in a plea of land to regain possession of real estate occupied by the defendant under the

provisions of a bond for a deed given by the plaintiff to the defendant. The case was submitted to the Presiding Justice of the Superior Court on an agreed statement of facts and exhibits, to be determined by him without a jury. The finding was for the plaintiff, and the defendant excepted thereto.

For our purposes, the following is a sufficient statement of the case, as gathered from the agreed statements of facts and the bond, which are made a part of the bill of exceptions:

The bond for a deed was in the form common in this jurisdiction. The consideration for the title to be transferred was One Thousand Dollars, to be paid "Fifty Dollars July 17, 1940; Fifty Dollars October 17, 1940, and One Hundred Dollars on October 17th. each and every year thereafter until said sum is paid in full; with interest at six per cent per annum payable annually from October 17, 1940." The bond contained also the following provision: "The said Jason Morton has privilege of cutting pulp from said lots and pay said Alverda P. Monk the sum of two dollars per cord when said wood is cut, sawed, peeled and piled; and an additional two dollars per cord after said wood is yarded in the field on said property. Any timber or wood that is cut from said lots and not used on the premises shall be paid for at the going price per thousand feet or per cord to said Alverda P. Monk as stumpage." And also, "Said Jason Morton to have possession of said premises until he shall have failed to perform the condition of this bond." Taxes assessed for the year 1940 were to be paid by the said Morton. Possession of the premises was delivered to the defendant and on July 17, 1940, a payment of Fifty Dollars was made by the defendant and indorsement made upon the bond as follows: "Rec'd Fifty ($50.00) dollars July 17th 1940 on morgage."

On October 17, 1940, a payment was made by the defendant of Fifty Dollars and indorsement upon the bond made as follows: "Rec'd Oct. 17th 1940 ($50.00) on morgage." On December 2, 1940, the defendant cut pulp wood and in accordance with the provision in the bond made a payment of Two Dollars to the plaintiff, for which a receipt was given and indorse-

ment upon the bond made as follows: "Rec'd Dec. 2nd 1940 (2.00) two dollars on morgage." On December 14, 1940, the defendant cut twenty-five cords of pulp wood and made payment of One Hundred Dollars. A receipt was given by the plaintiff of the following tenor: "December 14, 1940 Rec'd one (100) hundred dollars from Jason Morton of Benton for second twenty (25) five cords pulp no more or less.

Mrs. Alverda Monk

When you come down bring this receipt and your deed or note and I will put it on there." On November 22, 1941, a payment of Fifty-five Dollars and fifteen cents was made by the defendant and a receipt given of the following tenor: "November 22, 1941 Received of Jason Morton fifty-five and 15/100 dollars, it being $48.90 on interest on bond for a deed to October 17, 1941, said bond being dated July 17, 1940; and six and 25/100 dollars being for fire insurance premium.

$55.15 Alverda P. Monk By H. H. Brazzell her atty."

and indorsement was made upon the bond as follows:

"1941 November 22. Rec'd on within bond interest to Oct. 17/41 in sum of forty-eight and 90/100 dollars, $48.90."

Taxes upon the property for the year 1940 were paid by the defendant in accordance with the bond.

The plaintiff contends that the defendant was in default, in that no payment was made upon the principal on October 17, 1941. She claims that, under the provisions of the bond, the defendant was to receive no benefit for payments made for wood cut, unless the annual instalments were paid; that such payments were to be held in abeyance until final settlement. The defendant claims that the payments for wood cut should be credited upon the annual instalments; that the payments of December 2d and December 14th were anticipatory of the instalment due October 17th, and must stand in place thereof. If the plaintiff's contention as to the payment for wood cut is correct, the defendant was in default, as claimed. If the defendant's contention is correct, he was not in default and the plaintiff cannot maintain her action.

The issue raised brings into consideration the interpretation of so much of the bond as relates to the payment by the obligee of the bond, for pulp wood cut upon the premises.

In *Power Company* v. *Foundation Co.*, 129 Me., 81, 85, 149 A., 801, 802, the Court said:

> "It is fundamental, in construing written contracts, that valid intention, as deduced from the language of the whole instrument, interpreted with reference to the situation of the parties at the time the contract was made, must prevail. *Bell* v. *Jordan*, 102 Me., 67, 65 A., 759. Such intention, which has been called the polestar of construction, must be gathered from the writing, construed in respect to the subject-matter, the motive and purpose of making the agreement, and the object to be consummated. *Roberts* v. *McIntire*, 84 Me., 362, 24 A., 867, . . . An ambiguous contract will be construed most strongly against him who used the words concerning which doubt arises. 13 C. J., 544."

The bond is explicit that the obligee may cut wood, paying the obligor therefor, but it is absolutely silent as to giving credit for those payments upon the consideration named in the bond for the transfer of the land. A due regard, however, for the situation of the parties, the subject matter, the motive and purpose of making the agreement and the object to be consummated, compels the conclusion that the parties intended that the payments for wood were to be a credit upon the consideration for the transfer. Otherwise, the obligee of the bond would pay more than One Thousand Dollars, which was named as the consideration. This interpretation, the defendant adopts.

The bond is likewise silent as to whether the payments for the wood were to be credited upon final settlement or upon the annual payments. But we believe that a consideration of the situation of the parties, the purpose of making the agreement

and the object to be consummated, makes more reasonable the interpretation that the payments were to be credited as of the date when made, and thus be a payment on account of the annual payment next following the date upon which the payment for the wood was made. It was to the advantage of both parties that the final transfer of the property be consummated. This was the objective of the bond. Possession and use of the premises were given to the obligee. It is a common practice to allow the grantee in such transactions to operate the premises to obtain the means to meet his payments. *Thompson on Real Property*, Sec. 4873; *Sikes* v. *Page*, 12 Kentucky Law Reporter 780; 15 S. W., 248. It operates to bring about the objective sought and is not to the detriment of the grantor, as it replaces his security with money.

The parties might have entered into a contract containing either, a provision that the wood payments should be applied to the annual instalments or a provision that these payments should be held in abeyance until the final settlement; but, the bond being silent in this respect, we believe that the more probable and reasonable intention was that the payments should be applied to the annual instalments.

> "Where the language of a contract is contradictory, obscure or ambiguous, or its meaning is doubtful, so that the agreement is fairly susceptible of two constructions, the more natural, probable, and reasonable interpretation should be adopted." *Barnsdall Oil Co.* v. *Leahy*, 195 Fed. (CCA), 731, 734.

The rule that an ambiguous contract will be construed more strongly against him who uses the words concerning which doubt arises, is more than an arbitrary rule. Its purpose is to give effect to the intention of the parties. To the maker of an instrument is available language with which to adequately set forth the terms thereof. It is presumed that he will not leave undeclared that which he would claim as his right under the agreement; and the absence of a requirement against the

obligee is evidence that such requirement was not within the understanding of the parties. "He who speaks should speak plainly, or the other party may explain to his own advantage." *State* v. *Executors of Worthington*, 7 Ohio, pt. I, 171. If it was intended that the payments for the wood should not be for the benefit of the obligee until the annual instalments had been made, it would have been a simple matter to so indicate in the bond. Likewise, the obligor could have made the matter plain in the wording of the indorsements upon the bond acknowledging the receipt of the payments.

If we look to the acts of the parties in carrying out the transaction, the above interpretation is supported. At the time of the payment of Two Dollars on the first instalment of wood cut, the parties were apparently in agreement that the true nature of the payment should be indicated upon the bond. Not only was a receipt given, but the plaintiff, in her own words, indorsed it as a cash payment on the bond as of that date. The wording, date and amount excepted, was the same as in the two previous cash instalments. She offered, upon the receipt given for One Hundred Dollars in payment for the second instalment of wood cut, to indorse the payment upon the bond, and it must be presumed that she intended to make the same indorsement as made upon the previous payment for wood cut. A creditor may accept payment before it is due, and these indorsements indicate an intention that the payments should take effect as cash payments and as of the date made. If we had the bond before us with the indorsements thereon, and the one which the obligor intended to make thereon, and without any other evidence, we would be bound to the conclusion that there was nothing due upon the principal of the bond on October 17, 1941. In other words, the receipts and indorsements written by the obligor is *prima facie* evidence of intention to apply the payments to the annual instalment.

The treatment of the payments by the plaintiff was in accord with the interpretation which, judged by the subject matter, the motive and purpose of making the agreement and the

object to be consummated, is the more natural, probable and reasonable.

The defendant was not in default as to the principal on October 17, 1941. The default as to interest was waived by the plaintiff by the later acceptance of the same by the plaintiff.

Exceptions sustained.

PAUL S. WOODWORTH *vs.* CLARENCE A. LAFOY.

Cumberland. Opinion, January 29, 1943.

Automobiles. Negligence. Fact Finding.

The only basis for the consideration of exceptions to a referee's report on questions of fact by the Supreme Judicial Court is that there was no evidence of probative value to support the finding of the referee. In the instant case the record presents only questions which were for the referee to determine.

The rule (R. S. 1930, Chapter 29, Section 7) that the driver of a vehicle entering a public way from a private road shall yield the right of way to all vehicles approaching on such public way was not applicable upon the facts disclosed by the record in the instant case.

ON EXCEPTIONS BY THE DEFENDANT.

Action to recover for property damage caused by collision between the automobile of the plaintiff and that of the defendant. Plaintiff was approaching the public way from a private road. Defendant was driving on the public way. The collision occurred at the intersection of the public way and the private road. The plaintiff and the defendant each accused the other of negligence. The referee found for the plaintiff. Defendant excepted. Exceptions overruled. The case fully appears in the opinion.

Chaplin, Burkett & Knudsen, for the plaintiff.

Robert A. Wilson, for the defendant.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

MANSER, J. This is an action to recover property damage caused by an automobile collision. It was heard by a referee, with right of exceptions reserved as to matters of law. The report of the referee awarding damages to the plaintiff for $250 was accepted by a Justice of the Superior Court against objections of the defendant, and exceptions to this ruling bring the case forward. The seven exceptions are directed to alleged elements of negligence on the part of the plaintiff and freedom from negligence on the part of the defendant, all of which from the record were patently questions of fact. The only basis for consideration of the exceptions, under the established rule, is that there was no evidence of probative value to support the finding of the referee. *Richardson* v. *Lalumiere,* 134 Me., 224, 184 A., 392.

On the contrary, the testimony shows that there were no witnesses to the accident, except the parties themselves, and that litigation ensued is sufficient indication that their versions differed. They do agree, however, that the collision took place at or near the entrance of a private road upon a public highway where vision was more or less obscured by bushes. The plaintiff said he was approaching the public way, travelling slowly, and keeping to his right as he was making a right hand turn or curve, that the defendant came into view, driving from the public highway to make a left turn into the private road, but was on his own left side of the road directly in front of the plaintiff's car and "smashed completely into me." He testified that the private road was twenty-one feet wide in the traveled part at the point of impact and there was ample room for two cars to pass each other. In this he is substantially corroborated by a constable called to investigate.

The defendant, on the other hand, asserted that there was but one track or rut in which cars could travel where the private road entered the public way, that both cars occupied it as they approached each other, but he, seeing the plaintiff's car, was able to bring his own to a standstill before his vehicle was struck by that of the plaintiff. He admitted that he was

on the left hand side, but his theory of due care on his own part and negligence on the part of the plaintiff was that he stopped and the plaintiff didn't.

This presents a situation which is clearly for the fact finding tribunal to determine, and it cannot be said that the referee was wrong as a matter of law.

Defendant invokes the rule of the road laid down in R. S., c. 29, § 7:

> "The driver of a vehicle entering a public way from a private road shall yield the right of way to all vehicles approaching on such public way."

But the referee would be justified in finding that rule without application, if he concluded that the plaintiff was proceeding in the only proper course there was for him to follow, and that he would not have interfered with the progress of another car which held its own right hand side when approaching to pass. The real question upon the point is whether the plaintiff should, in the exercise of due care, have seen the defendant negligently approaching, and if so, whether he had opportunity to avoid the accident. *Petersen* v. *Flaherty*, 128 Me., 261, 147 A., 39; *Fitts* v. *Marquis*, 127 Me., 75, 140 A., 909.

While another legal question was presented by the defendant in his brief as to the status of the plaintiff in operating his car on a "private road," and a query as to whether he was a licensee of the owner of the adjoining premises, it was not raised in the pleadings, in the objections to the report of the referee, or in the exceptions to the ruling of the presiding Justice. It did appear in evidence that the plaintiff had a summer residence in the vicinity of the road upon which he traveled back and forth for eleven years. The justifiable conclusion, if the point were open for determination, would be that upon the evidence presented, the plaintiff was entitled to the rights of the ordinary traveler so far as this defendant was concerned.

Exceptions overruled.

POTTER'S INC., PETITIONER FOR REVIEW

vs.

GEORGE K. VIRGIN, RESPONDENT.

York. Opinion, February 1, 1943.

Review of Judgment.

In order for a petitioner to be entitled to a review under R. S. 1930, Chapter 103, Section 1, Par. II, he must establish three things (1) that the testimony referred to was false as to a material fact, (2) that he was surprised and was at the trial unable to prove its falsity, and (3) that he has since discovered evidence which with that before known is sufficient to prove the falsity.

The decision on the above questions rests with the Justice of the Superior Court before whom the petition is brought; but if he decides any one of them without proof and there is nothing in the record to justify his decision, there is an abuse of discretion and the question becomes one of law.

ON EXCEPTIONS BY RESPONDENT.

Petition by Potter's Inc. to review a judgment recovered by the respondent in an action for personal injuries caused by the alleged negligence of the petitioner. The petition was brought under the provisions of Chapter 103, Section 1, Par. II of Revised Statutes, 1930. The petition was granted. The respondent excepted. Exceptions sustained. The case fully appears in the opinion.

George S. Willard,

Gertrude Potter Morin, for the petitioner.

Daniel E. Crowley,

Titcomb & Siddall, for the respondent.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

THAXTER, J. The present respondent was the plaintiff in an action against the petitioner in which the respondent re-

covered a verdict for $1613 for personal injuries caused as alleged by the petitioner's negligence. Judgment was entered at the May Term, 1942. On July 10, 1942, a petition for review was filed. August 11, 1942, the petition was granted. The case is now before us on exceptions by the respondent.

The petition is brought under the provisions of Rev. Stat. 1930, Ch. 103, Sec. 1, Par. II, which read as follows:

> "Any justice of the superior court may grant one review in civil actions, including petitions for partition, and for certiorari, and proceedings for the location of lands reserved for public uses, when judgment has been rendered in any judicial tribunal in said county, if petition therefor is presented within three years after the rendition of judgment, and in the special cases following:
>
> "II. When the petitioner shows that a witness testified falsely to material facts against him in the trial of the action, whereby he was surprised, and was then unable to prove the falsity, but has since discovered evidence, which with that before known, is, in the opinion of the court, sufficient proof that the testimony was false; or if the witness has been convicted of perjury therefor."

The damages allowed were for an injury to the plaintiff's right hand. Elements of damage included a loss of wages and a loss of future earning capacity. There was medical testimony offered by both parties. The jury saw the injured hand. The petition alleges that certain testimony of the plaintiff at the trial relating to a material fact was false and was a surprise to the petitioner who was unable at the trial to prove its falsity, and that since the trial evidence has been discovered which is sufficient proof that the plaintiff's testimony was false. The testimony of the plaintiff at the trial referred to is as follows:

> "Question: 'Whether or not you have sought employment in recent days?' Answer: 'Yes.' Question: 'Where?' Answer: 'Saco-Lowell Shop.' Question: 'Whether or not you

could obtain that employment?' Answer: 'Providing my hand had been normal, yes.' "

The testimony which it is claimed shows the falsity of this evidence was given at the hearing on the petition for review by Russell Bennett and so far as is relevant is as follows:

"Q Was he offered employment by you? A He was.
Q In what capacity? A More or less supervision.
Q In what department? A Tin plate.
Q Was an information form of any kind made out for his case? A There was.
Q Was any day set for him to report to work?
A The day was set for him to report for examination.
Q What was the purpose of that examination?
A To appear before Doctor Dolloff.
Q Was his employment conditioned upon what Doctor Dolloff might say? A Not entirely.
Q Did you have the authority that day to hire regardless of Doctor Dolloff's findings?
A If he appeared for examination and was examined?
Q Yes? A Yes, I had the jurisdiction to hire."
"Q Did he report for that physical examination?
A He did not.
Q Did he ever get in touch with you again about his employment? A He did not.
Q You have never at any time refused him employment because of the injured condition of his hand?
A I have not."

The statute governs here. In order for the petitioner to be entitled to a review it is incumbent on him to establish three things: (1) that the testimony referred to was false as to a material fact; (2) that he was surprised and was at the trial unable to prove its falsity, and (3) that he has since discovered evidence which with that before known is sufficient to prove the falsity. The decision of these questions rests with the jus-

tice of the Superior Court before whom the petition is brought. *Sturtevant* v. *Randall*, 49 Me., 446. If, however, he decides any one of them without proof and there is nothing in the record to justify his decision, there is an abuse of discretion and the question becomes one of law. *Scott, Pet'r for Review* v. *St. Pierre*, 137 Me., 331, 16 A. (2d), 473.

In the present case we shall consider only the first requirement. Was the testimony false as to a material fact? We have great doubt as to the materiality of the testimony. It concerns only the question whether in one specific instance the petitioner was refused employment at a wage not specified. The important elements of damage were covered by the testimony of the doctors, and the jury could have formed their own conclusion from observation of the injury as to the ability of the respondent to work. But what is perhaps more important we are unable to see wherein there is justification for saying that the plaintiff's testimony was false as those words are used in the statute. All that Mr. Bennett says is that he offered the plaintiff employment in a supervisory capacity and this offer seems to have been in part conditioned on the result of a medical examination. The plaintiff may well have formed the opinion that this tentative offer was a refusal of the only kind of work which he felt capable of performing, namely, manual labor, for in referring to his application to the Saco-Lowell shop he says that he could have gotten employment there "providing my hand had been normal." It was the ability to use his hand that was uppermost in his mind. A comparison of the testimony of the plaintiff and of Mr. Bennett convinces us that there is no ground on which to base a finding that the plaintiff's testimony was false.

As the petitioner has not met one of the requirements of the statute, the petition should have been denied. The exception to the ruling of the presiding justice presents to this court under these circumstances an issue of law.

Exceptions sustained.

MAINE CENTRAL INSTITUTE *vs.* INHABITANTS OF PALMYRA.

Somerset. Opinion, February 11, 1943.

Construction of Statutes. Repeal by a Later Enactment. Schools.

In construing different statutes all statutes on one subject are to be viewed as one and such a construction be made as will as nearly as possible make all the statutes dealing with the one subject consistent and harmonious.

As to whether the enactment of a later statute effects an implied amendment or repeal of an earlier one, the test is whether the later statute is so directly and positively repugnant to the former that the two cannot consistently stand together.

It is a reasonable inference that the legislature cannot be supposed to have intended that there should be two distinct enactments embracing the same subject matter in force at the same time.

In such a situation the most recent expression of the legislative will be deemed a substitute for previous enactments and the one having the force of law.

In the instant case it was held that certain amendments of what is now Sec. 92 of Chap. 19, R. S. 1930, impliedly amended what is now Sec. 93 of the same chapter.

Under said Sec. 92 a town has the right to vote to authorize its superintending school committee to "contract with schools in two of the adjoining towns to the exclusion of the school in the third adjoining town." It is a matter of exercise of sound discretion by the superintending school committee.

REPORT ON AGREED STATEMENT OF FACTS.

Action by the plaintiff to recover tuition for instruction of four students whose parents' residences were then in the town of Palmyra. The town of Palmyra at town meeting authorized its Superintending School Committee to contract with the School Committee of Newport and the trustees of Hartland Academy for the schooling of pupils from Palmyra. The Palmyra School Committee made the contracts so authorized. The four students whose tuition is the subject of this action attended the Maine Central Institute which is located in Pittsfield. The plaintiff based its claim on Section 93 of Chapter 19, R. S. 1930; the defendants based their defense on Section 92

of said chapter. Judgment was for the defendants. The case fully appears in the opinion.

Fred H. Lancaster, for the plaintiff.

Locke, Campbell & Reid, for the defendants.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

HUDSON, J. Report on agreed statement of facts. The plaintiff seeks to recover tuition for instruction of four students whose parents' residences then were in the town of Palmyra. The Maine Central Institute is located in the town of Pittsfield which adjoins Palmyra. Also adjoining Palmyra, which has no high school, are the towns of Hartland and Newport.

The town of Palmyra "At its annual town meeting March 3, 1941, acting on an appropriate article therefor contained in the warrant . . . authorized its Superintending School Committee to contract with and pay the Superintending School Committee of the adjoining town of Newport and the Trustees of Hartland Academy located in the adjoining town of Hartland, respectively, for the schooling of pupils from Palmyra in the studies contemplated by Sec. 83 of Chap. 19, R. S. [1930] above-mentioned, viz: high school education for the school year 1941-42."

Contracts so authorized were executed, and during the school year of 1941-42 Palmyra's high school pupils, excepting the four whose tuition is in controversy here, attended either Hartland Academy or the high school in Newport.

Upon the making of the contracts, "The students, their parents, and Maine Central Institute were seasonably notified of the provision made by Palmyra for schooling of its pupils at Newport High School and Hartland Academy. . . ." But, nevertheless, the parents of these four students sent their children to the plaintiff Institute "over the protest by Pal-

myra that it had made provision for such students at Hartland Academy and Newport High School. . . ."

The plaintiff bases its right to recover on Sec. 93, Chap. 19, R. S. 1930, which in pertinent part reads as follows:

> "Any youth who resides with a parent or guardian in any town which does not support and maintain a standard secondary school may attend any approved secondary school to which he may gain entrance by permission of those having charge thereof, . . . and in such case the tuition of said youth, not to exceed one hundred dollars annually for any one youth, shall be paid by the town in which he resides as aforesaid. . . ."

Palmyra bases its defense on Sec. 92, Chap. 19, R. S. 1930, which in pertinent part reads:

> "Any town which does not maintain a free high school of standard grade may, from year to year, authorize its superintending school committee to contract with and pay the superintending school committee of any adjoining town or the trustees of any academy located within such town or in an adjoining town, for the schooling of pupils within said town in the studies contemplated by section eighty-three of this chapter. . . . When a town has made a contract as provided for in this section, the tuition liability of said town shall be the same as if a free high school were maintained in accordance with section eighty-three of this chapter, and the expenditure of any town for schooling of pupils as provided in this section shall be subject to the same conditions and shall entitle such town to the same state aid as if it had made such expenditure for a free high school."

Sec. 93 had its origin in Chap. 68, P. L. 1903, which so far as material to the question here raised is substantially the same as the present Sec. 93.

Sec. 92 originated in Sec. 7, Chap. 124, P. L. 1873, and then read in material part as follows:

> "Any town may from year to year authorize its superintending school committee to contract with and pay the trustees of *any academy in said town,* for the tuition of scholars within such town, in the studies contemplated by this act, under a standard of scholarship to be established by such committee. . . ." (Italics ours.)

Said Sec. 7 is found later in Sec. 34, Chap. 11, R. S. 1883, and in Sec. 62, Chap. 15, R. S. 1903, in substantially the same language. But on March 11, 1905, Sec. 62 of Chap. 15, R. S. 1903, was amended (see Sec. 13, Chap. 48, P. L. 1905), permitting the contract to be made also "with the school board of any adjoining town," and on March 25, 1911 (see Chap. 88, P. L. 1911), Sec. 62 of Chap. 15, R. S. 1903, as amended by Chap. 48, P. L. 1905, was repealed and in substitution thereof a new Sec. 62 was enacted whereby the contract could be made with "the superintending school committee of any adjoining town or the trustees of any academy located within such town or in an adjoining town."

The defendants' contention is that after these amendments of 1905 and 1911, a child residing with his parent in a town without a high school had no right to attend an outside school at the expense of the town for tuition unless the town failed to contract as provided in Sec. 92. The question then is whether said amendatory acts of 1905 and 1911 impliedly amended the then law, now appearing in Sec. 93.

That these sections, 92 and 93, refer to the same subject matter there is no question. It is well settled in this state that in construing different statutes all statutes on one subject are to be viewed as one and such a construction be made as will as nearly as possible make all the statutes dealing with the one subject consistent and harmonious. *Inhabitants of Turner* v. *Lewiston,* 135 Me., 430, 433, 198 A., 734; *Belfast* v. *Bath,* 137 Me., 91, 15 A. (2d), 249.

For cases dealing with an implied amendment or repeal of an earlier by a later statute, see *Thayer et al.* v. *Seavey,* 11 Me., 284, 286; *State* v. *Woodward,* 34 Me., 293, 295; *Pratt* v. *Atlantic & St. Lawrence Railroad Company,* 42 Me., 579, 587; *Mace* v. *Cushman,* 45 Me., 250, 260; *Jackman* v. *Garland,* 64 Me., 133, 135; *Knight* v. *Aroostook Railroad,* 67 Me., 291, 293; *Holmes* v. *French,* 68 Me., 525, 527; *Smith* v. *Sullivan,* 71 Me., 150, 153; *Staples* v. *Peabody,* 83 Me., 207, 210, 22 A., 113; *Thompson* v. *Lewis,* 83 Me., 223, 226, 22 A., 104; *Starbird* v. *Brown,* 84 Me., 238, 240, 24 A., 824; *Bradford* v. *Hawkins,* 96 Me., 484, 486, 52 A., 1019; *Stoddard* v. *Crocker,* 100 Me., 450, 453, 62 A., 241; *Eden* v. *Southwest Harbor,* 108 Me., 489, 493, 494, 81 A., 1003; *Jumper* v. *Moore,* 110 Me., 159, 161, 85 A., 485; *Bass* v. *City of Bangor,* 111 Me., 390, 394, 89 A., 309; *Veitkunas* v. *Morrison,* 114 Me., 256, 258, 95 A., 947; *Chase* v. *Scolnik,* 116 Me., 374, 377, 102 A., 74; and *State of Maine* v. *Carey,* 136 Me., 47, 50, 1 A. (2d), 341.

In the leading and much cited case of *Starbird* v. *Brown,* supra, it is stated on page 240, 84 Me., page 824 of 24 A.:

> "But the precedents are numerous in support of a general rule which is applicable when it is claimed that one statute effects the repeal of another by necessary implication.
>
> "The test is whether a subsequent legislative act is so directly and positively repugnant to the former act, that the two cannot consistently stand together. Is the repugnancy so great that the legislative intent to amend or repeal is evident? Can the new law and the old law be each efficacious in its own sphere?"

Again, in *Jumper* v. *Moore,* supra, it is stated on page 161 of 110 Me., page 486 of 85 A.:

> "It is, however, a well recognized principle, that where a new legislative act covers the same subject matter as an existing statute, and the two are so plainly repugnant

> and inconsistent that they cannot stand together, the old statute is to be regarded as amended by the new so as to become conformable thereto."

Implied amendment or repeal of an earlier statute by a later one rests "on the reasonable inference that the legislature cannot be supposed to have intended that there should be two distinct enactments embracing the same subject matter in force at the same time, and that the new statute, being the most recent expression of the legislative will, must be deemed a substitute for previous enactments, and the only one which is to be regarded as having the force of law." *Knight* v. *Aroostook Railroad,* supra, on page 293.

Then can Sections 92 and 93 consistently stand together? Is there a repugnancy so great that the legislative intent to amend or repeal is evident? Following the amendments of 1905 and 1911, Palmyra had a legislature-granted right, as did every other town, to vote to authorize its school committee to contract for outside instruction of its high school pupils in any approved high school or academy in any adjoining town. Did the legislature, however, intend to give a town this right and at the same time intend to leave with the child the right to attend any outside approved school in the state to which he might gain entrance and make the town pay for tuition? We think not. Such intentions would clearly spell absolute repugnancy.

Counsel for the defendants well state in their brief:

> "If section 93 means what the plaintiff says it does, then we can see no reason for section 92 at all. It should have been repealed. What good to a town is section 92 authorizing it to contract for the stated purposes if the students now have the right to attend what school they wish without the consent or permission of their own town's school committee?"

The amendments of 1905 and 1911, because of direct and positive repugnancy to the then existing law (now Sec. 93), impliedly amended it, so that thereafter, if a legal contract were made under now Sec. 92, a youth who resides with his parent or guardian in a town which has no high school could not at the town's expense for tuition attend an outside school to which he might gain entrance, but if no such contract were made, he would have that right. Very likely the predecessor statute of the present Sec. 93 was not repealed outright because of the right of the child therein remaining in the event no contract were made.

Finally, the plaintiff contends "that the town of Palmyra could not contract with schools in two of the adjoining towns to the exclusion of the school in the third adjoining town." But there is no such express limitation in the statute nor is there reason for implying such. The town votes the authority to the school committee and then it is for that committee to exercise sound discretion as to the making of the contract or contracts. It might well be to the great convenience of the students so far as travel is concerned to attend schools in two or three adjoining towns and if so, it would be very proper for the committee in the exercise of its discretion to make more than one contract. Probably herein there is such an example, for Hartland is located westerly of Palmyra while Newport is easterly therefrom. We cannot conceive that the legislature intended to make this impossible of accomplishment. Certainly the statutory language does not prevent it.

Judgment for defendants.

NORWAY WATER DISTRICT, PETITIONER,

vs.

NORWAY WATER COMPANY.

Oxford. Opinion, February 23, 1943.

Water Districts. Referendum Elections. Statutes. Eminent Domain. Amendment to Petition.

R. S., c. 8, § 42, warrants the conclusion reached by analyses of applicable constitutional and statutory provisions that a single method is provided for notification and conduct of meetings called for the sole purpose of casting a ballot for the election of county, state and national officers, and that the same method is used for the determination of questions submitted to the people by the legislature.

This method has application to a meeting which is confined to the one purpose of balloting upon a single referendum question submitted by the legislature for determination by that portion of the electorate which is affected.

The fundamental purpose is properly to inform legal voters of the District of the time and place when and where they may have opportunity to cast their ballots upon the particular question submitted for their determination by the Act.

This purpose is served, whether the town meeting be presided over by a moderator or by a selectman, this being the only difference in the two methods as to the call, advertisement and conduct of the meeting.

If reality be ascertained and patent, the faulty recital thereof which would result in perpetuation of error does not control, if proceedings are still pending.

In accordance with the established rule in judicial proceedings in this State, and particularly those governed by equity practice, amendments are liberally allowed in the furtherance of justice, and to insure that every case, so far as possible, may be determined on its merits.

ON REPORT FROM SUPREME JUDICIAL COURT, OXFORD COUNTY, IN EQUITY.

The charter of the Norway Water District authorized the District to acquire by purchase or by the right of eminent domain the entire property of the Norway Water Company, a private corporation. Upon failure to reach an agreement as to the purchase price of said property the Norway Water Dis-

trict instituted condemnation proceedings. The Norway Water Company attacked the validity of the proceedings for the organization of the Norway Water District and alleged other vital errors. Judgment was in favor of the Norway Water District and the case was remanded to the sitting Justice for further appropriate proceedings upon the petition presented by the Norway Water District. The case fully appears in the opinion.

Albert J. Stearns,

Locke, Campbell & Reid, for the petitioner.

Merrill & Merrill, by *Edward F. Merrill,* for respondent.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

MANSER, J. The Norway Water District was chartered by c. 55, P. & S. Laws of Maine 1941, as a quasi-municipal corporation. The Act was conditional until approved by a majority vote of the legal voters of the District at an election to be held not later than January 1, 1942. It was provided that the affairs of the District should be managed by three trustees elected by the municipal officers of the town of Norway. The District was authorized to acquire by purchase or by the exercise of the right of eminent domain the entire property of the Norway Water Company, a private corporation theretofore furnishing the water supply in Norway.

Proceedings were taken to secure the local referendum, an election was held, the ballot was in favor of the acceptance of the Charter, trustees were chosen, and upon failure to agree as to purchase price, the present condemnation proceedings were instituted.

The Norway Water Company and the Old Colony Trust Co., trustee for the benefit of bond holders of the water company, joined in attacking the validity and sufficiency of the proceedings to perfect organization under the Charter, and

further alleged errors of vital consequence in the proceedings instituted by the District trustees.

Upon the issues thus raised, the case was reported to this Court by agreement of the parties and with approval of the Chief Justice presiding.

The legislative and judicial history of water districts in Maine provides enlightenment on the matters to be considered. The first instance in this State where the legislature decided that public interest and welfare of a group of communities in a water supply for municipal and domestic service were sufficient to warrant the creation of a quasi-municipal corporation, which would take the place of the existing private water company, occurred in 1899 when under c. 200, P. & S. Laws of that year, the Kennebec Water District was created. Many objections, on constitutional and legal grounds, were raised and the Court was called upon to consider a wide range of questions, the determination of which removed doubts and uncertainties and sanctioned and expounded the legislative procedure there adopted. See *Kennebec Water District, in Equity* v. *Waterville,* 96 Me., 234, 52 A., 774, and *Kennebec Water District* v. *Waterville,* 97 Me., 185, 54 A., 6, 60 L. R. A., 856.

Since that time the feasibility, convenience and benefit of such public corporations have become increasingly apparent, and the legislature has granted many charters in districts comprising a part or all of a city, a town, or a combination of both. The initial legislation furnished a pattern which has been largely followed. In practically all of the charters, the establishment of a water district is made subject to a local referendum to make sure that the community affected is in favor thereof. The acquisition of the private system of water supply is provided for, either by purchase, if agreement can be reached as to price, or in event of failure to agree, by the exercise of the right of eminent domain, proper safeguards being provided to the end that the private Company shall receive just compensation for its assets and franchises. A petition is presented

to a Justice of the Supreme Judicial Court seeking the appointment of appraisers to determine the value of the plant, property and franchises, subject to final confirmation by the Court. While the jurisdiction thus given to the Court is special, and to be exercised only as provided for in the Act, yet it follows the course of equity procedure, by express provision in some charters, and by clear implication in all others. The guiding principle, therefore, has been expressed and has long had recognition that where important rights affecting a community are involved and the substantial rights of all parties are protected, technical objections are entitled to but little weight. *Kittery Water District* v. *Agamenticus Water Co.*, 103 Me., 25.

The first objection attacks the validity of the referendum election, and if sustained, the entire charter becomes a nullity, and the proceedings taken thereunder void. It is that the election was not legally called, advertised and conducted. The Act (§ 18) provides that it "shall take effect when approved by a majority vote of the legal voters of said district, voting at an election specially called and held for the purpose, by the municipal officers of the town of Norway, to be held at the voting places in said town; . . . Such special election shall be called, advertised and conducted according to the law relating to municipal elections; . . . The town clerk shall reduce the subject of this act to the following question: 'Shall the act to incorporate the Norway Water District be accepted?' and the voters shall indicate by a cross placed against the words 'Yes' or 'No' their opinion of the same. The result shall be declared by the municipal officers and due certificate thereof filed with the secretary of state by the clerk of said town."

The gravamen of the objection is that the procedure followed was that for town meetings for the election of county, state and national officers, and instead the meeting should have been called and conducted under the statutory provisions relating to regular town meetings.

There is no constitutional or statutory provision specifically

designating a method of procedure for "municipal elections" *eo nomine*. What then was the legislative intent by the use of this term? The same phraseology is found in practically all of the acts which provide for a local referendum, whether for cities or towns. The usual and regular town meeting procedure provided by R. S., c. 5, §§ 2-35, inclusive, has no application to cities, yet both cities and towns are municipalities.

Then we find § 36 of c. 5, R. S. making express provision that none of the preceding sections as to ordinary town meetings are applicable to town meetings for the choice of governor, senators and representatives and that town meetings for that purpose shall be held as the constitution directs. So we start out with different provisions as to procedure with regard to town meetings for the election of state officers.

The Constitution of Maine, Article IV, Part First, prescribes regulations for town meetings for the election of state representatives and also adapts similar procedure to such elections in cities.

Article IV, Part Second, § 3, provides that meetings within the State for the election of senators shall be notified, held and regulated in the same manner as those for representatives.

Article V, Part First, § 3, provides that meetings for the election of governor shall be notified, held and regulated in the same manner as those for senators and representatives.

R. S., c. 8, § 12, provides that municipal officers, sixty days before any election, may divide towns and wards of cities into not more than three convenient polling districts.

§ 23 of said chapter provides that the selectmen shall issue their warrant for state elections and "such meeting shall be warned like other town meetings." § 24 provides that the selectmen shall preside and have all the powers of moderators of town meetings.

Finally, we note § 42, which provides:

> "All town meetings required for election of county officers, state auditor, United States senator, representatives

to congress, or of electors of president or vice-president of the United States, or for the determination of questions submitted to the people by the legislature, shall, as to calling, notifying, and conducting them, be subject to the regulations made in this chapter for election of governor, senators and representatives, unless otherwise provided by law."

Clearly this section warrants the conclusion reached by analysis of all the foregoing constitutional and statutory provisions that a single method is provided for notification and conduct of meetings called for the sole purpose of casting a ballot for the election of county, state and national officers, and that the same identical method is used "for the determination of questions submitted to the people by the legislature."

Logic, therefore, compels the conclusion that the expression used in the charter "Such special election shall be called, advertised and conducted according to the law relating to municipal elections," has application to a meeting which is confined to the one purpose of balloting upon a single referendum question submitted by the legislature for determination by that portion of the electorate which is affected. Here, as in a state-wide referendum, the municipal officers are required to declare the result and the town clerk is required to file a certificate thereof with the Secretary of State. In regular town meetings there is no such requirement.

The fundamental purpose of the Act in this respect is to properly inform legal voters of the District of the time and place when and where they may have ample opportunity to cast their ballots upon the particular question submitted for their determination by the Act.

The preliminary requirements as to qualification of voters, warrant issued by selectmen designating time and place of meeting, and proof of notice by officer's return, are essentially the same for an ordinary town meeting as they are for town meetings for elections, enumerated in R. S., c. 8, § 42.

The basic difference is that a moderator is provided for in usual town meetings. Such officer is eliminated in meetings for elections, and the selectmen take his place. The office of moderator is to preside at and control a meeting or assembly where the citizens gather to discuss, deliberate and decide the prudential, administrative and political affairs of the town and to elect town officers. He regulates the business, declares the votes and when such declaration is questioned, makes certain by polling the voters. No person can speak until leave is obtained of the moderator, and all must keep silent at his command. He may remove a person guilty of disorderly conduct.

In elections there is no need for a presiding officer with such duties and responsibilities.

But the respondents assert that the case of *Kittery Water District* v. *Agamenticus Water Co.*, supra, is decisive to the contrary. There the town warrant provided for the election of a moderator and one was chosen and presided and the Court ruled that such a town meeting was effectual. The statement of the Court is:

> "The charter provided that the meeting should 'be called, advertised and conducted according to the laws relating to municipal elections.' Chapter 4 of R. S. (now c. 5 in 1930 Revision) relating to elections in towns applied and governed. This special meeting was duly called and its proceedings had in accordance with the provisions of that statute and the charter to which it applied."

The chapter referred to is that containing the provisions relating to ordinary town meetings. The method provided for meetings for elections was then contained in R. S., 1903, c. 6, § 54 et seq., now R. S. 1930, c. 8, § 23 et seq. From the record in that case, it appears that the act there construed, P. & S. L. 1907, c. 424, provided that the affairs of the District should be managed by a board of three trustees to be chosen by ballot at the meeting called to accept the Act, and that the Water District at any legal meeting thereof might adopt by-laws.

The warrant for the meeting included these as matters to receive attention as well as the balloting upon the acceptance of the charter. The Court evidently was of opinion that the nomination and election of trustees, the presentation as to their qualifications and the discussion as to by-laws, made the services of a moderator appropriate.

In the Act now under scrutiny, there were no trustees to be elected at the meeting for acceptance of the charter and no by-laws to be considered. Provision was made (§§ 6, 7) that the trustees should be elected by the municipal officers of the town of Norway within three days after the referendum meeting, while by-laws were to be thereafter adopted by the trustees. Here, then, it is of significance that the Act stripped the referendum meeting of every duty but one — the referendum ballot. In this connection, it is of interest to note that in this Act, as in most of the more recent similar Acts, it is provided that the referendum shall be had "at an election specially called and held for the purpose at the voting *places* in said town." Legislative intent appears to sanction more than one place for the accommodation of voters, and to negative the theory of the necessity of a moderator to regulate and control a deliberative assembly, or intention that the voters should be congregated at one time and place to enable them to participate in such an assembly.

Inasmuch as the preliminary requirements as to warrant, notice, return of officer, and legal qualifications of voters, are identical under both methods, the fundamental purpose to properly inform legal voters of the District of the time and place or places where they might have ample opportunity to signify their will upon the question submitted, is fully served, whether the meeting be presided over by a moderator or by a selectman. As the Court said in the Kittery case above cited:

> "The referendum to the people was designed to obtain an expression of their wishes. Such a full expression as was here had should not be disregarded unless some impera-

tive statute or rule of law requires. We find none. We hold that the meeting was legal and the acceptance of the charter valid."

The statement of the Court to the effect that the statutory provisions relating to ordinary town meetings "applied and governed," was perhaps more positive than necessary, and in any event, applied only to the organizational procedure there provided. Under the circumstances of that case, the method used was appropriate and the decision upholding the validity of the meeting proper. This, however, cannot be regarded as invalidating the meeting called under the Act here considered, and which accomplished a like purpose of properly informing the voters of the time and place of meeting, and giving ample opportunity for a full expression of their wishes. Here the voters signified their will in the usual ballot methods in this State, as provided for in the Act. The polls were open for nine hours, from ten A.M. to seven P.M. 569 ballots were cast during that period, of which 567 were in favor and two opposed. We find no "imperative statute or rule of law" in the present case which requires that the will of the electorate, so definitely made manifest, should be thwarted.

The case of *Kittery Water District* v. *Kittery Water Co.*, supra, was followed in *Rumford & Mexico Bridge District* v. *Mexico Bridge Co.*, 115 Me., 154, 98 A., 625. There the referendum provision required that the voters of Rumford Falls Village Corporation and the voters from the Mexico section of the District should hold separate meetings to be "called, warned and conducted according to the laws relating to municipal elections." The Court said:

"A similar phrase is found in many of the charters for water districts, which were submitted to the voters for approval. In *Kittery Water Dist.* v. *Water Co.*, 103 Me., 25, 67 A., 631, it was held that, under a similar provision, Chapter 4 of Revised Statutes relating to town elections applied and controlled."

The actual point there passed upon was the claim that a special provision of the Rumford Falls Village Corporation charter required publication of notice in a newspaper, which was not seasonably done. It was the only infirmity suggested. The Court said further:

> "It is not claimed that the meeting was not warned in all respects according to the laws relating to town elections."

Inasmuch as the method of warning or calling a meeting is the same in both instances, and the point decided by the Court was that a special provision for newspaper publication did not have application, the decision itself is not to be deemed adverse to the present holding.

Our Court has said:

> "The rules for conducting an election contained in the statute, are directory and not jurisdictional in their character. They are intended to afford all citizens an opportunity to exercise their right to vote, to prevent illegal votes, and to ascertain with certainty, the true number of votes, and for whom cast." *Rounds, Petitioner,* v. *Smart,* 71 Me., 380 at 388.

With particular application to the situation here considered, we adopt the reasoning of the Court in *East Bay Util. Dist.* v. *Hadsell et als.,* 239 Pac. 38, at pp. 45-46, 196 Cal. 725, as follows:

> "It is thus apparent that the election itself is the controlling feature and the ultimate objective of the statute. If the election has been honestly and fairly conducted, and no one has been injured by the manner in which the preliminary steps leading thereto have been taken, no reason exists for declaring it invalid. In the instant case there was no evidence offered on the part of the defendants tending to show that they had been prejudicially affected by the procedure which had been adopted and followed leading

up to the election. As heretofore set forth, the findings by the court were to the effect that no error or irregularity or omission in the proceedings affected any of the substantial rights of the defendants; that they had full notice that the proposition for the issuance of the bonds would be submitted to the electors of the district at an election to be held on the said 4th day of November, 1924; and that the vote at such election was a full and fair expression of the will of the electors of the district who were qualified to vote at said election upon said proposition. Those findings, while in some respects possibly subject to appellants' criticism that they are but conclusions of law, nevertheless speak the truth as an ultimate expression by the court of the conditions surrounding the situation.

"The books are filled to overflowing with statements of the rule, in substance, that, wherever possible from a standpoint of legal justice to validate an election, it is the duty of the court to do so."

The preliminary proceedings for calling ordinary town meetings and those for calling special elections being identical, and the statute concerning elections giving to the selectmen all the powers of moderators (R. S., c. 8, § 24) it is the opinion of the Court that a meeting held to ballot upon a question submitted to the voters would be valid whether provision was made for the election of a moderator, or whether a selectman presided. Under the particular Act now passed upon, a moderator was not a necessary official. The referendum meeting was legally called and held.

The remaining questions for determination have reference to certain amendments in the proceedings which were submitted by the petitioners and allowed by the Chief Justice presiding at the hearing. The officer's return on the referendum warrant, and the town clerk's report required to be filed with the Secretary of State, contained defects and errors which were corrected in accordance with the facts, as fairly shown

by the record. While it is claimed that the election as notified and held was by voters of the town of Norway, and not voters of the Water District, the fact cannot be gainsaid that the check list as prepared contained only the names of voters of the District, and ballots were cast by none others. This was specifically admitted during the hearing by counsel for the respondents. The objection is purely technical and without merit.

There was also objection to the allowance of an amendment making the Old Colony Trust Co., mortgagee under a bond mortgage of the Norway Water Co., a party defendant. This is not insisted upon, and inasmuch as the Trust Co. made a general appearance, joined in the answer of the Water Co., and was represented by counsel, it is evidently abandoned and needs no consideration.

There is one further issue to be considered concerning another amendment submitted by the petitioners, and allowed.

The Charter provided that the Act was subject to approval "by a majority vote of the legal voters of said district" and "only such voters as reside in said district as aforesaid are entitled to vote upon the above question." The petition of the trustees as originally filed alleged that the Act was approved by a majority vote of the inhabitants of the town of Norway. The Act required that the petition be filed on or before July 1, 1942. This was done, but, against objection, petitioner was allowed on August 14, 1942, to amend by striking out the particular allegation and alleging that the Act was accepted by a majority vote by ballot of the legal voters of the Norway Water District, called and held in the manner provided in the Act, that the votes cast were 567 for and 2 against, which vote exceeded 20% of the total number of names on the check list, as was also required by the Act, but not alleged in the original petition.

Complain is that an amendment, even though in accordance with the fact, could not be allowed after July 1, 1942, the time limit for presentation of the petition.

In elaboration of the foregoing objection, respondents assert that allegation in the original petition as to acceptance of the Act showed noncompliance instead of compliance with requirements, which were jurisdictional; that the Court, not having jurisdiction at common law but only by special legislative grant in the Charter, the petition must show on its face the jurisdictional facts and must be filed before July 1, 1942. As the petition did not show such jurisdictional facts until amended subsequent to July 1, it was null and void, say the respondents.

Acting in conformity to the established rule that in a judicial proceeding provided for by a special act of the legislature and granting the right of eminent domain, it must be shown that there has been compliance with jurisdictional requirements, the petitioners undertook to allege in their petition that the Act had been approved by the voters under the referendum provision thereof. The Act provided that it should be subject to approval "by majority vote by ballot of the legal voters of the Norway Water District, to wit, that part of the town of Norway which is within the limits embraced by the Norway Village Corporation," and the total of votes so cast for and against the acceptance of the Act must exceed 20% of the total number of voters on the check list of voters in said district.

The petition as originally presented alleged acceptance of the Act "by majority vote by ballot of the inhabitants of said *Town of Norway* qualified to vote in Town affairs, at a special meeting called for the purpose subsequent to said twenty-sixth day of July and before the first day of January, 1942, to wit, on the fourth day of November, 1941, *which meeting was called and held in the manner provided in said Act.*" (Emphasis ours.)

The next paragraph begins: "That within three days after the meeting of the voters of said *District* to accept said Act" etc.

The obvious and patent error in statement is the inadvertent use of "Town of Norway" instead of Norway Water District.

There was also an error of omission in the failure to allege that the total votes exceeded 20% of the eligible voters.

The petition was filed before July 1, 1942, as required by the Act. Hearing was assigned for July 21, 1942, and thence continued until August 14, 1942, when the errors and omissions in the petition were corrected by amendment.

The position of the respondents is the petition could not be amended as to jurisdictional allegations, and even if that were possible, corrections must be made before July 1, 1942, because Section 19 of the Act (c. 55, P. & S. 1941) provided:

> "If said water district shall fail to purchase or file its petition to take by eminent domain, before July 1, 1942, . . . then this act shall become null and void."

Emphasizing contention, the respondents say in effect that as the petition not only failed to show but negatived jurisdiction of the Court, it was a nullity, therefore no petition was before the Court, and by express fiat of the legislature the Act itself became null and void.

In judicial proceedings in this State, and particularly those which are governed by equity practice, it is the policy of the legislature and the uniform rule adopted by our Court that amendments should be liberally allowed in the furtherance of justice, and to insure that every case, so far as possible, may be determined on its merits. This is not peculiar to our own jurisdiction, but instead finds practical unanimity of accord throughout the country. 41 Am. Jur., Pleading, §§ 288, 292.

R. S., c. 91, § 42, provides as to equity causes:

> "The bill of complaint shall state the material facts and circumstances relied on by the plaintiff, with brevity, omitting immaterial and irrelevant matters, and may be amended or reformed at the discretion of the court, with or without terms, at any time before final decree is entered in said cause."

In *Conway Fire Insurance Co.* v. *Sewall*, 54 Me., 352 at 357, the Court said:

> "But, if the declaration was insufficient, it might have been amended while the cause was on trial, by inserting the allegation that notice and proof of the loss was in conformity with the statute, to which reference has been had. All that is required in amendments is, that the cause of action should remain the same. Within this limit, amendments, to reach the merits of the case, are most liberally allowed. A declaration so defective, that it would exhibit no sufficient cause of action, may be cured by an amendment, without introducing any new cause of action. *Pullen* v. *Hutchinson*, 25 Me., 249."

See also *Solon* v. *Perry*, 54 Me., 493; *Thomaston* v. *Friendship*, 95 Me., 201, 49 A., 1056.

Here the jurisdictional facts actually existed, as shown by the record. The parties were all before the Court. There had been no determination of their rights. The answer of the respondents had not been filed when the amendments were allowed. Ample opportunity was thus afforded to the defense to traverse the facts.

If reality be ascertained and patent, the faulty recital thereof which would result in perpetuation of error should not control, if proceedings are still pending.

But, assert the respondents, our Court has held otherwise, and cite as decisive thereof the case of *Newcastle* v. *County Commissioners*, 87 Me., 227, 32 A., 885. There, the Commissioners received a petition to alter a road in Newcastle after the selectmen of that town had refused to do so. The petition failed to state many facts necessary to give the Commissioners jurisdiction. They, however, acted upon the petition as drawn and decided to make the alteration in the road. Thereafter, the petition was amended. On certiorari the Court said, at p. 230:

> "But they [the Commissioners] have no right to amend a petition, signed by others, after it has been acted upon by them, and thus confer upon themselves a jurisdiction

> which they did not possess when the petition was presented."

That is not this case. The distinction appears by the comment of the Court prefacing the above cited quotation, when it said:

> "We do not doubt the authority of county commissioners to amend the record of their own doings."

Indeed, in a similar proceeding, decided at almost the identical time by the Court composed of the same Justices, in *Donnell* v. *County Commissioners,* 87 Me., 223, 32 A., 884, it was held:

> "On petitions of this sort, appropriate evidence may be received in aid of a defective record that would authorize amendments according to the fact. No such evidence is offered or suggested in this case."

So, too, the case of *Dinsmore* v. *Auburn,* 26 N. H., 356, relied on by the respondents, is to be read in the light of the fact that amendment vital to maintenance of the action was offered too late to be given effect, as Commissioners had already acted without jurisdiction.

Our Court has already well said in *Inh. of Durham, Appellants,* 117 Me., 131 at 134, 103 A., 9 at page 10:

> "Statutory requirements for taking private property for the public welfare are to prevent injustice and ensure property compensation, but not to needlessly delay what public convenience and necessity demand."

Further discussion appears unnecessary. The careful research and earnest endeavor of counsel for the respondents, who frankly state that they feel justified in raising every possible legal objection to the maintenance of these proceedings, no matter how technical it may be, has been painstaking and thorough, but not convincing. We hold that the proceedings have been regular, that such errors as were made in return, re-

ports and pleadings were amenable to correction, and have been so amended in accordance with the facts; that the petition for condemnation proceedings is properly before the Court, and that nothing has been done to nullify the Act of the legislature, to thwart the will of the public, or to deny to the respondents the rights accorded to them by the legislation. The case is accordingly returned to the sitting Justice for further appropriate proceedings upon the petition now pending in accordance with the provisions of the Act of incorporation of the Norway Water District, chapter 55 of the Private and Special Laws of Maine, 1941.

So ordered.

PHILIP M. BURNHAM ET AL. *vs.* AUGUSTUS G. HECKER.

Cumberland. Opinion, March 2, 1943.

Account. Burden of Proof. Evidence. Directed Verdict.

When a prima facie case is made out, there is imposed on a defendant the burden of offering a basis for defense.

In the absence of evidence which would have authorized a jury to find that some particular item in an account was wrong or that the amount charged was excessive, instruction to the jury to return a verdict for a plaintiff for the full amount is proper.

ON EXCEPTIONS BY DEFENDANT.

Action on account annexed. The plaintiff made out a prima facie case. The defendant did not dispute any particular item but claimed that it exceeded the amount which, in a conversation with one of the plaintiffs, the defendant stated he wanted to spend and was told by such plaintiff that the work would not cost so much as that. The justice presiding in the court below directed a verdict for the plaintiff. Defendant excepted. Exceptions overruled.

Bernstein & Bernstein, for the plaintiffs.

Carroll B. Skillin,

Philip F. Thorne, for the defendant.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, JJ.

MURCHIE, J. This case comes to the Court on exceptions (1) to an evidence ruling, and (2) to the action of the Justice presiding below in directing a verdict for the plaintiff. The action was on an account annexed, and the plaintiffs made out a prima facie case, under R. S. 1930, Chap. 96, Sec. 129, by offering an affidavit in the usual form, which was admitted without objection.

The defense offered does not challenge any item in the account sued either for work performed or for materials furnished, or the amount of the charge for any individual item, but is rather that the aggregate of the account sued and another previously paid by the defendant in connection with the same job exceeds $1000, which amount he had told one of the plaintiffs when engaging them to do the work was all he wanted to spend, and was answered that it would not cost so much. The account sued amounts to $657.78. It appears in evidence that the defendant had previously paid something in excess of $1,204.00 on account, at a time before the job was completed. The defendant sought to introduce in evidence a receipted bill, which the bill of exceptions discloses read in the amount of $1,024.58. He admitted that the plaintiffs had furnished all the labor and materials itemized in the account sued and that there was no duplication therein of anything paid for in the settled account. The sole basis on which the evidence was offered was to show a cost for all the work amounting to $1,682.36, as against the conversation about a maximum cost not to exceed $1,000.00. This, except for the certainty of the exact amount, was already in evidence.

The defendant does not contend that the plaintiffs contracted to do the work for $1,000.00. He admits that he had not been able to advise the plaintiffs in full detail as to all the work involved in the changes in his store which were under

consideration. The evidence discloses that he originally asked for a cost estimate; that he was advised that the making of one would cost money, and would involve blueprints and "what not"; and that he assented to having the work done on a "day to day" basis. There is no dispute but that the bill rendered and paid and the bill sued itemize the cost of the work done, somewhat, although not much, more than was originally contemplated; and that the charges, in and of themselves, are just and reasonable.

There is no merit in the exception to the evidence ruling. Without reference to the fact that the defendant had already testified he had paid a sum almost exactly equal to that shown in the receipted bill in connection with the work, and that he had recounted the limited cost conversation, it is definitely admitted that nothing in the receipted bill would challenge any item in the account sued.

Nor is there merit in the exception to the directed verdict. The plaintiffs made out a prima facie case by affidavit. The defendant proved neither that the account was in any respect wrong nor that he was entitled by contract to have the work done for any particular sum less than the total of the just and reasonable charges for labor and materials. When the party having "the burden of proof upon an issue necessary to the maintenance of an action, or to the defense of a prima facie case, introduces no evidence which, if true, . . . will authorize the jury to find in his favor," a verdict against him may be directed. *Heath, Ex'r.* v. *Jaquith,* 68 Me., 433; *Moore* v. *McKenney,* 83 Me., 80, 21 A., 749, 23 Am. St. Rep., 753; *Market and Fulton National Bank* v. *Sargent,* 85 Me., 349, 27 A., 192, 35 Am. St. Rep., 376; *Inhabitants of Woodstock* v. *Inhabitants of Canton,* 91 Me., 62, 39 A., 281. Under such circumstances a jury should be so instructed; *Jewell et al.* v. *Gagne,* 82 Me., 430, 19 A., 917; *Inhabitants of Wellington* v. *Inhabitants of Corinna,* 104 Me., 252, 71 A., 889. Exceptions to a refusal of such instruction are maintainable. *Cate* v. *Merrill et al.,* 109 Me., 424, 84 A., 897.

The rulings below excluding the evidence and directing the verdict were correct.

Exceptions overruled.

FRANKLIN PAINT COMPANY *vs.* PATRICK J. FLAHERTY.

Cumberland. Opinion, March 2, 1943.

Account. Non-Acceptance of Goods. Reasonable Time.

In an action of assumpsit on an account annexed, recovery of the purchase price may not be had unless acceptance of the goods sold be shown.

Under the Uniform Sales Act (Par. (2) of Sec. 43, Chap. 165, R. S. 1930) "Where by a contract to sell or a sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time."

A reasonable time is such time as is necessary conveniently to do what the contract requires should be done.

What constitutes a reasonable time on undisputed facts is a question of law.

Where an act constitutes a business transaction, there is a presumption that it was conducted in the regular and usual manner.

An order for goods received in Cleveland, Ohio, on September 15, 1941, and not delivered by the seller to the carrier in Cleveland until September 26, 1941, was, under the facts in this case, sent "within a reasonable time," after receiving the order.

ON EXCEPTIONS BY THE PLAINTIFF.

Action to recover the price of thirty gallons of paint ordered from the plaintiff by the defendant. No time was set for the delivery of the paint. The plaintiff delayed sending the paint until it had satisfied itself as to the financial standing of the defendant. The defendant refused to accept the paint on the ground that delivery was not made within a reasonable time. The case was heard by the presiding justice without a jury. He gave judgment for the defendant. Plaintiff excepted. Exceptions sustained. The case fully appears in the opinion.

Joseph E. Hall, for the plaintiff.

Richard S. Chapman, for the defendant.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, JJ. CHAPMAN, J., not participating.

HUDSON, J. The plaintiff sues to recover on account of an alleged sale of thirty gallons of roofing paint. The writ contains two counts in assumpsit, one an account annexed and the other a special count for nonacceptance. The presiding Justice heard and decided the "cause without the aid of the jury," the parties agreeing thereto. R. S. 1930, Chap. 91, Sec. 26. His decision was for the defendant. The case comes up on the plaintiff's bill of exceptions, corrected under Chap. 86, P. L. 1941.

Clearly the action is not maintainable on the first count, for "To maintain an action for the price, actual acceptance must be shown." *Chase* v. *Doyle,* 121 Me., 204, 206, 116 A., 267, and cases cited therein. It is admitted the paint was not accepted. Recovery if had must be on the second count charging non-acceptance.

The claimed justification for nonacceptance was an asserted unseasonable "delivery within the wording of the Sales Act."

Par. (2) of Sec. 43, Chap. 165, R. S. 1930 (Uniform Sales Act, in force both in Ohio and Maine) provides: "Where by a contract to sell or a sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time."

Reasonable time depends upon the facts and circumstances of the particular case, "such as the parties may be supposed to have contemplated in a general way in making the contract." *Hartman Coal Co., Inc.* v. *William J. Howe Co., Inc.,* 222 N. Y. S., 584, 586. Our court has stated that "a reasonable time is such time as is necessary conveniently to do what the contract requires should be done." *Hollis* v. *Libby et al.,* 101 Me., 302, 309, 64 A., 621, 624. "It is firmly settled in this State that what constitutes reasonable time, on undisputed facts, is not for the jury, but is a question of law." *Andrews* v. *The Dirigo Mutual Fire Insurance Company,* 112 Me., 258, 262, 91 A.,

978, 980. The facts in this case on this issue of reasonable time are undisputed.

Then as a matter of law did the plaintiff send this paint within a reasonable time? The record shows that the order was received in Cleveland, Ohio, on September 15, 1941. The ordered paint, way-billed "in the name of the defendant," was there delivered to the carrier on September 26, 1941. It was then that the plaintiff sent this paint to the defendant.

It appears from the bill of exceptions (seen and agreed to by the defendant) that the plaintiff was doing a credit business which required knowledge of the financial responsibility of buyers. In the bill of exceptions it is stated:

> "In the instant case the proposed buyer did not furnish this knowledge and seller was obliged to obtain the necessary information from and under his standing contract with Dun & Bradstreet, a well known commercial reporting concern."

Immediately upon receipt of the order, the plaintiff sought this knowledge from Dun & Bradstreet and received their report on September 25, 1941. It shipped the paint on the next day. Its place of business, as stated, was in Cleveland. The defendant's residence was in Portland.

The detail of what was done to obtain knowledge of the defendant's financial responsibility is lacking: for instance, as to how much correspondence was reasonably necessary, the time spent in sending and receiving letters, and what contacts with the defendant and others in Portland were required. No evidence by way of justification for nonacceptance was offered to show that the matter was not attended to with reasonable dispatch and in accordance with mercantile custom. The acquisition of this information being a business transaction, there is a presumption that it "was conducted in the regular and usual manner." 22 C. J., Sec. 46, on page 105.

There being no time fixed when this paint should be sent, the plaintiff had the right to take such time as was "necessary

conveniently to do what the contract" required to be done. *Hollis* v. *Libby*, supra. Moreover, the defendant, not supplying the credit information, must be "supposed to have contemplated in a general way in making the contract" (*Hartman Coal Co., Inc.* v. *Howe Company*, supra) that a reasonable length of time would be taken by the plaintiff to acquire it.

It seems to us that under the facts and circumstances of this case the plaintiff sent this paint "within a reasonable time" after receiving the order. That being so, the defendant had no legal right to refuse its acceptance on that ground.

Exceptions sustained.

CHAPMAN, J., not participating.

STATE OF MAINE *vs.* PATRICK JALBERT.

STATE OF MAINE *vs.* SAM JALBERT.

Aroostook. Opinion, March 2, 1943.

Game Laws Relating to Mink.

The legislative intention to forbid the hunting or the trapping of fur-bearing animals except during stated seasons is plainly apparent in the statute, which expressly designates mink as one of the protected species which shall not be sought by hunting or trapping except during the month of November.

The offense charged in each complaint is set forth with sufficient certainty to furnish knowledge that it describes an act punishable by statute and protects the respondent named from any hazard of double jeopardy.

The Court will consult sound sense rather than captious objections in looking to the meaning of allegations in complaints or indictments.

ON EXCEPTIONS BY RESPONDENTS.

The respondents were charged with having trapped for mink in closed season. They pleaded not guilty in the Northern Aroostook Municipal Court, waived hearing, were adjudged guilty, and then appealed to the Superior Court. In that Court they filed demurrers, which demurrers were overruled. Respondents

excepted. Exceptions overruled. Case remanded for further proceedings in the Superior Court. The case fully appears in the opinion.

Parker P. Burleigh, Jr., County Attorney,

James P. Archibald, for the State.

Arthur J. Nadeau,

James D. Maxwell, for the respondents.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

MURCHIE, J. These cases come to the Court on exceptions by the respondents to the overruling of demurrers on complaints charging that they severally trapped for mink in closed season. Identical wording of the complaints is that on the 20th day of October, 1941, the named respondent:

> "did trap for mink, said 20th day of October 1941, being closed time for the trapping of mink."

The respondents filed pleas of not guilty in the Northern Aroostook Municipal Court, waived hearing, were adjudged guilty, and appealed to the Superior Court. In that Court the demurrers in question were filed and overruled.

Counsel for the respondents does not seriously urge that October 20th, 1941, did not fall within the season which is closed throughout the State for the hunting or trapping of mink, but he urges the principle of law that penal statutes should be strictly construed and cites us to *Allen* v. *Young*, 76 Me., 80; *State* v. *Peabody*, 103 Me., 327, 69 A., 273; and *Commonwealth* v. *Hall et al.*, 128 Mass., 410, 35 Am. Rep., 387. There is no point in a recital of the facts or the exact legal issues involved in any one of these cases, since there is nothing in any one of them which would serve as a precedent for construing R. S. 1930, Chap. 38, Sec. 72, under which the complaints were made, otherwise than as forbidding the hunting

or trapping of mink except during the month of November.

The protection of fish and game is a very fertile field for legislation in this State. The particular statute, as in effect on the date when the offenses charged are alleged to have been committed, after not less than 16 amendements adopted subsequent to the revision of the statutes in 1930, presents the law governing the hunting and trapping of all fur-bearing animals. A particular paragraph declares a closed season on trapping wild animals generally. Another authorizes the training of dogs on foxes, coons and rabbits in a named season. The Legislature heretofore felt it worth while to classify the black bear as a game animal, P. L. 1931, Chap. 127; to repeal that declaration, P. L. 1941, Chap. 179; and to make the same declaration with reference to raccoons, P. L. 1937, Chap. 38. The latter provision is incorporated in the Section under consideration, as was the like provision relative to the black bear while it was effective.

So far as mink are concerned, however, the policy declared by statute has remained unchanged since the phraseology now in use was adopted in P. L. 1935, Chap. 143. The protection of mink has been a legislative policy since 1899, when a closed season was established running from May 1st to October 15th in each year, P. L. 1899, Chap. 42, Sec. 15. Prior to the enactment of P. L. 1937, Chap. 148, special provisions of which are hereafter noted, relatively long-term closed seasons on fur-bearing animals, subject to specified exceptions, had been in effect for a considerable span of years. P. L. 1917, Chap. 219, Sec. 46, declared it for the period from March 1st to October 14th. In 1929, P. L., Chap. 331, Sec. 41, extended it at both ends — from February 1st to November 15th. The 1937 law confirmed the two-year old policy of a perpetual closed season on fur-bearing animals, subject only to such exceptions as were declared by the establishment of annual open seasons of differing durations for different species; that applicable to mink being the month of November only.

Fundamentally the defense rests upon the claim that there

is a repugnancy between the particular line in Paragraph (a) of the Section of the statute which reads:

> "The open season on mink shall be the month of November only." P. L. 1937, Chap. 148,

following a general recital that:

> "There shall be a perpetual closed season on hunting or trapping any fur-bearing animal, except . . . :" P. L. 1935, Chap. 143,

and Paragraph (i):

> "Provided, further, that there shall be a closed season on trapping wild animals from May 15th to October 15th, of each year . . . " P. L. 1939, Chap. 133, as amended by P. L. 1941, Chap. 153.

The defense is asserted on claims (1) that the consolidated effect of these provisions, relative on the one hand to fur-bearing animals and on the other to wild animals, is doubtful or ambiguous as to any animal which might be considered both fur-bearing and wild; (2) that the ambiguity is magnified by the definitions of closed season and open season, contained in R. S. 1930, Chap. 38, Sec. 18, where the one bans all acts which might fall within any of the descriptive words "hunt, pursue, shoot, wound, trap or destroy," while the other declares when "it shall be lawful to take," the word "take" importing a reduction to possession; and (3) the technical ground that the complaints are insufficient in law to bring the offense charged within the ban imposed by Paragraph (a) because they contain no allegation that a mink is a fur-bearing animal.

There is no merit in any of these contentions. R. S. 1930, Chap. 38, Sec. 72, as amended by P. L. 1935, Chap. 143, established a perpetual closed season on the hunting and on the trapping of all fur-bearing animals, except for certain named species and as otherwise specifically provided in the particular Section. Mink was not one of the excepted species. Two years

later the perpetual closed season policy was reaffirmed and a limited open season for mink established. The claim of ambiguity rests exclusively in the enactment of P. L. 1939, Chap. 133, which wrote into R. S., Chap. 38, Sec. 72, a provision creating a closed season of limited duration for wild animals. Counsel argues that "it is generally well known that a mink is a wild animal." Let us so assume. It is certainly well known that a mink is a fur-bearing animal. It is apparent from a reading of the statute, and must have been to anyone who read it, that wild animals, save those excepted from the provisions of Paragraph (i) according to its terms, are protected by a closed season extending from May 15th to October 15th of each year, both days inclusive, and that fur-bearing animals, save again those specially excepted from the provisions of Paragraph (a) for the periods therein declared, are protected by a perpetual closed season. The provision is definite that hunting or trapping mink is forbidden except during the month of November.

The argument as to the conflicting nature of the definitions of the seasons is obviously strained. To take does import reducing to possession, and during the month of November annually, when there is an "open season on mink," such animals may not only be taken, but they may be sought by any means which comes within the common meaning of any of the words descriptive of what is forbidden in a closed season. Not so on October 20th in any year. At that time it is not only unlawful to take them, but to undertake to take them by any means, on fair construction, and by express legislative mandate, through trapping.

Assertion of the insufficiency of the complaints is not merely the lack of allegation that a mink is a fur-bearing animal, but that there was no allegation either that it was a fur-bearing animal or that it was a wild animal. The offense charged is not the trapping of a wild animal, as such. That is not forbidden on October 20th. The offense charged is trapping for mink and the Legislature has classified muskrat, mink, fisher, sable and

bear as fur-bearing animals by naming them specifically in the Paragraph (a) which establishes a perpetual closed season on all such animals. It is sufficient answer to the claim asserted by counsel to note the declaration of Bishop in his Criminal Procedure, quoted and cited with approval in *State* v. *Dunning*, 83 Me., 178, 22 A., 109, that the doctrine is general:

> " 'that the court will consult sound sense to the disregard of captious objections in looking for the meaning of the allegations in the indictment.' "

The offense charged in each complaint is alleged with all necessary certainty to furnish the court or a jury with knowledge as to whether it constituted an act punishable under the statute, and to protect the respondent from any hazard of double jeopardy. *State* v. *Bushey*, 96 Me., 151, 51 A., 872; *State* v. *Simmons et al.*, 108 Me., 239, 79 A., 1069. A mink is undoubtedly a fur-bearing animal. If either defendant on the day alleged did "trap for mink," as alleged in the complaint against him, he violated the statute. There can be no doubt that such is the exact offense charged, nor that it is constituted an offense by language so clear and explicit as to render it unnecessary to grope for construction.

Leave having been granted below for these respondents to plead anew if their demurrers were overruled, the mandate in each case is

Exceptions overruled.
Case remanded for further proceedings in the Superior Court.

EVA M. RANCOURT *vs.* PEARL B. NICHOLS.

Cumberland. Opinion, March 16, 1943.

Forcible Entry and Detainer. Termination of Tenancy at Will. Findings of Fact by Presiding Justice.

Alienation of property occupied by a tenant at will, by either deed or lease, terminates the tenancy.

The alienee of property claiming possession under a lease may treat his grantor's or lessor's tenant at will, who refuses to quit the premises, as a disseisor and maintain process of forcible entry and detainer.

The pendency of equitable proceedings involving title to the property constitutes no basis for delay in adjudication of the rights of the parties to possession.

ON EXCEPTIONS BY THE DEFENDANT.

Exceptions were taken by the defendant to a decision of the Superior Court on an agreed statement of facts in an action of forcible entry and detainer upon an appeal from the decision of the Municipal Court of Portland. The plaintiff had contracted to purchase property occupied by the defendant under a lease. The defendant instituted proceedings in equity seeking to have the contract of sale charged with a constructive trust in her favor, and to enjoin eviction by any process pending final action on the bill in equity. The plaintiff began the action in the present case after making demand for possession. The decision in the Superior Court was for the plaintiff. Defendant filed exceptions. Exceptions overruled. The case fully appears in the opinion.

Gould & Shackley, by *C. H. Shackley*, for the plaintiff.

Elton H. Thompson,

Walter F. Murrell, for the defendant.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

MURCHIE, J. This case comes to the Court on exceptions by the defendant to a decision in the Superior Court on process of forcible entry and detainer. The writ issued from the Municipal Court for the City of Portland on May 12, 1942, returnable a week later, and was there determined notwithstanding a plea, offered by way of brief statement accompanying the general issue, that title to the premises was "in question" and that a bill in equity was pending in the Supreme Judicial Court to determine the rights of the parties under a contract for the sale thereof from the defendant's landlord to the plaintiff, it being claimed that such contract was chargeable with a trust in favor of the defendant.

Appeal was taken to the Superior Court and the decision there is here under review on eight allegations of error. One asserts that the decision was against the weight of evidence, but factual findings by a single Justice acting without the intervention of a jury are not subject to exception if supported by any evidence. *Ayer* v. *Harris,* 125 Me., 249, 132 A., 742. Decision below was on an Agreed Statement of Facts and while the exceptions are variously worded, they present the single issue as to whether on those facts it was error in law to grant relief to the plaintiff under R. S. (1930), Chap. 108, Sec. 1.

It is well established in law that when title to property occupied by a tenant at will is passed by either deed or lease, the tenancy is terminated, *Esty* v. *Baker,* 50 Me., 325, 79 Am. Dec., 616; *Seavey* v. *Cloudman,* 90 Me., 536, 38 A., 540; *Small* v. *Clark,* 97 Me., 304, 54 A., 758; *Karahalies* v. *Dukais,* 108 Me., 527, 81 A., 1011; *Bennett et al.* v. *Casavant,* 129 Me., 123, 150 A., 319; *McFarland et al.* v. *Chase,* 7 Gray (Mass.), 462.

The premises were leased to the plaintiff by defendant's landlord for a term of one year from the date of the sale agreement. The plaintiff forthwith notified the defendant of the fact and made demand that the latter vacate the premises "at once." This was subsequent to the commencement of the equity proceedings, and defendant claims that despite the two efforts to transfer the right of possession, there has been no

alienation of her landlord's title. The claim is that the contract was ineffective because its validity has not been determined in the equity proceedings, and the lease equally so because it could transfer to the plaintiff "no greater right or additional privilege of right of possession" than the plaintiff already had under the contract. "It is certain," quoting counsel, "that on the face of it the lease is colorable and a deliberate attempt to evade the equity proceedings by forcing the issue" under the present process. It is unnecessary to consider whether or not the lease was in fact colorable. In *Bennett et al.* v. *Casavant*, supra, process of forcible entry was permitted a plaintiff claiming under a lease which had been found in equity proceedings to have been executed as "a subterfuge to accomplish the early eviction" of the defendant in possession. "The finding did not annul the lease," the Court stated in that case, nor would it affect the rights of the parties to the present action if it could be demonstrated that like purpose induced the execution of the plaintiff's lease. The defendant's tenancy was terminated by the execution of the lease, if the purchase contract which was intended to carry the right of possession had not already accomplished that purpose. Regardless of the possessory right following the execution of the contract, or upon the filing of the equitable process, the plaintiff on April 14, 1942, which is the date of the lease and of the alleged disseisin, was entitled in law to possession of the property. As against her, the defendant is a disseisor and the remedy sought to be used an appropriate one. *Baker et al.* v. *Cooper*, 57 Me., 388; *Karahalies* v. *Dukais*, supra; *Bennett et al.* v. *Casavant*, supra.

Included among the exceptions alleged by the defendant is one wherein error is claimed because of the neglect or refusal of the Justice below to make any finding on a motion to annul the defendant's recognizance, it being recited in the bill that such a motion was submitted for consideration simultaneously with the principal case. This omission cannot constitute prejudicial error against the defendant, since a valid recognizance is essential to the prosecution of her appeal from the Munici-

pal Court, *Merrill* v. *Hinckley*, 49 Me., 40, and granting her motion would have terminated the proceedings in favor of the plaintiff.

In view of the equitable defense intended to be raised by the brief statement, it is necessary that some note be made of the history of the property immediately prior to the commencement of this particular action. The facts appear partly in the Agreed Statement and partly in the bill in equity which is incorporated therein by reference along with copies of the purchase contract and of the lease. The former is dated March 26, 1942, and the latter April 14, 1942, although it is intended to cover a term of one year commencing on the earlier date. Defendant occupied the premises as a tenant at will prior to February 11, 1942, when the plaintiff hired an apartment therein. On March 25, 1942, the defendant was notified in writing that the property had been sold to the plaintiff. The plaintiff brought process of forcible entry and detainer against the defendant on three occasions subsequent to the execution of the purchase contract and prior to the issue of the present writ, all of which, to quote the Agreed Statement, were nonsuited "for technical reasons." The equity process was instituted following the service of the first forcible entry writ and included among the defendant's prayers was one for an injunction against the prosecution of that process or of any action at law intended to deprive her of full possession and enjoyment of the premises until final determination of the rights of the parties.

In addition to the facts above noted, the bill in equity contains allegations that the defendant negotiated with her landlord for the purchase of the premises and with the plaintiff for a loan to enable her to make a deposit in connection with the purchase, prior to the execution of the sale agreement. The trust is claimed on the basis of a confidential relationship.

The common law rule was undoubted that a defendant in forcible entry and detainer could not prevail on equitable grounds, *Jewett* v. *Mitchell*, 72 Me., 28, but under the Law and

Equity Act, so-called (originally enacted as P. L. 1893, Chap. 217 — Sec. 4 of which is now found in R. S. 1930, Chap. 96, Sec. 18), a defendant in any action at law is permitted to defend by pleading any matter which would be ground for relief in equity. This right is sufficiently broad to include actions of forcible entry, *Shriro et al.* v. *Paganucci,* 113 Me., 213, 93 A., 358, where protection was from forfeiture because of delay in the payment of rent.

There is, however, a definite limitation of the right conferred by this statute which is clearly stated in *Martin et al.* v. *Smith et al.,* 102 Me., 27 at 31, 65 A., 257 at 259, as follows:

> "The statute does not go so far as to provide for the separate determination of a legal right and of a distinct, independent, equitable right in the same action at law. . . . The equitable matter to be pleaded in the action at law must be matter of defense to the plaintiff's claim, not matter of set off, not matter constituting ground for relief in equity apart from and independent of the action at law."

The equitable defense there sought to be interposed against a writ of entry was the omission, from the foreclosed mortgage under which the plaintiffs claimed title, of a recital showing that the property in question was subject to a prior encumbrance. The only equitable remedy was reformation of the instrument. Decision was that consideration could not be given in the legal process to either how or whether the mortgage should be reformed.

It is not necessary in this case to determine whether the trust claim which the defendant asserts is properly subject matter for defense under the Law and Equity Act or, like the reform of a written instrument, exclusively within equity jurisdiction. The defendant has already resorted to equity. Her trust claim is there pending. The purpose of her plea in this action at law is not to have a present determination of her equitable rights, but that very delay which she has already sought by way of injunction in the Supreme Judicial Court

and been denied. The Justice below ruled rightly in refusing to grant the equivalent of that same injunction in this proceeding.

Exceptions overruled.

BYRON HILL *vs.* JOSEPH JANSON.

York. Opinion, March 19, 1943.

Automobiles. Negligence. Intersections of Roads. Stop Signs. Amendments to Declaration. Questions for Jury.

A driver is not compelled to wait for a vehicle too far away to reach the intersection before he shall have crossed. The distance of the approaching vehicle from the intersection point and its speed are among the elements of consideration.

It was a jury question, in the instant case, as to whether the plaintiff had reasonable opportunity to pass without peril or danger to either driver, assuming the exercise of reasonable care on the part of the other driver.

An automobile driver is required to be on the lookout and to see apparent danger.

Suitable warning signs must be erected by the State Highway Commission to designate through ways in order to make such designation effective for the regulation of traffic.

The purpose of the statute requiring the erection of such signs is to give travelers on specially designated through ways the right of way over all vehicles entering or crossing such through ways.

It is a matter of common knowledge that stop signs are placed at intersecting streets which are not through ways, by municipal authorities. The ordinary stop sign, however, indicates no change of the general right of way rule. The special rule applies only when the sign suitably warns of a through way intersection (R. S. 1930, Chapter 29, Sections 7 and 8).

When it is urged that a right of way rule is abrogated because a stop sign is near the intersection of two ways, it cannot be assumed, without evidence, that one of the ways is a through way and that the stop sign was erected under the authority of the State Highway Commission.

ON MOTION FOR A NEW TRIAL AND ON EXCEPTIONS.

Action for damages arising from an automobile collision near the intersection of two roads. The defendant conceded

that his employee, then engaged in defendant's business, was negligent but claimed that the plaintiff was guilty of contributory negligence. In support of his claim the defendant asserted that the general rule as to right of way (R. S. 1930, Chapter 29, Section 7) did not apply to the circumstances in the case because of the presence of a stop sign near the intersection. It did not appear in the evidence that the sign had been erected by the State Highway Commission to designate a through way, and the presiding justice refused to give instruction to the effect that the general rule as to right of way did not apply because of the stop signs. The jury returned a verdict for the plaintiff and assessed damages. The defendant excepted and moved for a new trial. Motion overruled. Exception overruled. The case fully appears in the opinion.

Joseph E. Harvey,

Willard & Willard, for the plaintiff.

Louis B. Lausier,

William P. Donahue, for the defendant.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

MANSER, J. Action for damages arising from an automobile collision. Verdict for the plaintiff for $970. The case comes up on defendant's motion for new trial and on exceptions to refusal of presiding Justice to give an instruction to the jury requested by the defendant. The accident occurred in the town of Dayton on July 24, 1941, on the northerly side of highway designated as Route #5 and near its intersection with a gravel road known as the Gordon road. Route #5 is a black surfaced tarvia road 21 feet wide running approximately east and west, from Waterboro to Saco. The Gordon road is of gravel, approximately 14 feet wide, and converges into Route #5 from a southeasterly direction. The lower or southerly line of the Gordon road approaches Route #5 on a long slant at an angle

of approximately 45 degrees. The upper or northerly side of the Gordon road, however, is snubbed off short at approximately a right angle. The area thus created forms a long triangle which merges into Route #5 and is all of tarvia surface. There is a stop sign on the southerly side of the Gordon road near the base of the triangle. This sign is 152 feet from the point where the southerly line of Gordon road actually reaches Route #5. The plaintiff, following the natural course of travel, would reach the projected lower or southerly side of Route #5 in a distance of about 90 feet. He testified that he stopped at the stop sign, looked in a westerly direction and saw no car approaching. He then proceeded in low gear to the projected side line of Route #5, when he saw the defendant's truck traveling easterly and at a point which, measured on the plan (an exhibit in the case), was then 160 feet away. He continued across to the northerly side of Route #5 and was in his right hand lane when the truck of the defendant, loaded with two tons of ice, crossed diagonally in front of him and collided, twisting both front fenders and headlights to the right and sheering off the front bumper of his car. The truck then continued onto the lawn of adjoining property, cutting deep furrows therein. Marks on the road showed that the brakes of the defendant's truck were applied with force over a stretch of 65 feet. The damage to the truck, as shown by a photographic exhibit, was to the right front fender and wheel, which were practically demolished.

The defendant concedes that his servant, then engaged on his business, was guilty of negligence. He contends, however, that the plaintiff was guilty of contributory negligence as a matter of law.

It was shown that, from the stop sign where the plaintiff halted, there was a clear view westerly for at least 600 feet, and it is contended that, when the plaintiff arrived at the actual intersection of the two roads, and admittedly saw the defendant's truck, he should have waited and allowed it to pass. According to credible testimony, however, the truck was

then 160 feet from him, and he had but to cross to the right side of a comparatively narrow highway.

It was a jury question as to whether the plaintiff had reasonable opportunity to pass without peril or danger to either traveler, and assuming the exercise of reasonable care on the part of the other. The distance of the approaching vehicle from the intersecting point, and its speed are among the elements for consideration. A driver is not compelled to wait for a vehicle too far away to reach the intersection until he has crossed. *Petersen* v. *Flaherty*, 128 Me., 261, 147 A., 39; *Gold* v. *Portland Lumber Corp.*, 137 Me., 143, 16 A. (2d), 111; *Richards* v. *Neault*, 126 Me., 17, 135 A., 524. Here evidence for the plaintiff is that the defendant's servant, confronted by no emergency, and without reasonable cause, diverted his course and ran into the plaintiff's car after it had crossed the intersection and was on its own right of way.

The defendant invokes, as applicable, the familiar rule stated in *Rouse* v. *Scott*, 132 Me., 22, 164 A., 872; *Gregware* v. *Poliquin*, 135 Me., 139, 190 A., 181; *Banks* v. *Adams*, 135 Me., 270, 195 A., 206, that an automobile driver is required to be on the lookout and to see an apparent danger. On the record, however, the jury would be justified in finding there was no apparent danger.

Some stress is also laid upon the proposition that there was a variance between the pleading and proof, that the plaintiff's case was presented upon the theory that the collision was head on, and that the exhibits negative that assumption. It does appear that the declaration originally alleged a head on collision, but the record shows that the declaration was amended, with approval of the Court, by eliminating that allegation. No exception thereto was perfected, and the point is without significance on any ground.

The verdict, reflecting the conclusion of the jury that the plaintiff was not guilty of contributory negligence, this being the defendant's only contention, was justified and the motion for a new trial cannot be sustained.

EXCEPTIONS

The defendant, however, claims that he was aggrieved because the presiding Justice in his charge to the jury gave only the statutory law of the road as to drivers at ordinary street intersections, in accordance with R. S., c. 29, § 7, which provides:

> "All vehicles shall have the right of way over other vehicles approaching at intersecting public ways from the left, and shall give the right of way to those approaching from the right; . . . "

Inasmuch as the defendant was admittedly approaching from the left of the plaintiff, this rule would favor the plaintiff by giving him the right of way, and in event the jury concluded that both vehicles were approaching the intersection at approximately the same time, the defendant would still be subject to the presumption of negligence because of failure to accord to the plaintiff such right of way.

The exception presented for consideration is the refusal to give the following requested instruction:

> "The right of way statute does not apply in this case because of the presence of the stop sign on the Gordon Road."

In elaboration, counsel for the defendant assert that the general rule was without application to the particular circumstances, and instead a special rule provided under the succeeding section of the statute, R. S., c. 29, § 8, controlled.

So far as pertinent § 8 provides:

> "For the purposes of this and the succeeding section, the state highway commission of Maine may from time to time designate certain state and state aid highways and county and town ways connecting such state and state aid highways as through ways, and may after notice revoke any such designation; . . . Every vehicle approaching on a

through way to point of its intersection with a way other than a through way so as to arrive at such point at approximately the same instant as a vehicle approaching on such other way shall as against such other vehicle have the right of way, and every vehicle immediately before entering or crossing a through way at its point of intersection with another way shall first come to a full stop, . . . No such designation of a through way shall become effective as to regulation of traffic at such a point of intersection until said commission shall have caused suitable warning signs or signals to be erected at or near such point."

The real gist of the exception is the claim that Route ♯5 was a through way, that a stop sign existed near the point of intersection with the Gordon road, and that this situation entitled the defendant to the special right of way rule as set forth above.

There is nothing in the record to show that Route ♯5 has been designated by the State Highway Commission as a through way. *Suitable* warning signs must be erected to make such designation effective as to regulation of traffic. The purpose of this statute is to give travelers on specially designated through ways the right of way over all vehicles entering or crossing such through ways. This abrogates the general rule in many instances. The requirement that suitable warning signs shall be erected, carries with it the necessary implication that the traveler be apprised that the highway is a through way. Otherwise, he would have a right to rely upon the general right of way rule. The only evidence as to the character of the warning sign here is that it was "a stop sign." It is a matter of common knowledge that stop signs are placed at intersecting streets which are not through ways, and by municipal authorities. The usual, ordinary stop sign indicates no change of the general right of way rule. The special rule applies only when the sign suitably warns of a through way intersection.

The defendant relies upon cases holding, in effect, that a stop sign is presumed to have been lawfully erected and maintained. The cases cited do not reach the situation here described. In fact, it is noted in *McMillan v. Nelson* (Fla), 5 So. (2d), 867, that:

> "It was the same character and sort of sign as those used all over the State by the State Road Department to warn of such condition and danger. . . . The sign is shown to have been so located as to give warning of danger at an intersection of which the State Road Department had jurisdiction."

While stop signs may be presumed to have been erected by proper authority, yet when it is urged that a right of way rule is abrogated and reversed because a stop sign was near the intersection of the two ways involved, it cannot be assumed without evidence that one of the ways was a through way and that the stop sign was erected under authority of the State Highway Commission.

The refusal by the presiding Justice to give the requested instruction is not exceptionable.

Motion overruled.
Exception overruled.

ANDREW J. BECK, BANK COMMISSIONER

vs.

CORINNNA TRUST CO.

Penobscot. Opinion, March 23, 1943.

Statutes. Insolvent Banks. Receivers.

A statute must be construed in the light of the purpose which the legislature had in mind in enacting it. What may be within the letter may not be within its spirit.

The statute under which the proceeding in the instant case was brought is not mandatory and did not require the Court to appoint a receiver. The court may exercise its discretion.

The purpose of Sec. 52 of Chap. 57, R. S. 1930, is to protect the public and particularly those who may be or may become depositors in the bank.

The primary duty of a receiver of an insolvent bank is to collect the assets and distribute the proceeds among the creditors. In the instant case, this end had been practically attained under the voluntary agreement with the Merrill Trust Company.

ON APPEAL.

Bill in equity brought by the Bank Commissioner alleging that the Corinna Trust Co. was insolvent and asking that its affairs be wound up and its assets distributed. Subsequently a petition was filed asking for the appointment of a receiver. In January, 1930, an agreement was made by the defendant with the Merrill Trust Company under the terms of which the defendant ceased to do business, the Merrill Trust Company took over the cash of the defendant on hand and on deposit and agreed to pay the depositors of the defendant; and the defendant gave a note to the Merrill Trust Company for the balance of the obligation assumed by the Merrill Trust Company. Pursuant to this agreement, the assets of the defendant have been gradually liquidated and the note reduced. All the depositors have been paid and the Merrill Trust Company was the only creditor. Bill dismissed. Plaintiff appealed. Appeal dismissed. Decree of lower Court affirmed. The case fully appears in the opinion.

Frank I. Cowan, Attorney General,

Eaton & Peabody, for the Bank Commissioner.

Edgar M. Simpson, for the defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, CHAPMAN, JJ.

THAXTER, J. This bill in equity brought by the bank commissioner alleges that the defendant is insolvent and asks that

it be enjoined from the further prosecution of its business and that its affairs be wound up and its assets distributed. Subsequently, and after the filing of an answer by the defendant, a petition was filed praying for the appointment of a receiver. After a hearing, the sitting justice entered a decree dismissing the bill and the case is now before us on an appeal by the plaintiff from such ruling.

The defendant was organized in 1919 under the general law to do a trust and banking business. On January 13, 1930, in accordance with the terms of an agreement with the Merrill Trust Company, another banking institution, the defendant ceased to carry on its businesss. This agreement consummated negotiations which had been in progress between the two banks, the terms of which were embodied in a letter from the Merrill Trust Company to the defendant of the following tenor:

"MERRILL TRUST COMPANY

Capital $1,000,000 Surplus $800,000

BANGOR, MAINE

January 9, 1930

The Corinna Trust Company,
Corinna, Maine.

Dear Sirs:

As the result of negotiations with your Directors we hereby make the following offer and proposition:

The Merrill Trust Company will assume and pay all your obligations to depositors or others. In this connection your depositors at their option will upon request receive cash for their deposits, or they may transfer the same to this bank or any of its branches. You are forthwith to cease to accept deposits or loan money.

In consideration of this assumption of your obligations, you will transfer to us cash and your deposits in your office or other banks. Any difference and deficit between the total of the obligations by us assumed and the cash and

deposits above referred to, will be your unconditional obligation to us, and will be represented by your promissory note to us due on or before one year from date and bearing interest at 5½% per annum, payable quarterly.

You will proceed to collect as they mature, notes, loans and obligations due you. Monthly or quarterly you will pay to us for application on said note the proceeds of your collections.

The obvious effect of this transaction is to substitute one creditor in lieu of many; and to give you ample time to collect obligations due you and to liquidate your affairs to satisfy your obligation to that one creditor.

If your stockholders vote in favor of this transaction, your letter of acceptance will constitute a contract between our institutions.

Respectfully yours,

MERRILL TRUST COMPANY
HENRY W. CUSHMAN, President"

The offer of the Merrill Trust Company was duly accepted by the stockholders of the defendant at a special meeting held January 13, 1930 and the same day the defendant transferred to the Merrill Trust Company all its cash on hand and on deposit in other banks amounting to a total of $13,064.30, in consideration of the obligation of the Merrill Trust to assume and satisfy all obligations of the defendant to its depositors. The defendant then gave to the Merrill Trust a note for the balance of the obligation assumed, which, since January 13, 1930 in accordance with the terms of the agreement, has been paid in part by the liquidation of assets of the defendant. The bill in equity was filed June 2, 1941 and on January 13, 1942, about a month prior to the hearing on the bill, the balance due on the note including interest amounted to $36,596.84. The assets remaining as security for this note were appraised at $3,175.34. At all events it is conceded, and in fact the answer tacitly admits, that at the time of filing the bill the defendant was in-

solvent and there is no doubt that this situation still exists. Except for the purpose of liquidating its assets for the benefit of the Merrill Trust Company, the defendant has not conducted any business since January 13, 1930. Its only indebtedness is represented by the balance due on the note. The depositors have been paid in full.

Under these circumstances, did the presiding justice have the right to dismiss this bill?

As we read the record it is apparent to us that counsel for the plaintiff consider the connection of the Merrill Trust Company with the transaction as immaterial to the decision of this case. Whether this point of view is due to the fact that the Merrill Trust Company is not a party to these proceedings or to the construction which counsel place on the statute here involved is not altogether clear. It is true that the trust company is not a party and no decree entered here is binding on it, but, nevertheless, the arrangement which was made between the two banks is a matter of consequence in determining whether the relief prayed for by this plaintiff should be granted. Whether the Merrill Trust Company is a creditor is important, for counsel must concede that, if it is not a creditor, there would be no basis for the bill. And that it is the only creditor may likewise be relevant. The court cannot be asked to consider the facts in this record as if they had no relation to each other or to forgo drawing from them reasonable and logical deductions. They must be viewed as a whole. So interpreted it is apparent that there was an arrangement entered into between these two banks for the voluntary liquidation of the defendant. The Merrill Trust Company assumed the obligation to pay the depositors of the defendant and presumably received certain benefits. That they were not all that was anticipated is beside the point. For a period of more than ten years prior to the time of filing this bill it was the defendant's only creditor and was not powerless to control the policy of those charged with the task of disposing of its assets. It negotiated and participated in a method, often followed in similar

cases, for the quiet and orderly liquidation of this bank utterly inconsistent with the proceeding now brought by the bank commissioner, who we cannot believe is acting contrary to the wishes of the only creditor involved. The decision as to whether, at the time the bank was closed, it was wiser to dispose immediately of all the assets involved or to nurse them along over a long period of time as has been done, could certainly have been made by the Merrill Trust Company. At the end of a year, holding an overdue note, matters were certainly subject to its direction and control. That bank may not have been to blame for not anticipating the severity or the length of the depression or the onset of a war with all the consequent depreciation in values; but, the stockholders of the defendant, who by the terms of the agreement had in effect surrendered all direction over it to the other bank, should not for the benefit of that other bank be charged with the responsibility for decisions which they did not have the power to control. We discuss these aspects of the matter because we think they have a very distinct bearing on the discretion which in our opinion the sitting justice had to dismiss this bill.

Counsel claim that the plaintiff could in this instance demand the appointment of the receiver as a matter of right. This right it is claimed is given by the statute, the essential part of which reads as follows, Rev. Stat. 1930, Ch. 57, Sec. 52:

> "*Sec. 52. Commissioner may apply for injunction to restrain insolvent corporation; powers and duties of the justice in such cases; may appoint receivers, who shall report annually; duties of commissioner and attorney-general. R. S. c. 52, sec. 54. 1923, c. 144, sec. 52.* If, upon examination of any such corporation, the bank commissioner is of the opinion that it is insolvent, or that its condition is such as to render its further proceedings hazardous to the public or to those having funds in its custody, he shall apply, or if, upon such examination, he is of the opinion that it has exceeded its powers or failed to comply

with any of the rules, restrictions, or conditions provided by law, he may apply to one of the justices of the supreme judicial court or of the superior court to issue an injunction to restrain such corporation in whole or in part from proceeding further with its busines until a hearing can be had. Such justice may forthwith issue process for such purpose, and after a full hearing of the corporation, may dissolve or modify the injunction or make the same perpetual, and make such orders and decrees to suspend, restrain, or prohibit the further prosecution of its business as may be needful in the premises, according to the course of proceedings in equity; and he may appoint one or more receivers or trustees to take possession of its property and effects, subject to such rules and orders as are from time to time prescribed by the supreme judicial court or the superior court, or by any justice thereof in vacation."

If we understand the argument of counsel, it is that if a bank is insolvent the bank commissioner must bring a bill in equity for its liquidation. In short he has no alternative under the statute. Attention is called in this connection in their brief to the use of the word "shall" in the first part of the section and to the later use of the word "may" when the statute refers to the authority given to the bank commissioner to bring a bill if the bank "has exceeded its powers or failed to comply with any of the rules, restrictions, or conditions provided by law. . . ." In the first instance counsel say that there is compulsion on the bank commissioner, in the second the statute confers on him an authority which he may or may not use as he sees fit.

This court has, however, repeatedly held, in accordance with well recognized principles, that there is more to a statute than mere words. If it is to have flesh and blood and life it must be construed in the light of the purpose which the legislature had in mind in enacting it. What may be within its letter may not be within its spirit. *Inhabitants of the Town of Ash-*

land v. *Wright*, 139 Me., 283, 29 A. (2d), 747; *Perkins* v. *Kavanaugh*, 135 Me., 344, 196 A., 645; *State* v. *Day*, 132 Me., 38, 165 A., 103; *Carrigan* v. *Stillwell*, 99 Me., 434, 59 A., 683, 68 L. R. A., 386; *Landers* v. *Smith*, 78 Me., 212, 3 A., 463; *Holmes* v. *Paris*, 75 Me., 559.

The purpose of the statute now before us seems clear. It is to protect the public and particularly those who may be depositors or intend to become depositors in the bank. As was said in another connection, *Gardiner Trust Company* v. *Augusta Trust Company*, 134 Me., 191, 199, 182 A., 685, 689: "Because of the direct interest in a bank of all those who may become depositors in it and the vital concern of the general public in its proper management, the state has interposed its authority in order to define its power, to supervise its management, and in case of trouble to take over and distribute its assets." We think it was the intention of the legislature to put compulsion on the bank commissioner to take action if the continued operation of a bank would be hazardous to the public or to depositors. That is the primary purpose of the statute. To be sure there is no such qualification in the provision referring to insolvency, because it would seem to be clear that continued operation of an insolvent bank perforce would be hazardous to the public or depositors.

But the bank with which we are dealing has not been in operation for over ten years and no one claims or could claim that the public is in any danger because of the mere fact of its insolvency. Under these circumstances the statute should not be so construed as to make it mandatory on the bank commissioner to bring a bill in equity praying for the appointment of a receiver whose primary duty would be to collect the assets and distribute the proceeds among creditors, an end which has already been practically attained under the voluntary agreement entered into by the two banks.

We might at this point call attention to the fact that if the rigid construction of the statute contended for by the plaintiff is correct it would be manifestly impossible to have carried out

any such voluntary and desirable arrangement as was consummated in this instance. For if the provision of the statute is mandatory the bank commissioner would immediately have been compelled on finding insolvency to take over the assets of the bank from the hands of those entrusted with its liquidation under the agreement. He did not do so.

It is clear from the record that the bank commissioner has apparently from the time of the execution of the agreement been aware of the fact that the defendant was insolvent. Certainly he has had this knowledge since 1936 when an examination was made. No action was then thought necessary because neither the rights of the public nor of depositors were in any danger. The very failure of the bank commissioner to act then is utterly inconsistent with the claim which through his counsel he now presents to this court. We do not think that he was recreant in his duty for his failure to act when he knew of insolvency because we construe the statute as he then did and does not seem to do now.

Even if we accept the construction claimed by the plaintiff's counsel that the bank commissioner must bring the bill for an injunction and for the appointment of a receiver, we should like to ask where is there found anything in the statute which compels the court to grant that prayer? Is the discretion of the court which it has in other cases of receivership taken from it? Perhaps here we shall be permitted to turn to the wording of the statute on which so much reliance has been placed. Though the statute reads that the bank commissioner "shall" apply for an injunction to one of the justices of the supreme judicial court, yet in discussing the action to be taken by the court it says: "Such justice may forthwith issue process" . . . "may dissolve or modify the injunction or make the same perpetual" . . . "and he may appoint one or more receivers." How can we possibly construe this language so as to take away from the justice sitting in equity the wise discretion which he has in such cases and to read into it the meaning that he must grant the prayer of the bill?

We have here an insistence that a receiver must be appointed, not to carry out the ordinary duties of a receiver to liquidate the assets of the bank and distribute the proceeds among creditors, but solely to bring a suit against stockholders for the benefit of one creditor who under the terms of a voluntary agreement to all intents and purposes has had it in its power for more than a decade to direct the manner in which the assets of this bank should be disposed of. The statute does not require the court to appoint a receiver under such circumstances as this. The discretion of the sitting justice in refusing to do so was we think wisely exercised.

Appeal dismissed.
Decree affirmed.

NOBLE R. STEVES, PETITIONER FOR MANDAMUS,

vs.

FREDERICK ROBIE.

FRASER & WALKER, INC., PETITIONER FOR MANDAMUS,

vs.

FREDERICK ROBIE.

Kennebec. Opinion, March 30, 1943.

Automobiles. Right to Use Highway. Mandamus.

The Revised Statutes (Chapter 29, Section 46) provides a proper remedy to a person aggrieved by the decision of the Secretary of State in refusing to issue a certificate of registration, and such remedy is exclusive. Mandamus will not be granted in such cases.

The legislature had the right to provide an exclusive method of appeal from the decision of the Secretary of State.

The right to use the highways for business is not inherent or vested but in the nature of a special privilege which the State, through the legislature, may condition, restrain, extend or prohibit. Registration is for the purpose of exercising such control and the certificate of registration constitutes a license to operate in accordance with such conditions as are imposed.

ON EXCEPTIONS BY THE PLAINTIFFS.

Mandamus proceedings by the plaintiffs to compel Frederick Robie as Secretary of State to register petitioners' truck. The plaintiffs applied for registration of their truck and claimed that they were entitled, as a matter of law, to such registration without payment of an excise tax. The respondent claimed that under the provisions of Chapter 152 of Public Laws, 1937, he was forbidden to issue registration without payment of excise tax and refused to register the truck. The plaintiffs petitioned for a writ of mandamus to compel registration. The sitting justice in the Supreme Judicial Court, Kennebec County, in Equity, denied the writ. Plaintiffs excepted. Exception overruled. The case fully appears in the opinion.

Locke, Campbell & Reid, by *Herbert E. Locke,*

Arthur A. Hebert,

Horace P. Moulton, of Boston, for the petitioners.

Frank I. Cowan, Attorney General,

Neal Donahue, Assistant Attorney General, for the respondent.

SITTING: STURGIS, C. J., THAXTER, MANSER, MURCHIE, CHAPMAN, JJ.

CHAPMAN, J. Two cases are presented to the Court upon the same briefs, for the reason that the issues to be decided are identical. For convenience of expression, the two cases may be considered as one in our discussion. The cause comes to this Court upon exceptions to the denial of a writ of mandamus by the sitting Justice.

The petitioner, a resident of Massachusetts, applied to the respondent, in his capacity as Secretary of State for the State of Maine, for the registration of a motor truck, which was to some extent to be operated in the State of Maine. He claimed that he was entitled, as a matter of law, to registration without payment of an excise tax, by reason of R. S., Chap. 12, Sec. 90, as amended, and Chap. 29, Sec. 40, as amended.

The respondent, in his said capacity, claimed that by reason of Public Laws of 1937, Chap. 152, amending R. S., Chap. 12, Sec. 92, as a matter of law, he was forbidden to issue registration without payment of the excise tax. Upon refusal to grant the registration, the applicant sought a writ of mandamus. The alternative writ was issued and the respondent made return thereto. The first defense pleaded in the return is that the petitioner is not entitled to the peremptory writ, in that R. S., Chap. 29, Sec. 46, provided him with an appropriate and exclusive remedy. The chapter, known as "Motor Vehicle Law," covers the general subject of registration and operation of motor vehicles, and the section reads as follows:

> "If any person is aggrieved by the decision of the secretary of state in revoking or suspending a license or certificate of registration or by the refusal of the secretary of state to issue a license or certificate of registration, he may within ten days thereafter appeal to any justice of the superior court, by presenting to him a petition therefor, in term time or vacation. Such justice shall fix a time and place for hearing, which may be in vacation, and cause notice thereof to be given to the secretary of state; and after hearing such justice may affirm or reverse the decision of the secretary of state and the decision of such justice shall be final. Pending judgment of the court, the decision of the secretary of state in revoking or suspending any license or certificate of registration shall remain in full force and effect."

The petitioner, in accordance with the procedure set forth in R. S., Chap. 116, Sec. 18, traversed the respondent's allegation that he was restricted to the statutory remedy and, in turn, the respondent joined issue. This issue must be decided before we pass to the consideration of other questions raised, inasmuch as the Court, in this proceeding, has authority to pass upon such other questions only if mandamus is a proper remedy for the plaintiff to invoke.

The writ of mandamus is of ancient origin. It came into being as an extraordinary writ, to cover situations wherein justice could not be had by resort to the ordinary common-law actions. Originally, it was strictly a writ of prerogative, issued only at the discretion of the Court, and not as of right. This statement, however, does not accurately apply at the present time. It is true that it issues upon the sound discretion of the Court, but this is not an arbitrary discretion; it is judicial discretion, and where there is a right, and the law has established no specific remedy, this writ should issue as a matter of law. *Proprietors of St. Lukes Church* v. *Slack, et als.*, 7 Cush., 226; *Elmer* v. *Com. of Ins.*, 304 Mass., 194, 199, 23 N. E., 2d, 295.

Defining the proper scope of the writ, Chitty says, in his General Practice, Vol. 1, 791:

> "And in general to induce the court to interfere, there must be not only *a specific legal right*, but also the *absence* of any other *specific legal remedy*, in order to found an application for a mandamus."

This rule has been universally followed. *Ex parte Park Square Automobile Station, Pet.*, 244 U. S., 412, 37 S. Ct., 732, 61 Law. Ed., 1231; *Amory, et als.* v. *Assessors of Boston*, 306 Mass., 354, 28 N. E., 2d, 436; *Baines* v. *Zemansky*, 176 Cal., 369, 168 P., 565; *Matter of Burr* v. *Voorhis*, 229 N. Y., 382, 387, 128 N. E., 220; *Rowe* v. *Border City Garnetting Co.*, 40 R. I., 394, 101 A., 223. This is the accepted law in the State of Maine. *Baker* v. *Johnson*, 41 Me., 15; *Dennett* v. *Manufacturing Co.*, 106 Me., 476, 76 A., 922.

The Courts have been unwilling to extend the operation of the writ and its use has been kept within its own narrow limits. *State, ex rel.* v. *Foland*, 191 Ind., 342, 349, 132 N. E., 677. In the *Baker* v. *Johnson* case, at p. 20, our Court showed its unwillingness to relax the rule in the following language:

> "It cannot be granted to give an easier or more expeditious remedy but only where there is no other remedy, being both legal and specific. Tapping's Mandamus, 18."

This rule is made more certain by the principle that, when there has been incorporated in a statute dealing generally with a subject matter, a remedy for its infraction, the remedy so provided will be regarded as exclusive. *Stoddard* v. *Public Utilities Comm.*, 137 Me., 320, 19 A., 2d, 427; *School Committee of Lowell* v. *Mayor*, 265 Mass., 353, 164 N. E., 91. The rule is particularly applicable in the present case, inasmuch as the right to use the highways for business is not inherent or vested but in the nature of a special privilege which the State, through the Legislature, may condition, restrain, extend or prohibit. *Chapman* v. *City of Portland*, 131 Me., 242, 160 A., 913; *State* v. *Mayo*, 106 Me., 62, 75 A., 295, 26 L. R. A., N. S., 502, 20 Ann. Cas., 512; *Burgess* v. *Mayor & Aldermen of Brockton*, 235 Mass., 95, 126 N. E., 456; *Packard* v. *Banton*, 264 U. S., 140, 44 S. Ct., 257, 68 Law. Ed., 596. Registration is for the purpose of exercising such control and the certificate of registration constitutes a license to operate in accordance with such conditions as are imposed. Such license is a privilege and in no sense a contract or property, *In re Stanley*, 133 Me., 91, 174 A., 93; *Burgess* v. *Mayor & Aldermen*, supra, and the State may make such rules for its issuance as it may deem proper. Rugg, C. J., said in *Burgess* v. *Mayor & Aldermen*, supra, "The rights of a licensee can rise no higher than the terms of the statute or ordinance by which he became the holder." By analogy, it may be said that an applicant for a privilege created and existing by a statute cannot disregard the procedure designated for its issuance by the statute.

The Legislature intended to provide to the applicant who may feel himself aggrieved by the decision of the Secretary of State, a method of obtaining judicial determination of the correctness of that decision, and further intended that this method should be exclusive. This was within the province of the Legislature. We believe, however, that it intended that the method provided should be simple, expeditious, adequate and sufficient; one that would not be disadvantageous to the applicant as compared to the writ of mandamus. We think it did

so. The process provided is by petition, the simplest judicial procedure known to our courts. It has none of the technicalities attendant upon the ordinary common-law processes and is limited in the promptness with which the remedy may be had, only by the principle that the procedure must be according to due process of law. The appellate tribunal designated is one particularly adapted to and competent for the determination of factual and legal questions and it is continuously available.

Our decisions, defining the remedy that will preclude the issue of the writ, have used the words, "adequate and sufficient." *Dennett* v. *Manuf. Co.*, supra.

It follows that not only did the Legislature exercise its right to provide an exclusive method of appeal from the decision of the Secretary of State but that the method provided was one well suited for the purpose and not in any way disadvantageous to the applicant.

We therefore have no right to establish a precedent for disregarding a rule so clearly defined and consistently followed in judicial decisions. *Ex Parte Park Square Automobile Station, Pet.*, supra. In delivering the opinion that the Court had no power to issue the writ of mandamus in place of express remedial processes created by the statute, Chief Justice White said, at p. 414, 244 U. S.:

> "It is not disputable that the proposition thus relied upon is well founded and hence absolutely debars us from reviewing by mandamus the action of the Court below complained of, whatever may be our conviction as to its clear error. *Ex parte Harding*, 219 U. S., 363." (31 S. Ct., 324, 55 Law. Ed., 252, 37 L. R. A., N. S., 392.)

The sitting Justice was correct, as a matter of law, in denying the writ.

In each case, the entry will be,

Exceptions overruled.

RUTH POISSON

vs.

TRAVELERS INSURANCE CO. AND PORTSMOUTH GARAGE CO.

York. Opinion, April 1, 1943.

Insurance Contract. Master and Servant. Findings of Fact.

Unless some statutory requirement controls, it is competent for the insurer and the insured to determine by definite contract the extent of the coverage.

A policy of insurance should be given only such effect as was intended when it was made.

The Appellate Court will not reverse the findings of fact made by the trial court unless they are clearly wrong.

ON APPEAL BY DEFENDANTS.

A bill in equity was brought by the plaintiff under the provisions of R. S. 1930, Chapter 60, Sections 177-180, to reach and apply insurance money to the satisfaction of judgments obtained by the plaintiff against two persons employed by Portsmouth Garage Co. on account of injuries suffered by the plaintiff in an automobile accident which were due to the alleged negligence of said employees. Plaintiff alleged that the judgment debtors were, at the time of the accident, operating an automobile owned by Portsmouth Garage Co. for the purposes of the business of the Garage Co. and that they were thereby within the coverage of the policy of insurance issued to the Portsmouth Garage Co. by Travelers Insurance Co. The defendants contended that under the terms of the policy said judgment debtors were not within the coverage of the policy. In the trial court judgment was rendered for the plaintiff. Defendants appealed. Appeal sustained. Decree reversed. Case remanded for decree dismissing the bill. The case fully appears in the opinion.

Armstrong & Spill, by *Simon Spill*, and

Lester M. Bragdon, for the plaintiff.

Verrill, Hale, Dana & Walker, for the defendants.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

MANSER, J. Equity appeal by defendants. The bill is brought under R. S., c. 60, §§ 177-180, to reach and apply insurance money to the satisfaction of judgments obtained by the plaintiff against Ross F. Eslinger and Ross B. Eslinger, by reason of damages sustained as the result of an automobile accident, which occurred in Wells, Maine. The negligence of Ross F. Eslinger was the basis of the action, and one judgment was recovered against him personally. The other judgment against Ross B. Eslinger, his father, was recovered upon the ground that the son was employed on the business of the father at the time of the accident.

The plaintiff now seeks to impress liability upon the Travelers Insurance Co. by reason of an automobile policy issued to the Portsmouth Garage Co. No suit has been brought or judgment at law recovered establishing legal responsibility on the part of the Portsmouth Garage Co. for the accident.

It is claimed, however, that in the present equity proceedings, it was competent to show that Eslinger, Sr. was in the employ of the Portsmouth Garage Co.; that he delegated to his son authority to perform a ministerial act which affected the Company's interest; that the son thereupon became a subagent of the Company, and as the accident happened while he was so employed, and while using a car owned by the Company, both of the Eslingers must be regarded as servants of the Company and as such insured under the policy issued to it.

Otherwise stated, the contentions of the plaintiff are that the automobile was owned by the Garage Company; was in operation for a purpose affecting the business of the Company, the named assured; and that the relationship of the Eslingers to the Garage Company brought them within the coverage terms of the policy according to its proper legal interpretation.

The presiding Justice admitted the evidence, sustained the plaintiff's contentions, and by appropriate decree, ordered the Travelers Insurance Co. to satisfy the judgments obtained by the plaintiff against the Eslingers.

While the questions of fact involved are argued by counsel on both sides, the record does not show that the findings of the presiding Justice thereon are clearly erroneous or unsupported by evidence. It is the well-established rule that the appellate court will not reverse such findings unless they are clearly wrong. *Hartley* v. *Richardson,* 91 Me., 424, 40 A., 336; *National Bank* v. *Reynolds,* 127 Me., 340, 143 A., 266, 60 A. L. R., 712.

The real question, however, is whether the facts so found justify the legal conclusions reached.

Fundamentally, the question of whether either or both of the Eslingers were insured under the policy issued by the Travelers Insurance Co. to the Portsmouth Garage Co. requires consideration of the applicable statute and of the terms of the policy itself.

There is no privity of contract between the plaintiff, (who secured judgments against the individual Eslingers,) and the Travelers Insurance Company which issued a liability policy to the Portsmouth Garage Co. If the proceeds of the policy can be reached by the plaintiff, it is only by virtue of statutory authority or by express provision of the policy. *Colby* v. *Insurance Co.,* 134 Me., 18, 181 A., 13.

The statutory provision is found in R. S., c. 60, § 178, as follows:

> "Whenever any person . . . recovers a final judgment against any other person, firm, or corporation, for any loss or damage specified in the preceding section, the judgment creditor shall be entitled to have the insurance money applied to the satisfaction of the judgment by bringing a bill in equity, in his own name, against the insuring company to reach and apply said insurance money;

provided that when the right of action accrued the judgment debtor was insured against said liability, . . ."

To determine, then, whether the Eslingers, the judgment debtors, were insured, recourse must be had to the policy itself. It contains an explicit definition of the word "Insured" as used therein, in the following language:

"The unqualified word 'insured' includes not only the named insured but also any partner thereof if the named insured is a partnership, and the president, vice president, secretary and treasurer of the corporation if the named insured is a corporation, with respect to the operation, for business or pleasure of any automobile owned by or in charge of the named insured, except an automobile owned by such partner or officer or by a member of his family; . . ."

It is conceded that the Portsmouth Garage Company, the named insured, is a corporation, and that neither of the Eslingers hold the position of president, vice president, secretary or treasurer of the corporation.

The plaintiff urges, in effect, that the corporation is but a theoretical legal entity which must carry on its operations, including those specified in the policy, by human agents; that it is responsible for the negligence of its servants so employed; that their acts within the scope of their employment, were the acts of the corporation itself, and the policy by necessary implication must be held to indemnify the corporation for the negligent acts of its agents, and consequently its liability can be established in these proceedings.

It is further noted that the coverage of the policy includes "the ownership, maintenance or use of any automobile for any purpose in connection with the above defined operations, and also for pleasure use."

This, contends the plaintiff, lends emphasis to the interpretation that the persons who actually conduct the operations are insured.

The guiding principles of construction are well expressed in *Johnson* v. *Insurance Co.*, 131 Me., 288, 161 A., 496, 498, as follows:

> "It is the general rule that if the language of an insurance policy is ambiguous, or susceptible of interpretations differing in import, construction should be most strongly against the insurer, on whom the obligation of the contract rests, and who is supposed to have chosen the wording.
>
> "Another rule, which safeguards the first against any abuse of its application, is this: If the terms of the policy present no ambiguity, they are to be taken and understood, as a usual thing, according to their plain and ordinary sense. Parties contracting in writing are supposed to have the intentions which their agreement effectually manifests.
>
> "True, literalism should not be pushed to the length of frustrating, in whole or in part, the general intention the contract evidences; nor, on the other hand, should words be made to mean what they do not really say. A contract should be so construed as to give it only such effect as was intended when it was made."

In policies of this general character which have been brought to judicial attention, there are found definitions as to the persons or class of persons included in the designation "named assured." Illustrations appear in our cases of *Colby* v. *Insurance Co.*, 134 Me., 18, 181 A., 13; *Rioux* v. *Assurance Co.*, 134 Me., 459, 187 A., 753; *Johnson* v. *Insurance Co.*, supra; *Coffey* v. *Gayton et al.*, 136 Me., 141, 4 A. (2d), 97. These differ from one another, and unless some statutory requirement controls, it is, of course, competent for the Insurer and Insured to determine by definite contract the extent of the coverage. In an ordinary contract, the parties who execute the same are usually the only ones bound by its obligations or entitled to its benefits. From the very facility of use of a particular motor vehicle by several

persons, however, has apparently arisen the advisability of including others than the single policy-holder in what has come to be known as "extended coverage" clauses. The inclusion of coverage in the policy under consideration is definite, explicit and certain. It is limited to the corporation, its president, vice president, secretary and treasurer. The language is clear and the Court can give it only such effect as was intended when it was made. While it is not necessary for reasons to be assigned for the particular provision in the policy under scrutiny, it is obvious that it safeguards the garage corporation and yet does not deny to persons injured by the negligence of the corporation's employees the benefit of its indemnifying provisions. To be entitled to such benefit, the corporation itself must be sued for the tortious acts of its employes. A judgment must be recovered against the corporation in a suit in which the very question of whether the tort feasor was the servant and agent of the corporation is put in issue, and the corporation thus becomes entitled to a jury verdict thereon. In the present instance, two individuals were sued and judgments obtained. The corporation's responsibility for their acts was not in such suits of consequence. The Insurance Co. and the Portsmouth Garage Co., by the policy contract entered into between them, limited the insurance liability, and in legal effect made it incumbent upon one who suffered injury to procure a judgment at law against the Company or one of its four named officers, in order to create liability on the part of the Insurance Co.

The liability of the insurer may be extended by statutory requirement, and this, as it happens, is evidenced by the policy in question. The principal establishment of the Portsmouth Garage Co. is located in New Hampshire. Under Chapter 161 of the Laws of 1937 of that State, there is such a requirement, and we find that the policy contains an endorsement "with respect to suits and claims arising out of automobile accidents occurring within the State of New Hampshire" by the terms of which "the coverage provided herein is *extended* to any person who has obtained possession or control of the motor

vehicle of the named assured with his express or implied consent." It is not contended that this requirement has application to an accident which happened in Maine.

Appeal sustained.
Decree reversed.
Remanded for decree dismissing the bill.

BERTRAM A. BROOKS *vs.* GEORGE B. JACOBS.

Somerset. Opinion, April 2, 1943.

Negligence. Schools. Teacher and Pupil. Facts for Jury. Misfeasance. Nonfeasance. Public Officer.

The relationship of teachers to their pupils is in the nature of *in loco parentis*. The teacher is the substitute of the parent.

Misfeasance is the performance of an act which might be lawfully done, in an improper manner, by which another person receives an injury. Nonfeasance is the non-performance of some act which ought to be performed.

There is a common law obligation that every person must so act or use that which he controls as not to injure another.

Whether or not a schoolteacher is a public official, he is liable for personal acts of nonfeasance if he fails to discharge a duty owed to an injured person and such nonfeasance is the proximate cause of the injury.

In this State a public officer, as to public work over which he assumes control and direction, is liable not only for his affirmative act of negligence but also for his negligent inaction.

Whether or not, in the instant case, the defendant in fact took charge of the erection of the building where the accident happened and had full charge thereof was a question of fact for the jury.

ON EXCEPTIONS BY PLAINTIFF.

Action to recover for injuries to the plaintiff alleged to be due to the negligence of the defendant. Defendant was, at the time of the accident which was the subject matter of this action, and for many years had been a teacher of manual training in the Madison High School. The plaintiff was a student in defendant's class. The Superintending School Committee au-

thorized the construction of a building to be used for vocational training; and authorized the employment of boys in the manual training class to work on the building, there being no compensation for the work; but such work, if done by the boys to be considered, and to be given credit for, in the manual training course. The plaintiff, while engaged in work on the building which he was directed or permitted by the defendant to do, was injured by the breaking of a staging. The issues in the case were whether or not the defendant had full charge of the work on the building and what duty, if any, he owed to the plaintiff and whether or not he was liable for an act of negligence, whether or not such act was his personal act or failure to act, which was the proximate cause of plaintiff's injuries. Judgment was for the defendant. Plaintiff filed exceptions. Exceptions sustained. The case fully appears in the opinion.

Bernstein & Bernstein, for the plaintiff.

William B. Mahoney,

Clayton E. Eames, for the defendant.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

HUDSON, J. This is an action of negligence brought by the plaintiff against his former manual training schoolteacher. Jury tried, verdict was for the defendant. The plaintiff presents twenty-one exceptions, four with relation to admissibility of evidence (only one is now pressed), four to instructions to the jury, and thirteen to refusals of requested insturctions. Although the exceptions to instructions given and to the refusals to instruct are many, they really involve one issue of law: viz., the duty, if any, owed by the defendant to the plaintiff as a basis of negligence.

The accident happened on January 4, 1939. Then and for many years prior thereto, the defendant was and had been a manual training teacher in the Madison High School, and on

that date, the plaintiff, a senior twenty years old, was a student in his class.

Besides the manual training class under the defendant, there were other groups receiving instruction in the high school, each of which had a teacher and among which were the auto mechanics, electricity, and plumbing groups.

The superintending school committee of the town of Madison, having caused a rural school building to be torn down, voted on October 14, 1938, to construct a vocational training building in the village near the high school building, using material, so far as sufficient and suitable, that came from the razed building, and for labor, the work of the boys forming the groups or classes above-mentioned, supplemented by young men of the N.Y.A. The students were not compelled to work on the new building; they could not if their parents objected. They received no compensation. What they did constituted a part of their school course work, for which they were given credit, and in time was confined to their instruction periods.

On the day of the accident (as claimed by the plaintiff), he and another boy were directed by the defendant to go to the building then in process of construction, around all of which a temporary staging had been erected, and shovel off the snow from the staging and the roof of the building, or anyway part of it. The defense claimed that on that particular day the boys requested the right and were permitted to do this work. In the performance of it, whether directed or permitted, the plaintiff, while on the upper staging, due to a breaking "ledger board," was "catapulted" to the ground and seriously injured.

Nailed at both ends, this board led from an outside upright to the window sill. It with other ledger boards helped to support the flooring of the staging. The evidence nowhere discloses who in fact selected and "nailed on" this particular ledger board. Although new, it broke transversely in the vicinity of a certain pine knot hole.

An issue was raised as to whether or not the defendant had full charge of the construction of this building, the plaintiff claiming that he did, the defendant insisting, however, that it was under the control and direction of the superintending school committee and the superintendent, who he asserted obtained the assistance and cooperation of the different teaching heads of the above-mentioned groups in the carrying on of the work, each teacher to direct the work of his own class. It did appear, however, by admission of the defendant, that he assisted in selection of the site for the building and prepared the plans which were accepted by the school committee. At times he was at the building while his students were working there. He claimed to have no authority over those of the other classes so working, although he said that if they asked him a question he would give them the requested information. He denied any personal act of negligence.

The relationship of teachers to their pupils has been stated to be in the nature of *in loco parentis*. We find no Maine case directly so holding, but language in *Patterson* v. *Nutter*, 78 Me., 509, 7 A., 273, so denotes, as therein it is said: "He is placed *in charge* some times of large numbers of children. . . . He must govern . . . and control. . . ." (Italics ours.) In the Patterson case, supra, is cited *State* v. *Pendergrass*, 2 D. & B. (N. C.), 365, in which this statement is made: "The teacher is the substitute of the parent. . . ."

In *Fulgoni* v. *Johnston*, 302 Mass., 421, 19 N. E., (2d), 542, it is stated on page 423:

> "The defendant" (a manual training schoolteacher) "was a public servant with limited duties and powers. At least since the leading cases of *Moynihan* v. *Todd*, 188 Mass. 301, and *Barry* v. *Smith*, 191 Mass. 78, it has been settled in this Commonwealth that public officers engaged wholly in the performance of public duties are liable only for their own acts of misfeasance in connection with ministerial matters."

Perhaps the leading "public officer" case in Massachusetts is *Moynihan* v. *Todd*, supra, in which the defendant was a superintendent of streets. Therein it is stated on page 305:

> "We are of opinion that the principle which underlies the rule that public officers and other agencies of government are not liable for negligence in the performance of public duties goes no further than to relieve them from liability for non-feasance, and for the misfeasances of their servants or agents. For a personal act of misfeasance, we are of opinion that a party should be held liable to one injured by it, as well when in the performance of a public duty as when otherwise engaged. We think that the general course of decision in this Commonwealth is not in conflict with this view. But for acts of misfeasance of a servant or agent in such cases, there is no liability. This is because the rule *respondeat superior* does not apply."

We have no doubt the Massachusetts court was speaking of misfeasance and nonfeasance in accordance with their ordinary and usual meaning. Misfeasance is "The performance of an act which might lawfully be done, in an improper manner, by which another person receives an injury," while nonfeasance is "The non-performance of some act which ought to be performed." *Bouvier's* 1934 *Law Dictionary*, on pages 809 and 852. In *Moulton* v. *Scully*, 111 Me., 428, 89 A., 944, on page 434, nonfeasance is defined as "an omission to perform a required duty at all, or a total neglect of a duty; the omission of an act which a person ought to do."

In *Ducey* v. *Brunell*, 250 Mass., 114, 117, Chief Justice Rugg stated the Massachusetts public officer rule as follows:

> "A public officer is liable for any tort of *active misfeasance personally committed* by him while acting in the discharge of his ministerial duties as such and not as the special agent of the municipality, although the munici-

> pality in the absence of special statute may not be liable therefor," (Italics ours),

citing among other cases *Moynihan* v. *Todd,* supra, and *Barry* v. *Smith,* supra. Also see *Pease* v. *Parsons,* 273 Mass., 111.

But our Court, in *Bowden* v. *Derby,* 97 Me., 536, 55 A., 417, in dealing with a road commissioner as a public officer, has adopted a somewhat different rule, for it said on pages 541 and 542:

> "The dictates of humanity, and a proper regard for the lives and safety of the workmen engaged upon public no less than private works require that some one should be bound in law to furnish a reasonably safe place in which to do their work. . . . While he" (meaning the road commissioner) "need not answer for another he must answer for himself. *A personal liability attaches to him for his failure to exercise reasonable care in providing safe machinery with which, and a safe place in which, the defendant might work.*" (Italics ours.)

Thus, this Court has held that a public officer is liable not only for his own affirmative act of negligence but as well for his own negligent inaction. This difference between the Massachusetts and Maine rules probably was noted by Mr. Justice Qua when in *Fulgoni* v. *Johnston,* supra, on page 423 he stated: "Compare *Bowden* v. *Derby,* 97 Maine, 536." This is likewise indicated by examination of *Moffitt et al. v. Davis et al.,* 205 N. C., 565, 172 S. E., 317, 318, the other case cited by him for comparison purposes, since in the *Moffitt* case, supra, it was held as in Maine "that one who holds a public office, administrative in character, and in reference to an act clearly ministerial, may be held individually liable, in a civil action, to one who has received special injuries in consequence of *his failure to perform* or negligence in the performance of his official duty." (Italics ours.)

The presiding Justice in the instant case gave the Massa-

chusetts rule and limited liability "to his" (the defendant's) "own personal misfeasance." He employed virtually the identical words appearing on page 423 of the *Fulgoni* case, supra, when he said:

> "To put it in legal language, a public officer engaged wholly in the performance of a public duty, is liable only for *his own act of misfeasance* in connection with ministerial matters." (Italics ours.)

The claimed negligent acts as alleged in the plaintiff's writ and as to which evidence was introduced (the transcript is made a part of the bill of exceptions) are those both of misfeasance and nonfeasance as previously defined: for instance, failure to "provide a suitable and safe staging," failure to "cause it to be set up in a suitable and safe manner," failure to "cause it to be kept and maintained in a safe and suitable condition," failure to "employ suitable and careful persons in erecting and maintaining said staging," permitting "the use of old, worn and rotten boards as planking," permitting "the use of a board with a patent knot in its center," permitting "old rusty nails to be used," failure "to use sufficient nails," failure "to use boards of sufficient thickness and strength," the use of "boards too thin and too light," failure "to inspect the staging to ascertain its soundness," and failure "to warn the plaintiff of the dangerous condition . . . which he, the defendant, well knew or in the exercise of due care should have known."

So it will be seen that many of the plaintiff's grounds for recovery based on acts of claimed nonfeasance, recoverable under the Maine rule aforesaid, were denied him, even if the defendant as teacher were rightly regarded a public officer. It would seem, however, that if a schoolteacher were not a public officer, *a fortiori* he would be liable for his personal acts of nonfeasance, if such spelled a failure to discharge a duty he owed the injured party and constituted the proximate cause of such party's injuries. Thus it becomes unnecessary herein to determine whether a schoolteacher is or is not such a public officer.

In *Guyten* v. *Rhodes*, 29 N. E. (2d), 444 (Ohio), it is stated on page 445:

> "If the teacher is liable for malfeasance, there appears no sound reason why he should not be held liable for either misfeasance or nonfeasance, if his acts or neglect are the direct proximate cause of injury to the pupil."

In Michigan the Court in *Gaincott* v. *Davis*, 281 Mich., 515, 275 N. W., 229, said on page 231:

> "At least in a limited sense the relation of a teacher to a pupil is that of one in loco parentis. We are not here concerned with the law applicable to punishment of a pupil by a teacher; but rather with the law applicable to the duties of a teacher in the care and custody of a pupil. In the faithful discharge of such duties the teacher is bound to use reasonable care, tested in the light of the existing relationship. If, through negligence, the teacher is guilty of a breach of such duty and in consequence thereof a pupil suffers injury, liability results. It is not essential to such liability that the teacher's negligence should be so extreme as to be wanton or willful."

The *Guyten* and *Gaincott* cases, supra, seem to indicate that the duty is based on the teacher-pupil relationship of "in loco parentis," and that because the teacher has the care and custody of his pupils with right to govern and control them in their school work, he must so act as not negligently to injure them, whether the act is one of misfeasance or nonfeasance.

But apart from the teacher-pupil relationship, there is a "common-law obligation that every person must so act or use *that which he controls* as not to injure another." (Italics ours.) 35 Am. Jur., Sec. 584, page 1020. This principle has been invoked in determining liability of an employee to third parties. In Sec. 587 of 35 Am. Jur., it is stated on page 1024:

> "As in any case wherein liability on the part of the indi-

vidual is predicable of negligence, liability of an employee to a third person, where there is a master and servant relationship, is based upon the common-law duty resting upon every person to use due care and proper precaution so that he does not act or use that which he controls so as to negligently injure another person."

The plaintiff's claim is that the superintending school committee put the defendant with his consent in full charge of the erection of this building with the right to make use of his pupils in that work unless they objected, over whom he had control and direction, and so as a matter of law he was duty bound "to use due care and proper precaution" so that no negligent act of his, either of commission or omission, should proximately result in injury to them.

Whether the defendant in fact took on the erection of this building and had full charge thereof was a question of fact for the jury. If he did, we think that he assumed the duty as stated in the plaintiff's contention, with the result of liability if he failed in the discharge of that duty either by misfeasance or nonfeasance, provided such failure were the proximate cause of the injuries received by the plaintiff.

In 35 Am. Jur., Sec. 585, on page 1022, it is stated:

"Much criticism has been directed at the 'attenuated refinement,' as it has been termed, which attempts to fix the liability of an employee to a third person by a consideration of the wrongful conduct as misfeasance or as nonfeasance, and the tendency is to repudiate the doctrine of nonliability for nonfeasance and to hold the employee liable for the breach of any duty which he owes to a third person without regard to whether his conduct is properly characterized as misfeasance or nonfeasance."

We agree with this statement. We think liability in such a situation is dependent upon the establishment of the duty to the third party and breach thereof as the proximate cause.

Furthermore, we believe that when one accepts responsibility of due care towards those under his direction and control he must exercise that care not only as to what he himself actually does in its observance but as to what he fails to do, which in the exercise of due care he should have done. This duty is not entirely but somewhat analogous to that which an employee owes to his fellow employee, as expounded in *Hare* v. *McIntire*, 82 Me., 240. On page 245 our Court stated:

> And we are of opinion that where two or more persons are engaged in the same general business of a common employer, in which their mutual safety depends somewhat upon the care exercised by them respectively, each owes to the other a duty resulting from their relation of fellow-servants, to exercise such care in the prosecution of their work as men of ordinary prudence usually use in like circumstances; and he who fails in that respect is responsible for a resulting personal injury to his fellow-servant. Such a liability would necessarily have a salutary influence in inducing care on their part."

"What Are Misfeasances" as distinguished from nonfeasances is discussed in Sec. 586 of 35 Am. Jur., supra, on page 1023. Therein a distinction is noted between breach of a duty owed by the employee to his employer by virtue of their contract and that independently owed to the third party, the breach of the former constituting a nonfeasance and of the latter a misfeasance. Finally it is stated: "Thus, the meaning of nonfeasance is narrowed down to mere failure to enter upon the performance of a duty which the contract imposes upon the servant."

If this be sound (we do not say it is or is not), it will not avail this defendant, because such a distinction was neither given nor explained to the jury and it had the right to understand and should have been expected to understand from the instruction as given that the defendant would not be liable unless he were guilty of some active misfeasance personally

committed. Nowhere in the charge do we find any definition of the meaning of misfeasance and nonfeasance. It is highly improbable that the jury without such had any proper conception of their legal meaning.

Following a bench conference after the charge, the presiding Justice said:

> "I am requested to say that the fact that the defendant was a manual-training schoolteacher cannot shield him from the consequences of his own negligence. That is what is requested. I say he has a responsibility; a limited responsibility. He is responsible *for his own acts;* not the acts of others." (Italics ours.)

But whether a failure to act was intended to be embraced within the words "his own acts" was not clarified to the jury. The jury might have conceived that the words "his own acts" had reference only to his personal affirmative acts and so would exclude failure of action, especially in view of instructions previously given in the charge, of which mention has already been made. It should have been made clear to the jury that, although the defendant were the manual training schoolteacher of the plaintiff, if it found that the defendant had full charge and control of the work involved in the erection of this building, he would be liable for any act of negligence proximately causing the injuries of the plaintiff whether said negligence was due to an affirmative act upon his part or a failure by him to do that which a reasonably prudent person would have done under like circumstances.

We conclude, whether the defendant were rightly or wrongly regarded as a public officer coming within the Maine public officer rule, the plaintiff was prejudicially aggrieved by the instruction of the presiding Justice. This being so, we need not consider other exceptions presented by the plaintiff.

Exceptions sustained.

GERARD D. DAIGLE *vs.* DAVID D. PELLETIER.

Aroostook. Opinion, April 8, 1943.

Bailment. Workmen's Compensation Act. Directed Verdict.

The delivery of a municipally owned fire-truck, by its driver, to a garage for requested service and the acceptance of it for the service requested, by the garage, constitutes a bailment.

In the performance of such contract of bailment, in the absence of any control by the bailor, the garage proprietor and his employees engaged therein are independent contractors whose negligence is not imputable to the bailor.

An essential element of every contract of bailment of an automobile for repairs is the agreement of the bailee to return the car to the bailor or his authorized representative; and if the contract does not by its express or implied terms fix the place of return, the car must be delivered in the garage or shop where it was deposited or at some other appropriate place where it is kept for redelivery, on demand, and the bailee is under no obligation to make delivery of it elsewhere; but the automobile must be in a proper place for return when redelivery is tendered.

A mere offer to return an automobile after it had been repaired or serviced does not effect a redelivery of it if the car is then so situated that it cannot be repossessed by the bailor and taken away by the exercise of reasonable driving ability and skill, and, unless the bailor waives his rights to have a proper return, it is the duty of the bailee to move the car to a proper place or by other means make it ready for redelivery and until this is done the bailor can refuse to receive the car back.

In the case at bar, on the undisputed facts and those which must be deemed to be true, when the return of the fire-truck was tendered by the garage after it had been serviced, it was not in a proper place and ready for redelivery, and its removal into the street was to make restitution required by the contract of bailment.

The repair man while removing the truck from the garage was acting as an independent contractor and was not the servant of the customer.

The backing of the fire-truck into the street, not being an inherently dangerous or unlawful undertaking, the defendant was not bound to supervise the operation of the fire-truck or guard against accidents which might result only from the unlawful or negligent acts of the independent contractor.

The insurance carrier, having waived its right to pursue its remedy under the statute, this action by the plaintiff in his own name is authorized under the provisions of R. S. 1930, Chapter 55, Section 24.

Inasmuch as a verdict for the plaintiff, in the instant case, if it had been returned in the court below, could not have been sustained, it was the duty of the trial judge to direct a verdict for the defendant.

ON EXCEPTIONS BY THE PLAINTIFF.

Action to recover damages for personal injuries. The plaintiff was injured by ladders attached to a fire-truck owned by the town of Fort Kent which was being backed out into the street by a repair man employed by the Fort Kent Garage, where the truck had been taken by the defendant, its driver and custodian, and delivered for the purpose of having its battery recharged. When the truck was ready for delivery, the defendant was notified. The exit facilities from the garage were such that it was difficult to back the truck out, the defendant was unable to do so and requested the repair man to take the truck out, it being a practice at the garage for employees, at the request of customers, to take cars out of the repair shop. The repair man backed the car out, the defendant leaving the operation of the truck entirely to him. Although the plaintiff had received compensation under the Workmen's Compensation Act, the insurance carrier waived its right to pursue its remedy under the statute, and this action was by the plaintiff in his own name against the defendant, and defendant's liability was the only issue in the case. The trial judge granted a motion by the defendant for a directed verdict. Plaintiff excepted. Exceptions overruled. The case fully appears in the opinion.

Doherty & Brown, for the plaintiff.

James E. Mitchell,

Roland A. Page, for the defendant.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

STURGIS, C. J. In this action to recover damages for personal injuries the trial judge granted a motion by the defend-

ant for a directed verdict and the plaintiff reserved exceptions.

The transcript of the evidence discloses that as Gerard D. Daigle, the plaintiff, an undertaker's assistant, rode along the main street of Fort Kent on the running-board of a truck, he was struck and seriously injured by ladders attached to a fire-truck owned by the town of Fort Kent which was being backed out into the street by Julian P. Landry, a repair man employed by the Fort Kent Garage. The fire-truck had been taken to the repair shop of this garage by the defendant David D. Pelletier, its driver and custodian, and delivered there to Landry the repair man to have its battery recharged.

Landry accepted delivery of the fire-truck, serviced it and when the work was finished notified Pelletier the driver it was ready to go, but at that time the repair shop was so filled with cars that the fire-truck, which with ladders on it was more than twenty feet long, could not be turned around and driven out into the street but had to be backed out the door, angled around in and then backed out through a long, narrow alley on the garage property which was the only available exit to the street. This Pelletier was unable to do and having made that known to Landry asked him to take the fire-truck out and without express authority from but with the knowledge of the shop foreman, and in accordance with a practice in this garage for employees at the request of customers to take cars out of the repair shop and through the alley to the street, Landry backed the car out. Pelletier exercised no control or supervision over Landry but, leaving the driving of the fire-truck entirely to him, went into the front of the building and made his way out to the street with the apparent intention of taking possession of the machine when it was out of the alley, and he did not arrive there until after the accident had taken place.

Although the plaintiff has received Workmen's Compensation for his injuries the insurance carrier has waived its right to pursue its remedy under the statute and this action by the

plaintiff in his own name is authorized and timely. R. S., Chap. 55, Sec. 24, as amended; *Foster* v. *Hotel Co.*, 128 Me., 50, 145 A., 400. It is against David D. Pelletier the driver of the fire-truck and his liability only is in issue. In the several counts of the declaration, regardless of their order, it is alleged that he is liable because the repair man was his servant, and if not, he failed to properly supervise and guard against accidents from the operation of the fire-truck.

The taking of the fire-truck of Fort Kent by its driver into the repair shop of the Fort Kent Garage and the acceptance of it for servicing by the repair man constituted a bailment, the contract by its express or implied terms being to charge the battery and redeliver the fire-truck on demand. *Frost* v. *Chaplin Motor Co.*, 138 Me., 274, 25 A. (2d), 225. By the weight of authority in the performance of a contract of bailment for the repair or servicing of an automobile, in the absence of the exercise of any control by the bailor, a garage proprietor and his employees engaged therein are independent contractors whose negligence is not imputable to the bailor. *Freeman* v. *Southern Life Ins. Co.*, 210 Ala., 459, 98 So., 461; *Andrews* v. *Bloom*, 181 Ark., 1061, 29 S. W. (2d), 284; *Segler* v. *Callister*, 167 Cal., 377, 139 P., 819; *Woods* v. *Bowman*, 200 Ill. App., 612; *Johnson* v. *Selindh*, 221 Ia., 378, 265 N. W., 622; *Chute* v. *Morey*, 234 Mass., 387, 125 N. E., 574; *Whalen* v. *Sheehan*, 237 Mass., 112, 129 N. E., 379; *Onafer* v. *Strout*, 116 N. J. L., 274, 183 A., 215; *Woodcock* v. *Sartle, et al.*, 146 N. Y. S., 540; *Perry* v. *Fox*, 156 N. Y. S., 369; *McCloskey* v. *Nagel*, 202 N. Y. S., 34; *Bakery Co.* v. *Smith*, 162 Tenn., 253, 36 S. W. (2d), 80; *Menger* v. *Manphrey*, 200 Wis., 485, 227 N.W., 938; 5 *Blashfield* § 2966; 7-8 *Huddy* §§ 130, 133; 42 *C. J.*, 1114. See *Flaherty* v. *Helfont*, 123 Me., 134, 122 A., 180.

An essential element of every contract of bailment of an automobile for repairs, however, is the agreement of the bailee to return the car to the bailor or his authorized representative and if the place of return is designated therein the contract is

not complete until a delivery there has been made. *Andrews* v. *Bloom,* supra; *McCloskey* v. *Nagel,* supra. If the contract does not, by its express or implied terms, fix the place of return the car must be delivered in the garage or shop where it was deposited or at some other appropriate place where it is kept for redelivery on demand and the bailee is under no obligation to make delivery of it elsewhere. *Frost* v. *Chaplin Motor Co.,* supra; *Maynard* v. *James,* 109 Conn., 365, 146 A., 614; *Marron* v. *Bohannan,* 104 Conn., 467, 133 A., 667; 6 *Am. Jur.,* 303. But the automobile must be in a proper place for return when redelivery is tendered. *Storey* on *Bailments,* § 117. Neither reason nor authority supports the view that a mere offer to return an automobile after it has been repaired or serviced effects a redelivery of it if the car is then so situated that it cannot be repossessed by the bailor and taken away by the exercise of reasonable driving ability and skill, and unless the bailor waives his rights to have a proper return, we think it is the duty of the bailee to move the car to a proper place or by other means make it ready for redelivery. Until this is done the bailor may refuse to receive the car back. In doing it the bailee is only completing the bailment and he retains his status as an independent contractor.

The undisputed facts and those which must be deemed to be true in the case at bar compel the conclusion that when the return of the Fort Kent fire-truck was tendered in the Fort Kent Garage after it had been serviced, it was not in a proper place and ready for redelivery and its removal into the street was to make the restitution required by the contract of bailment. The repair man who did this was still acting as an independent contractor. *Rankin* v. *Nash-Texas Co.,* 129 Texas, 396, 105 S. W. (2d), 195. He was not, without obligation, extending a mere accommodation or favor, and the servant of the customer as in *Andres* v. *Cox, et al.,* 223 Mo. App., 1139; *Marron* v. *Bohannan,* supra.

As to the failure of the defendant, David D. Pelletier, to supervise the backing out of the fire-truck or guard against

accidents from that operation it need only be said that apparently the repair man with whom the bailment contract was made was a competent driver who the contractee had a right to assume would exercise reasonable skill and care in completing delivery of the car. This not being an inherently dangerous or unlawful undertaking, the contractee was not bound to supervise it or guard against accidents which might result only from the unlawful or negligent acts of the independent contractor. *Boardman* v. *Creighton*, 95 Me., 154, 49 A., 663; *Davis* v. *Whiting & Son Co.*, 201 Mass., 91, 87 N. E., 199; *Press* v. *Penney*, 242 Mo., 98, 145 S. W., 458; 27 *Am. Jur.*, 513 *et seq; Annotation* 18 A. L. R., 811. This rule applies to an agent, which on this record the defendant may have been, who within the scope of his authority employs an independent contractor for his principal. *Weaver* v. *Foundation Co.*, 310 Pa., 310, 165 A., 381.

Inasmuch as others not made parties might be prejudiced in their rights or liabilities growing out of this bailment we have not decided questions which are not of controlling importance in this case. For the reasons which have been stated a verdict for the plaintiff, if it had been returned in the court below, could not have been sustained and it was the duty of the trial judge to direct a verdict for the defendant. *Ward* v. *Power & Light Co.*, 134 Me., 430, 187 A., 527; *Day* v. *B. & M. Railroad*, 97 Me., 528, 55 A., 420. The exception reserved to that ruling cannot be sustained.

Exception overruled.

FRANCES C. BERNSTEIN *vs.* METROPOLITAN LIFE INSURANCE COMPANY OF NEW YORK, Docket No. 954.

ALBERT BERNSTEIN, A MINOR BY FRANCES C. BERNSTEIN, HIS MOTHER AND NEXT FRIEND, *vs.* NEW YORK LIFE INSURANCE COMPANY, Docket No. 955.

JOSEPH BERNSTEIN *vs.* NEW YORK LIFE INSURANCE COMPANY, Docket No. 956.

SELDON BERNSTEIN, A MINOR BY FRANCES C. BERNSTEIN *vs.* NEW YORK LIFE INSURANCE COMPANY, Docket No. 957.

ROBERT L. BERNSTEIN, A MINOR BY FRANCES C. BERNSTEIN *vs.* NEW YORK LIFE INSURANCE COMPANY, Docket No. 958.

FRANCES C. BERNSTEIN *vs.* NEW YORK LIFE INSURANCE COMPANY, Docket No. 959.

FRANCES C. BERNSTEIN, JOSEPH BERNSTEIN, HELEN BERNSTEIN GANS, AND SELDON BERNSTEIN, ALBERT BERNSTEIN AND ROBERT BERNSTEIN, MINORS UNDER AGE OF 21, WHO BRING THIS ACTION BY FRANCES C. BERNSTEIN, MOTHER AND NEXT FRIEND, *vs.* THE MACCABEES, Docket No. 960.

ALLAN COHEN, ADM'R OF THE ESTATE OF CHARLES J. BERNSTEIN, DECEASED, *vs.* NEW YORK LIFE INSURANCE COMPANY OF NEW YORK, Docket No. 961.

ALLAN COHEN, ADM'R OF THE ESTATE OF CHARLES J. BERNSTEIN, DECEASED, *vs.* NEW YORK LIFE INSURANCE COMPANY, Docket No. 962.

ALLAN COHEN, ADM'R OF THE ESTATE OF CHARLES J. BERNSTEIN, DECEASED, *vs.* NEW YORK LIFE INSURANCE COMPANY, Docket No. 963.

HELEN BERNSTEIN GANS *vs.* NEW YORK LIFE INSURANCE COMPANY, Docket No. 966.

JOSEPH BERNSTEIN AND HELEN BERNSTEIN GANS *vs.* THE MACCABEES, Docket No. 967.

Penobscot. Opinion, April 14, 1943.

Insurance. Presumptions as to Life and Death. Evidence. Reference.

Where there are no expressed findings of particular facts and decisions were for the plaintiffs, it must be assumed that the referees found for the plaintiffs on all issues of fact necessarily involved.

Questions of fact settled by referees, if their findings are supported by any evidence of probative value, are finally decided. Whether death has taken place is a question of fact.

Referees are the sole judges of the credibility of witnesses and the value of their testimony.

For a period of seven years following disappearance of a person there is a presumption of continuance of life, after which, without intelligence respecting him, the presumption of life will cease.

Presumptions of life and death as well as the presumption against death by suicide may be repelled by sufficient proof of facts.

During the seven year period, while the presumption of the continuance of life exists, death may be proved by showing facts from which a reasonable inference would lead to the conclusion that death had taken place.

Death need not be proved beyond a reasonable doubt, but may be established by facts proven and proper inferences based thereon.

Mere disappearance is insufficient to prove death, but disappearance, where there is no intelligence as to the absentee, although search and inquiry are made, together with other circumstantial facts proven with legitimate inferences based thereon, may be sufficient to establish death.

Where the evidence is only circumstantial and two equally plausible conclusions are deducible from the circumstances, referees with jury rights may decide which it shall adopt, and every other reasonable conclusion than the one arrived at need not be excluded in a civil action.

Inferences based on mere conjecture or mere probabilities are insufficient to prove death.

Herein, without basing inferences on mere conjectures, a finding of death by suicide was justified by facts proven and legitimate inferences founded thereon.

Inference of death may arise from a disappearance inconsistent with the continuance of life even though exposure to particular peril is not shown.

An inference of death, founded on a reasonable probability, must prevail against mere possibilities.

The rule is that following disappearance such search and inquiry shall be made as a reasonably prudent person would make in view of the circumstances.

Where the promise to pay in a benefit certificate was upon proof of actual death, proof of such death by circumstantial evidence was sufficient.

In the instant cases, proof of death having been established by circumstantial evidence, recovery was not forbidden under the by-law of the Maccabees.

The validity of said by-law is governed by the law of Michigan, domicile of the Maccabees, and, in that state, a provision in a by-law that proof of death shall be "direct and positive" rather than circumstantial is illegal and void.

The proofs of claims, in the instant cases, set forth sufficient data as to the time and place of death.

ON EXCEPTIONS TO THE ACCEPTANCE OF THE REPORTS OF THE REFEREES.

These twelve actions, by consent heard together before three referees, were brought to recover upon life insurance policies and benefit certificates on account of the alleged death of one Charles J. Bernstein. The defendants contended that there was not sufficient proof of death, said Bernstein having disappeared, and the proof of death presented being circumstantial. The referees found for the plaintiffs. Defendants excepted. Exceptions overruled in all cases. The cases fully appear in the opinion.

Michael Pilot, and *Abraham Stern,* for the plaintiffs.

James E. Mitchell, for Metropolitan Life Insurance Company of New York.

Fellows & Fellows, and *A. M. Rudman,* and *Leon V. Walker,* for New York Life Insurance Company.

Cecil H. Burleigh, and *Reginald Harris,* for The Maccabees.

SITTING: HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

HUDSON, J. These twelve actions, by consent heard together before three referees, come up on defendants' exceptions to acceptances of their reports. The exceptions are practically

identical except that in the two Maccabees cases additional errors are claimed. The suits were brought to recover upon life insurance policies and benefit certificates on account of the alleged death of one Charles J. Bernstein, formerly of Bangor.

The principal contention of all defendants is that the record does not disclose a sufficient quantum of proof of death of the insured. Without extended reports the referees found that the plaintiff in each case was entitled to recover a specified amount. These amounts are not contested if there be liability. Although there were no expressed findings of particular facts, it must be assumed that the referees found for the plaintiffs upon all issues of fact necessaily involved. *Chabot & Richard Co.* v. *Chabot,* 109 Me., 403, 405, 84 A., 892. So it must be assumed that these referees found for the plaintiffs on the issue of death.

In this jurisdiction, "Questions of fact once settled by Referees, if their findings are supported by any evidence, are finally decided. They and they alone are the sole judges of the credibility of witnesses and the value of their testimony." *Staples* v. *Littlefield,* 132 Me., 91, 93, 167 A., 171, 172; *Richardson* v. *Lalumiere,* 134 Me., 224, 227, 184 A., 392.

It seems to have been conceded that Mr. Bernstein, the insured, disappeared on December 27, 1939, and that since then there has been no intelligence with respect to him, although search and inquiry were made. These actions were brought about seven months after the disappearance — that is, within the seven-year period during which there is a presumption of continuance of life and after which, "without intelligence respecting him, the presumption of life will cease, and it will be incumbent on the other party asserting it, to prove that the person was living within that time." *Stevens* v. *McNamara,* 36 Me., 176, 178, 179, 58 Am. Dec., 740; *Wilson, Adm'x* v. *Insurance Co.,* 132 Me., 63, 65, 66 A., 57, and cases cited therein.

These presumptions of life and death as well as the presumption against death by suicide may be repelled by sufficient proof of facts. Even during the seven-year period while the pre-

sumption of continuance of life exists, "Death may be proved by showing facts from which a reasonable inference would lead to that conclusion. . . ." *Johnson* v. *Merithew*, 80 Me., 111, 115, 13 A., 132, 133, 6 Am. St. Rep., 162.

Whether death has taken place is a question of fact for the triers of facts and "Each case must be decided by the competent tribunal upon proof of the facts and probabilities, that life has been destroyed." *White* v. *Mann*, 26 Me., 361, 370. Death may be established by facts proven and proper inferences based thereon and where the evidence is undisputed, yet if different legitimate inferences may be drawn from it, a question of fact is presented for the jury (here the referees). *Whitehouse* v. *Bolster*, 95 Me., 458, 461, 50 A., 240, a case, however, not involving death but pertinent in principle.

During the existence of the presumption of continuance of life, the fact of mere disappearance is insufficient to prove death, but disappearance, where there is no intelligence as to the absentee, although search and inquiry are made, together with other circumstantial facts proven with legitimate inferences based thereon, may be sufficient to establish death. Herein the facts tending to show death were circumstantial, not direct.

Death need not be proved beyond a reasonable doubt. Where the evidence is only circumstantial and " 'two equally plausible conclusions are deducible from the circumstances,' the jury" (the referees herein had jury rights) "may decide which it shall adopt . . . and 'every other reasonable conclusion than the one arrived at need not be excluded in civil actions.' " *Cox* v. *Metropolitan Life Ins. Co.*, 139 Me., 167, 28 A. (2d), 143, 145.

In the cases at bar, our duty is simply to determine whether the findings of the referees were supported by *any* evidence of *probative* value, not by a fair preponderance of it. As stated in *Staples* v. *Littlefield*, supra, on page 93, "We are not, therefore, obliged to study the voluminous report of the evidence in this case for the purpose of ascertaining on which side the evidence

preponderates or what testimony we regard as most entitled to credence.... The parties to this controversy submitted their cause to a tribunal of their own choosing. To it they entrusted, without limitation, the power to decide questions of fact. Having chosen to go to that tribunal, they cannot now be heard upon the merits of this Court so long as there was produced before the Referees any evidence upon which could be based a decision."

The record discloses that Charles J. Bernstein, the insured, when he left his home in Bangor on December 27, 1939, was a man fifty-five years old, living with his wife fourteen years younger than he, four children by her, the oldest fourteen, twins thirteen, and a month old baby, together with his son, Joseph, twenty-five years old, issue of a former marriage. By that marriage he also had a daughter, Helen (older than Joseph), who lived in Connecticut. His home life was happy; he was an affectionate husband and father. He had had a cheerful disposition and had seemed to enjoy life, but there was much evidence that at least for several months before his disappearance he was extremely unhappy. It pictured him as a greatly discouraged man whose spirit had been sadly broken, so enmeshed with crushing circumstances that return to his former status of happiness and contentment seemed to him impossible. It disclosed many facts of recent occurrence before the disappearance from which the referees could have found that Mr. Bernstein believed his future was to contain only disgrace and sorrow which would deprive him of all desire to continue on fighting the battle of life.

He was a small loan investor and insurance broker. He never had been affluent. Mostly he hired his capital. His income was dependent on his ability to receive a higher percent on money he loaned than he paid in borrowing, and had diminished greatly. When he disappeared, he was hopelessly insolvent, his indebtedness exceeding his assets by more than $30,000. Upon pressure, he faced bankruptcy. "His insurance premiums were pressing him." He had borrowed practically

all he could from friends, relatives, and others. He had exhausted his credit at the bank, where he was in default. The loan values of his insurance policies had become almost nil. His home was heavily mortgaged.

He was a proud man and in the past had secured the confidence and respect of those with whom he had dealt. His inability to pay two of his creditors in particular, his aged uncle and an elderly friend, Mr. Zinn, disturbed him greatly. His disclosed purpose of leaving Bangor on December 27th was to try to procure a loan in Boston from one whom he had known for years for aid in paying his note to Mr. Zinn. Originally he had borrowed $5,000 from him. Some months before his departure he had with much difficulty raised $2,000 and had reduced the Zinn loan to $3,000, for which balance he gave him his note payable on January 1, 1940. Immediate payment of this he faced upon leaving home. When his son, Joseph, was taking him to the station to entrain for Boston, he told him that "George Zinn had showed him more consideration than most of his friends" and that "he was going to pay George Zinn off if it was the last thing he was ever going to do." He had already stated that "he was in so deep he didn't know how he was ever going to come out of the hole" and that "he was paying more interest than he was earning." He also said he couldn't face bankruptcy because of his friends, that "he couldn't let down his uncle Harris, who was eighty-five years old, and George Zinn and the rest of his friends."

Upon his arrival in Boston, without success he sought a loan of $1,500 from Mr. Garrity, an old acquaintance. The most he could obtain from him was $50, which he would not accept. It would afford no relief. When he left Mr. Garrity he told him that he would be sorry. Two days later Garrity read in the Boston papers that Mr. Bernstein was missing off the Boston-New York boat.

Recently his secretary, a young lady, had noticed how depressed he was. She kept his books and had knowledge of his

financial situation. She volunteered a loan of $500 to him from herself and her sister. He took it but returned it almost at once, saying that he couldn't keep it because they worked too hard to get the money.

His daughter visited him during his wife's convalescence from childbirth only a short time before he disappeared and noted the change in him. She tried to get him to take a small amount of money from her, but he could not bring himself to do it. He knew it could be of no help to him considering his needs. He told her he was "so deep in it he never had been so deep in financial difficulties before and he just didn't know what he was going to do." At another time he said to her, "I don't know just what to do, but I am going to do something about it real soon."

Many nights when Joseph, his son, came home late he found his father pacing the floor, apparently in great distress of mind.

In the latter part of November, 1939, The Merrill Trust Company was pressing him for payment of a deficiency of $1,000 on notes he had discounted at the bank, money he had collected and had not turned in.

He had procured two loans from a Mr. White, $5,000 in 1938 and $1,000 in the spring of 1939, the former secured by a policy of insurance. After the birth of the baby, White refused him another loan. He told Mr. White that he had "some internal trouble, it is serious, and I don't expect to live very long." Once when Mr. White was at his office to collect interest money, he said, "Well, you have had a pretty good time all your life, haven't you?" which White admitted. Then said Mr. Bernstein, "If you was to die you wouldn't be missing much, would you?" Then later he added, "I have had a pretty good time all my life; . . . I realize if I live much longer I wouldn't have much of a good time, and it wouldn't bother me any if I was to die tomorrow." "And then," said White, "he gave a big laugh as if it was kind of a joke." But was it?

When Mr. Bernstein left his office the day before he went to Boston, he said to his secretary, "Thank you for all your past favors," a thing she said he had never done before.

When leaving his son at the station in Bangor, he said, "Aren't you going to wish me luck?"

Mr. Russ, vice president of The Merrill Trust Company, who had had charge of Mr. Bernstein's credit at the bank, testified that he noticed "a great change" in him "the latter part of 1939"; that Mr. Bernstein had more or less difficulty in the summer and fall of 1939 in getting enough money to loan to make enough for him to live on, that he was always trying to get more money from the bank and because he couldn't he was very much disturbed and particularly because his credit had already been reduced. When he attempted to congratulate him upon the birth of the child, Mr. Bernstein told him he didn't think congratulations were in order. It seemed to be, he said, more or less the last blow, for "I don't know what I am going to do." Like testimony was also given by Mr. Colby, another officer of the bank. Mr. Bernstein also told his daughter, Helen, that "He felt that at his age and present financial condition that he had really no right to bring a child into the world. He said to me that he wished it were my baby instead of his own." He also told Mr. Zinn "he had almost persuaded his wife to submit to an illegal operation but somehow or other he couldn't seem to convince her and he wished he had been able to."

After Mr. Bernstein's conference with Mr. Garrity in Boston, he wired his wife in Bangor, "NO LUCK LEAVING TONIGHT BOAT INTERVIEW NEW YORK PARTY HOME FRIDAY LOVE — CHARLIE." About 5:30 o'clock on the afternoon of December 27th the steamship *Acadia* sailed from Boston for New York by way of Cape Cod Canal. This boat, having seven decks (two for freight), was 403 feet in length and 61 feet in breadth. "A" was the topmost deck and beneath in order were "B," "C," "D," etc. Its passenger capacity was 750. On this night there were 160 passengers. The next morning it was discovered

in New York that outside stateroom 251 on Deck "D" was locked, its key missing, and that inside there were a pair of men's rubbers and a black leather bag, containing among other things some of Mr. Bernstein's personal correspondence. Later this bag was positively identified as property of Mr. Bernstein. It was also learned on investigation that the landing stub of one of the tickets from Boston was missing. All others were accounted for.

The company records disclosed that one "C. J. Bernstein" had purchased stateroom 251. The bed therein showed that it had not been slept in that night, but a bodylike outside impress indicated that someone had lain on it.

The insured was identified as a passenger that night by Mr. Canty, Chief Steward of the *Acadia*. He testified that for about 25 minutes just before nine o'clock in the evening he sat within four feet of him on the quarterdeck watching a horse race game. He said he was "pensive and quiet." He thinks this was while they were yet in the Canal, which ordinarily it takes about an hour and a quarter to pass through. Then emergence is into Buzzards Bay and from there on the trip is on the open sea to New York with land at varying but long distances.

Considerable testimony was introduced as to conditions at the pier in New York where this boat landed with reference to the possibility of one's jumping down from "C" deck rail a distance of approximately 15 feet onto a two and one-half to three feet wide walk against the blank wall of a warehouse there situate (the walk used by linemen in hauling in and securing hawsers), and keeping from falling off into the water. The evidence tended strongly to show that this was practically impossible for any person, and all the more so for Mr. Bernstein, who had a tubercular hip, was lame, and had much difficulty in walking. One would reasonably expect that such a spectacular feat in that place, even though accomplished, would likely have attracted attention of eye witnesses.

The defendants insist that the finding of death by the

referees was obtained without sanction of law by piling inference upon inference. In the recent case of *Bechard, Adm'x* v. *Lake,* 136 Me., 385, 391, 392, 11 A. (2d), 267, 270, it is stated: "When it is sought to establish a case upon inference drawn from facts, it must be from facts proven. Inferences based on mere conjecture or probabilities will not support a verdict." Also see *Seavey* v. *Laughlin,* 98 Me., 517, 518, 519, 57 A., 796; *McTaggart* v. *Railroad Co.,* 100 Me., 223, 230, 60 A., 1027; *Titcomb* v. *Powers,* 108 Me., 347, 349, 80 A., 851; *Alden* v. *Railroad Company,* 112 Me., 515, 518, 92 A., 651; *Kerr* v. *Dyer,* 116 Me., 403, 405, 102 A., 178; *Mahan* v. *Hines,* 120 Me., 371, 378, 115 A., 132; *Syde's Case,* 127 Me., 214, 217, 218, 142 A., 777; *Ward* v. *Power & Light Co.,* 134 Me., 430, 433, 187 A., 527.

Professor Wigmore, in his Third Edition of *Wigmore on Evidence* says in Vol. 1, Sec. 41, beginning on page 434:

> "It was once suggested that an 'inference upon an inference' will not be permitted, *i.e.* that a fact desired to be used circumstantially must itself be established by testimonial evidence; and this suggestion has been repeated by several Courts, and sometimes actually enforced.
>
> "There is no such orthodox rule; nor can be. If there were, hardly a single trial could be adequately prosecuted. For example, on a charge of murder, the defendant's gun is found discharged; from this we infer that he discharged it; and from this we infer that it was his bullet which struck and killed the deceased.... In these and innumerable daily instances we build up inference upon inference, and yet no Court (until in very modern times) ever thought of forbidding it. All departments of reasoning, all scientific work, every day's life and every day's trials, proceed upon such data...."

In 95 A. L. R., beginning on page 162, is an exhaustive annotation on "Inference on inference; presumption on presumption." Finally, on page 186, it is stated:

"What appears to be the true rule is well stated in another opinion of that court," (Indiana) "in which, after referring to the contention that its conclusion violated the rule that probative force may not be assigned to an inference deduced from another inference, the court said: 'There is a rule to that effect. It, however, is frequently misinterpreted and misapplied. For the purpose of supporting a proposition, it is not permissible to draw an inference from a deduction which is itself purely speculative and unsupported by an established fact. Where an inference not supported by or drawn from a proven or known fact is indulged, and is then used as a basis for another inference, neither inference has probative value. Such a process may be described as drawing an inference from an inference, and is not allowable. 'At the beginning of every line of legitimate inferences there must be a fact, known or proved.... Where there is such a fact, the proper tribunal is not only permitted to, but also it is its duty to, draw therefrom those legitimate inferences that seem to be most reasonable. An inference so drawn becomes a fact in so far as concerns its relation to the proposition to be proven. It merges itself into the proven fact from which it was deduced, and the resulting augmented fact becomes a basis for other proper inferences. To assign to an inference properly drawn a position inferior to an established fact would in effect nullify its probative force.' "

But it is not necessary herein to consider whether the rule which seems to have been adopted in this state should now be abandoned, for we think that without piling inference upon inference and without basing inferences on mere conjectures a finding of death by suicide was justified by facts proven and legitimate inferences founded thereon. Granting the soundness of the rule, fact A when proven may warrant inference A′ when reasonable and proper, and so fact B may warrant inference B′, and other proper inferences may be drawn from

tween two situations, one involving a direct line of inferences from a base fact to an ultimate conclusion, and the other where from many proven facts as many legitimate inferences are derived and the ultimate fact is determined by considering the weight of these independent facts and inferences therefrom.

In *Bechard, Adm'x* v. *Lake,* supra, this court recently, although it recognized the rule, nevertheless collected the facts proven with their legitimate inferences and from them found lack of proof of the exercise of due care.

In *Hanzes* v. *Flavio,* 234 Mass., 320, 125 N. E., 612, the question was whether the death of a soldier had been established. When last seen he was engaged in a battle in Greece and then was uninjured. Since then he had not been seen or heard from. It appeared that funeral services in his memory were held by his relatives in his native town in Greece and that they had written their friends in this country that he was dead, although they had no personal knowledge of his death. It was also shown that the soldier left property in Massachusetts on which administration had been taken out. The court held that these facts were all competent evidence upon the question of death and said on page 328: "Collectively such facts were sufficient to support a finding that he died in the battle or shortly thereafter."

In *Johnson et al.* v. *Merithew,* supra, the court held the evidence sufficient to justify a finding that a vessel was lost with all on board within six months after sailing and said on page 115 of 80 Me.:

> 'Death may be proved by showing facts from which a reasonable inference would lead to that conclusion, as by proving that a person sailed in a particular vessel for a particular voyage and that neither vessel nor any person on board had been heard of for a length of time sufficient for information to be received from that part of the globe where the vessel might be driven or the persons on board of her might be carried."

In *White* v. *Mann*, supra, the court said on page 370:

> "The time, when such presumption" (of death) "will arise, may be greatly abridged by proof, that the person has encountered such perils as might be reasonably expected to destroy life, and has been so situated, that according to the ordinary course of human events he must have been heard of, if he had survived."

Likewise, *Fidelity Mutual Life Association* v. *Mettler*, 185 U. S., 308, 22 S. Ct., 662, 46 L. Ed., 922, was a case dealing with inference of death by drowning. The court said on page 316 of 185 U. S.; page 922 of 46 L. Ed.:

> "In our opinion the evidence was sufficient to justify the inference that Hunter was drowned in the Pecos river, on December 4, 1896, and the court below properly refused to peremptorily instruct the jury to find for defendant."

Then followed a recitation of facts and circumstances which were held sufficient to justify the finding of death. The following instruction was upheld:

> "While death may be presumed from the absence, for seven years, of one not heard from, where news from him, if living, would probably have been had, yet this period of seven years during which the presumption of continued life runs, and at the end of which it is presumed that life ceases, may be shortened by proof of such facts and circumstances connected with the disappearance of the person whose life is the subject of inquiry, and circumstances connected with his habits and customs of life, as, submitted to the test of reason and experience, would show to your satisfaction by a preponderance of the evidence that the person was dead."

In the Mettler case is cited *Davie* v. *Briggs*, 97 U. S., 634, 24 L. Ed., 1086, in which Mr. Justice Harlan said:

"If it appears in evidence that the absent person, within the seven years, encountered some specific peril, or within that period came within the range of some impending or immediate danger, which might reasonably be expected to destroy life, the court or jury may infer that life ceased before the expiration of the seven years."

Then Chief Justice Fuller, who wrote the opinion in the Mettler case, pointed out that there might be an inference of death where there was a disappearance if the circumstances were inconsistent with a continuation of life, even though exposure to some particular peril was not shown and the evidence indicated that the absentee came within the range of immediate danger. Also see *Tisdale* v. *Connecticut Mut. Life Ins. Co.*, 26 Iowa, 170, 96 Am. Dec., 136, 137.

In *Continental Life Ins. Co.* v. *Searing*, 240 F., 653, the last seen of the insured was when he "was just entering the surf" and the court held that that with other facts in the case constituted sufficient proof of death.

In *Occidental Life Ins. Co.* v. *Thomas*, 107 F. (2d), 876, the insured was in a boat at dusk and not therein the next morning. It held that it was not necessary that the proof preclude all possible inference except that of accidental drowning. The court added:

"Thomas may be still alive, or if dead, it may be that he died from other than accidental causes; but the facts essential to a recovery need not be established to a moral certainty or beyond a reasonable doubt. This is a situation where . . . the same evidence not only supports the inference of death, but also points to the cause of it."

In *United States* v. *Hayman*, 62 F. (2d), 118, it is stated on page 120:

"The Supreme Court of the United States has itself declined to accept as exclusive the rule of Davie v. Briggs, that proof must be made that at the time of the disappear-

ance the person was subjected to peril or danger. Fidelity Mutual Life Ins. Co. v. Mettler, 185 U. S. 308, 22 S. Ct. 662, 46 L. Ed. 922; cf. Wigmore Evid., Sec. 2531. In that case it was declared that the inference of death might arise from a disappearance *inconsistent with the continuance of life* even though exposure to particular peril is not shown." (Italics ours.)

In *Prudential Ins. Co. of America* v. *Stewart,* 286 F., 321, the court said on page 324:

"When we add to those circumstances and facts the evidence that Stewart could not swim, and that the current of the Columbia river was strong, the inference drawn by the District Court that Stewart was drowned becomes entirely reasonable, and there is far from enough to enable us to say that it is not fair and proper."

In *Bergman* v. *Supreme Tent, Knights of Maccabees,* 203 Mo. App., 685, 220 S. W., 1029, the court states on page 1032 of 220 S. W.:

"Here it is not necessary that the absent person should have been in contact with a specific peril, and the death may be inferred where the circumstances of the disappearance are *inconsistent with a continuation of life.*" (Italics ours.)

In *Rose* v. *United States,* 4 F. Supp., 340, where it appeared that one Carpenter was on board a ship anchored by the side of another, but later disappeared, the court, sustaining a finding of death, said on page 341: "The inference is inescapable that he either fell overboard or jumped overboard with an intention of swimming to land," and then on page 342 stated that "The circumstances surrounding the disappearance of Carpenter justify a finding that his death soon followed upon his leaving the ship, whether intentional or otherwise."

This from 25 C. J. S., Sec. 9, on page 1065 et seq.:

"In civil cases, death may be proved by proof of facts raising a presumption of death, or by direct evidence. Death may also be proved in some instances by circumstantial evidence. Wide latitude is allowed in the admission of evidence to prove death. Thus any facts or circumstances relating to the habits, character, condition, affections, attachments, prosperity, and objects in life, which usually control the conduct of men and are the motives of their actions, are competent evidence from which may be inferred the death of one absent and unheard from, whatever may have been the duration of such absence, but these facts must have occurred, or the character have been recognized, within such reasonable time prior to the death sought to be proved that they may justly be supposed to afford some light tending to establish or refute it, for remote acts as well as remote consequences are excluded. The age and health of the absentee, his purpose at the time he left, any peril that he may have encountered, the duration of his absence, his failure to claim rights, the absence of tidings, and the extent of the search made are all proper for consideration. . . . An inference of death, founded on a reasonable probability, must prevail against mere possibilities."

The last sentence quoted has significance with reference to the claim of the defendants that there was a possibility that Mr. Bernstein intended "a possible disappearance alive."

The defendants rely on *Howard* v. *Equitable Life Assur. Soc.*, 197 Wash., 230, 85 P. (2d), 253, in which is was held that ". . . there were not sufficient facts presented to prove the death of the insured without the aid of the presumption arising after the expiration of the seven years' absence." It was claimed that the insured fell or threw himself from a ferry boat into Lake Washington and drowned. He had been absent for more than seven years at the time of the trial, but the plaintiff sought to prove death within the seven-year period

so as to come within coverage of the policy. The court said on page 255 of 85 P. (2d):

> "While death, like any other fact, may be proved by circumstantial evidence, the evidence discloses no reason for Mr. Navone's disappearance except his mental condition. He was devoted to his wife and their children. He was well thought of in his community. He was not in a position of peril when last seen. No one saw him drown, and while he talked of suicide he had never been guilty of any act wherein he sought to take his own life."

The court was dealing with a factual question, as did the jury, which found that death had been established.

It is not claimed, of course, that we are bound by that decision. Hardly ever if ever are the facts in two cases exactly alike. Here there are dissimilarities. But even upon like facts different courts may arrive at different conclusions. We believe that our court, in view of the reasoning in decisions hereinbefore cited, would have reached the conclusion in the Howard case that the insured did either fall or jump into the lake and drown.

As above stated in several cited cases, it is not absolutely necessary that the absentee be in a position of peril when last seen. If he is, that is just one additional circumstance tending to show death, but failure to prove that fact does not prevent other circumstantial facts when of sufficient probative value from proving death.

Reverting to the facts in the cases at bar, we think that on this record the referees could have found and no doubt did find: first, that Mr. Bernstein embarked on this boat in Boston; second, did not disembark in New York; and third, was not on the boat when it landed. It follows by necessity that during that trip, probably between the western end of the Canal and New York (the boat made no landing between Boston and New York), he disappeared from it by jumping into the ocean, his purpose being self-destruction.

True, it does not necessarily follow that he was drowned, but as above noted, proof of death does not require absolute certainty. Was it reasonably probable under the facts proven and proper inferences therefrom that he drowned? We think so. For him to have survived, if he had any such desire, either he would have had to swim ashore or have been rescued by some boat or other agency. There is no evidence of any such means available. Still, it is possible that he was saved, although not probable. But as hereinbefore stated, a reasonable probability need not yield to a mere possibility. The question before the referees, it is true, was whether the death had been established by a fair preponderance of the evidence. While we think it was, that is not the question before this court. Can we say, the case having been heard before referees, that there was no evidence of probative value to establish the death? We cannot.

It was also claimed that the evidence did not establish that diligent search and inquiry for Mr. Bernstein were made after his disappearance. The rule is that such search and inquiry shall be made as a reasonably prudent person would make in view of the circumstances. 25 C. J. S., Sec. 6, d, on page 1059. Also see *Modern Woodmen of America* v. *Michelin,* 101 Okl., 217, 225 P., 163, where the court said on page 167 of 225 P.:

> ". . . the party upon whom devolves the duty to make inquiry concerning the missing one is required to make only such search and inquiry at such places and sources of information and from such persons as a reasonably prudent person under the same or similar circumstances would deem to be sufficient under the terms of the rule as stated."

Also see *Wentworth* v. *Wentworth,* 71 Me., 72, 74; *Chapman* v. *Kimball,* 83 Me., 389, 395, 22 A., 254; *Stockbridge, Petitioner,* 145 Mass., 517, 519, 14 N. E., 928. We consider there was full compliance with the rule.

THE MACCABEES CASES.

We will now consider certain additional points made in the Maccabees cases.

In the benefit certificates issued by the Maccabees the promise to pay was "upon proof of *actual* death." (Italics ours.) Counsel contend that a variance exists between the pleadings and proof, that breach of one contract was alleged and breach of another proved. As permitted by Sec. 40, Chap. 96, R. S. 1930, the plaintiffs declared in "indebitatus assumpsit on an account annexed" to recover "proceeds due on insurance policy" number etc., which contained the promise as above stated. Inasmuch as actual death was proved, although by circumstantial evidence, there was no variance.

In *Steen* v. *Modern Woodmen of America*, 296 Ill., 104, 129 N. E., 546, the court stated on page 549:

> "Much of the argument is based upon the theory that this by-law excludes proof of death by circumstantial evidence."

The by-law referred to provided:

> "No lapse of time or absence or disappearance on the part of any member heretofore or hereafter admitted into the society, without proof of *the actual death* of such member while in good standing in the society, shall entitle his beneficiary to recover. . . ." (Italics ours.)

Then in comment upon this by-law the court continued on page 549 of 129 N. E.:

> "We do not think the by-law subject to this construction. The law is well settled in this state that death may be proven by circumstantial evidence, and we do not consider that the by-law attacks in any way that established principle."

Also in *De Vore-Norton* v. *Brotherhood of Locomotive F. and E.*, 132 Okl., 130, 270 P., 12, it was held that although the

insurance contract calls for "positive proof" of death, such proof may be by circumstantial evidence.

Likewise, it is claimed by counsel for the Maccabees that Sec. 281 of their by-laws prevents recovery. This by-law reads as follows:

> "The absence or disappearance of a member of the Association from his last known place of residence for any length of time, shall not be evidence of the death of the member, and no right shall accrue under the certificate of membership to a beneficiary nor shall any benefits be paid *until conclusive proof* has been made of the death of the member aside from any presumption that might arise by reason of his absence, provided when death is established by presumption of law, or when death has occurred in violation of the laws of this Association, or the laws of the land, then and in such cases the full liability of the Association shall be the reserve maintained by the Association in that case...." (Italics ours.)

It will be observed that the first clause has to do with what shall not be evidence of death and that the remainder of the section relates to liability. The gist of the latter part of the section, as we view it, is that proof of death simply by use of the presumption is insufficient, but that in addition thereto to recover there shall be other "conclusive proof," with this qualification, that when the death is established only by presumption of law, liability shall be limited to the reserve maintained by the Association in that case. The section does not forbid recovery when proof is established by circumstantial evidence, but it is provided that such other proof shall be "conclusive."

Then what was intended by the use of the word "conclusive"? Absolutely conclusive? So conclusive as to admit of no doubt or even of a reasonable doubt? Or was "conclusive" intended to have the meaning of "positive" so that there must be positive proof of death?

> "A stipulation for 'positive proof of death' means proof as positive as the circumstances reasonably afford, and positive enough to satisfy the judgment of reasonable men, the production of the body not being indispensable." 7 Couch on Insurance, page 5494, Sec. 1542, and cases there cited.

The above questions, however, we need not answer, because, granting without admitting that "conclusive" was intended to mean proof so conclusive as to constitute proof beyond a shadow of doubt, the by-law would be void and against public policy in the state of Michigan, the Maccabees' domicile, the law of which state governs its validity. *Modern Woodmen of America* v. *Mixer*, 267 U. S., 544, 45 S. Ct., 389, 69 L. Ed., 783, 41 A. L. R., 1384; annotation in 60 A. L. R., 592.

In *Utter* v. *Travelers' Ins. Co.*, 65 Mich., 545, 32 N. W., 812, the Michigan court stated on page 816 of 32 N. W.:

> "Courts will not permit the course of justice, upon trials before them, to be stipulated or contracted in such manner as to defeat the ends to be subserved by such trials. The parties to the contract cannot agree to oust the courts of jurisdiction over such contract. The operation of this clause, *requiring direct and positive proof*, in many cases would, in effect, preclude the court from jurisdiction and bar recovery. If they can make this agreement, they can also stipulate that the evidence must come from certain persons, or make any agreement they see fit, controlling and directing the course of proceeding upon the trial. They may contract in relation to a condition precedent before bringing suit, or in relation to anything going to the remedy, but not to the right of recovery itself. Wood, Ins. 750. Circumstantial evidence is regarded by the law as competent to prove any given fact; and sometimes it is as cogent and irresistible as direct and positive testimony." (Italics ours.)

This opinion came down April 28, 1887, but as recently as April 3, 1934, that court in *Leahey* v. *State Life Ins. Co.*, 266 Mich., 631, 254 N. W., 229, stated on page 230: "We have held that courts will not permit the course of justice, upon trials before them, to be stipulated or contracted in such a manner as to defeat the ends to be subserved by such trials," and then as authority cited the Utter case, supra. We do not find that the law enunciated in the Utter case, supra, has since been modified in that state. Many times in other states it has been cited with approval, although not always. For some of the approving cases, see *Haines* v. *Modern Woodmen of America*, 189 Iowa, 651, 178 N. W., 1010, on page 1015; *Ellis* v. *Interstate Business Men's Acc. Ass'n*, 183 Iowa, 1279, 168 N. W., 212, 215; *Fleming* v. *Merchants' Life Ins. Co.*, 180 N. W., 202, 205 (Iowa); *Gaffney* v. *Royal Neighbors of America*, 31 Idaho, 549, 174 P., 1014, 1016; *Hannon* v. *Grand Lodge, A. O. U. W. of Kansas*, 99 Kan., 734, 163 P., 169, 171; *Smith* v. *Maryland Casualty Co.*, 63 N. D., 99, 246 N. W., 451, 453; *Rollins* v. *Business Men's Acc. Ass'n*, 204 Mo. App., 679, 220 S. W., 1022, 1026; *McCormick* v. *Woodmen of the World*, 57 Cal. App., 568, 207 P., 943, 944; *American Casualty Co.* v. *Horton*, 152 S. W. (2d), 395, 398 (Texas); *Fleming* v. *Merchants' Life Ins. Co.*, 193 Iowa, 1164, 188 N. W., 703, 706; *American Ben. Life Ass'n* v. *Hall*, 96 Ind. App., 498, 185 N. E., 344, 345; *Campbell* v. *Monumental Life Ins. Co.*, 34 N. E. (2d), 268, 274 (Ohio); *Fernandez* v. *Sovereign Camp. W. O. W.*, 142 Kan., 75, 46 P. (2d), 10, 14.

But it is not a question of what the law is in this regard in any state except Michigan — not even in Maine. The law in Michigan seems plainly to declare against the validity of such a by-law. We need not affirm or disaffirm its soundness. We are herein compelled to accept it as law in that state which governs us in these Maccabees cases.

Finally, it is claimed by counsel for the Maccabees that due proofs of claim were not furnished because of failure to set forth therein the time and place of death. An examination of

the proofs, however, shows that the facts attending the disappearance were set forth in detail including the date and place of embarkation on S. S. *Acadia*, the departure of the boat from Boston on December 27, 1939, with the absentee on it, its destination (New York), his failure to land at New York, and then finally is set forth in specific language the drowning of the deceased "sometime between nine o'clock P.M. of December 27, 1939 and prior to the docking of said steamship *Acadia*." This we deem sufficient.

Exceptions in all cases overruled.

STURGIS, C. J., and THAXTER, J., not participating.
MURCHIE, J., concurring in result only.

ALICE PEARL
vs.
CUMBERLAND SAND & GRAVEL CO., INC.

JAMES PEARL
vs.
CUMBERLAND SAND & GRAVEL CO., INC.

Cumberland. Opinion, April 14, 1943.

Course of Employment. Findings of Fact by Referee.

In the instant case, the controlling questions were questions of fact.
When the decision of a referee is supported by evidence of probative value, exceptions to the acceptance of his report cannot be sustained.

ON EXCEPTIONS BY THE DEFENDANT.

Actions for damages for injuries in an automobile accident.

The plaintiffs were injured when the automobile in which they were riding collided with defendant's truck driven by defendant's employee. At the time of the accident, said employee was on his way back to his job from the restaurant where he had been for luncheon. The case was heard by a referee, who

found for the plaintiffs and awarded damages. His report was accepted in the trial court. Defendant filed exceptions. Exceptions overruled. The case fully appears in the opinion.

I. Edward Cohen, for the plaintiff.

Harry S. Judelshon, for the defendant.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

STURGIS, C. J. In these actions of tort, which were tried together before a Referee with right to except as to questions of law reserved, the defendant filed exceptions to the acceptance of the Reports allowing the plaintiffs recoveries and awarding damages.

The plaintiffs were injured when the car in which they were riding, collided with one of the defendant's trucks at the intersection of Elm and Lancaster Streets in Portland. The driver of the truck, employed by the defendant Company to haul sand with it from a pit in a nearby town to a construction job at the corner of Cedar and Lancaster Streets in Portland, it being noon when he dumped a load of sand which he had just hauled in, drove the truck to a restaurant several blocks away for his luncheon and at the time of the accident was on his way back to the job to get a slip for the sand he had delivered and return to the pit. It does not appear that there was any other eating place nearer the job or on his regular route, and although he had not received express permission to use the truck to drive to his noonday meals, this had not been prohibited.

The trier of fact could have found on the evidence that the negligence of the driver of the defendant's truck was the proximate cause of the plaintiffs' injuries and they were in the exercise of due care. He had a right to infer that the responsible officers of the defendant Company should have anticipated that its employee might have to use the truck to drive to his luncheon when he was in Portland at the noon hour and impliedly authorized him to do so. And whether at the time of the

accident, although the purpose of his slight deviation had been accomplished, he had resumed his employment and was acting in the course of it was a question of fact and not of law. This case is governed by *Good* v. *Berrie,* 123 Me., 266, 122 A., 630. It is not within the rule laid down in *Robertson, Admtrx.* v. *Armour Company,* 129 Me., 501, 152 A., 407.

The controlling questions in this case were of fact and the decision of the referee thereon was supported by evidence of probative value. The exception to the ruling below cannot be sustained. *Wood* v. *Balzano,* 137 Me., 87; *Jordan* v. *Hilbert,* 131 Me., 56, 158 A., 853. The entry in each of these cases must be the same,

Exceptions overruled.

ARMAND PETIT, PETITIONER FOR MANDAMUS,

vs.

ARMAND DUQUETTE.

York. Opinion, April 16, 1943.

Mandamus. Elections.

A refusal to issue a peremptory writ which could not be obeyed is not error.

ON EXCEPTIONS.

The petitioner presented a petition for a writ of mandamus to compel the placing of his name on the election ballot after the election referred to had been held. Writ was refused. The petitioner excepted. Exceptions overruled. The case fully appears in the opinion.

Thomas F. Sullivan, for the petitioner.

Louis B. Lausier,

William P. Donahue, for the defendant.

SITTING: STURGIS, C. J., HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

PER CURIAM.

Exceptions duly certified to the refusal of a Justice of the Supreme Judicial Court to award a peremptory writ on a petition for mandamus to compel the Clerk of the City of Biddeford to place the name of the petitioner, as an Independent candidate for the office of Councilman at large, on the general ballot to be used in an approaching municipal election.

It clearly appearing that this proceeding was neither instituted nor heard until after the election to which it relates had been held and finally concluded and the respondent then had no power or authority to act upon the petitioner's nomination for the office he was seeking, the refusal to issue a peremptory writ which he could not obey was not error, and abstract questions, raised in the pleadings and on the briefs, required no ruling.

As a prior timely but independent petition, denied on other grounds with exceptions reserved but withdrawn, lends no efficacy to this proceeding, the entry is,

Exceptions overruled.

MEMORANDUM DECISION

CASE WITHOUT OPINION.

EDWIN BOBB, PETITIONER, *vs.* STATE OF MAINE.

Opinion, June 17, 1942.

Clarence Scott,

Hayden C. Covington, Brooklyn, N. Y., for the petitoner.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, WORSTER, MURCHIE, JJ.

PER CURIAM.

This is a Petition and Motion to rectify alleged Errors in the Opinion in the case of *State of Maine* v. *Edwin Bobb* argued before the Law Court at the September Term, 1941, and appearing in 138 Me., 242, and 25 Atl. (2d), 229.

A careful examination of this Petition and Motion discloses no error which requires correction.

Petition dismissed.
Motion denied.

OPINIONS OF THE JUSTICES

QUESTIONS AND ANSWERS

QUESTIONS SUBMITTED BY THE HOUSE OF REPRESENTATIVES OF MAINE TO THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MAINE, MARCH 24, 1943, WITH THE ANSWERS OF THE JUSTICES THEREON.

STATE OF MAINE

The House

Whereas, there has been introduced in the House of Representatives of the 91st legislature a bill appertaining to the issuance of certain state bonds which, if constitutional, would materially alleviate the financial problems of the state, and

Whereas, said bill has been reported "ought to pass" by the committee to which it was referred and has been passed to be engrossed by both branches of said legislature and is now in order to be enacted, and

Whereas, there are now outstanding bonds of the state which mature or are subject to redemption before June 30, 1947, including $1,000,000 at 4% Kennebec Bridge bonds which are callable on June 1, 1947, and

Whereas, it is now possible to sell the state's bonds at a rate of less than 2%, and

Whereas, it is possible to reinvest the proceeds of the sale of state bonds in federal government securities so that the state will be able to retire such outstanding bonds, including the Kennebec Bridge bonds, in 1947 from the sale of the said federal government securities without any loss of interest, and thus replace the 4% bonds with 2% bonds, and

Whereas, it is vital to the state during this war period to conserve all of its resources, and the House of Representatives

find, as a fact, that this is a solemn occasion, now, therefor be it

ORDERED, That in accordance with the provisions of the constitution of the state, the justices of the supreme judicial court are hereby respectfully requested to give this House their opinion of the following question: "Would H. P. 1069, L. D. 558, 'An Act to Provide for the issuance of the Refunding Bonds of the State' if enacted by the Legislature in its present form be constitutional?"

House of Representatives
March 24, 1943
Received Passage
HARVEY R. PEASE,
Clerk.

STATE OF MAINE

In The Year Of Our Lord Nineteen Hundred Forty-Three

H. P. 1069 — L. D. 558

An Act to Provide for the Issuance of Refunding Bonds of the State.

Emergency preamble. Whereas, the present world-wide state of war existing between the United State and the Axis Powers has brought about (a) a complete and unprecedented dislocation in the normal economic life of the United States, (b) a cessation of the importation of crude rubber into the United States, and (c) the establishment, by executive order of the President of the United States, of the War Production Board and the various administrative agencies therein which, in the performance of their duties with regard to defense and civilian supply, priorities and allocations have seriously curtailed the sale of new rubber tires, casings and tubes and have ordered the rationing of the available supply of gasoline for public consumption; and

Whereas, the foregoing facts have resulted in serious reductions, and are expected to result in further reductions, in the

revenues received by the state from the gasoline tax, from the motor vehicle registration and drivers' licenses, and from other sources; and

Whereas, it may become necessary, in order to protect the credit of the state, to make provision for refunding immediately some of the outstanding bonds of the state, and the protection of the credit of the state is essential to the public peace, health and safety; and

Whereas, in the judgment of the legislature, the present excellent market for state and municipal bonds will permit the refunding of outstanding bonds of the state at lower interest rates, but such market may be seriously affected at any time by developments in the present World War; and

Whereas, in the judgment of the legislature, these facts create an emergency within the meaning of section 16 of Article XXXI of the constitution and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore, Be it enacted by the People of the State of Maine, as follows:

Issuance of refunding bonds. For the purpose of refunding like principal amounts of bonds of the state which are now outstanding and which mature or are subject to redemption before June 30, 1947, the treasurer is hereby authorized, with the approval of the governor and council, to issue from time to time refunding bonds of the state, such refunding bonds of each issue to bear interest at a rate or rates less than the rate now borne by the bonds to be refunded, to mature at such time or times, to be in such form, to be sold in such manner and at such price, not less than par and accrued interest, and to be executed in such manner, as may be determined by the treasurer with the approval of the governor and council; provided, however, that no such issue of refunding bonds shall be delivered more than 1 year prior to the maturity or the date of redemption of the bonds to be refunded unless (a) the proceeds of such refunding bonds shall be invested by the treasurer in securities which constitute direct obligations of, or

obligations the principal and interest of which are unconditionally guaranteed by, the United States Government and which have a maturity prior to the maturity date or the redemption date of the bonds to be refunded and (b) the premium paid to the state for such refunding bonds shall be in excess of (i) the additional interest which the state will be required to pay during the period both the bonds to be refunded and the new refunding bonds will be outstanding and (ii) the premium which will be required to purchase such government securities. The treasurer shall hold such investment in a separate fund for the bonds to be refunded and shall use the proceeds of such investment in paying, either at the maturity date or dates or the redemption date, the bonds to be refunded. The holders of the refunding bonds of each such issue shall be subrogated to all the rights, powers and privileges of the holders of the bonds refunded thereby.

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

TO THE HONORABLE HOUSE OF REPRESENTATIVES OF MAINE:

The undersigned Justices of the Supreme Judicial Court have the honor to submit the following answer to the question propounded to us bearing date of March 24, 1943, relating to the issuance of refunding bonds of the State.

QUESTION.

Would H. P. 1069, L. D. 558, "An Act to Provide for the issuance of the Refunding Bonds of the State" if enacted by the Legislature in its present form be constitutional?"

ANSWER.

Unless otherwise expressly prohibited, the Legislature has the power to authorize the refunding of valid outstanding obligations of the State but the issuance of bonds for that purpose an unreasonable length of time before the maturity of the indebtedness for the avowed and inseparable purpose of establishing an interim investment fund for gain and profit as

is authorized by H. P. 1069, L. D. 558, pending in the 91st Legislature of Maine, will create a new debt or liability on behalf of the State in violation of the Provisions of Section 14 of Article IX of the Constitution of Maine as amended. We answer this question in the negative.

Very respectfully,

GUY H. STURGIS
SIDNEY ST. F. THAXTER
JAMES H. HUDSON
HARRY MANSER
HAROLD H. MURCHIE
ARTHUR CHAPMAN

Dated March 30, 1943.

QUESTIONS SUBMITTED BY THE HOUSE OF REPRESENTATIVES OF MAINE TO THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MAINE, MARCH 26, 1943, WITH THE ANSWERS OF THE JUSTICES THEREON.

STATE OF MAINE

Whereas, a bill has been introduced into the House and it is important that the Legislature be informed as to the constitutionality of the proposed bill; and

Whereas, it appears to the House of Representatives of the Ninety-first Legislature that it presents important questions of law and that the occasion is a solemn one; now, therefore, be it

ORDERED: That in accordance with the provisions of the Constitution of the state, the Justices of the Supreme Judicial Court are hereby respectfully requested to give this Legislature their opinion of the following question:

Has the Legislature the right and authority under the Constitution to enact a law according to the terms of the following bill?

H. P. 1301, L. D. 830

An Act Relating to Alternative Method of Enforcement of Tax Liens.

Sec. 1, P. L., 1933, C. 244, § 1, amended. Section 1 of chapter 244 of the public laws of 1933, as amended, is hereby further amended to read as follows:

"Sec. 1. Alternative method for the enforcement of liens for taxes on real estate. Liens on real estate created by section 3 of chapter 13 of the revised statutes, in addition to other methods previously established by law may be enforced in the following manner, provided, however, that in the inventory and valuation upon which the assessment is made there shall be a description of the real estate sufficiently accurate to identify it. Any officer to whom a tax has been committed for collection, or his successor in office in case of his death or disability, may, after the expiration of 8 months and within 1 year after the date of commitment to him of said tax, give to the person against whom said tax is assessed, or leave at his last and usual place of abode, or send by registered mail, to his last known place of abode, a notice in writing signed by said officer stating the amount of such tax, describing the real estate on which the tax is assessed, alleging that a lien is claimed on said real estate to secure the payment of the tax and demanding the payment of said tax within 10 days after service or mailing of such notice. If an owner or occupant of real estate to whom said real estate is taxed shall die before such demand is made on him, such demand may be made upon the executor or administrator of his estate or upon any of his heirs or devisees. After the expiration of said 10 days and within 10 days thereafter, said officer shall record in the registry of deeds of the county or registry district where said real estate is situated, a certificate signed by said officer setting forth the amount of such tax, the name of the person against whom said tax was assessed, a description of the real estate on which the tax is assessed and an allegation that a lien is claimed on said real

estate to secure the payment of said tax, that a demand for payment of said tax has been made in accordance with the provisions of this act and that said tax remains unpaid. When the undivided real estate of a deceased person has been assessed to his heirs or devisees without designating any of them by name it will be sufficient to record in said registry said certificate in the name of the heirs or the devisees of said decedent without designating them by name. At the time of the recording of the certificate in the registry of deeds as herein provided, in all cases such officer shall file with the town treasurer a true copy of said certificate and also at the time of recording as aforesaid, the said officer shall mail by registered letter to each record holder of a mortgage on said real estate, addressed to him at his place of last and usual abode, a true copy of said certificate. If the real estate has not been assessed to its record owner the officer shall send be registered mail a true copy of said certificate to the record owner. The fee to be charged to the taxpayer for said notice and filing shall not exceed $1 and the fee to be charged by the register of deeds for such filing shall not exceed 50¢."

Sec. 2. P. L., 1933, c. 244, additional. Chapter 244 of the public laws of 1933, as amended, is hereby further amended by adding thereto a new section to be numbered section 6, and to read as follows:

"Sec. 6. Bill in equity to set aside tax or tax lien claimed invalid. At any time prior to the expiration of 18 months after the recording of the tax lien provided for in the foregoing sections, any person who has a legal or equitable interest in the real estate covered by such lien, and who claims that the provision of law relating to the assessment of the tax or the perfection of the tax lien have not been complied with, may bring a bill in equity to set aside the tax lien as invalid. The court may stay the foreclosure of such tax lien pending final decision, and shall, after notice and hearing, either affirm the validity of such tax and tax lien, or set aside the tax or the tax lien or both as invalid and void."

Sec. 3. P. L., 1933, c. 244, additional. Chapter 244 of the public laws of 1933, as amended, is hereby further amended by adding thereto a new section to be numbered section 7, and to read as follows:

"Sec. 7. Limitation on action to set aside tax or tax lien provided; exception. At the expiration of said 18 months after the recording of the tax lien, if such tax has not previously been paid or the tax lien redeemed, the town shall be conclusively presumed to have acquired an absolute title to the real estate described in such tax lien, and all claims adverse thereto and not seasonably prosecuted under the provisions of section 6 shall be forever barred, provided however that this presumption and limitation upon action shall not apply where the tax lien is claimed to be invalid because the description in the recorded tax lien was insufficient to reasonably identify the property, or because the tax was not assessed against the person or persons legally assessable therefor, or because of failure to send the notices required by section 1 hereof."

Sec. 4. P. L., 1933, c. 244, additional. Chapter 244 of the public laws of 1933, as amended, is hereby further amended by adding thereto a new section to be numbered section 8, and to read as follows:

"Sec. 8. Remedy when property conveyed after tax paid or redeemed. In event any person entitled so to do pays the taxes assessed upon property or redeems the same at any time before expiration of the redemption period, and thereafter the town conveys the same to a third party under claim of title obtained by foreclosure of a tax lien, the purchaser thereof acquires no title thereto but may recover of the town his actual damages in an action on the case."

House of Representatives
March 26, 1943
Passed

HARVEY R. PEASE,
Clerk.

To The Honorable House of Representatives of Maine:

The undersigned Justices of the Supreme Judicial Court have the honor to submit the following answer to the question propounded to us bearing date of March 26, 1943, relating to Amendments and Additions to Public Laws 1933, Chapter 244, providing an Alternative Method of Enforcement of Tax Liens.

Question.

Has the Legislature the right and authority under the Constitution to enact a law according to the terms of the following bill?

H. P. 1301, L. D. 830

An Act Relating to Alternative Method of Enforcement of Tax Liens.

Answer.

The Amendment of Chapter 244 of Public Laws of 1933 by the addition of Section 6 and Section 7 as proposed in H. P. 1301, L. D. 830, pending in the 91st Legislature of Maine, would provide a method by which a person might be deprived of his property without due process of law. We, therefore, answer this question in the negative.

Very respectfully,

Guy H. Sturgis
Sidney St. F. Thaxter
James H. Hudson
Harry Manser
Harold H. Murchie
Arthur Chapman

Dated March 30, 1943.

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The purpose of the statute requiring the erection of such signs is to give travelers on specially designated through ways the right of way over all vehicles entering or crossing such through ways.

It is a matter of common knowledge that stop signs are placed at intersecting streets which are not through ways, by municipal authorities. The ordinary stop sign, however, indicates no change of the general right of way rule. The special rule applies only when the sign suitably warns of a through way intersection (R. S. 1930, Chapter 29, Sections 7 and 8).

When it is urged that a right of way rule is abrogated because a stop sign is near the intersection of two ways, it cannot be assumed, without evidence, that one of the ways is a through way and that the stop sign was erected under the authority of the State Highway Commission.

Hill v. *Janson*, 344.

In answering emergency calls a fire department vehicle having the right of way under Revised Statutes 1930, Chapter 29, Section 13, is exempt from the operation of regulations controlling the movement of traffic by signal lights or other means or devices.

The right of way given to public service vehicles by the statute and their exemption from traffic regulations, however, do not relieve their operators from the duty of exercising due care to prevent injury to themselves and others lawfully upon the ways. The measure of their responsibility is due care under all circumstances.

Russell v. *Nadeau*, 286.

The Revised Statutes (Chapter 29, Section 46) provide a proper remedy to a person aggrieved by the decision of the Secretary of State in refusing to issue a certificate of registration, and such remedy is exclusive. Mandamus will not be granted in such cases.

The legislature had the right to provide an exclusive method of appeal from the decision of the Secretary of State.

The right to use the highways for business is not inherent or vested but in the nature of a special privilege which the State, through the legislature, may condition, restrain, extend or prohibit. Registration is for the purpose of exercising such control and the certificate of registration constitutes a license to operate in accordance with such conditions as are imposed.

Steves v. *Robie*, 359.

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The delivery of a municipally owned fire-truck, by its driver, to a garage for requested service and the acceptance of it for the service requested, by the garage, constitutes a bailment.

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does not bar extradition, since the purpose of the statute is to secure the person of the accused for future arrest under the governor's warrant. In the instant case, there was no necessity for such hearing to effect the purpose of the statute.

Where there is a defective allegation in an indictment as to the time of the commission of the offense for which extradition is demanded, it does not necessarily constitute a defense to extradition.

In habeas corpus proceedings in a case of a demand for extradition, the indictment need not conform to the standard required, judged as a criminal pleading, but it must show satisfactorily that the accused has been charged with commission of a crime in the demanding state.

In Re King, Petitioner, 203.

The Court will consult sound sense rather than captious objections in looking to the meaning of allegations in complaints or indictments.

State v. *Jalbert*, 333.

DAMAGES.

Damages are not recoverable when uncertain, contingent, or speculative. They must be certain both in their nature and in respect of the cause from which they proceed.

To authorize a recovery of more than nominal damages, facts must exist and be shown by the evidence which afford a basis for measuring the plaintiff's loss with reasonable certainty.

Where damages are occasioned by different causes from each of which there is more or less damage to the property, if a portion of the damage is from a cause for which the defendant is not liable, the burden of proof is on the plaintiff to show the damage from the cause for which the defendant is liable as distinguished from other causes, and for only this part of the damage may recovery be had.

Gottesman & Company v. *Portland Terminal Co.*, 90.
Sone v. *Portland Terminal Company*, 90.

The true measure of damages, in such a case as the present, is compensation for the conscious suffering both physical and mental of the decedent, and nothing more except expenses for care and nursing and the loss of earnings between the time of injury and death.

The assessment of damages for pain and suffering is for a jury under our system of jurisprudence, but an appellate court has jurisdiction to correct jury error when factual decision is clearly wrong, or a damage award is manifestly excessive.

There can be no question that the Supreme Judicial Court should and will grant relief to a defendant whenever it seems apparent that a jury has made an excessive award influenced by prejudice, passion or corrupt motives.

McNamee v. *Lovejoy*, 191.

DIRECTED VERDICT.

Exceptions to a directed verdict must be sustained if the evidence in the case would have warranted the jury to return a different verdict. When fairminded and unprejudiced persons may reasonably differ in the conclusions to be drawn from undisputed facts, the question is one of fact for the jury.

Shaw v. *Piel*, 57.

The question for determination in the Law Court when the propriety of a directed verdict is in issue is whether or not the evidence presented might properly have justified a verdict for the adverse party.

Barrett v. *Greenall*, 75.

ELECTIONS.

R. S., c. 8, § 42, warrants the conclusion reached by analyses of applicable constitutional and statutory provisions that a single method is provided for notification and conduct of meetings called for the sole purpose of casting a ballot for the election of county, state and national officers, and that the same method is used for the determination of questions submitted to the people by the legislature.

This method has application to a meeting which is confined to the one purpose of balloting upon a single referendum question submitted by the legislature for determination by that portion of the electorate which is affected.

The fundamental purpose is properly to inform legal voters of the District of the time and place when and where they may have opportunity to cast their ballots upon the particular question submitted for their determination by the Act.

This purpose is served, whether the town meeting be presided over by a moderator or by a selectman, this being the only difference in the two methods as to the call, advertisement and conduct of the meeting.

Norway Water District v. *Norway Water Co.*, 311.

It clearly appearing that this proceeding was neither instituted nor heard until after the election to which it relates had been held and finally concluded and the respondent then had no power or authority to act upon the

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the presiding justice, and failing in that contention, his remedy then is, by objection to the Supreme Judicial Court, to establish a proper bill of exceptions.

Colby v. *Tarr*, 277.

The only basis for the consideration of exceptions to a referee's report on questions of fact by the Supreme Judicial Court is that there was no evidence of probative value to support the finding of the referee. In the instant case the record presents only questions which were for the referee to determine.

Woodworth v. *Lafoy*, 297.

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FACTUAL QUESTIONS.

Questions as to the credibility and sufficiency of evidence are for the determination of a jury.

Barrett v. *Greenall*, 75.

When a defendant offers no denial of testimony tending to prove her own direct knowledge of a material fact, it is for the proper trier of the fact to determine whether or not the omission carries any implication of the truth thereof.

Issues of fact and as to the credibility and the weight of testimony are for the determination of the jury.

Bubar v. *Bernardo*, 82.

Whether or not, in the instant case, an oral contract for temporary insurance was made was a question of fact for the jury.

It was for the jury to decide whether the agent's action and his statement at the time of the fire amounted to admission by him that he had covered the plaintiff with temporary insurance; and, considering the evidence in the instant case, it cannot be said that the verdict of the jury was manifestly wrong.

Hurd v. *Insurance Company*, 103.

The issue as to whether a particular set of facts creates the relationship of employer and employee, or constitutes the one doing the work an independent contractor, is for jury determination.

Whether or not an employer owes such a duty to an employee, or an independent contractor, riding home from work on the employer's truck at the close of the day, when such employer was present and either observed or

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The statute of frauds above cited does not make the oral contract void but simply prevents the maintenance of an action on the same if thereafter before action is brought there be no sufficient memorandum or note thereof in writing.

Such memorandum or note does not constitute a new contract; it simply makes enforceable the original contract, although oral.

The memorandum or note may be made during marriage.

It is only necessary that the written evidence, namely, the memorandum or note in writing, necessary to satisfy the statute of frauds, be in existence at the time the action is brought.

Smith v. *Farrington*, 241.

INFERENCES.

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INSTRUCTIONS.

Manifest error in law in a judge's charge to the jury where as a result thereof injustice results may be examined on a motion for a new trial, as against the law, even though better practice demands that the point be raised in a bill of exceptions.

The giving of the instruction in the instant case, invoking the rule as to burden of proof (where evidence is circumstantial) that is applicable only in criminal cases constituted an error in law that was highly prejudicial to the rights of the defendant and was well calculated to result in injustice.

Cox v. *Metropolitan Insurance Co.*, 167.

INSURANCE.

As a general rule, in the absence of statute or charter provision to the contrary, a contract for insurance may be made orally even although the statute or charter expressly provides that the *policies* shall be signed by designated officers.

The above rule applies in mutual insurance cases in the absence of any statutory or charter provision to the contrary.

A promise by an applicant for insurance in a mutual insurance company to pay his assessments is a sufficient consideration to support the undertaking of the insurance company, through its agent, in covering designated property with temporary insurance, pending decision on the application.

By statute, agents of insurance companies shall be regarded as in place of the company in all respects regarding any insurance effected by them. This includes agents of mutual companies.

A policy of insurance should be given only such effect as was intended when it was made.

Unless some statutory requirement controls, it is competent for the insurer and the insured to determine by definite contract the extent of the coverage.

It is the general rule that if the language of an insurance policy is ambiguous, or susceptible of interpretations differing in import, construction should be most strongly against the insurer, on whom the obligation of the contract rests, and who is supposed to have chosen the wording.

Poisson v. *Travelers Insurance Co.*, 365.

INVITEE.

If a person goes upon the property of another by invitation of the owner, there is the duty of the owner to maintain the place in a reasonably safe and suitable condition.

An invitation may be express or implied. Generally, an invitation is implied in behalf of one who enters the premises of another in pursuance of an interest or advantage which is common or mutual to both him and the owner.

Shaw v. *Piel*, 57.

JOINDER.

Where there are joint defendants and but one bill of exceptions is filed, the exceptions should be sustained if either defendant is aggrieved by the ruling of the court.

Hodges v. *South Berwick Water Co.*, 40.

In the instant case, inasmuch as on the case made by the bill and proof, accounting by and redemption from the defendant Findlen was the only relief to which the complainant was entitled and a decree consistent with equity and good conscience could be entered affecting him alone, the absent defendant Tierney was not an indispensable party and her joinder as a defendant did not require a dismissal of the Bill as to defendant Findlen; and a dismissal as to defendant Tierney, for want of jurisdiction, effectually terminated her status in the Bill as a party.

Devine v. *Tierney et al.*, 50.

Separate counts in a single declaration alleging (1) that plaintiff was in the exercise of due care when his injury was suffered, and (2) that defendant at the time was subject to the Workmen's Compensation Act may properly be included in one declaration.

Bubar v. *Bernardo*, 82.

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The fact that the purchaser of farm property knows that the equitable mortgagor rather than his own vendor, is in possession of and operating the farm which is bought does not, alone, directly prove actual notice of the existence of the outstanding equity or compel inquiry concerning it but it is a circumstance to be considered with others in determining whether inquiry should have been made.

Devine v. *Tierney et al.*, 50.

PARENT AND CHILD.

The right of a parent to the custody of a minor child is not an absolute right, though the right of a parent to the care and custody of a child should be limited only for urgent reasons.

In all cases involving the custody of a minor, the welfare of the child is the controlling consideration.

The authority of the state in determining the custody of a minor child supersedes all authority conferred by birth upon a parent and it has the power and right to dispose of the custody of children as it shall judge best for their welfare.

Merchant v. *Bussell*, 118.

In the case of a child born out of wedlock, where no one has ever been legally adjudicated to be the father, all the obligations of care, nurture and support, and the correlative rights to services and earnings, devolve upon the mother; and she has a right of action for the seduction of a minor child.

Bunker v. *Mains*, 231.

PAUPER SETTLEMENT.

When a man leaves a town and has no habitation there, there is no presumption that he intends a temporary absence and has a continuing purpose to retain it as his home nor, on the other hand, is there any presumption that he has no such intention.

The burden is upon the party setting up the five years' continuous residence to prove it.

Mexico v. *Moose River Plantation*, 8.

Legitimate children have the settlement of their father if he has any in the state; if he has not, they shall be deemed to have no settlement in the state (Chap. 203, P. L. 1933) and are state paupers.

While the legislature has no power to disturb vested rights, it does have the right to establish rules for the settlement of paupers as matters of mere positive or arbitrary regulation, and is limited in its power only by its own perception of what is proper and expedient.

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PUBLIC OFFICIALS.

In this State a public officer, as to public work over which he assumes control and direction, is liable not only for his affirmative act of negligence but also for his negligent inaction.

Brooks v. *Jacobs*, 371.

PUBLIC SERVICE VEHICLES.

The right of way given to public service vehicles by the statute and their exemption from traffic regulations, however, do not relieve their operators from the duty of exercising due care to prevent injury to themselves and others lawfully upon the ways. The measure of their responsibility is due care under all circumstances.

Russell v. *Nadeau*, 286.

PUBLIC UTILITIES.

A corporation may be organized under the general law to carry on as a public utility within the State the business of supplying water for the use of the public. (R. S. 1930, Chapter 56, Section 8 as amended by P. L. 1937, Chapter 99, Section 1.)

By statute (R. S. 1930, Chapter 62, Section 44, as amended by P. L., 1935, Chapter 30) a public utility may lawfully sell all of its corporate property when it shall have first secured from the Public Utilities Commission an order authorizing it so to do.

Hodges v. *The South Berwick Water Company*, 40.

RAILROADS.

When there is a collision between a train and a truck and the truck driver is killed, the defendant railroad is liable if there was a time prior to the collision when the driver of the truck could not and defendant's trainmen could, by the exercise of due care, have prevented the accident.

Jordan v. *Maine Central Railroad*, 99.

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REVIEW OF JUDGMENT.

In order for a petitioner to be entitled to a review under R. S. 1930, Chapter 103, Section 1, Par. II, he must establish three things (1) that the testimony referred to was false as to a material fact, (2) that he was surprised and was at the trial unable to prove its falsity, and (3) that he has since discovered evidence which with that before known is sufficient to prove the falsity.

The decision on the above questions rests with the Justice of the Superior Court before whom the petition is brought; but if he decides any one of them without proof and there is nothing in the record to justify his decision, there is an abuse of discretion and the question becomes one of law.

Potter's, Inc. v. *Virgin*, 300.

RIGHT OF WAY.

See AUTOMOBILES.

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A conditional vendee of a motor vehicle is answerable to the vendor to the extent of the interest of the latter in the vehicle, but does not occupy such a trust relationship as to prevent him from making settlement by compromise with a tort feasor without the sanction of the vendor.

The general rule established by the great weight of judicial authority is that either the conditional vendor or vendee can prosecute an action for injury to the property by a third party and a judgment secured by either is a bar to an action by the other. If, in the instant case, the plaintiff has not received what it is entitled to from the conditional vendee, its remedy is against him.

The fact that the conditional sales contract was duly recorded is without legal effect upon the right of the tort feasor to make settlement with the conditional vendee. Such tort feasor is liable to any person lawfully in possession of the chattel. He is not put upon inquiry as to the actual title thereto.

The statute is for the benefit and protection of all persons who have any interest in examining the record title to property of which they may thereafter become owner, either in whole or in part, absolutely or otherwise.

Motor Finance Company v. *Noyes*, 159.

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STATUTE OF LIMITATIONS.

STATUTES.

It is fundamental that in the construing of a statute the purpose for which it was enacted be considered and that a construction which leads to a result clearly not within the contemplation of the lawmaking body be avoided. Above all an interpretation which leads to an absurd result should be avoided even though by so doing, the strict letter of the enactment be disregarded.

Town of Ashland v. *Wright*, 283.

In construing different statutes all statutes on one subject are to be viewed as one and such a construction be made as will as nearly as possible make all the statutes dealing with the one subject consistent and harmonious.

As to whether the enactment of a later statute effects an implied amendment or repeal of an earlier one, the test is whether the later statute is so directly and positively repugnant to the former that the two cannot consistently stand together.

It is a reasonable inference that the legislature cannot be supposed to have intended that there should be two distinct enactments embracing the same subject matter in force at the same time.

In such a situation the most recent expression of the legislative will will be deemed a substitute for previous enactments and the one having the force of law.

Maine Central Institute v. *Inhabitants of Palmyra*, 304.

A statute must be construed in the light of the purpose which the legislature had in mind in enacting it. What may be within the letter may not be within its spirit.

Beck v. *Corinna Trust Co.*, 350.

TAXATION.

The rule that the use of property at the time a tax is assessed determines whether the property is or is not exempt from taxation is not arbitrarily controlling or decisive. It is the actual appropriation of its property by a benevolent institution for the use for which the institution is organized and not the physical use on the exact day of the assessment which controls.

Determination as to exemption in the case of benevolent and charitable institutions depends upon whether there is an actual appropriation of the property for which exemption is claimed to the purposes of the institution. Upon the whole record, in the instant case, there clearly appears to have been such appropriation by the plaintiff. Because the purposes had not all attained fruition, uncertainty as to the exact time of fulfillment of a definite scheme of development to which plaintiff corporation was distinctly committed did not preclude exemption.

TENDER.

TRESPASSER.

UNIFORM CRIMINAL EXTRADITION ACT.

See CRIMINAL LAW.

WAGE BOARD.

WAREHOUSEMEN.

WILLS.

WORKMENS' COMPENSATION ACT.

APPENDIX

CONSTITUTIONS AND STATUTES CITED, CONSTRUED, ETC.

CONSTITUTION OF MAINE.

REVISED STATUTES.

STATUTES OF MAINE.

PRIVATE AND SPECIAL LAWS OF MAINE.