REPORTS

OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE.

BY SIMON GREENLEAF,
COUNSELLOR AT LAW.

VOL. I.

CONTAINING THE CASES OF THE YEARS 1820 AND 1821.

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DISTRICT OF MAINE—ss.

BE it remembered that on this eighteenth day of February in the year [SEAL.] of our Lord one thousand eight hundred and twenty-two, and the forty-sixth year of the Independence of the United States of America, SIMON GREENLEAF, Esq. of the District of Maine, has deposited in this office the title of a book, the right whereof he claims as author, in the words following, viz.

"REPORTS OF CASES argued and determined in the Supreme Judicial Court of "the State of Maine. By SIMON GREENLEAF, Counsellor at Law."

In conformity to the Act of the Congress of the United States, entitled "An "act for the encouragement of learning, by securing the copies of maps, charts, "and books, to the authors and proprietors of such copies, during the times "therein mentioned"; and also to an act entitled "An act supplementary to "an act entitled an act for the encouragement of learning, by securing the "copies of maps, charts and books, to the authors and proprietors of such "copies, during the times therein mentioned, and extending the benefits there-"of to the arts of designing, engraving and etching historical and other "prints."

JOHN MUSSEY, JUN. { *Clerk of the District Court of Maine.*

A true copy of record.

Attest, JOHN MUSSEY, JUN.

Clerk D. C. Maine.

PAGINATION ERRORS:

This volume contains no pages 377-378 or pages 403-404. This is a pagination error. There is no missing text.

JUDGES

Of the Supreme Judicial Court of the State of Maine during the period of these Reports.

The Honorable PRENTISS MELLEN, *Chief Justice.*

The Honorable WILLIAM P. PREBLE, } *Justices.*
The Honorable NATHAN WESTON Jr. }

Attorney General ERASTUS FOOTE, Esq.

ADVERTISEMENT.

In preparing the following cases for the press, the Reporter, without the advantage of any previous acquaintance with the duties of the office, brought into it an earnest desire to exhibit a luminous and faithful statement of every case, and a disposition to shrink from no labour which might promote that design. But he owes much to those gentlemen of the bar who have given him the aid of their notes of arguments, by which he has been able to correct his own;—and much more to the kindness of the Judges, who in all cases, and these are sufficiently apparent, in which written opinions were delivered, have permitted him to transcribe them. For the use he has made of materials thus furnished, as well as of those obtained by himself, he alone is responsible to the profession, and to the public; to whose judgment with no feigned solicitude the volume is respectfully submitted.

Although the cases in *York* and *Cumberland* in the year 1820 were decided before his appointment to the office, yet it was deemed an acceptable service to the profession to obtain and publish them; both for their intrinsic value, and for the purpose of commencing the series with the first decisions of this Court.

The statutes of *Massachusetts* which were in force at the time of the separation of *Maine* from that State, being of the like force here until revised or repealed, they are cited simply as statutes of the political year in which they were enacted, without any specific designation; thus,—*Stat.* 1783. *ch.* 43.—and no statutes of *Massachusetts* are cited which were enacted after the separation of *Maine*.

Such of the statutes passed at the first session of the

first legislature of *Maine*, as are referred to in the earlier cases, are cited as the statutes of 1820, thus,—*Stat.* 1820. *ch.* 28. But being afterwards republished with the laws revised by the legislature of 1821, the statutes of this State, except in the few instances above mentioned, are cited as *Revised Statutes*, adding the number of the chapter.

The reader is desired to correct the following errors of the press.

Page 161, line 4 from bottom, for *counsel*, read *consee*.
303 15 from top, for *argument*, read *agreement*.
320 9 " " read " and *not* the money due" &c.

And at the end of the case *Dole v. Hayden*, page 155, add the following "*Note*:—The Chief Justice gave no opinion in this cause, having formerly been of counsel for one of the parties."

A TABLE OF THE CASES.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE COUNTY OF

YORK.

AUGUST TERM,

1820.

STEELE *v.* ADAMS.

If one, in consideration of a sum of money, bargain and sell land, and in the deed of conveyance acknowledge the receipt of the purchase-money, when in truth no money was paid, yet the bargainor is estopped by the deed to say the contrary.

THIS was an action of *assumpsit* brought to recover the price of seven acres of land. At the trial of this action, upon the general issue, before *Putnam J.* at *May* term, 1819, the plaintiff proved that on the first day of *July* 1816, he conveyed seven acres of land to the defendant, by a deed purporting to be in consideration of two hundred and forty-five dollars, paid by the defendant, the receipt of which was therein acknowledged by the plaintiff. The counsel for the plaintiff, stated, and offered to prove, that the deed was delivered without the actual payment of any consideration, upon the verbal promise of the defendant to pay or settle for it afterwards; and that the defendant had been in possession of the land since the delivery of the deed. But the Judge directed a nonsuit, which was to be set aside if, in the opinion of the whole Court the action was maintainable upon the facts stated.

This question was argued at this term by *J. Holmes* and *Woodman* for the plaintiff, and *Adams* for the defendant; and the action being continued *nisi* for advisement, the opinion of the Court was delivered at the succeeding term in *Cumberland*, as follows.

MELLEN C. J. Several objections have been made against the plaintiff's right to recover in this action, and if either of them be found substantial, the nonsuit must be confirmed.

In the *first* place it is contended by the defendant's counsel, that the testimony offered by the plaintiff and rejected by the Judge is inadmissible according to the principles laid down in the case of *Stackpole v. Arnold*, 11 *Mass.* 27; as going either to contradict or to explain a written contract, under seal.

We are not satisfied that this falls within the reasoning and principles of that case, or of any others which have been adduced in support of this objection. The acknowledgement of payment seems to be no part of the contract of sale, within the principles of those decisions,—but is, in effect, merely a receipt for money paid, which is only evidence of the extinguishment, or partial fulfilment of a contract; and, if not under seal, is open to explanation or contradiction. Whether the circumstance of this acknowledgement being contained in the deed, and under the seal of the plaintiff, has closed the door of inquiry, will presently be examined.

In the *second* place it has been contended that the alleged promise of the defendant is void by the Statute of frauds, or rather by that clause of the *Stat.* 1783, *chap.* 37. which declares that "no action shall be maintained upon any contract "or sale of lands, 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." But the cases which have been cited to support this objection are not similar to this case.

The case from 4 *Mass.* 342. was on a promise to execute a bond of defeasance;—that is, to convert an absolute estate into an estate upon condition; or, in other words, to convey to the plaintiff an equity of redemption. This certainly is an interest in real estate; and such a promise is clearly within the Statute. Without a particular examination of the others, it is sufficient to say that neither of them was founded on an express promise to pay the price of a parcel of real estate sold and conveyed to the defendant.

A promise of this kind does not seem to be a "contract or sale of real estate"; or rather, as was probably intended, a "contract *for the* sale of real estate";—but is only a contract to pay the agreed value of the real estate already sold and conveyed. Clearly no action can be maintained on a *verbal* promise to convey real estate;—but it does not seem to follow if a man has contracted by parol to make and deliver a deed of certain real estate to his neighbour for a certain sum, and does honestly execute the agreement on his part, and the purchaser enters into possession of the land under the deed,—that after this, the purchaser should be permitted to avoid the payment of the purchase money, on the ground that his promise to pay it was void by the statute. In many cases it has been held that a contract, though within the statute of frauds, becomes binding by a partial execution of it. And several cases have been decided in *New-York*, in which the grantor has been permitted to recover of the grantee the agreed price of the land sold, in an action of *assumpsit*. But we shall not pursue this inquiry any farther at present; because we do not decide the cause upon this ground; nor do we mean to be understood as giving any opinion whether any action could be maintained on such promise.

The *last* objection relied on by the counsel for the defendant is, that the plaintiff is *estopped* by his own deed to deny that he has received the consideration or purchase-money, which receipt is distinctly and explicitly confessed in the deed.

Estoppels are said to be odious, because they exclude the truth, or prevent the party who is estopped from shewing the fact. And if, in the present instance, the plaintiff is estopped, it is the consequence of his own act, and not the fault of the law;—it is owing to an inattention to those legal principles and provisions which all are presumed to know, and by which all must be governed. To apply the law of estoppels to the present case may operate to the injury of the plaintiff; and the consequence may be, that a fraud may be successfully practised by the defendant. We may regret this particular consequence;—but should we refuse to apply legal principles in every case as our duty requires us to apply them, the general consequences would be much more to be lamented.

The law upon this subject seems to be well settled. In *Co. Lit.* 352. *a.* it is said that "estoppels arise by matter in writ-"ing, as by deed indented ——— by making of an acquit-"tance by deed indented, or deed poll." It is elsewhere said, *Veale v. Warner*, 1 *Saund.* 325. *note* (4.) that the "plaintiff, after "acknowledging in writing that the defendant had paid him "the money, ought not to be admitted to deny the payment "of it." So, in covenant upon an indenture of lease, *nil habuit in tenementis* is a bad plea;—the defendant is estopped to plead it. *Kemp v. Goodall*, 1 *Salk.* 277. 6 *D. & E.* 62. A party in a deed is estopped by the recital of any particular fact, as that he had received a sum of money, &c. *Shelley v. Wright*, *Willes Rep.* 9. *Strowd v. Willis*, *Cro. El.* 362. 756—7. 2 *Leon.* 11. 1 *Chitty on Pleading*, 575. *Speake v. United States*, 9 *Cranch* 28. And in *Massachusetts* it has been decided that a party shall not be permitted to say that in making covenants he acted as agent, when he covenanted in his own right. *Eveleth v. Crouch*, 15 *Mass.* 307.

In the case of *Davenport v. Mason*, 15 *Mass.* 85. *Wilde J.* in delivering the opinion of the Court, says, when speaking of the admissibility of parol evidence, "It is impossible to say "that this evidence is repugnant to the deed: for nothing can "be collected *from the deed*, touching the consideration, or the "payment of the purchase-money. It is true that the pre-"sumption is that payment was made; ——— but this pre-"sumption, being a species of evidence in relation to matter "of fact, and not arising from the construction of any clause "in the *deed*, may be repelled by oral testimony." And again, "When the usual clause in relation to the consideration is alto-"gether *omitted*, we think that the agreements of the parties may "be shewn by oral proof, without violating any known rule "of law, which we should be very sorry to break in upon, "whatever may be the supposed equity of the case."

In *Dyer* 169, cited with approbation in 2 *Shep. Abr.* 9. this case appears:———"If one in consideration of 1000*l.* bargain "and sell land, and *rei veritate* no such sum is paid, and "yet it is said by the deed to be so, and a receipt of the "money; it seems that the bargainor is estopped by this to "say the contrary." This precisely resembles the case at bar.

In *Jackson v. Bowen*, 1 *Caines* 358. parol proof was offered

to shew a mistake in the course of one of the lines of a piece of land conveyed; but it was rejected. The deed was an estoppel. And in *Shep. Touchst.* 222. 510. it is stated as settled, that parol evidence is admissible to shew the consideration of a conveyance, when the same is not particularly *expressed in the deed.*

Many other cases might be cited in which the same principle is established or recognized. Indeed all the authorities seem, on this point, to be in perfect harmony, at least so far as we have been able to examine them; with the exception of *Sheppard v. Little*, 14 *Johns.* 210. In that case the Court decided, that the plaintiff was not estopped by the acknowledgement in his own deed of his having received the consideration; and in an action of *assumpsit* for the money, oral testimony was admitted to contradict this confession under the plaintiff's own hand and seal, and on this proof he recovered. Much, however, as we are inclined to support the present action, and much as we respect the learned Court which decided the case of *Sheppard v. Little*, yet we cannot assent to the principle of that decision. It seems opposed to a long series of determinations by successive Judges, and to the principles which regulate estoppels. We do not perceive why a man is not as much estopped to deny one fact expressly stated in his deed, as another. If he is not, the doctrine itself is of no importance. *Spencer J.* in delivering the opinion of the Court, seems to speak of the principle urged against the action as a well known principle, but considers it as misapplied to that cause. But we cannot perceive why it was not applicable, and why it should not have barred the action. The case is certainly at variance with the principles stated in *Davenport v. Mason;* and we incline to that course of decisions which the Courts of *Massachusetts* have invariably pursued relating to the question now under consideration.

On the whole we are of opinion that the plaintiff, by his own deed, has given to the defendant *proof* that the consideration, or purchase-money has been paid. This proof is of such a nature, that it is not competent for him, according to the principles of law, which we are bound to respect, to contradict or impeach it; and therefore the motion to set aside the nonsuit is overruled.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE COUNTIES OF

CUMBERLAND AND OXFORD.

AUGUST TERM,

1820.

BABB & WIFE *v.* PERLEY.

A husband has no right, by the marriage, to commit waste on his wife's land, though the coverture is a suspension of any *remedy*, at common law, against him.

And if a judgment creditor of the husband extend his execution on the land of the wife, he thereby succeeds to the husband's *legal right* to the rents and profits of the land, but not to his legal *impunity for waste.*

If the creditor in such case injure the inheritance of the wife, as by cutting down and selling the trees, an action on the case lies against him, in which the husband must join.

THIS was an action of *trespass on the case* for an injury done to the interest of the wife, by cutting down and carrying away sundry trees standing on land of which the plaintiffs alleged themselves to be seized in right of the wife.

At the trial of this action before *Wilde J.* at the last *October* term in this county, it was admitted by the defendant that the plaintiffs were seized as alleged in their writ, until he, being a judgment creditor of the husband, extended an execution in his own favor on the *locus in quo*, as the estate of the husband; and it appeared that this extent was made with the formalities of law. After the extent, the defendant cut down, carried away, and *sold* about fifty cords of wood growing on the lot in question.

Upon this evidence the Judge instructed the jury that by virtue of the extent of the execution the defendant acquired all the title of the husband to the *locus in quo*, and that the cutting and selling of the wood was fully justified; and a verdict was

thereupon returned for the defendant, subject to the opinion of the Court upon the correctness of those instructions.

The cause was argued at this term by *Emery* for the plaintiff, and *Longfellow* for the defendant, and the judgment of the Court was as follows.

MELLEN C. J. The facts in this case present some questions, respecting which Judges and Counsellors have taken different views.—They appear somewhat novel and we do not find that they have received any express judicial decision.—We have examined the cause with much attention, and after some vibration of opinion have at length arrived at a result with which we are all satisfied.

The facts reported by the Judge who sat in the trial of the cause led the counsel, in the argument, to the consideration of two questions; and it may be convenient for us to pursue the same course.

The *first* inquiry is, "What were the *rights* and *liabilities* of "*Babb* in virtue of his acquiring a freehold estate in right of his "wife in the land in question, and in consequence of his de-"stroying or selling and disposing of the wood or timber grow-"ing on the land?"

The *second* inquiry is, "What are the *rights* and *liabilities* "of *Perley*, as *assignee* of said *Babb* and owner of his former "interest in the land, in virtue of his ownership and conse-"quent upon *his* destroying or selling and disposing of said "wood and timber?"

With respect to the *first* question, it may now be observed that the land on which the trees were cut by *Perley* is admitted to be a wood-lot, uncultivated, and in a state of nature.

When a man marries a woman who is seized in fee of lands, he thereby gains a freehold in her right.—He acquires a *life estate*. It will be an estate for the *life of the wife only*,—(unless he be tenant by the curtesy) in case he should survive her; or an estate for *his own life*, in case she should survive him; because the law presumes that the coverture will continue until the death of one of the parties.——"He does not be-"come, by the marriage, absolute proprietor of the inherit-"ance; but as the governor of the family, is so far the master

"of it, as to *receive the profits of it* during her life." *Co. Lit.* 351. 2 *Bl. Com.* 433. *Barber v. Root*, 10 *Mass.* 261. These profits,—this *usufruct* of the wife's lands, the husband may dispose of according to his pleasure, without or against her consent.

For any injury to the annual profits, or for taking away the emblements, the husband may maintain an action against the wrongdoer, in *his own name*, without joining the wife. But for an injury to the *inheritance*, as for cutting down the timber growing on the wife's land, he cannot maintain such action *without joining the wife;* for the damages will survive to her. 3 *Lev.* 403. *Vern.* 82. *Reeves Dom. Rel.* 130. 133.

These cases mark the distinction between the rights of the husband and those of the wife in relation to the lands of which they are seized in *her right*.——If, then, the husband has a right only to the *usufruct* or profits of his wife's lands, the question is, what were the rights which *Babb* had in the land abovementioned, and what control over it? Could this land yield *any profits*, according to the legal signification of the term? Some light may be thrown upon this point, by considering the principles of the decision in the case of *Conner v. Sheppard*, 15 *Mass.* 164. In this case the Court decided that a widow could not by law be endowed of lands in a wild and uncultivated state; and the reason assigned by the Court is, that "of a lot "of wild land, unconnected with a cultivated farm, there *are no* "*rents and profits*."—Again they say, "In many instances the "inheritance would be prejudiced without any actual ad- "vantage to the widow to whom the dower might be assigned.— "For according to the principles of the common law, her estate "would be forfeited, if she were to cut down any of the trees "valuable as timber.—It would seem too, that the mere change "of the property from wilderness to arable land, or pasture, "might be considered as waste."———"The very *clearing of* "*the land*—would be *actually*, as well as *technically*, waste of the "inheritance."

In the case of *Sargeant & al. v. Towne*, 10 *Mass.* 303. the Court determined that a devise of wild and uncultivated land carried a *fee* without any words of inheritance;—because a *life estate* would be of no use to the devisee.—He *would* not, even

if he *could* without committing *waste*, undertake the cultivation of the land devised.

It would seem from the authorities above cited, that the plaintiff *Babb*, prior to the extent of *Perley's* execution, had no *right* to cut down the timber on his wife's land, or to do those acts which, in the case of a tenant for life, or years, would *be waste*.—It is true *Babb* had the *power* to do it: and so he had the *power* to pull down a house, had there been one on the land; or to beat and wound his wife;—but not the *right* to do this;—because, in the *last* case, he would be indictable for the offence:—and, we believe that a Court of Chancery would prohibit a husband from a wanton destruction of the wife's house or property.——The wife, in all these cases, is destitute of the usual remedy by action for damages against the husband for this or any other injury to her inheritance; because a wife can in no case sue her husband.—The agreement to marry, and the consequent marriage, amount to a *waiver* of this right of action against each other.—This principle is founded on reasons of sound policy. But it does by no means follow that because the husband has the *power* of doing many acts prejudicial to the interest or inheritance of his wife with *impunity*, that he can assign and transfer this power to a *third person*, and give him this privilege of impunity.—In *this* situation of parties policy does not require that this impunity should exist; and therefore it does not exist.

As to the *second* question, we would observe that whatever were the rights and liabilities of *Babb* as husband, those of *Perley* the assignee seem to be more defined and better explained; and if any doubt remain as to *Babb's* rights before the extent of *Perley's* execution, the cause may be decided on this *second* point by the application of principles well settled and understood.

It is admitted that the extent of *Perley's* execution against *Babb*, upon his estate in the land in question, operated to transfer and convey to *Perley* all *Babb's* interest or estate in such land.—It certainly could not convey any more, though it might place the estate in a different situation in respect to *other* persons. Let us then suppose that, instead of this extent, *Babb* had by his deed conveyed to *Perley* all his right, title and in-

terest in and to the land belonging to his wife.—The facts would then present to us no other than the common case of the division of a fee simple estate, into a *freehold* and a *reversion*. The *freehold* or *life estate* would be in *Perley;* and the *reversion* would be in *Babb's* wife; because *Babb*, her husband, had not, and could not have any control over this reversion.—Nothing short of a deed signed by *her* as well as by him could operate to convey it to *Perley*.—The extent has not affected, in any degree, her *reversionary* interest. *Perley*, then, being only *tenant for life* of the land in virtue of the extent of his execution, he could not lawfully commit *waste*.—It would be inconsistent with his estate.

The act complained of is the cutting and carrying away and *selling* about forty cords of wood. Of course, it was an act which a tenant for life has no right to do; it was not for firewood nor fences; it was neither for *building nor repairing*.

In the case before us, *Mrs. Babb*, the reversioner, sues *Perley* for committing this waste on her *inheritance*. Her husband is joined in the action, not because he has any interest; for that has already been legally conveyed to *Perley;* but because a feme covert can never *sue alone*, unless in two or three special cases, forming exceptions to the general rule.—And now, we may ask, why should not the action be maintained? If it should be urged, that it will be prejudicial to the rights of the husband's creditors, by depriving them of the power of converting the lands levied upon to any profitable use; the answer is, the *creditors* of the husband cannot have any more control of the wife's land than the husband *himself* had. The creditors may avail themselves of the *profits* of the wife's land in satisfaction of their demands against the husband; but if there *are no profits*, it is nothing more than the common misfortune of those creditors, whose debtors are insolvent.

The law is consistent and just. It subjects the *land* to the payment of the wife's debts, and the *profits*, to the payment of the debts of the husband. After mature deliberation, we perceive no other mode of deciding this cause without changing the nature of legal estates, and disturbing those principles by which such estates are created and protected.

We are unanimously of opinion that the verdict must be set aside and a new trial granted.

HUBBARD & AL. EX'RS. *v.* CUMMINGS.

A deed of conveyance of land in fee, and a mortgage of the same, made at the same time by the grantee to the grantor, are to be taken as parts of one and the same contract.

If such grantee, being an infant, continue in possession of the land after his arrival at full age, this is an affirmance of the contract.

So if, without *actual* possession, he bargain and sell the same land to a stranger.

In a case stated for the opinion of the Court, the parties agreed on the following facts,

Jackson, the Plaintiffs' testator, being seized in fee of a certain lot of land, on the 9th day of *August*, 1815, conveyed it to one *Dudley*, by deed, with the usual covenants of warranty; and *at the same time*, as security for the purchase-money, took from *Dudley* a mortgage of the same land. At the time of making these deeds *Dudley* was a minor. Afterwards, on the 10th day of *October*, 1816, *Dudley*, being of full age, and remaining in possession of the land, for a valuable consideration conveyed it with warranty to *Simeon Cummings and others*; and they in like manner conveyed it to the tenant, against whom *Jackson's* executors brought this action to recover possession of the land as mortgaged to their testator.

Greenleaf, for the demandants, cited *Zouch v. Parsons*, 3 *Burr*, 1794. *Co. Lit.* 2. b. 51. b. *Worcester v. Eaton*, 13 *Mass.* 374. *Com. Dig. Enfant*, C. 6. 8. *Holbrook v. Finney*, 4 *Mass.* 566. 8 *Co.* 42. *Badger v. Phinney*, 15 *Mass.* 359.

Fessenden, for the tenant, cited *Dean and Boycot*, 2 H. Bl. 515. *Taylor v. Croke*, 4 *Esp.* 187. *Willis v. Twombly*, 13 *Mass.* 234. *Boston Bank v. Chamberlain*, 15 *Mass.* 220.

Mellen, C. J. delivered the opinion of the Court.

It is agreed by the counsel on both sides that the deed of a minor is not absolutely *void*, but only *voidable* at the election of the minor after his arrival at full age. This principle of law is perfectly plain, and no authorities need be cited in support of it.

But it is contended by the counsel for the tenant that the minor, after his arrival at full age, did avoid the mortgage deed made by him during his minority; and that the conveyance

made by him with warranty to *Cummings* and others was an open and explicit disavowal and disaffirmance of the mortgage, and passed the fee of the estate to his grantees.

The counsel for the demandants, on the other hand, contends that the deed from *Jackson* to *Dudley* and the mortgage back to *Jackson* form but *one contract;* and that the continuance of *Dudley's* possession of the premises, after he became of full age, amounted to an affirmance of the whole contract, on the principle, that it must be affirmed or rescinded *in toto;* and that even the deed itself to *Simeon Cummings and others* may be considered as an affirmance of the first deed and mortgage.

It is said that the promissory notes which were given for the purchase-money by the minor have not been paid nor put in suit; and that perhaps no objection will ever be made by *Dudley* to the payment, on account of his infancy at the time of signing them. Still, the defence made in this action, and the facts on which the tenant relies, shew at once on which side of the case the justice of it is to be found.

The principal question is, do the deed from *Jackson* to *Dudley*, and the mortgage to *Jackson*, in the circumstances under which they were executed, constitute *one contract?* If, in legal contemplation, they cannot be considered as distinct and independent contracts, but as only one contract; the application of a few acknowledged principles will lead to an easy and satisfactory decision.

The common learning with respect to a mortgage may serve to illustrate the subject. It is well known to be wholly immaterial whether the condition annexed to such a conveyance be contained in the deed of conveyance, or in another instrument under seal, and executed at the same time, as a defeasance. Both deeds form but one contract.

If *A* convey lands to *B*, in fee, to the use of *C*, the wife of *B*, shall not be endowed of these lands; for the seizin of *B*, is only instantaneous. *Co. Lit.* 31. *b.* 2. *Co.* 77. *a.* The seizin for an instant is where the husband, by the same act or same conveyance by which he acquires the fee, parts with it. This principle is recognized in the case of *Holbrook v. Finney*, 4 *Mass.* 566. and in the cases there cited; and that case goes the length of establishing the doctrine contended for by the demandants'

counsel, as to the construction to be given to a deed and mortgage back to the grantor, executed at the same time. In that case the Court say, "The mortgage back to the father, from the terms of it, is of the same date with the conveyance from him. They are therefore to be considered as parts of the same contract." And again—"the two instruments must be considered as parts of *one and the same contract*, between the parties, in the same manner as a deed of defeasance forms, with the deed to be defeated, but one contract, although engrossed on several sheets." We are satisfied with this decision, and the reasons on which it is founded.

In the case under consideration, the legal operation of the deed *to* and mortgage *from Dudley*, was to convey an *equity of redemption* in the premises, and nothing more. Suppose a deed had been made by *Jackson* to *Dudley*, on condition to be void if *Dudley* should not, on a certain day, pay him a certain sum. In both cases he might acquire the absolute estate by payment of the money according to the terms of the condition.

It was at the option of *Dudley* to confirm or rescind the bargain, on his arrival at full age; but he could not confirm it in part, and rescind it in part. *Kimball v. Cunningham*, 4 *Mass.* 502. This would be giving to the minor not only the privilege of protecting himself, but the power of injuring others, without any legal accountability. We apprehend the law is not liable to this imputation. A minor is sufficiently protected from imposition and danger, if he may, on arriving at full age, rescind his contracts, and restore to his rights the person with whom he has contracted. The case of *Badger v. Phinney* cited by the counsel for the demandants is full to this point. It is impossible not to perceive the sound sense as well as sound principles of that decision, and to feel its force when applied to the case before us. In that case the goods had been sold to a minor, who was supposed to be of full age at the time he gave his promissory notes for the value;—and avoided them by the plea of infancy. The Court allowed the vendor to reclaim and hold the goods;—and they went even further;—they said that as to the goods which the minor had sold, and for which he had received payment, he could never have reclaimed them, though he had disaffirmed the contract at full age. without restoring the

price of the goods to the purchaser. In other words, the contract must be rescinded *in toto*. If affirmed in *part*, it is affirmed in the *whole*.

The only question remaining, is, whether *Dudley*, after he became of full age, did affirm the contract made with the testator. We have seen that he continued in possession of the lands until he sold to *Cummings*, which was sometime after his arrival at full age; and that he claimed to hold the lands by virtue of *Jackson's* deed, inasmuch as he undertook to sell and convey them with warranty. If an infant make an agreement, and receive interest upon it after he is of full age, he confirms the agreement. 1 *Vern.* 132. Or, if he make an exchange of land, and after he is of full age continues in possession of the land received in exchange. 2 *Vern.* 225. So, if he purchase lands while under age, and continues in possession after his arrival at full age, it is an affirmance of the contract. *Co. Lit.* 3. *a.* 3 *Com. Dig. Enfant, C.* 6. 2 *Bulstr.* 69. 2 *Vent.* 203. 3 *Burr.* 1710. On this point the authorities seem clear and decisive;—the law is plain as the fact.

The case of *Boston Bank v. Chamberlain* which was cited by the counsel for the tenant is not similar to the case now before us. In the case cited, both parties claimed under deeds from the same person; one deed being made during his minority, and the other after his arrival at full age. But it does not appear how or from whom the minor obtained his title; there was no question as to instantaneous seizin; nor the construction of two instruments as forming one contract only.

Upon a full consideration of the case we are all of opinion that the action is maintainable upon principles of law well established; and such as will protect an honest man from injury, as well as relieve a minor from the consequences of his indiscretion, or incapacity in making contracts. This decision will do justice to the heirs or creditors of *Jackson* and leave the tenant to seek his indemnity upon the covenants in the deed of *Dudley*, or his own immediate grantors.

Let judgment be entered for the demandants as on mortgage.

TURNER *v.* CARSLEY.

Practice.

Where the plaintiff sued trespass and false imprisonment in the Circuit Court of Common Pleas, and judgment being against him there, he appealed to the Supreme Judicial Court, where he had a verdict for thirty dollars only; yet it was holden that he had "reasonable cause for such appeal," under *Stat.* 1817. *ch.* 185.

THIS was an action of *trespass and false imprisonment*, brought in the Circuit Court of Common Pleas and the damages laid at more than *seventy* dollars. In the Court below the verdict was for the defendant. The plaintiff appealed, and on trial in this Court had a verdict for thirty dollars only; and now moved the Court for a certificate that there was "reasonable cause for such appeal," in order to recover his costs of the appeal, pursuant to *Stat.* 1817. *ch.* 185. *sec.* 2. The defendant also moved for his costs, by virtue of the same statute.

Emery, for the defendant.

The variety of modes in which the legislature have acted upon this subject, to restrain parties within certain limits to the jurisdiction of the Common Pleas, demonstrates the importance of the principle they have sought to establish. The right of appeal in all personal actions where the *ad damnum* is less than seventy dollars, is restrained by a positive and peremptory statute;—and the "reasonable cause" mentioned in the statute must be construed to mean a reasonable expectation of recovering more than seventy dollars. It was the intent of the legislature to give the Court below a final and exclusive jurisdiction over all actions of less value;—and if their jurisdiction were to depend on the mere pleasure of the plaintiff, as indicated by the sum he might choose to allege in damages, the beneficial purposes of the statute would be utterly defeated. It would always be in the power of the plaintiff, by laying large damages, and offering feeble evidence in support of his action, to bring every cause, however trifling, into this Court; thus ousting the Court below of its jurisdiction, and virtually repealing the Statute.

Davis, for the plaintiff.

The statute authorizes the giving of costs to the plaintiff appellant, when he had *reasonable cause* to appeal, though on the

appeal he recover less than seventy dollars. The condition is—not a reasonable expectation of recovering an amount beyond the final jurisdiction of the Common Pleas,—but, just cause of complaint with its decision. The limitation is established to prevent parties from transcending the tribunals adapted to their demands, where they may have justice without subjecting their adversaries to disproportionate expense. But when a party failing below, succeeds above, by the same effort, in establishing the jurisdiction he had originally elected, had he not reasonable cause to appeal? And shall he be punished by paying the costs incurred in vindicating his right, because he does not recover sufficient to support the superior jurisdiction which he has reluctantly been compelled to seek? It is a necessity imposed by the party himself in resisting the plaintiff's just demand, and driving him to his *dernier resort*.

The objection that by admitting this latitude of construction the jurisdiction of the Common Pleas may be avoided, and the object of the provision defeated, can never apply with much justice where the party recovers upon substantially the same evidence which went for nothing below. But the answer to all arguments of this sort is, that the statute gives the Court a *discretion*. If, notwithstanding, the reasonable cause of appeal can only be ascertained by the amount recovered, and must be decided by the verdict, what kind of discretion is it, which is thus reduced to a mere matter of arithmetical calculation, and determined by a set of tables? If one construction ousts the Common Pleas of its jurisdiction, the other deprives the Court of its legal discretion.

THE COURT observed that as the plaintiff, after losing his cause in the Court below, had gained a verdict here, they must conclude it *reasonable* that he should appeal in order to obtain it:—and they would presume that the contest in the Court below was a fair trial of the whole strength of the parties, until the contrary should appear. If the plaintiff had withheld his evidence at the first trial, with intent to oppress the defendant, this was an evil which it was in the power of the Court, in the exercise of its discretion as to costs, to correct. But nothing of this kind appearing in the present case, they certified that the plaintiff had reasonable cause to appeal.

LUNT *v.* KNIGHT.

Practice.

THIS was an action of trespass *quare clausum fregit*, similar, in its history, to the foregoing case of *Turner v. Carsley*, except that the verdict for the plaintiff in this Court was for no more than *six* dollars.

Fessenden, for the defendant, objected, among other things, that the action ought to have been brought before a justice of the peace, the amount of the verdict shewing that it was within his cognizance.

But THE COURT observed that had the verdict in the Common Pleas been for the plaintiff, as it appears now it ought to have been, he would have had full costs there, the jurisdiction of justices of the peace in these actions to a certain amount, being concurrent with that Court, but not exclusive. And for the reasons stated in the other case, they granted the certificate.

FARRAR & AL. *v.* MERRILL.

After a lapse of more than seventy years without any adverse claim, the jury may presume a grant from the original proprietor of a share in a township of land, to a person afterwards constantly acting as grantee of such share, sustaining various offices as such in the corporation of proprietors, and paying taxes thereon; although such share consist of wild land, and be not holden by any open visible possession.

THIS was a *writ of entry* on the demandants' own seizin of a lot of land in *Turner*, and a disseizin by the tenant; who pleaded the general issue, and prayed in aid the title of *Thomas Hobart*.

It appeared on the part of the demandants, that the late *Province of Massachusetts Bay* in *June* 1765, granted to *Captain Sylvester* and his companions, soldiers in the *Canada* expedition in 1735, their heirs and assigns, the right to locate a township of land in the *District of Maine*, in lieu of a township lost by the running of the line of *New-Hampshire;* and confirmed said grant and the location under it, in 1768;——that the lot demanded was regularly drawn to the right of *Samuel Dwelley*,

one of the original grantees, *November* 17, 1781, as appeared by the proprietors' records ;——that *Samuel Dwelley*, by his deed of special warranty against the grantor and all claiming under him, dated *March* 1, 1815, conveyed all his right to one sixty-fourth part of the town of *Turner* to *Lemuel Dwelley* one of the demandants, who conveyed one half of his said right, in common *May* 1, 1815, to *Samuel Farrar*, the other demandant ;——that in *May* 1815, the demandants sent an agent to the lot, who felled the trees on several acres, cleared and planted half an acre, and erected a small house thereon; said lot having never been cultivated, or inclosed in fences ;——and that the demandant's father, *Samuel Dwelley*, had been often heard to say that he owned land in *Maine*, which was granted for his father's services in the *Canada* war of 1735.

The tenant produced a paper, found among the papers of the proprietors in the possession of their last Clerk, the corporation having been dissolved in 1788, on which the name of *David Little* was placed against the right of *Samuel Dwelley*, and also against the right of one *Roach*. He also produced the book of the proprietors' treasurer, in which *David Little* was credited *July* 25, 1738, with the payment of a tax in the right of *Richard Dwelley ;* and was marked as delinquent in three pounds ten shillings *November* 20, 1740, which sum is credited in the following year. In the same book were entered the receipt of divers sums from *David Little, Jun.* on the *Samuel Dwelley*-right, in the years 1769, 1774, and 1776. And it appeared that at a proprietors' meeting holden *October* 20, 1768, the same *David Little, Jun.* was chosen one of the proprietors' committee to call their meetings ; at one of which, in *November* 1770, he presided as Moderator. He also produced a deed from *Little* to *Nathaniel Waterman*, without covenants, conveying one sixty-fourth part of the town of *Turner*, " being the original right of *Samuel Dwelley* who was a soldier under *Capt. Joseph Sylvester* in the Canada expedition of 1735,"—and derived title from *Waterman* through *Thomas Hobart*, and others, to himself. He also proved the payment of taxes on the land, by *Waterman* and his heirs and assigns, from time to time, till the commencement of this action ;—that the entry of the demandants' agent in 1815, was forbidden by the agent of *Hobart ;*—and that since the year

1738, no one had ever made claim to the *Dwelley* right, except said *Little* and those claiming under him.

Upon this evidence, *Wilde J.* who presided at the trial of this cause, at the last term holden in this county, instructed the jury, that if they were satisfied that *Little* had been admitted as one of the proprietors of said land, in the right of said *Dwelley*, had always been treated and acknowledged by the proprietors as the true owner of that right or share in the common property until he sold it to *Waterman;* and that *Waterman* had been acknowledged and admitted as proprietor of the same right; and that no person claiming under *Dwelley*, the original proprietor, had ever questioned *Little's* right until recently, as proved by the witnesses,——then they might presume, from these and the other circumstances in the case, that there was a grant of that right in common, from *Dwelley* to *Little*. And they accordingly returned a verdict for the tenant. To this direction the demandants filed exceptions.

Fessenden for the demandants.

Whitman for the tenant.

MELLEN C. J. Upon the facts reported by the Judge who sat in the trial of this cause, there seems no question that *Samuel Dwelley the elder* was one of the original proprietors in common of the tract of land of which the demanded premises are a part; and unless the facts disclosed in the defence can be considered as furnishing a sufficient answer to the action, the title of said *Dwelley* seems to be regularly deduced, and the demandant entitled to recover. Indeed no question has been raised on this head by the counsel in the argument of the cause.

The counsel for the demandant has relied upon two objections;—one, to the admission of a certain paper bearing the name of *David Little* placed against the right of *Samuel Dwelley;* and also the right of one *Roach*. This paper, though objected to on the trial, was admitted by the Judge to go in evidence to the jury. The other objection is made to the instruction given by him to the jury, as to their authority to presume a grant to *Little*, if they believed the facts which had been proved by the tenant.

There seems, in the *exceptions*, to be no particular objection

to the opinion of the Judge admitting the paper just mentioned; but only to his instructions to the jury. However, we have examined both points.

The *paper* was found among the other papers in the office of the proprietors' clerk; but was not signed, nor authenticated or referred to in any particular vote or proceedings of the proprietors; and being viewed alone would seem to be inadmissible as proof; though the facts appearing on the *records* of the proprietors go far to strengthen the presumption that *David Little* was, at the time the paper was made and left in the office, the owner of *Dwelley's* right. But we consider the question as to the admissibility of the paper as wholly unimportant in the view we have taken of the cause; for we are all of opinion that the facts appearing on the undisputed records of the proprietors, taken in connection with some other facts which have been proved, fully justify the instructions and opinions delivered by the Judge to the jury, and the verdict which the jury have returned. It is our duty, in deciding on the exceptions, to look to the whole evidence, and not disturb the verdict when the facts proved, independent of the paper objected to, furnish the tenant with a substantial defence.

By the records it appears that *David Little*, as early as the year 1740, was noted as a delinquent in taxes;—that in 1768 and 1770 he was elected into offices, and in various capacities served the proprietors;—that he was found at their meetings, acting with them;—that in 1769 he paid taxes on the right of *Samuel Dwelley*, and that the lot demanded was drawn to his right in *November* 1781;—that in 1777 *David Little* conveyed to *Nathaniel Waterman* (under whom the tenant claims) one sixty-fourth part of the general tract, being the original right of *Samuel Dwelley*;—that the lands have always remained unoccupied and in a state of nature;—that since the year 1738, down to *May* 1815, no claim to this land was ever made by *Samuel Dwelley* or any of his descendants, or any persons claiming under him or them by purchase, except *David Little* and his representatives;—and that in *May* 1815 the demandant made a formal entry on the lands, before the commencement of this action.

On this proof, and in these circumstances, it is contended that

the jury could not legally be permitted to presume a grant to *David Little* by *Samuel Dwelley* of his right in common; because the presumption is against the record of the proprietors, no part of which is pretended to be lost. In answer to this it may be said, that so far as the records state, so far they support the presumption. But the objection is founded on the supposition that the conveyance of the right of *Dwelley* to *Little* must appear on the records of the proprietors. There seems, however, no ground for this; because such transfers of common rights are usually by deeds; and surely an unrecorded deed may be presumed, after a lapse of nearly eighty years, when legal principles do not forbid it, and when facts strongly support the presumption. But the counsel for the demandant has produced several authorities to shew that unless those claiming under the presumed grant have been in possession, no legal presumption can arise; and that, like a prescription, it must depend on such possession. We are not disposed to deny the principle of the cases cited. The reason of the law in these cases is, that where the possession of the lands claimed has been openly held by others adversely to the claim of him who would presume a grant, such possession repels the presumption. But this principle cannot apply to wild lands where no visible possession can exist. There is nothing, then, in this case, of a nature to repel the presumption; but, on the contrary, *an age of silence* on the part of all those under whom the demandant claims; and the admission of the proprietors, in their meetings for nearly forty years before the dissolution of the proprietary, that *Little* was a proprietor; so far as they could admit such a fact by allowing him to attend and vote at their meetings, and join in the duties and services devolving on their officers. This is a circumstance, equal, perhaps, to open possession, in favour of the presumption; and there is not a solitary fact since the year 1738 to oppose it, except the entry of the demandant in 1815.

We think the Judge was correct in submitting all these facts to the consideration of the jury; that his instructions to them were proper; and that the conclusions drawn by them were fully authorised.

Judgment on the verdict.

HARDING'S CASE.

In an indictment for forcible entry, at common law, it is not necessary to allege a seizin of the *locus in quo*.

The *Stat. 5. Rich. 2. chap. 7.* is part of the common law of this State.

Forcible entry into a dwelling house is indictable at common law, though the force be alleged only in the formal words *vi et armis*.

THE defendant was indicted for that he, "with force and "arms, to wit, with an axe and auger, unlawfully, violently, "forcibly, injuriously and with a strong hand, did enter into "the dwelling-house of *Joseph Cate* in said *Portland*, and in his "actual and exclusive possession and occupation with his fami-"ly; and the said *Harding* did then and there unlawfully, vio-"lently, forcibly, injuriously and with a strong hand, bore into "said dwelling-house with said auger, and cut away a part of "said house, and stove in the doors and windows thereof with "said axe, said *Joseph's* wife and children being in said house, "thereby putting them in fear of their lives", &c.

A verdict of conviction being found against the defendant, he moved that judgment be arrested for the following reasons:—

1. That the allegations contained in said indictment do not amount to any criminal offence, either at common law, or by statute.

2. That the indictment contains no allegation that *Joseph Cate* was seized of the said dwelling-house, or of the land whereon the same stands, at the time of the alleged forcible entry: nor does it allege who was seized of the same; neither does it appear but that *Harding* was himself seized of the freehold.

3. That there is no allegation in said indictment of any seizin of the said dwelling-house or of the land whereon the same stands, neither is there any averment in said indictment that said *Cate* was either lawfully or peaceably in possession of said dwelling-house at the time of the alleged forcible entry into the same, nor does it appear from any allegation in said indictment, but that said *Cate* was in possession of said dwelling-house by force and by wrong, which force it was lawful for said *Harding* to repel with force.

Hopkins, in support of the motion.

Three causes of arrest are assigned. But the subject is to be considered as though the *first* cause assigned were in the shape of exceptions to the direction of the Court to the jury: and the following facts, in addition to the allegations in the indictment, are relied on as sufficient to have justified a direction of acquital. It was admitted or proved at the trial, that the land and part of the house where the act mentioned in the indictment was done, had been assigned to *Harding November* 19, 1819, as his purparty, under regular proceedings in a petition for partition, to which proceedings *Cate* was a party, and was present at the assignment; after which, and a week before the act complained of was done, upon *Cate's* refusal to pay rent, the defendant had ordered him to quit the premises. And there was no proof of bodily violence done by the defendant to any person. It is contended that the jury should have been directed to acquit the defendant, because these facts, and those stated in the indictment, do not constitute any offence at common law, or by any statute.

At common law, if the right of entry be not lost, a man may enter into his own land, even *manu forti*;—and such entry is not an offence. If, indeed, it be accompanied with a riot, assault and battery, or any other breach of the peace, such riot or assault, &c. is, without doubt, punishable. But it is not an offence *per se*. No mischief can result from such a principle; and if any specific offence accompany the entry, the punishment for that offence is sufficient security for the rights of the community. The doctrine contended for will support the rights of the injured person against a wilful and deliberate wrongdoer. The contrary doctrine offers protection to the deliberate perpetrator of known wrong.

Such was the common law in *England*;—and so it remained until *Stat.* 5. *Rich.* 2. when the common law, *in that country*, was found to create much inconvenience by arming the tenants of the lords against each other, and giving a dangerous authority to powerful men. A statute was then enacted which restrains all entries into lands *manu forti*; since which, it is admitted that, in *England*, such entry could not be made. We are not, however, to conclude that this statute ever had force here. This is

contended because, so far as we can learn, this is the first instance of any such prosecution in this country, and because the reason which led to the enactment of this statute never existed here;—we had no vassalage—no barons to acquire dangerous power;—the reasons of the statute never crossed the ocean;—and we are therefore justified in treating it as the law of a foreign country, which a different state of things has excluded from our criminal code. 3. *Bac. Abr.* 555. 556. *tit. Forcible Entry A.*

The *second* reason is properly in arrest. No seizin is alleged,—neither in *Cate*, nor in any other person. It is contended that such averment is necessary, in order that the defendant may know, specifically, what he has to defend, and how to prepare for trial. *People v. Shaw*, 1 *Caines* 125.

The *third* reason is also in arrest. If the facts in this indictment be all true, and they must be so taken being found by the jury, what, it may be asked, is the consequence? We cannot conclude, from any thing in the indictment, that he has committed any offence. It may all be true, and yet, *under certain circumstances*, *Harding* may be entirely innocent and fully justified. The indictment does in no wise negative these circumstances; and therefore no legal conclusions of guilt can be made against him. It may be likened to an indictment for an assault and battery, containing no averment that the act was *contra pacem*. In this case, as it might be an offence, or it might not, and the indictment cannot settle the question, no sentence could be passed. Or, suppose one indicted and convicted of stealing and carrying away a chattel, which is not alleged to be the property of a third person. Here could be no sentence; for the law is well settled that the chattel in such case, shall be presumed to be the property of the person charged. So in the case at bar, it being uncertain, from any thing in the indictment, whether the defendant is guilty of a crime or not, and the legal presumption being in favour of innocence, no sentence ought to pass upon him.

Todd, for the State.

Every entry made *manu forti*, with a dangerous weapon, putting peaceable citizens in jeopardy or fear, is a breach of the

peace; and subjects the party thus entering to an indictment. The defendant's having a right of entry cannot justify the degree of force exerted on this occasion: and when it is apparent that the force was effected with a dangerous weapon, and accompanied with acts which could not fail to excite terror, the public have an interest to suppress such unlawful violence. *Rex v. Storr*, 3 *Burr.* 1698. and *Rex v. Bathurst, there cited.*

If *Harding* had the right he pretends to have had, he should have made such use of it as the law would justify; and having offended in this particular, he is liable *criminaliter* to its animadversions. The peaceable domicil of the citizen is not to be assailed in this hostile manner with impunity. The evidence adduced at the trial having fully supported all the material allegations in the indictment, the verdict is well found, and affords a sufficient foundation for a judgment.

PREBLE J. At another day in the term, delivered the judgment of the Court, as follows.

We are requested by the defendant's counsel to consider the first cause, assigned in his motion in arrest of judgment, as a motion for a new trial. In the form, in which the subject is brought before us, we can take notice of no facts, but those alleged in the indictment. The cause assigned also is properly in arrest of judgment. The indictment is at common law. If the facts charged, therefore, do not constitute an indictable offence at common law, no sentence can be pronounced upon the defendant.

The earlier authorities do sanction the doctrine, that at common law, if a man had a right of entry in him, he was permitted to enter with force and arms, where such force was necessary to regain his possession. [*Hawk. P. C. Chap.* 64. and the authorities there cited.] To remedy the evils arising from this supposed defect in the common law, it was provided by *Stat.* 5. *Rich.* 2. *Chap.* 7. that "none should make any entry into any "lands or tenements, but in cases where entry is given by "the law; and in such cases, not with strong hand nor with "multitude of people but only in a peaceable and easy man-"ner." The authorities are numerous to show that for a trespass,—a mere civil injury, unaccompanied with actual force or

violence, though alleged to have been committed with force and arms, an indictment will not lie. But in *Rex v. Bathurst*, *Sayers' Rep.* 226. the Court held that *forcible entry into a man's dwelling-house* was an indictable offence *at common law*, though the force was alleged only in the formal words *vi et armis*. In *Rex v. Bake*, 3 *Burr.* 1731. it was held that for a forcible entry an indictment will lie *at common law;* but actual force must appear on the face of the indictment, and is not to be implied from the allegation, that the act was done *vi et armis*. In the *King v. Wilson*, 8 *D.* & *E.* 357. an *indictment at common law* charging the defendant with having unlawfully and with a strong hand entered the prosecutor's mill, and expelled him from the possession, was held good. In this latter case *Lord Kenyon* remarks "God forbid these facts, if proved, should not be an indictable "offence;—the peace of the whole country would be endanger-"ed, if it were not so." The case at bar is a much stronger one, than either of those cited. The peace of the State would indeed be jeopardized, if any lawless individual, destitute of property, might, without being liable to be indicted and punished, *unlawfully*, *violently*, *and with a strong hand*, armed *with an axe and auger*, *forcibly enter a man's dwelling-house*, then *in his actual*, *exclusive possession and occupancy with his wife and children—stave in the doors and windows*, *cutting and destroying*, *and putting the women and children in fear of their lives.*

The second objection that no seizin is alleged does not apply to indictments for forcible entries at common law. Under the statute of *New-York* against forcible entry, the party aggrieved has restitution and damages; and hence it is necessary that the indictment should state the interest of the prosecutor. The *People v. Shaw* cited by the defendant's counsel, and the *People v. King*, 2 *Caines* 98. are cases upon the statute of that State. In *Rex. v. Bake*, *Mr. Justice Wilmot* remarks; "No doubt an "indictment will lie at common law for a forcible entry though "they are generally brought on the acts of parliament. On "the acts of parliament it is necessary to state the nature of the "estate, because there must be restitution, but they may be "brought at common law." In *The King v. Wilson*, *Lord Kenyon* says, "No doubt the offence of forcible entry is indictable "at common law, though the statutes give other remedies

"to the party grieved, restitution and damages; and there-"fore in an indictment on the statutes, it is necessary to state "the interest of the prosecutor." Our statute contains no such provision, and gives no remedy by indictment. It simply provides a process to obtain restitution, leaving the parties, the one to his action for damages, the other to his liability to be indicted and punished at common law.

With respect to the third objection: it is alleged in the indictment that the house was *Cate's dwelling-house in his actual and exclusive possession and occupation with his family*, and that the defendant *unlawfully entered*, &c. On the whole we think the indictment contains sufficient matter to warrant a judgment upon the verdict which has been found against the defendant; and the motion in arrest is accordingly overruled.

HERMAN *v.* DRINKWATER.

A Shipmaster having received a trunk of goods on board his vessel, to be carried to another port, which on the passage he broke open and rifled of its contents; the owner of the goods, proving the delivery of the trunk and its violation, was admitted a witness, in an action for the goods against the shipmaster, to testify to the particular contents of the trunk, there being no other evidence of the fact to be obtained.

This was trover for certain articles of jewelry: and the question of law reserved in the case, being argued at this term by *Todd* for the plaintiff, and *Longfellow* for the defendant, the opinion of the Court, from which the facts in the cause will sufficiently appear, was delivered at another day in the term, as follows, by

Weston J. This case exhibits conduct of great turpitude on the part of the defendant; the more aggravated as it has a tendency to impair our national character abroad. The plaintiff, an unsuspecting foreigner, ignorant of our language, but proposing to seek an establishment among us, having invested his property in certain articles of small bulk, shipped them, packed in a trunk and two boxes, on board the brig of which the defendant was master, then in the port of *London*, who undertook to transport them to the city of *New-York*. He engaged a pas-

sage for himself in the same vessel to accompany his goods, and sent on board his clothes and other baggage necessary for his personal accommodation. The defendant, little regarding the interest of the stranger, sailed without him. On the passage he violated the trunk and boxes, presented a part of their contents to his mate and crew, but kept the more valuable himself; professedly because he might be held responsible at a future day.

Instead of sailing for the city of *New-York*, he sailed for, and arrived at, *Portland*. Here he disposed of a part of his plunder; secure as he hoped from being called to an account by the injured foreigner, whom he had left on the other side of the Atlantic.

In the meantime the plaintiff, thus unexpectedly separated from his property, took passage in another vessel and arrived at *New-York*. Not hearing of the defendant there, he wrote to *Portland* where the vessel was owned. His correspondent applied to the defendant, who denied ever having received the goods; and it was not until certain of the articles sold in *Portland* were identified beyond all question, by the particular description which the plaintiff had furnished, under oath, of the contents of the trunk and boxes, that the fact was established that the defendant had received and embezzled the property.

All the foregoing facts were proved by unexceptionable testimony.

To prove the particular contents of the trunk and boxes, the judge, who presided at the trial, admitted the deposition or affidavit of the plaintiff, upon the ground of necessity; he not having it in his power to establish the fact by other proof. This testimony was objected to on the part of the defendant; and if improperly received, the verdict, which was returned for the plaintiff, is to be set aside, and a new trial granted.

That the testimony of a party is not to be received in his own cause, is a general rule of law of almost universal application. But to this rule there are some exceptions, founded in necessity.

The most ancient case is that which is to be found in the second volume of *Rolle's Abridgment* 685. 686. in which the principle is expressly recognized that the party robbed is from necessity a competent witness to prove the robbery, and of what

sum or things he was robbed, in support of his own action under the statute of *Winton.* This particular exception is also recited as existing law, by *Stat.* 8. *Geo.* 2. *chap.* 16. *sect.* 15. and has since been considered as well established by all who have treated upon the law of evidence.

In *Johnson v. Browning*, 6 *Mod.* 216. in an action for a malicious prosecution for a felony, the testimony given by the defendant's wife at the trial of the indictment, she being the only person present when the supposed felony was committed, was received in evidence to prove the fact, which was justified from the necessity of the case.

The suppletory oath of a party to prove entries in his book, appearing to be in his own hand writing, has been admitted by long usage and practice supported, to the extent in which it has been here received, by no other authority than the principle of necessity. 4 *Mass.* 455.

And to prove the loss of instruments, which appear to have once existed and to have been genuine, the oath of the party has been received; he alone in ordinary cases being able to testify to that fact. If the correctness of this practice has never been settled here by judicial decisions, it has been recognized in the first tribunals of some of our sister States. 1 *Hayward* 4. *id.* 410.

The admission of the complainant as a competent witness, under certain limitations, in support of a complaint upon the statute for the maintenance of bastard children is, upon the same principle of necessity, authorized by statute.

In the case before us, the plaintiff had sustained his action by proof not liable to objection; but the extent of the damages to which he was entitled could be ascertained only by his own testimony. As he was to accompany the goods himself it is not to be presumed that he took any bill of lading or receipt from the defendant; and if he had, such an instrument does not usually specify the particular contents of trunks and packages. The plaintiff therefore, unless his oath is admitted, must be deprived of an adequate remedy; although the justice of his claim is most apparent. The analogy between his case and that of the party robbed in an action under the statute of *Winton*, is very striking; and his testimony is strongly corroborated by circumstances.

Upon the whole we are all of opinion, that the deposition or affidavit of the plaintiff was rightfully admitted, upon the ground of necessity; and that he is entitled to judgment upon the verdict.

FOSDICK *v.* GOODING & AL.

If the husband aliene to two in severalty, and die, the widow's dower is to be assigned out of each distinct parcel of the land.

So if he aliene to one, and the grantee afterwards convey in separate parcels to several.

Tenants in severalty, of distinct parcels of land, cannot be joined in a writ of dower.

In dower, *several tenancy* must be pleaded in abatement: *non-tenure* may also be pleaded in bar.

Dower unde nihil habet, wherein the plaintiff demanded against the defendant *Gooding* and *Ann Graffam* her just and reasonable third part of a certain messuage or parcel of land in *Portland*, whereof she alleged herself to be dowable of the estate of her late husband *Nathaniel F. Fosdick* deceased.

In a case made for the opinion of the Court, it was agreed that *Nathaniel F. Fosdick* was seized in fee of the premises described in the declaration in his lifetime, and during his marriage with the plaintiff;—that the *United States* afterwards, and before his death, extended their execution on the same, in part satisfaction of a judgment recovered by them against him, by which the fee passed to the *United States*;—that the *United States* afterwards sold and conveyed the same in fee to *Josiah Paine*, who conveyed the same in fee to *Caleb Graffam* deceased, late husband of *Ann Graffam* one of the tenants;—that said *Ann*, after the death of her husband, and before the decease of *Fosdick*, had one third part of the premises set off to her in dower;—that *Gooding* purchased the *whole* estate of *Caleb Graffam*, including the reversion of dower, and was in the actual occupation of the other two thirds of the premises;—and that in that manner *Gooding* and *Ann Graffam* were tenants of the same at the bringing of this action. *Ann Graffam* was defaulted. No plea in abatement was put in by *Gooding*;—and the question hereupon submitted to the Court was—"wheth-

er the demandant is now entitled to maintain her action against the tenant *Gooding*, jointly with the said *Ann ?*"

The cause was argued at this term by *Daveis* for the demandant, and *Whitman* for the tenant, and continued to the following term for advisement.

Argument for the demandant.

The question turning upon the right of action, the argument for the demandant divides into two considerations;—first, in regard to the right, and secondly, the remedy.—The consideration of the latter, which without doubt is necessary to be pursued under our own statute, leads also to an examination of the original remedy at common law, of which it is proper to argue that the statute is only in affirmance; and that the provision of the legislature may be usefully interpreted by the ancient usage.

1. The *right* of the demandant to endowment, against a second dowress and a subsequent purchaser, becomes of importance from the inferences, to which it leads in respect to her *remedy*. The defendant endeavours to maintain a technical argument, (reversing the just principle of juridical reasoning) from the supposed absence of a joint remedy to the negation of a proper right. Whereas, if in consequence of the prior sole seizin of the demandant's husband in the whole parcel, (the fee having neither been divided in the act by which the property was parted from him, nor by any subsequent disposition,) she has become entitled to have one solid third part set off to her in severalty, then the law must grant her an appropriate remedy; and, whatever principles might apply in other cases, her right of action must be shaped according to the nature of her case.

The right of the wife to dower, though dependent on the seizin of the husband during the coverture, cannot be affected by any act of his; and can only be abridged or destroyed by some act of her own. It does not depend upon the continuance of the seizin.

The first seizin, upon the common principle of priority, gives the first title to dower. Whenever the original right becomes mature, it relates back to the original seizin, unaffected by any intervening occurrence. *Vide* 2 *Bac. Abr.* 144. *Dower G.* The

seizin of the dowress is considered to be a legal continuation of the husband's seizin, however it may have been intercepted; so that, though when actually endowed she holds at common law of the heir, yet she acquires no new freehold, but is taken to be in *by* her husband and *of* his estate; and thus tenancy in dower is distinguished from tenancy by the curtesy, the former being in the *per*, while the latter is in the *post*.—*Vide* 1 *Inst.* 241. *note* 167.—*Gilbert on Dower* 395.—1 *Inst.* 30. *note* 177. *Hal. MSS. citing* 5 *E.* 3. *Entry* 66 *&* 36. *Hen.* 6. *Dower* 30.—*Windham v. Portland*, 4 *Mass.* 388. *per Parsons C. J.*

Hence the legal proposition, which is a regular comment on this principle,—that dower defeats descent; so that only two thirds descend in fee; and that a disseizee may enter upon the dowress of his disseizor, after her endowment, although his entry is tolled by the descent cast upon the heir; "for the law adjudgeth no mean seizin between the husband and wife." 1 *Inst.* 240. 241. *note* 167.—*Vide Eldrige & al. v. Forestall & al.* 7 *Mass.* 253.

The same principle, with some limitation, extends equally to purchasers. Dower defeats alienation, as well as descent. It is not necessary to the perfection of this title that the husband should die seized. Though he sell the estate, it is still subject to the dower, as it is not in his power to defeat the right, which was inchoate in his life time; and, when it becomes consummate by his decease, the title *overreaches the alienation*. *Vide* 1 *Inst.* 32. *a.* 2 *Black. Com.* 132. 2 *Saund.* 45. *note* 5. 9 *Mass.* 367.

The legal operation of this doctrine, that the original seizin of the husband (to which the prior title to dower, whenever it attaches, is reunited,) entirely overreaches and defeats every subsequent seizin, capable of being acquired in consequence of his disposition or death, is to create in regard to land subject to dower, though only as an inchoate right, such a lien or liability, that the heir or purchaser acquires therein but a base or qualified estate. In such portion he possesses only a reversionary interest. "Now upon the matter, he hath but a reversion dependent upon a freehold." 1 *Inst.* 31. *a.*

Some partial modification of this principle seems to take place in regard to purchasers; occasioning a distinction, which is established between their respective rights, or rather the

rights, which they are respectively capable of transmitting to their wives, in lands previously subject to claims of dower; constituting the rule of *dos de dote*. According to the definition of this doctrine at common law, the wife of an alienee may be endowed of lands formerly set off in dower, but the wife of an heir may not.—See 1 *Inst.* 31. *Perkins, sec.* 315. 316. 4 *Rep.* 122. *Bustard's* case. *Fitz. N. B.* 351. *H.* 2 *Saund.* 45. *note* 5. 9. *Vern.* 220. 221. 231. *Dower G.* 16. 17. 18. *& G.* 3. 2 *Bac. Abr.* 138. *Dower E.* In the words of *Bustard's* case (4 *Rep.* 122.) "dower tolls the estate, which descends by law, but not the estate gained by purchase."

It may not be necessary, to constitute a title to dower, that the husband should be absolutely seized of an indefeasible estate; and of a defeasible estate the wife may have dower, until the estate be defeated, according to *Perkins, sec.* 420. It is also decided, that the widow of a devisee may have her dower in the whole of the land devised, notwithstanding a quiescent liability to dower. *Hitchins v. Hitchins*, 2 *Vern.* 403. cited. 1 *Cruise* 153. And such an assignment may be sufficient, until it is subverted. For the superior inchoate claim may never become consummate by survivorship of the wife; or the subordinate title may be secured against disturbance by the covenants of the former husband in the conveyance to the latter.

Still such title, can only be compared to the imperfect species of estate gained by the levy of an execution on land under previous attachment, or to the lien of a second mortgagee, which avail until they are avoided. That the elder title to dower is perfectly paramount in its nature, and must prevail whenever it comes in conflict, has been recognized by the Supreme Court of *New-Hampshire* in the case of *Geer v. Hamblin.* So that it may be said that there can be but one proper title to dower in the same parcel of land. See *Co. Lit. sec.* 54. which notwithstanding the apocryphal character attributed to it by *Coke*, who says "it is evident from the context, that this shaft never came out of *Littleton's* quiver of choice arrows," is cited with respect by *Brooke, Dower pl.* 30.

It is perfectly settled by the ancient authorities, that an elder dowress whenever her title becomes consummate, may maintain an action against the widow of her husband's alienee, who has

been first endowed, for her dower in the whole of the land. *Vide* 1 *Inst.* 42. *a.* and the case of the *Parises*, 5 *Edw.* 3. *Vouch.* 249. cited in *Bustard's* case, 4 *Rep.* 122; more succinctly stated in note 181. to 1 *Inst.* 31. *a.* from *Hal. MSS;*—and see *Rol. Abr.* 677. cited 2 *Bac. Abr.* 138. *Dower E.*

Therefore the perfect and paramount right of a prior dowress to endowment over a second, is well established by law and admitted by the default of one of the tenants.

Again; from the attraction of the seizin of the wife, after she is endowed, back to the original seizin of the husband, it follows, according to the consequence stated in the books, that she is in exactly of his estate.

Therefore of lands holden by him as tenant in common she can only be endowed in common, and not by metes and bounds, as she can have no other estate than her husband had. 1 *Inst.* 37. *b.* 2 *Bac. Abr.* 137. *Dower D.*

Upon the same principle, where the husband was sole seized, the wife shall be endowed of a solid portion by metes and bounds. Dower is defined *de quocunque tenemento tertia pars.* 1 *Inst.* 33. *b.*—This method of endowment is denominated "according to common right." 1 *Inst.* 30. *b.* 32. *b.* & 39. *b.* Common right gives the widow the third part of each several parcel, messuage or manor by metes and bounds. 1 *Rol. Abr. H. pl.* 6. 682. 683. 684. 2 *Bac. Abr.* 134. *Dower D.* 2. and see *Rutledge C. J.* in case of *Scott*, 1 *Bay's Rep.* 507. *S. P.*

Where dower is assigned by the sheriff he is bound to assign a third part of each manor, messuage, &c. The heir may assign one parcel in lieu of one third of each. 1 *Cruise* 163. *Title Dower, ch.* 4. The distinction is, that the dowress may accept a certain parcel in lieu of her proper portion of each; but she cannot be compelled to compound her right. This obvious distinction may serve to reconcile a variety of apparently conflicting cases. Any mode of endowment, which deprives a dowress of an entire portion in each estate of her husband, is contrary to common right, and not favoured at common law.—The idea of her undertaking to pick out of distinct parts of the same parcel is scarcely contemplated, certainly not sanctioned, by the common law. "One shall not have two writs of dower *unde nihil habet* at the same time in the same vill," &c. by *Shard.* 13. *Ed.* 3. see *Fitz. N. B.* 348. *note a.*

Such a capricious fancy can no more be indulged to the dowress than it can be exercised in regard to her. Where, for instance, the sheriff undertook to assign to the demandant for her dower of a house, the third part of each chamber and returned that he had chalked it out to her; it was held an idle and malicious assignment, and he was committed for it, for he ought to have assigned her certain chambers or rooms thereout. See *Palmer* 265. 2 *Bac. Abr.* 135. *Dower D.* 2.

Again it is laid down, that the assignment of dower must be absolute, and not subject to any exception, qualification or reservation whatever; as the dowress "comes in the *per* by her husband, and is in continuance of his estate, which the heir or tenant are but ministers or officers of the law to carve out for her;" and accordingly all such attempted modifications of the perfect right are treated as totally abortive. See 2 *Bac. Abr.* 135. *Dower D.* 2. and cases there cited.

The only exception, that can be suggested to the absolute right of entire endowment in estate, of which the husband was sole seized, may be where he by his own act severs the estate, and divides the land into parcels by different alienations. For there is thus created a severance of that seizin, of which her's is only a continuation. Such seems to be the effect of the decision of *Potter v. Wheeler*, 13 *Mass.* 504. But it was contended on the part of the demandant, that the exception was to be restrained by this rule, and not extended to any subsequent subdivisions either by heirs or alienees; over all which her seizin rides; and from which her title is protected, by its relation to the seizin of her husband. In the present case however, there has never been any severance of the estate; the whole fee having passed out of *Fosdick* at once, and the whole title having passed to *Gooding*, as it was in *Graffam*, who had *Fosdick's* estate.

Moreover it rather strengthens the argument in favor of the entirety of the right, that where there are several feoffees, a certain portion may be assigned in dower by one in discharge of the whole. Though doubted by *Coke*, how the other feoffees could plead such an assignment, not being parties to it, 1 *Inst.* 35. *a.* yet *Perkins*, *sec.* 402. evidently considers it clear that they may, and that it operates as a general discharge.

The doubt, as affecting the right, was of a rather technical description. The right was of a real nature upon the land itself, as much as of a personal character against the purchasers.—Several feoffments must certainly mean of the same land; otherwise such an endowment would be against common right, which could be available only by consent, not at all affecting the legal right independent of the amicable arrangement. *Vide Viner Abr.* 261. *Dower Z.*

The main reason why dower should be assigned in a compact state is contained in the definition of the estate; viz. a provision for the benefit of the widow and younger children, to whom it must necessarily be more beneficial in such shape.

This conclusion is reinforced by a consideration of the inconveniences flowing from a different method, which may be illustrated by examples arising out of the present case. The last dowress happens here to be first endowed.—Suppose for instance, that the right of *Paine's* wife, not having been relinquished, should have been matured before the demandant's. According to the argument, the second dowress (*Mrs. P.*) would have drawn one third of *Mrs. Graffam's* third, together with one third of *Gooding's* two thirds for her dower, in separate portions. Then the demandant would be obliged to take one third of each residue left to *Gooding* and *Mrs. Graffam*, and one third of each of the two parts set off to *Mrs. Paine.* In the rapid transfer of real estate in commercial countries these divisions might be multiplied almost beyond imagination; and in the course of things, not observing the order of nature adopted in the law of descent, accumulate in such a manner that the elder dower might ultimately be compounded of an infinitude of fractions. Add, that "*privileges*," which are generally secured to dowresses in assignments, would form another fruitful, if not ludicrous, source of subdivision. And what reason can there be, that after the decease of all the dowresses, who might have been endowed before though their titles were after hers, her dower should be holden to stand in this distracted state? Or what remedy could there be to consolidate it?

As a summary of the argument, so far as it has proceeded, it is apparent, that the prior right of dower supersedes any titles capable of being acquired to any portions of the land upon

which it is a lien, subsequent to the conveyance of the fee by the husband of the first dowress, inasmuch as her right is of a post-liminary character; and such other claims are merely in the *post* while she comes in the *per*. Being in of the estate of her husband, it follows that she is to be endowed of an entire third part of every separate parcel, of which he was sole seized. And as her seizin, being a legal continuation of his, defeats every subsequent seizin, it is a clear consequence or necessary corollary of the proposition, that it equally defeats every future variety of such seizin or intermediate mode of possession. If therefore the demandant's right to dower defeats *Gooding's* seizin, it also defeats *Graffam's*, out of which that of his grantee and that of his widow are equally derived; and especially the seizin of the latter, whether she is considered as in by the one or holding of the other.

The seizin of both defendants being thus defeated in regard to the demandant, and they being tenants of the premises in actual possession, it is entirely immaterial as it respects her in what capacities or proportions they may contend to claim, or in what respectful relations they may agree to recognize each other. Their pretensions to resist her title being dissolved by its transcendancy, it is simply sufficient for her that they remain on the land, and are not disposed to assign her dower in a satisfactory or legal manner. They are alike interlopers, and can set up no shield to protect each other by their mutual intrusion.

By these considerations the ground seems to be cleared for the action of the demandant. The legal remedy should be adapted in correspondence to the legal right. And that principle will authorize her to join the defendants.

2. *In regard to the remedy*:—it is a general rule in real actions, that all persons, who are on land demanded, should be made defendants, as they may have rights, and have the privilege of protecting themselves against a judgment by disclaiming any interest.

It was said by *Lord Kenyon* in *Mitchell v. Tarbut*, 5 *D & E.* 651. that "where there is any dispute about the title to land, all the parties must be brought before the court."

The rule extends to all personal actions arising *ex delicto*, whether trespass, trover or case, of which real property is the root. *Vide* 1 *Saund.* 291. *notes.* 1 *Chitty* 71. 76.

In real actions, writs of entry, &c. generally, it is imperative, that all who claim the lands demanded jointly in any manner, must be made defendants; and the omission of any may be pleaded in abatement. *Booth* 131. 134. 178. 179. 1 *Chitty* 71.—And there seems to be no distinction in this respect between dower and other real actions. If the lands, in which dower is demanded, are claimed by one, he alone can be sued; if by several jointly, all must be sued. At common law, the writ of dower must be brought against all the tenants of the freehold or persons having a freehold interest. 3 *Chitty* 593. *Vide Com. Dig. Pleader* 294. The omission of any one of the tertenants in an action of dower is matter of abatement. See *Viner's Abr.* 275. *Dower L. a.* 9. where "in dower by several *præcipes* the name of one of the tenants was left out in the clause *unde quæritur*, and also in the summons; by which it was abated against all." Yet this plea applies in general only to tenants in common, who would seem on the other hand not to be properly liable to several *præcipes*. It appears therefore to be a fair inference, that all who are on land, in which dower is demanded, of whatever estate, are jointly liable to the action.

There may be an exception, where several are in possession by distinct titles under different grants from the husband himself; and there ought perhaps in such separate tenancies to be separate actions. It may however be observed that sole or several tenancy is not noticed as a plea by *Sellon* (*Vide vol.* 2. 299;) and misjoinder in that case can only be matter of abatement.

There are numerous precedents, both ancient and modern, for joining several tenants in the same action in a writ of dower. If little notice is taken in them whether the tenants held by different titles, it only manifests of how little importance the distinction was deemed. As a general remark applicable to the cases, the seizin of the defendants being defeated by the demandants, its relative character became very immaterial.

Several instances occur, in the old books, of actions of dower by several *præcipes* against several tenants, all included in one writ. *Vide Pasch.* 7. *Hen.* 6. *fol.* 33. 34. *Viner Dower O. a. pl.* 15. Dower against two.—Dower by one *præcipe* against *W.* and by another *præcipe* against *R.* and no objection taken on that score. *Viner Dower M. a. pl.* 2. As the practice on this point

is apprehended to exist in *England*, when the demandant comes to count, the demand is rendered joint against all; and the judgment is also joint.

In *Rastall, Judgment in Dower pl.* 3. there is a *joint* demand against four, and judgment against the four on *cognovit actionem.*

Hil. 5. *Ed.* 3. *fol.* 10. *pl.* 21. "Feme brought dower *per divers præcipes versus plusors.* And as to one *præcipe*, *Stanf.* said for him against whom the writ was brought, that he had nothing but as guardian, yet not named guardian, &c. And as to another *præcipe*, *Trew.* said that she had demanded a moiety of part and a third of the residue, yet all in one vill," &c.—where it appears, that they defended in different capacities, pleaded distinct pleas and exhibited no connexion or privity; yet were joined in one action.

A stronger case is stated in the Year-book, *Hil.* 39. *Ed.* 3. *fol.* 4. where the defendants in such an action evidently had distinct estates.—This was dower by several *præcipes* against two women. One prayed the other in aid, and said they were parceners and *had made partition*, and aid was granted. Although their original title was the same; yet they had distinct rights as coparceners, and by the severance of their estate, each had become seized in severalty.

Fitzherbert is express, that a woman shall not only have a writ of dower in *London* against several tenants by a several *justicies* in one writ, but that she shall also have her writ of dower (viz: at common law) against several tenants by several *præcipes*, all in one writ. This is found at the conclusion of his chapter on Writ of *Dower*, *Unde nihil habet. F. N. B.* 348. (148.) The form of expression is not joint tenants, tenants in common or coparceners but *several tenants.* The phrase "several tenants" implies several titles; and it may be inferred from the method of proceeding against them (by several *præcipes*) that they held in severalty; though that may be immaterial.

To the same point may be cited the more modern authorities of 3 *Ld. Raym.* 151. *Lutw.* 734. *S. C.* where there were several defendants, and the count was general against them all. Although it may not distinctly appear upon the face of these reports, whether the several defendants were tenants of different portions, yet that conclusion is more likely than the reverse. There

is no reason to suppose they were tenants in common. But the very silence of those authorities on this point is an emphatic comment on the insignificance of the distinction. The more remarkable, as the elder authorities were sufficiently apt in taking pertinent distinctions.

But it is insisted for the defendant on the authority of *Merrill v. Russell*, 1 *Mass.* 469. that "not tenant" is a good plea;—which is unquestionable, whether under our own statute or at common law. Further, forms are found in *Morgan*, transcribed in later books on Pleading, from which is maintained the right of the defendants to plead sole tenure as to part, and non tenure to the residue.

Nevertheless it appears to want the sanction of respectable authorities to determine how far *non tenure of parcel* is proper to be alleged in answer to a writ of dower; for it is contrary to the policy of the provision to permit it to be curtailed or eluded in such a manner. *Vide Viner* 275. 276. *Dower L. a.* 5. 12. according to which the demandant may be admitted to maintain, that *Gooding* is tenant enough for her demand, notwithstanding his supposed non tenure of the parcel in *Mrs. Graffam's* possession; and that for that purpose it is not for him to deny that he is fully so.

At all events, as far as this rule of pleading has any operation, it is conceived to be restricted to those cases where there has been a severance of the fee by the husband himself; and that it is not to be construed to defeat the action of dower in any case where the defendant relies on a subsequent partition. The 3 *Chitty*, 601. where an opinion is founded and expressed upon the form of the pleadings, is not clear, how the separate tenancy originated in this respect.—Such a plea accordingly is not supposed to be applicable in the present case, where there has never been any proper severance; less is it important to *Gooding*, who is yet seized in fee of the whole estate.

A further argument in favour of maintaining a joint action against the present parties arises in consideration of their *privity*. Both derive their titles from *Graffam*. *Gooding*, under him, is seized in fee of the whole estate of *Fosdick*, subject to dower; while *Mrs. Graffam* has a freehold in one third, of which *Gooding* holds the reversion. Her seizin is a continuation of her

husband's. In regard to her, *Gooding* is the representative of *Graffam* :—so that, in case of her eviction, he would be liable to make a new assignment; and in case of his own eviction of any portion, as for example by a recovery against him under an elder title in dower, his indemnity would be open upon the warranty of *Graffam*.

That the operation of this privity, between dowresses and the representatives of their husbands, extends equally to the heirs and alienees; *Vide* 5 *Edw.* 3. *Vouch.* 249. 4 *Rep.* 122. 1 *Inst.* 31. *note* 181. *Litt. sec.* 54. and *Rol. Abr.* 677. before cited.

Such is the privity in this respect between heirs and feoffees, that where there are several of the latter, any of whom are sued in dower, they may vouch the heir, and he may plead an assignment made by himself. 1 *Inst.* 35. *a.* And it appears, that even the alienee may plead such an assignment by the heir. *Vide Moor* 26.

The consequences of this privity extend further to those remotely interested in the estate. A release of the right of dower to a remainder-man shall enure to the tenant for life; and the remainder-man or reversioner may in like manner avail himself of a release to tenant for life. See 8 *Rep.* 299. *Altham's case.* 2 *Bac. Abr.* 141. *Dower E.*

The dowress is described at common law to be attendant to the reversion dependant on her estate for the services incident to it upon the feudal principle; and it is said that if the reversion be granted, the tenant in dower may also be attendant to the grantee. *Perk. sect.* 424. 425. 427. 9 *Rep.* 135. 2 *Bac. Abr.* 145. *Dower H.*

By the statute of *Gloucester* 6 *E. I. c.* 7. and by the adoptive provision of our own of 1783. *c.* 40. *sec.* 3. the estate of tenant in dower is forfeited to the reversioner for waste.

Again, it is a general principle, that if the tenant be only seized for life, he ought to pray him in the reversion or remainder in aid to defend the inheritance, and if he do not, it seems in strictness, according to Sergeant *Williams*, to amount to a forfeiture. 2 *Saund.* 45. *c. note.*

And the reversioner ought to have an opportunity to defend against a claim of dower. 9 *Viner* 286. *Dower M. a.* 62.—In dower, the tenant informed the Court, that the reversion is in

one, who ought to be received to save his title; and the Court ordered him to plead at the return of the *petit cape*. *Lord Morley's case*, 2 *Brownl.* 122.

Wherever there is a reversioner therefore, that may be joined, it is always desirable to do it, as it saves the delay of vouching and praying in aid. It is expedient to avoid delay in actions of dower. The reason assigned is, that the widow has nothing to live upon in the mean time. Therefore in *unde nihil habet* no protection is allowable at common law, as it might starve the demandant. 1 *Inst.* 131. *a.* 9 *Viner's Abr.* 279. *Dower M. a.* 10. And all dilatory pleas in dower are discountenanced on the same principle. *Barnes' Notes*, 2. *Foster v. Kirkley.* 2 *Saund.* 44. *note* 4.

But it is made a question, whether a party in the situation of *Mrs. Graffam* has such an estate, as to be capable of assigning Dower: And it is said that guardian in socage, tenant by statute merchant, statute staple or *elegit*, or lessee for years cannot assign dower. To this point *Perkins sect.* 403. 404. is cited from 2 *Bac. Abr.* 133.

This objection is obviated by joining the reversioner, upon the ground before stated, according to several valuable antient authorities.

Year-book, 1 *Edw.* 3. *fol.* 2. *pl.* 7. is a writ of dower against tenant by *elegit* alone. It was argued, that *in favorem dotis* a writ lay against a tenant for years; and the fact, that it lies against guardian in chivalry was urged as a reason;—but in the end the parties were advised to bring a new writ against the heir and tenant by *elegit* jointly; and plaintiff became nonsuit.

The result of this recommendation is visible in the subsequent *Year-book*, 2 *Ed.* 3. *fol.* 15. *pl.* 11. Writ of dower against tenant by *elegit* and the heir; and the heir making default, the tenant by *elegit* vouched him and pleaded his tenancy; and seizin was adjudged to the demandant; and the voucher entered on the roll; and the sum of the recognizance, and the whole manner of the tenancy, in order to save the estate of tenant by *elegit*.

The reason of entering the matter in this manner upon the record seems to have been, that as the tenant was entitled to the estate until his debt was paid, the term ought to be extended in

proportion as the quantity was diminished.—It may also be observed, that the estate of tenant by *elegit* is holden by metes and bounds (See *Jacob's Dict. Art.* ELEGIT) as the defendant, who is only tenant for life in the present action, holds her part.

The same point is supported by 3 *Lev.* 168. *pl.* 219. *Williams v. Drew*, cited 9 *Viner* 285. *Dower M. a.* 53. Dower against *W. & D.*—*W.* made default. *D.* surmised that he was a lessee for fifty years under the demandant's husband, and suggested that the action was brought by covin to make him lose his term, and prayed it might be protected. And *per tot. cur.* it was granted. Moreover they held clearly that upon the default of *W.* judgment could not be rendered for a mere moiety, *the matter trenching to the whole.* So the term of *D.* was sustained, subject to the dower.

These authorities were argued to be sufficient to support the action against *Mrs. Graffam* as the mere tenant of a term, and *Gooding* as the reversioner of her part, as well as against him also in respect to the other two thirds in his sole seizin; for in the case from the Year-books the heir must have holden the other moiety in his own right as well as the reversion of that holden by *elegit.*

Again, the reason assigned why tenants of terms by *elegit*, &c. for example, cannot assign dower; viz. that they have not an estate large enough to answer the plaintiff's demand, as none can assign dower but those who have a freehold, &c. does not apply to the present case; as *Mrs. Graffam* has a freehold.

The action may also be supported upon the statute of 1783, *c.* 40. *sec.* 1.; which provides that the writ of dower may be "brought against the tenant in possession, or such *persons* (in the plural) who may have or claim right or inheritance in the same estate, in manner and form as the law prescribes." The concluding clause, it is probable, does not relate exclusively to the form of process; but may be understood to give a declaratory character to the provision; consonant with the principle of the common law, stated 3 *Chitty* 593, that the action must be brought against all having freehold interests. And according to the construction put upon the statute by the Supreme Judicial Court of *Massachusetts* in the case of *Parker v. Murphy*, 12

Mass. 485. it is required to maintain the action, that the tenant should be of the freehold at the time it is brought.

Both defendants are tenants within the statute. *Ann Graffam* is in possession of one third part, claiming right, and having her estate assigned to her in due form of law. Of that proportion against *Gooding* she was rightfully endowed. Her dower is only liable to be defeated by the demandant. She is then entitled to a new assignment against him, and he to a writ of admeasurement against her; though he may not be able to contest her present right to retain the whole of her freehold, until the recovery of the demandant.

Gooding being seized of the whole in possession or reversion, subject to as many rights of dower as remain unrelinquished, it is important that he should be made a party to defend his own estate. It is a benefit to him to be joined; as otherwise *Mrs. Graffam* might object against a process of admeasurement, that the present demandant was not dowable; from which she is now precluded.

No inconvenience arises from such a joint demand, because the tenant in dower may disclaim as to all the residue, under the statute of 1795. And the reversioner may show his estate; so that the rights of all parties may be secured.

In what other manner could the plaintiff make her demand? To demand of *Gooding* one third of two thirds, and then of *Ann Graffam*, or rather of her and *Gooding*, one third of the other third, would require distinct judgments and executions.—But "*per Brian J.* 13. *E.* 4. 7. *Br. Dower pl.* 73. she cannot have several judgments of one and the same thing, but one entire judgment." And she could not have judgment of a moiety, the matter trenching to the whole.

But the consideration of damages recoverable in dower has been pressed upon the court as an objection to the action, inasmuch as they must be joint against both the parties, while one of them might have been perfectly willing to assign and thereby avoid an action. But, (without regard to the grace with which such a suggestion comes from one party after a default of the other,) the demandant is entitled to her damages for the detention of her dower. And if she is entitled to a joint action, she is also entitled to have her damages jointly assessed,

The damages are incidental; and it is an inversion to argue against the action from the assessment of damages. There is no novelty however in joint damages. It may be an inconvenience, to which all must subject themselves, who agree to be associated for any purpose by which they may be mutually exposed to them. If they are not equally *tort feasors*, they may make an apportionment of them among themselves upon equitable principles;—otherwise it is the fortune of their enterprize.

The topic of damages however is not treated as of the gravest importance in its influence upon the rights of the dowress, by *Jackson J.* in delivering the opinion of the court in the case of *Parker v. Murphy*, 12 *Mass.* 487. In that case it was considered, that the damages might be recovered against the grantee of an heir, upon whom a demand had been made, notwithstanding the grantee should have never heard of the demand or the widow. For if the purchaser knew of the unextinguished right, the price would be regulated by it. If he were not apprized of the latent title, he must rely for his indemnity upon the covenants; and it would amount to nothing more than a mortgage or any other secret lien, for which he must seek his legal remedy, upon his security.

Mellen C. J. at the succeeding term delivered the opinion of the Court as follows:

At the hearing of this cause we listened with much pleasure to the learned and able discussion of its merits; and having since examined most of the authorities to which we have been referred, we have at length arrived at what we believe to be a correct and legal conclusion.

In the argument two questions have been presented for our consideration—

1. Was the action rightly commenced against the two tenants *jointly?*

2. If not, can the tenant *Gooding*, the other tenant being defaulted, *now* object to this joinder, and thereby defeat the action, no plea in abatement having been put in?

The statement of facts shews the respective characters and rights of the two tenants, their relation to the demandant, and to each other.

At the commencement of the action they were tenants of the freehold in *severalty*, of distinct parcels of the premises whereof dower was demanded.

Numerous authorities were cited and arguments urged to prove that the seizin of the dowress is, in consideration of law, a continuation of the seizin of the husband, as to priority of right of dower and the mode of assignment.

We deem this principle of law to be well settled, subject to certain limitations hereafter mentioned; and we shall not dwell upon this part of the case, but proceed to the examination of some others, involved in a degree of doubt and uncertainty.

As a consequence flowing from the principle just stated, the counsel for the demandant contends that the original seizin of the husband entirely overreaches and defeats every kind of subsequent seizin that may be acquired after his alienation or death.

Our statutes provide two modes by which a widow may obtain the assignment of her dower; and one or the other of these modes is to be adopted, according to circumstances.

In those cases in which the husband *dies seized*, provision is made for the assignment of dower by the Judge of Probate; and in such cases this course is almost universally pursued. It is a subject peculiarly appertaining to the jurisdiction of the Probate Court,—and in the case of *Sheafe v. O'Neil*, 9 *Mass.* 9. it is considered as the correct mode of proceeding. But the power of the Judge is confined to those cases in which the husband *dies seized*. If, in his lifetime, he had parted with the estate, and the assignee holds and owns it, the jurisdiction of the Probate Court does not extend to it. In such cases, and such only, is it *necessary* to institute a suit at common law:—perhaps we may say that in such cases only can it be *proper* so to do.

It seems to be admitted that the husband, in his lifetime, may, by his conveyance, in some degree *impair* the widow's right of dower, though he cannot *defeat* it:——that is to say—if he should die, not having alienated any portion of his estate, his widow could legally be endowed *in solido*;—but if he should convey his estate to four different persons, one distinct parcel to each, and die, the widow must demand and receive dower of the four different grantees, in four different parcels; and this

may essentially *impair the value* of her dower, though not in any degree *lessen the proportion*. The case of *Porter v. Wheeler*, 13 *Mass.* 504. seems to adopt and proceed upon this principle. It recognizes the power of the husband to affect the widow's rights to a certain extent by his act of conveyance, and impair them by qualifying the mode of her enjoyment of them.

The case of *Porter v. Wheeler* goes no further than to declare the effect of a sale and conveyance by the husband of a *part* of the estate, to one person, he continuing to own the residue; and this is supposed to be essentially different from the case where the husband conveys the *whole* estate to one man, and this grantee afterwards, and in the lifetime of the husband, makes a division of the estate, by selling it to *two persons*, in two *distinct parts*. According to the argument of the demandant's counsel, the widow, in this latter case, might demand her dower against these two after-purchasers *jointly*. The question is deserving of consideration, whether there be any legal distinction in the two cases. Where the husband conveys the estate to two or more in *severalty*, the act is admitted to bind the wife, to a certain extent;—and the reason is, because it is his act, by virtue of which the partition is effected. Now is it not *his* act, which causes the partition in the other case stated. If the husband sells his estate to *A.* and *B.* in equal parts in severalty, he then *directly* makes the division:—if he sells the whole estate to *C.* who sells it to *A.* and *B.* in equal parts in severalty, then the husband makes the division *indirectly*:—and it would seem that when this second conveyance is made by *C.* to *A.* and *B.* in the lifetime of the husband, the consequences as to the widow, in respect of dower, would be the same. In the one case, the husband divides the estate himself and by his own deed;—in the other, he sells the whole estate, and parts with all control over it; and thereby expressly authorises his grantee to divide the estate into as many parcels as he may think proper.

The facts in the case of *Porter v. Wheeler*, and other cases bearing on this point, did not require an examination of the principle of law as to the operation of the husband's deed, except where he made the partition by his own *immediate* act; but we apprehend the same principle must be applied in the case where the partition of the estate is made by an assignee

of the husband, before the widow comes forward to demand her dower. In both cases it is the act of the husband, mediate or immediate, which creates the severance of the estate, and, to the extent before mentioned, qualifies the rights of the widow.

The next inquiry is, whether the principle which we have been examining is applicable to the case before us. It does not appear that *Fosdick*, the husband of the demandant, ever did in his lifetime alienate the estate in question by any legal act or instrument;—but still he did not *die seized* of it, because the *United States* extended their execution upon it to satisfy a judgment they had obtained against him for a debt which he owed them. He did not redeem the estate within the time by law allowed for its redemption, whereby it vested absolutely in the *United States*. This is a *statute-purchase* of the estate;—differing from a common purchase only in this, that the price was determined by indifferent judges, and the transfer of the fee was not *purely* voluntary:—but the effect of the extent was to pass all *Fosdick's* title and estate in the premises, and his deed could have done no more. Why should any legal distinction exist between the two cases, in relation to the widow's dower? If the husband can to a certain extent, impair her dower as to the mode of enjoying it, by a conveyance by his deed, why should not a conveyance by extent have the same effect, it being made to satisfy a judgment, and thereby to *discharge a debt which the husband had an unquestionable right to contract.* In regard to the point under consideration, what difference can there be between a husband's contracting a debt of 1000 dollars, and paying it by a piece of real estate which he conveys to his creditor by *deed;* and his suffering himself to be sued for the debt, and the same land to be taken by execution in satisfaction of the debt? If then the extent be, similar, in its effects, to a deed from *Fosdick* to the *United States*, the question will not be varied by the subsequent conveyances from the *United States* to *Paine*, and from *Paine* to *Graffam;* as these owed their origin to *Fosdick's* acts, in contracting a debt to the *United States*.

Thus, by the act of *Fosdick*, the estate in question was once the property of *Graffam*, whereby *Ann Graffam*, his widow, became entitled to her dower; and her husband dying before

Fosdick, that dower has been assigned to her, in virtue of which assignment she now claims and possesses a portion of the premises described in the writ, and *Gooding*, as purchaser, claims and possesses the residue, including the reversion. Each of the defendants is tenant in severalty of a *sufficient estate*,—one owning and possessing a *freehold*, and the other a *fee-simple*.

If this reasoning be correct, it seems to follow conclusively that the tenants were improperly joined, in this action.

But we proceed to examine the cause on other grounds, and independently of the analogies above suggested.

It does not appear in more than one or two of the ancient cases cited, whether the defendants, who were joined in an action of dower, were *several* or *joint* occupants and tenants of the freehold:—as in the cases cited from *Rastall* 235. *Dower. Viner, Dower M. a.* 2. 7 *H.* 6. 33. 34. The case from *Fitzherbert*, relied on by the counsel, is open to the same remark. The terms "*several tenants*" do in no wise imply, in all cases, that they were tenants *in severalty*, of distinct parcels. The word "*several*" is often used numerically. The same remark as to uncertainty is admitted by the plaintiff's counsel to be applicable to the case from 3 *Ld. Raym.* 151. The case cited from *Viner* 275. *Dower L. a.* 9. is equally uncertain as to the nature of the tenancy, whether *joint* or *several*. Neither can any thing certain be inferred from the passage cited from the note in 3 *Chitty on Pleading* 593. The words are—"The action of dower should be brought against all the tenants of the freehold." Does this mean *several* tenants? Certainly not.

With this uncertainty before us as to the precise nature of the facts in many of the old cases, it may afford us light to look into books of more modern date. The learning and indefatigable research of *Chitty* entitle him to much respect as a special pleader. In his 3 *Vol.* 601. we are furnished with the pleas in an action of dower against *two persons*. They were submitted to the examination of *Mr. Warren*, who gave the following opinion:——"As there is in this case a *separate tenancy*, there ought "to be *separate actions;* and the defendants having *severally* "*pleaded* non-tenancy, I think the action ought to be discontin- "ued and new ones brought *against each respective tenant.*" The "*non-tenancy*" which each one pleaded must have been as to

part only of the premises; otherwise a *new action* would not have been commenced against each. This last cited passage seems to explain the other, above quoted from the same volume.

Booth, in many places, speaks of the similarity of the pleadings in actions of dower to those in other real actions.

Some years since, it was usual in writs of entry, to declare against a number of disseizors in one writ, although they were in possession of different parcels of the demanded premises, and each claiming independently of the others. Many causes commenced in this manner, were finally decided;—but in an action pending when the late Chief Justice *Parsons* came upon the bench, he corrected the practice, and by consent of parties all the tenants but one were struck out of the writ. Since that time, it has uniformly been the course of proceeding to commence actions against each tenant who claimed and occupied in severalty. The principle is clearly stated in *Varnum v. Abbot & al.* 12 *Mass.* 480. In this manner the confusion arising from the trial of distinct and different rights in the same action has been avoided, and legal principles and forms of proceeding have been restored. The same convenience results from adopting similar principles in actions of dower. If separate tenants are joined in actions of dower, questions distinct and independent in their nature may require decision. One may plead a release of dower as to the premises he holds in severalty;—another may plead that there has been no demand ever made by the plaintiff;—in fact there may be as many distinct trials as there are parties. Nothing but consent on the part of the defendants can render such a mode of proceeding admissible.

But it is contended that *Gooding* being the owner of the reversion, stands in the place of the heirs of *Graffam*;—that there is therefore such a privity between the defendants, that he ought to be joined in the action with *Ann Graffam*, the widow and tenant in dower; because he would be liable to voucher to save his estate;—and that by such joinder, the delay of vouching would be avoided. But this delay cannot be the ground of any argument; and perhaps, according to our practice, no such voucher would be necessary or proper. The proceedings in our Courts respecting voucher to warrant are essentially vari-

ant from those in use in *England*, either formerly, or at the present day; and we cannot reason from these with accuracy or safety. With us, the warrantor of the tenant may be vouched; but yet he is never joined in the action originally, and he need not come into Court after he is vouched. The object in view, and the advantage, in vouching him is that the record of the proceedings and judgment in the action against the tenant, may become legal evidence in an action to be brought by the tenant against the warrantor or his representatives, on his covenants. We therefore do not particularly notice the numerous authorities on this head cited by the demandant's counsel, as we consider the application of them to this cause as, at least, very doubtful. Besides, it should be remembered that *Gooding* owns a part of the estate in fee-simple, exclusive of the reversion, to which the foregoing objection cannot apply.

But if the cases cited from the early *Year-books* did shew explicitly that several tenants, holding distinct parcels in severalty of the lands whereof dower was claimed, were joined in one action; still there exists an argument with us against such joinder, which did not exist at that time in England.

Before the statute of *Merton*, 20 *Hen.* 3. *chap.* 1. no damages were recoverable in actions of dower, even against *the heir*, in those cases where the husband *died seized*:—and against the assignee of the husband that statute gave no action. But by our laws, damages may be recovered after demand, in all cases, against the person having the legal estate; as is settled in the case of *Parker v. Murphy*, 12 *Mass.* 485. If then a joint action of dower can be maintained against several persons, claiming and holding distinct parcels, the consequence will be, the assessment of joint damages, in cases perhaps where some of the defendants may be unable to pay their proportion; and of course those who are of ability must pay the whole, and seek their remedy against one or more co-defendants unable to reimburse them. Besides, it may appear on trial that much larger damages ought to be recovered against some of the defendants than against others.

There is another argument deserving consideration, which tends very plainly to shew the impolicy, if not injustice, of allowing a joint action of dower to be maintained against several

persons holding in severalty parcels of the estate formerly belonging to the husband;—whether they hold as *immediate grantees* under him, or as *assignees* of such grantees;—and strengthens the argument in favour of the principle we would establish. If the husband in his lifetime sold the estate to *A. B.* and *C.* in distinct parcels *without* warranty, each purchaser would estimate the loss which he might sustain should the wife of the grantor survive him, and demand her dower. Or, if the husband sold *with* warranty to each, he could estimate very nearly the sum in damages which each grantee could recover of his representatives, if the wife should survive and demand her dower. Now in the case stated, it is admitted that several actions of dower must be brought. Suppose the husband sold the whole estate to *A.* and he sold it in three distinct parcels to *B. C.* and *D.* If *A.* gave no warranty to either of these purchasers, the price given by each would be regulated in some degree by the liability to dower, and the consequent reduction in value. This diminution could be estimated by each purchaser; and thus he would make his contract with understanding and fairness. But if the principle contended for by the plaintiff's counsel be correct, a joint action might be maintained against *B. C.* and *D.* and the dower be so assigned as to swallow up the whole tract conveyed to *B.* who would thus be left destitute of any remedy, and actually suffer a loss three times greater than he anticipated or had any reason to expect. And if *A.* sold to each *with* warranty, still *B.* might be placed in the same situation, should his warrantor prove unable to indemnify him on his covenants. It is true the chance of future insolvency must always be taken by the purchaser in cases of warranty;—but this is no good reason why a principle of law should be adopted or sanctioned, by which such purchaser should be compelled to incur the hazard of losing three times the amount which was contemplated either by him or his grantor. The inconvenience and injustice in the case last supposed, of a division of the estate by the *grantee of the husband*, are equally as great as in the case where the *husband himself* makes the division by his own deeds;—and it does not readily occur to us what sound reason there can be why the same legal principles should not be applied to both; or why, in either

case, an action of dower should, in this State, be maintained against grantees, *jointly*. We cannot perceive any justice or reason in requiring a course of proceedings leading to such results, introducing inconveniences and perplexities, and often producing losses and damage which cannot be repaired.

We do not consider our statute as in any manner altering the common law with respect to the mode of declaring in actions of dower, by using the plural expression "*persons*," in describing those against whom the action may be brought. The words of the statute may be satisfied by supposing them to mean *all persons claiming right or inheritance in the estate jointly*. But we need not resort to such arguments, because this kind of language is common in statutes where a joinder of different offenders, debtors, or delinquents in the same indictment or action was never contemplated by the legislature.

Under this head we will mention one argument more, which does not seem to admit of an answer.

According to *all* the authorities upon this subject, it is perfectly clear that in real actions, and, among others, in actions of dower, *several* tenancy *may be* pleaded in abatement, and that it is a good plea. This principle seems to be as clearly laid down, as the principle that in actions of *assumpsit* the omission to join all the *joint promissors* as defendants may be pleaded in abatement, and that such plea is good. The authorities as to the plea in abatement of *several tenancy* will be noticed under the next head. They establish the principle that in actions of dower *several persons*, claiming, holding and owning *distinct* parcels of the estate whereof dower is demanded, cannot legally be joined as defendants in the same action. The books shew, with equal clearness, that in actions of *assumpsit* all the joint promissors *must* be joined. A joint action in the one case, and an action not embracing all the joint promissors in the other, cannot be maintained, unless in the real action the exception to the *joinder*, and in the personal action to the non-joinder, has been waived, either expressly or by implication.—This leads us to the consideration of the second question presented by the case.

2. Can the tenant *Gooding now* object to the joinder of the two tenants in this action, no plea in abatement having been

filed in the case ;—or, in other words, *must* several tenancy be pleaded in *abatement ?*

In *England*, *non-tenure* is pleadable in abatement only. *Booth*, 28. *Comyn's Dig. Abatement F.* 14. The same principle was recognized in *Massachusetts* in the case of *Keith v. Swan*, 11 *Mass.* 216. Afterwards in the case of *Prescott v. Hutchinson*, 13 *Mass.* 440. it was decided that a *disclaimer* was good as a plea in bar, having long been used as such ;—and in *Otis v. Warren*, 14 *Mass.* 229. it was decided that *non-tenure* might also be pleaded in bar. If therefore the present action had been commenced against *Gooding* only, and he had pleaded in bar *non-tenure* as to all or a part of the premises described, such plea would have been good here, though not in *England*. As to the plea of several tenancy, it does not appear, by any decisions in *Massachusetts*, to have changed its original character. In the *English* books of authority it is always considered as a plea in abatement. *Booth* 34. *Rast. Ent.* 365. *a.* 6 *Jacob's Dict.* 68. *Comyn's Dig. tit. Abatement F.* 12. "If an action be sued "against *several*, it may be pleaded in *abatement* that they hold "*severally*." "So in a *mort d'ancestor* several tenancy is a good plea." "So in *dower*." See also 3 *Chitty* 601. 602. Though

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The members of the profession are indebted to the demandant's counsel for the following note of the case cited in his argument, decided in the Supreme Court of *New-Hampshire*, in which the opinion of the Court was delivered by the learned Chief Justice SMITH.

CHESHIRE, Supreme Court. } SALLY GEER *v.* WM. HAMBLIN.
MAY TERM, 1808. }

DOWER, (writ date 2*d September*, 1806.)—the writ in the form prescribed by statute *p.* 153.—The plaintiff *was* the wife of *Shubael Geer, late* of *Charleston* and demands her reasonable dower of a messuage, &c. in *Charleston*, bounded as follows, &c. which was in the seizin and possession of the husband—whereof he was seized in fee during the coverture.—The defendant pleaded several pleas. The third plea in bar was, that on the 1*st May*, 1777, at *Charleston* one *John Hubbard* was married to *Prudence Hubbard ;*—that afterwards and before the said *Shubael* is supposed to have been seized, viz. the same 1*st May*. 1777, the said *John Hubbard* was seized of the said messuage in fee ;—that afterwards, and before the commencement of this suit, viz. 30*th May*, 1806, the said *John Hubbard* died and the said *Prudence* survived him and thereby became, and still continued, legally entitled to demand and recover against the defendant *her* reasonable dower of the said messuage, of the en-

it is said in the books quoted, that several tenancy and *non-tenure may* be pleaded in abatement, the meaning is that they *must* be. They are classed among those things which may be pleaded in abatement, as distinguished from those which form another class and are pleadable in bar. By omitting to plead his *several tenancy*, the tenant *Gooding* must be considered as having waived all objections to the form of the action, and he is now precluded from urging them on the trial of the merits.

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dowment of the said *John Hubbard* her husband which the defendant is ready to verify, &c. Demurrer and joinder.

C. Ellis, for the Defendant.

Chamberlain, for the Plaintiff.

The opinion of the Court was now delivered by the Chief Justice.

The question is whether the matter set forth in the plea in bar, viz. that another widow,—the widow of one prior in seizin, *has a claim* of dower in the same lands,—is a bar to the plaintiff's recovery? To constitute a good bar it must be shewn that the plaintiff has no right. That two widows should be endowed out of the same messuage is no novelty. (See case put by *Swift J. p.* 254, 5.) The case put by *Perkins, sec.* 315, and noticed by *Lord Coke* in his commentary on *Littleton*, shews that this may be the case in *England.* (*Co. Litt.* 31. *a. Watk.* 49. *London 2d Ed.*) This plea is therefore bad, unless it can be maintained that *Shubael Geer*, the husband of the demandant, had no seizin in deed or in law during the coverture in the premises described in the writ, and that is the matter to be tried on the first issue. The only objection stated to his seizin in this plea is, that another person was seized before him, whose wife is entitled to dower. But how does this shew that *Shubael Geer* had no seizin?—To constitute a claim to dower it is not necessary that the husband should be seized of an *indefeasible estate*, though *Shubael Geer had* such an estate. *Lord Coke* puts the case of grandfather, father, and son; and the grandfather is seized of three acres of land in fee, and taketh wife and dieth;—the land descendeth to the father, who dieth, either before or after entry, the wife of the father is dowable;—clearly the wife of the grandfather is dowable. (3 *Bac. Abr.* 367. *Perkins* 420. 1 *Inst.* 31. *a. Perkins sect.* 315. *F. N. B.* 351.) Here there are two widows dowable. The grandmother will have an acre for her dower; and the wife of the father shall have a third of the remaining two acres, because her husband was not seized in deed or in law of the part which constitutes the dower of the grandmother. Her title to dower is paramount the title of the father. She is *in* from her husband and not from the heir. Her estate is, as it were, the continuance of his;—that is—the husband's—the heir has only a reversion. *Watk.* 84. Her title is more favoured than his by descent, though the heir is an object of favour in the English law. Instantly on the death of the grandfather, the father was seized of the two thirds. Of the one third his seizin was defeated by the grandmother's title to dower. As to this he has only a reversion expectant upon a freehold, which is not a seizin which entitles the wife to dower. When the

The authorities on this point are clear, and they settle the question in favour of the demandant.

We might have decided this last point alone, sparing ourselves the labour of examining the other and principal question.

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grandmother dies, the father's wife shall not be endowed of this one third, and this is a case where *dos de dote peti non debet.* Here the father's title was by descent, and two widows are endowed in the same messuage, one of one third, and the other of one third of the residue, that is, two thirds. (*Watk.* 94.)

But the case farther supposes that the grandfather had *enfeoffed* the father.—In this case the wife of the grandfather on his decease would have for dower one third of the whole, and the wife of the father one third of the remaining two thirds. And in case of the death of the grandmother before the father's wife she would have dower in the other third, that is, *dos de dote.* For here the husband was seized and his seizin is not defeated by his mother's dower. (*Watk.* 96.) He is not *seized so as* to defeat the right of the grandmother to dower; but *so as* to give his wife title to dower in the whole, when the grandmother's title to dower ceases. *If the father die first and his wife have her dower assigned, the grandmother can maintain her writ of dower against the mother.* (*Watk.* 98. &c.) Apply that to this case. We may suppose *John Hubbard* conveyed to *Shubael Geer,* and he to defendant. On the death of *John Hubbard* his wife was entitled to dower, because *John Hubbard* was seized. On the death of *Shubael Geer* his wife was entitled to dower, for the same reason. But as her husband was seized subject to *Prudence Hubbard's* claim to dower that claim must be satisfied. *Sally Geer* will therefore be entitled to one third of two thirds and one third of the remaining one third—that is, of the whole—on the death of *Prudence Hubbard.*

It would seem therefore clear that it is immaterial as to the rights of the parties which died first, *John Hubbard* or *Shubael Geer.* The *after-seizin* is good except *quoad* the *prior* claims to dower.—Supposing this to be the present case, the plaintiff is entitled to recover her dower one third of the whole, liable to be reduced to one third of two thirds *if Mrs. Hubbard* should be pleased to demand her dower: which it is not likely she will, the estate of her husband being solvent. But this is a matter of which *William Hamblin,* the defendant, cannot avail himself. *As against him* the demandant has a good claim to one third of the whole. If this should be reduced by *Mrs. Hubbard,* taking her dower one third of the whole, it is an affair that concerns the two widows. I should suppose that the defendant will not be very anxious for such an event, because it will take from him one third and one third of two thirds, that is, five ninths instead of three ninths.

It is absurd to suppose, as this plea does, that the demandant's right to dower when she has in her favor the three incidents, marriage, seizin, and the death of the husband, should depend on the contingency of another—who has also a right—demanding or omitting to enforce her right. Lands, subject to a title of dower, were devised to a person in fee, who died leaving a widow. This widow sued for her dower, and recovered a third part of the whole, without any regard to the title of dower in the widow of the testator, who did not

But as this was fully argued by the counsel we concluded to give an opinion on that also; especially as it may be useful in regulating the practice in future actions of this nature.

Judgment for the demandant.

put her claim in suit. Not having recovered her dower it was to be laid out of the case. (*Cruise I.* 153. *Hitchens v. Hitchens*, 2 *Vernon* 403.)

It is strong evidence against this plea that it never was before pleaded. And yet the case must often have occurred. This plea does not state that *Prudence Hubbard* did not join with her husband in conveying. But it admits an after-seizin in *Sally Geer*. There must have been a conveyance of some kind from *John Hubbard;* but as it is stated, that *Prudence Hubbard* has a lawful claim of dower, perhaps it is sufficient. But the plea is bad in substance; the matter set forth is no answer to the demandant's claim.

WHITTEMORE *v.* BROOKS.

An execution had been extended on land as the estate of *George Whittemore*, and in an action to recover possession of the land against the judgment creditor, the tenant, to shew an intermediate conveyance from the demandant to the judgment debtor, proved the existence of a deed of the land, seen by a witness in the possession of the debtor, but not registered; and also proved the signature of the demandant as grantor in the deed, and of one of the subscribing witnesses, who was also the magistrate before whom the deed was acknowledged, but who, being interested, could not be examined as a witness:—but this was held insufficient, without proof of diligent inquiry after the other subscribing witness.

Entry sur disseizin for a lot of land in *Portland*, in which the demandant counts upon his own seizin within thirty years, and on a disseizin by the tenant. Plea, *nul disseizin* and issue thereon. At the trial of this action the demandant, to support the issue on his part, read to the jury a deed of the demanded premises from one *George Whittemore* to him, dated *December* 21, 1812, which was duly registered. The tenant then read in evidence a judgment and execution in his own favour against *George Whittemore* which was extended on the same land *December* 29, 1818, as the estate of said *George*. And to prove the land to be the property of *George*, the tenant called *Mr. Neal*, who testified that in *April* or *May* 1815, *George*, being in embarrassed circumstances, applied to him to effect a settlement with

his creditors, and in the course of the conversation shewed him a roll of deeds, among which was one from the demandant to said *George*, of the land in question. *Mr. Neal* could not name the subscribing witnesses to this deed, until his recollection was refreshed by a recurrence to certain other deeds on record. He then testified that it was acknowledged before *Thomas Webster, Esq.* and attested by him and *William A. Simonton*, as subscribing witnesses; and that he knew the hand-writing of *Mr. Webster* and of *Nathaniel Whittemore*, the grantor, which he saw on the deed. *Mr. Webster* being proved to be interested in the suit, his testimony was not admitted. The counsel for the tenant being then required to produce *Simonton* the other subscribing witness, it was suggested that he was absent at sea; and *Mr. Neal* testified that he was in town some months since, and was under the control, or lived in the house, with said *George*, but where he was *then* he did not know.

The Judge instructed the jury that this evidence was sufficient to prove the existence and execution of the deed from the demandant to *George Whittemore;* and they thereupon returned a verdict for the tenant, which the demandant moved the Court to set aside, for the misdirection of the Judge.

Longfellow for the demandant.

Emery and *Greenleaf* for the tenant.

MELLEN C. J. A motion is made to set aside the verdict which has been returned for the tenant, on the ground that improper evidence was admitted on the trial of the cause, to prove the execution of a deed from the demandant to *George Whittemore*, under whom the tenant claims the demanded premises in virtue of the extent of his execution on the same, as the property of the said *George Whittemore.*

It appears from the report that an instrument purporting to be a deed of the premises from the demandant to *George Whittemore* was, in *April* or *May* 1815, seen by the witness *Neal*, in the possession of *George;*—that it appeared to have been signed and sealed by the demandant, and witnessed by *Thomas Webster* and *William A. Simonton;*—and that the names of *Nathaniel Whittemore* as grantor, and *Thomas Webster* as witness, were in their hand-writing respectively. *Mr. Webster*, being proved to

be interested in the cause, could not be, and was not, admitted as a witness. *Simonton* was not produced; nor was the deed present; nor any reasons assigned for their absence, except what are stated in the report. Upon this evidence the Judge considered the deed or instrument as sufficiently proved for the consideration of the jury.

The question before us is, whether, in such circumstances, the deed was properly submitted to the jury as a legal conveyance of the premises to *George Whittemore*, or as a proper subject for their consideration.

The *best* evidence, to prove the execution of the deed would have been the testimony of *Simonton*;—and the law requires the party to produce the best evidence in his power. The single inquiry, then, is whether the facts stated in the report shew that *secondary* evidence was the best in the power of the tenant to produce; or, in other words, whether it was shewn that due diligence had been used to procure the attendance of *Simonton* as a witness, or his deposition, and that he could not be found.

On this point the proof is nothing more than this;—that at the time of the trial the *tenant's counsel* stated that he *believed Simonton* was *at sea*; and *Neal* testified that some months before he was in town, under the control, or power, or lived in the house with *George Whittemore*; but *he* did not know where he was then.

It does not appear that any summons was taken out for him; nor that any inquiries were made after him at the house of *George Whittemore*, or any where else; and nothing is stated shewing that *Simonton* was not then in town, and had not been, from the time that *Neal* last knew him to have been there. Comparing *these facts* with those on which questions of this nature have been decided in *other* causes, we are satisfied that the *secondary* kind of evidence was improperly admitted and allowed as competent to prove the execution of the deed.

In *Phillips' Law of Evidence* 362, it is stated that if *none* of the subscribing witnesses can be examined, on account of their interest, acquired *after* the execution of the deed, proof of the *attesting witnesses'* hand-writing is sufficient proof of execution. In the case at bar only *one* of the subscribing witnesses is so interested; and therefore it is not within *that* principle. So,

where the witness cannot be found, *after strict and diligent inquiry.* 12 *Mod.* 607. 7 *D. & E.* 266. 2 *East.* 183. 1 *Taunt.* 365. 2 *Taunt.* 223. 2 *Campb.* 282.

So if, after *diligent inquiry*, nothing can be heard of the subscribing witness, so that he can neither be produced himself, nor his *hand-writing* proved, the execution of the deed may be proved by proving the hand-writing *of the party.* The facts in the case before us do not bring it within this principle. *Phillips' Evid.* 363. 364. *and cases there cited.*

In *Cunliffe v. Sefton*, 2 *East.* 183. proof that inquiry was made at the house of the obligor and obligee, without being able to obtain intelligence of such a person as the witness, was held sufficient.

In *Crosby v. Piercy*, 1 *Taunt.* 365. proof that diligent inquiry had been made at the usual residence of the witness, and an answer that he had absconded to avoid his creditors, and could not be found, was held sufficient to authorize the admission of secondary proof.

In *Wardell v. Fermor*, 2 *Camp.* 282. proof of a commission of bankruptcy against the witness, and that he had not surrendered, though the commission had issued twelve months before, was held sufficient.

In *Mills v. Twist*, 2 *Johns.* 121. the plaintiff, the day before the sitting of the Court, called on the defendant, and inquired after his sons who were the subscribing witnesses, and was falsely told by him that they were gone on a journey; and this was held insufficient to justify the admission of the secondary proof; due diligence not having been used.

In *Cook v. Woodrow*, 5 *Cranch* 13. the witness, a year before, had left the District of *Columbia*, declaring he should go to *Philadelphia*;—he went from the District to *Norfolk*, and said he should go farther south;—he had not been heard of for twelve months;—a subpœna had been issued and given to the Marshall who could not find him in the District. The Court said it did not appear that the witness could not have been produced if proper diligence had been used, no inquiry having been made for him at *Norfolk*;—perhaps the witness was then there. Secondary evidence was therefore properly excluded.

The counsel for the tenant have observed that they could

not be prepared to prove the execution of the deed, as they did not know who the subscribing witnesses were, in season to produce them. The answer to this objection is, that they knew *at the trial*, and could have moved for an opportunity to produce them. This objection does not *now* exist.

But there is another objection to the verdict. It does not appear when the deed in question was made;—whether *before* or *after* the deed from *George Whittemore* to the demandant, which is dated *December* 21, 1812. It might have been before that time; and if so, no title would have existed in *George Whittemore* at the time of extending the tenant's execution, even if the deed had been proved in the most satisfactory manner.

Verdict set aside, and a new trial granted.

Note. The objection arising from the absence of a subscribing witness, was termed by *Lord Mansfield*, "a captious objection";—*Abbot v. Plumbe*, *Doug.* 216. but he said that the rule requiring his testimony was "a *technical rule*, and cannot be dispensed with, unless it appear that his attendance could not be procured."

The rule seems originally to have been founded in the notion that the subscribing witnesses are *agreed on* between the parties to be the only witnesses to prove the instrument;—*Barnes v. Trompowsky*, 7 *D. & E.* 262.—a notion which *Spencer J.* in *Hall v. Phelps*, 2 *Johns.* 451. says "is, to speak with all possible delicacy, an absurdity."

Afterwards the rule was placed on the ground that the *best evidence* should be required. Hence very strict proof was demanded of diligent search after the witness, or proof of his death, &c. before the admission of secondary proof. *Coghlan v. Williamson*, *Doug.* 93. *Cunliffe v. Sefton*, 2 *East*, 183. *&c. Cooke v. Woodrow*, 5 *Cranch* 13.

But of late the Courts have considered the objection arising from the absence of the subscribing witness, unaccompanied with any suggestions of fraud, as entitled to much less regard than formerly. In *Jackson v. Burton*, 11 *Johns.* 64. *Kent C. J.* observes that "the rules and practice of the Court leave this point with some latitude of discretion." And *Sir James Mansfield*, after adverting to the difficulty of laying down as a general rule *what* shall be deemed sufficient inquiry for a subscribing witness before letting in proof *aliunde*, refers the rule to the ground of *public convenience*, observing that more inconvenience results from excluding, than from admitting the secondary evidence. *Crosby v. Piercy*, 1. *Taunt.* 366.

The following cases of admission of secondary proof, including those set down by *Mr. Day* in his note to *Call v. Dunning*, 5 *Esp.* 17. are all which have fallen under the writer's observation, and may not be unacceptable to the reader.

1. Where the witness was dead; or presumed to be so. *Anon.* 12 *Mod.* 607.

Barnes v. Trompowsky, 7 *D. & E.* 265. *Adam v. Kerr*, 1 *B. & P.* 360. *Banks v. Farquarson*, 1 *Dick.* 167. *Mott v. Doughty*, 1 *Johns. Ca.* 230. *Dudley v. Sumner*, 5 *Mass.* 463.

2. Where he is made executor to one of the parties, or otherwise subsequently incapacitated. Case cited in *Goss v. Tracy*, 1 *P. Wms.* 289. *Godfrey v. Norris*, 1 *Stra.* 34. *Davison v. Bloomer*, 1 *Dal.* 123. *Bulkeley v. Smith*, 2 *Esp.* 697. *Cunliffe v. Sefton*, 2 *East.* 183. *Burrett v. Taylor*, 9 *Ves. jr.* 381. *Hamilton v. Marsden*, 6 *Bin.* 45. *Hamilton v. Williams* 1 *Hayw.* 139.

3. Where he was interested at the time of signing, and continues so. *Swire v. Bell*, 5 *D. & E.* 371.

4. Where he is become blind. *Wood v. Drury*, 1 *Ld. Raym.* 734.

5. Where he has been convicted of an infamous crime. *Jones v. Mason*, 2 *Stra.* 833.

6. Where he is resident beyond sea. *Anon.* 12 *Mod.* 607. *Barnes v Trompowsky*, 7 *D. & E.* 266. *Wallis v. Delancey*, *ib. cit.*

7. Where he is out of the jurisdiction of the Court. *Holmes v. Pontin*, *Peake's Ca.* 99. *Banks v. Farquarson*, 1 *Dick.* 167. *Cooper v. Marsden*, 1 *Esp.* 1. *Prince v. Blackburn*, 2 *East.* 250. *Sluby v. Champlin*, 4 *Johns.* 461. *Dudley v. Sumner*, 5 *Mass.* 444. *Homer v. Wallis*, 11 *Mass.* 309. *Cooke v. Woodrow*, 5 *Cranch* 13. *Baker v. Blunt*, 2 *Hayw.* 404.

8. Where he is not to be found, after diligent inquiry. *Coghlan v. Williamson*, *Doug.* 93. *Cunliffe v. Sefton*, 2 *East.* 183. *Call v. Dunning*, 5 *Esp.* 16. 4 *East.* 53. *Crosby v. Piercy*, 1 *Taunt.* 364. *Jones v. Brinkley*, 1 *Hayw.* 20. *Anon.* 12 *Mod.* 607. *Wardell v. Fermor*, 2 *Campb.* 282. *Jackson v. Burton*, 11 *Johns.* 64. *Mills v. Twist*, 8 *Johns.* 121. *Parker v. Haskins*, 2 *Taunt.* 223.

9. Where a fictitious name has been put by the party who made the deed. *Fassett v. Brown*, *Peake's Ca.* 23.

10. Where the deed comes out of the hands of the adverse party, after notice to produce it. *Rex v. Middlezoy*, 2 *D. & E.* 41. and cases there cited. *Bowles v. Langworthy*, 5 *D. & E.* 366.

11. Where the adverse party, pending the cause, agrees to admit the execution of the instrument at the trial. *Lang v. Raine*, 2 *B. & P.* 85.

12. Where, being called, the witness denies having seen it executed. Case cited by *Ld. Mansfield* in *Abbot v. Plumbe*, *Doug.* 216. *Lesher v. Levan*, 2 *Dal.* 96. *Ley v. Ballard*, 3 *Esp.* 173. *n.* *Powell v. Blackett*, 1 *Esp.* 97. *Park v. Mears*, 3 *Esp.* 171. *Fitzgerald v. Elsee*, 2 *Camp.* 635. *Burton v. Toon*, *Skin.* 639. *McCraw v. Gentry*, 3 *Campb.* 232.

13. Where, the instrument being lost, the parties could not know who the witnesses were. *Keeling v. Ball*, *Peake's Ev. app.* lxxviii.

14. Where the witness was incapacitated at the time of signing, being the wife of the obligor. *Nelius v. Brickell*, 1 *Hayw.* 19.

In the English Courts, confessions of the party that he made the deed, are not admitted in evidence, until a foundation is first laid by proving diligent inquiry after the subscribing witnesses. *Johnson v. Mason*, 1 *Esp.* 89. *Abbot v. Plumbe*, *Doug.* 216. *Barnes v. Trompowsky*, 7 *D. & E.* 267. *Manners v. Postan*, 4 *Esp.* 239. *Breton v. Cope*, *Peake's Ca.* 30. *Call v. Dunning*, 5 *Esp.* 16. *Lang v. Raine*, 2 *B. & P.* 85.

But this doctrine is denied in *New-York*; where it is held that the confes-

sion of the party, precisely identified, is as high proof as that which is derived from a subscribing witness. *Hall v. Phelps*, 2 *Johns.* 451. This rule, however, is not admitted to apply to a deed not acknowledged, nor agreed to be admitted in evidence, but denied by the plea of *non est factum*. *Fox v. Reil*, 3 *Johns.* 477.

It is observable that in nearly all the cases on this subject, the instrument to be proved was the foundation of the suit, and its genuineness put in issue by the pleadings;—or it was a deed duly registered, so that all persons might know who were the witnesses.

If the subscribing witnesses cannot be produced, the course generally has been to admit the instrument to go in evidence, after proving *their* handwriting. *Webb v. St. Lawrence*, 3 *Bro. Parl. Ca.* 640. *Mott v. Doughty*, 1 *Johns. Ca.* 230. *Sluby v. Champlin*, 4 *Johns.* 461. *Adams v. Kerr*, 1 *Bos. & Pul.* 360. *Cunliffe v. Sefton*, 2 *East.* 183. *Prince v. Blackburn*, 2 *East* 250. *Jones v. Brinkley*, 1 *Hayw.* 20. *Jones v. Blount*, 1 *Hayw.* 238. *Douglas v. Saunderson*, 2 *Dall.* 116. *Cooke v. Woodrow*, 5 *Cranch* 13.

But several cases occur in which, in addition to the signatures of the witnesses, Courts have required proof of the hand-writing of the *party*. *Wallis v. Delancy*, cited in 7 *D. & E.* 266. *Hopkins v. De Graffenreid*, 2 *Bay* 187. *Oliphant v. Taggart*, 1 *Bay* 255. *Irving v. Irving*, 2 *Hayw.* 27. *Clark v. Saunderson*, 3 *Bin.* 192.

The plaintiff has been admitted a good witness to prove the death of a subscribing witness, in order to let in the evidence of his hand-writing. *Douglas v. Saunderson*, 2 *Dall.* 116. cites 1 *Bl. Rep.* 532. *Godb.* 193. 326. *Show.* 363.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE COUNTY OF

LINCOLN.

SEPTEMBER TERM,

1820.

PETERSON, PLAINTIFF IN ERROR, *v.* LORING.

If a report made by three referees be recommitted, and one of them neglect or refuse to sit again; the other two are competent to make a new award similar to the former, with additional costs.

Error, to reverse a judgment rendered by the Circuit Court of Common Pleas on a report of referees.

The submission was made pursuant to *Stat.* 1786. *c.* 21. The referees, having met and heard the parties, made a report in favour of the defendant in error, which, for some cause not apparent on the face of the proceedings, was recommitted. Another meeting was notified, at which the original defendant, now plaintiff in error, and one of the referees, did not attend; and the other two referees, certifying that no additional facts were exhibited to them by either of the parties, and that they were satisfied with the former report, which all had signed, made a new award of the same amount of debt and costs as before, with additional costs of reference. This report was accepted and judgment rendered thereupon for the original plaintiff, to reverse which the present writ was sued out.

The error assigned was, that the judgment was rendered upon the report of two referees only, made in the absence of the third, without hearing the parties, or any testimony or allegation relating to the same. Plea, *in nullo est erratum*.

Ames, for the plaintiff in error.

It has been often decided that where parties leave the common law remedy, and adopt one provided by statute, the statute must be strictly pursued. It is not enough that a matter in dispute be *referred* to a tribunal of *three* persons,—the *three* must also *act* upon it; and if it be recommitted, the *three* must again *hear* the parties;—which, in the present case has not been done. The Court, therefore, had no jurisdiction of the subject upon which they have undertaken to adjudicate. *Jones v. Hacker*, 5 *Mass.* 264. *Monosiet v. Post*, 4 *Mass.* 532. *Short v. Pratt*, 6 *Mass.* 496.

Orr, for the defendant in error.

Where referees once meet, and have a full hearing of the merits and make a report, which is recommitted, if they all *never* meet again, it is no error. *May v. Haven*, 9 *Mass.* 355. The *Stat.* 1786. *c.* 21. gives the Circuit Court of Common Pleas a jurisdiction as extensive as the present case requires. All the requisitions of the statute must be strictly pursued, till the report *comes into Court;* after which it is to be treated as a *rule of Court*, and is governed by the principles of the case of *May v. Haven.* If not, it is in the power of either party, by collusion with one of the referees, to defeat the beneficial purposes of the statute, and completely to oust the Court of its jurisdiction.

In the case of *Short v. Pratt* the facts are imperfectly stated. It does not appear whether the first report in that case ever was offered the second time, or not; and therefore it wants an essential point of similarity with the case at bar. And so far as the facts are alike, it is overruled by the case of *May v. Haven.*

The effect of the recommitment of the report is nothing more than the continuance of an action; and if the referees refuse to return the rule, it is a contempt of Court, and punishable by attachment. In the present case they have done all they could do. The three met the parties, heard them, and agreed upon a report. At the solicitation of the losing party, the report was recommitted for farther proof. No such proof being offered, and one of the referees, probably the friend of the plaintiff in error, declining to sit again, the other two return the report, expressing themselves satisfied with it as it was. It is then a

report made by all the referees, and the judgment upon it is not erroneous.

Ames, in reply.

It was as important that the third referee should be present at the second meeting, as at the first. His reasonings, and opinions and his general aid were as necessary to the parties and they had as perfect a right to them in the one case as in the other.

As the first report appears correct in all matters of *form*, it is manifest that its recommitment was because of some improper or irregular proceedings by the referees,—some defect of *substance*—which being proved to the Court, induced them to send it back for revision. It was then a report *refused*, and of no force. It could not lawfully be made the foundation of a judgment, otherwise it would have been accepted. All the validity of the judgment in this case arises from the *second* report; not from the first, which has no more power or virtue than a judgment appealed from.

Mellen C. J. Upon the award before us it appears that at the hearing of the parties, on the 29*th* day of *March* 1820, all three of the referees attended, and all of them signed the report, which was presented to the Circuit Court of Common Pleas at *April* term following, and was then recommitted. It also appears that all three of the referees never met again to re-examine the cause; but that two of them, in the absence of the third, who, as well as *Peterson* declined or neglected to attend, without any further hearing of the parties, or any farther proof, ratified the report which *all* had signed, and reported that *Loring* should recover the sum mentioned in the report of 29*th* *March*. The acceptance of this report at the *August* term following, and the judgment rendered thereon, is the error assigned.

Two cases have been cited, as nearly resembling the case at bar;—one by the plaintiff—the other by the defendant. The plaintiff relies on the case of *Short v. Pratt*, 6 *Mass.* 496. In that case all the referees had made and signed their report, which, being presented to the next Court for acceptance, was recommitted. At the following term of the same Court *two* of

the referees made a *new report*, on which the judgment complained of was rendered. In that report it appears that they had met the parties, and *having heard their several pleas and allegations*, made *that* as their *final award*. Whether the sum reported by this final award was the same as that mentioned in the former; or whether it was a greater or less sum does not appear.* In that case the Chief Justice observed, that "all the referees must hear the parties; and if they do not all agree, the greater part may proceed."

The defendant has cited the case of *May v. Haven*, 9 *Mass.* 325. This also seems analogous to the case before us, and is considered by the counsel for the defendant as reversing the decision in the case of *Short v. Pratt*. In order to arrive at a correct determination, we do not consider it important to examine the principles of any of the other cases which have been cited. In the case of *May v. Haven* it appears that *all three* of the referees made the report, which was presented for acceptance, and recommitted; and that after the recommitment *two* of them met the parties, but the *third* declined attending;—"wherefore, without any further hearing of the parties," they reported as before, adding costs.

It was contended that the first report had lost its effect, and become a nullity by the recommitment. The Court thought otherwise,—sanctioned the last report, and affirmed the judgment of the Court of Common Pleas, on the acceptance of the report. With these two decisions before us, we are to decide whether to affirm or reverse the judgment complained of in the case at bar.

If the two cases were at variance, we should perhaps be inclined to respect the authority of the latter decision, on the ground that the Court intended it as a revision and reversal of the opinion delivered in the former. But we consider both cases as perfectly consistent, and founded on correct principles.

* The Reporter has since ascertained that the first report, in the case cited, was in favour of *Short*; and that the second, by two of the referees, was in favour of *Pratt & al.* The observations of *Parsons C. J.* are therefore applicable to a *new* report, *different* from the former, and made by two of the referees, the third not having been present at the hearing;—and the case, thus explained, is not contradicted by the case of *May v. Haven*.

In the case of *Short v. Pratt two only* of the referees met the parties after the recommitment—heard their pleas and allegations—and made a *new* and *final* award between the parties; nor does it appear that there was any proof before the Court that the absent referee *assented to*, or even *knew* its amount, or the principles or facts on which it was founded. Speaking of *such* a report, the Chief Justice observed that *all the referees must hear the parties.* In the case of *May v. Haven* all the referees made and signed the *first* report; and after the recommitment two of them met, and the third declining to join them, they proceeded no further,—had no further proof or hearing,—but merely ratified the first report, to which *all the three* had previously agreed. In essence, it was the report of *all*, though signed the last time by *two* only, of the referees. The arguments and opinions of the absent referee had produced their proper effect, at the hearing of the parties when all were present.

The case at bar is similar to that of *May v. Haven*, and must be governed by similar principles. *Bradshaw*, the absent referee, had *once* agreed to, and signed, a report, awarding precisely the same sum in damages to *Loring*, as was reported by the other two in his absence. No change was made in the report; none had taken place in the opinions of the referees; nor was any opportunity offered which could produce such change. We all are satisfied that there is no error in the judgment complained of, and of course the

Judgment is affirmed, with costs for the defendant.

RIGGS & AL. *v.* THATCHER, SHERIFF, &c.

No action can be maintained for an escape on mesne process, unless the plaintiff could have maintained the original action against the prisoner.

No action lies at the suit of the prosecutor, against the Sheriff, for the escape of a prisoner charged with larceny under *Stat.* 1804. *c.* 143. before conviction: even though the prisoner may have pleaded guilty at his examination before the magistrate.

CASE against the Sheriff of *Lincoln* for the negligence of the gaoler, in suffering one accused of larceny to escape.

The declaration states that one *Abraham Pitt*, on the fourth

day of *September* 1816, in the night time, at *Georgetown*, broke and entered the plaintiffs' shop, and therefrom did feloniously steal, take, and carry away two hundred and fifty dollars in current bank bills and specie being the property of the plaintiffs;—that the plaintiffs thereupon in order to bring said *Pitt* to justice, and recover their said property, on the seventh day of the same *September* at *Bath*, in said county, on complaint under oath, procured a warrant to be issued in due form of law from *D. S.* Esquire, one, &c. directed to the Sheriff, &c. whereon said *Pitt*, on the ninth day of said *September*, was apprehended by *N. A.* one of the deputies of said Sheriff, and carried before the same Justice, and being put to plead to said complaint, pleaded that he was guilty of the matters therein alleged against him;—that being ordered to recognize for his appearance at the next Supreme Judicial Court, to answer for the crime aforesaid, and refusing so to recognize, he was committed to the county gaol, into the hands and custody of *W. B.* deputy gaoler under the defendant;—that at the next Supreme Judicial Court an indictment was found by the Grand Jury against said *Pitt* for the crime aforesaid. And the plaintiffs aver that said *Pitt* was indeed guilty of stealing, taking and carrying away the property of the plaintiffs as aforesaid;—that on trial he would have been convicted thereof;—and their debt secured to them; together with a recompense, which would have been ordered and awarded them for their time, trouble and expense, in aiding and procuring said conviction. Yet the said *W. B.* by neglect of the duties of his said office, on, &c. suffered the said *Pitt* to escape out of said gaol and go at large, and he has never since been apprehended;—whereby the plaintiffs have lost their property and expenses aforesaid, &c.

A verdict being returned in this action for the plaintiffs, the defendant moved in arrest of judgment,

1—That by the declaration it appears that the said *Pitt* had not been convicted of the offence for which he was committed to prison.

2—That by the declaration it further appears that the plaintiffs have no cause of action against the defendant.

S. E. Smith, in support of the motion.

No instance can be found in the books, of a civil action being

brought against the Sheriff for the escape of a felon. The private injury, in such cases, is merged in the public wrong. Escapes of this kind have without doubt been suffered repeatedly, for centuries; and the total want of any precedent of a remedy sought by civil action, evidently shews that no such action lay, by the common law. The argument from *non user* is, in this case, of great strength.

If the present action can be supported at all, it lies by force of *Stat.* 1784. *c.* 66. and *Stat.* 1804. *c.* 143. The former of these statutes gave to the party injured treble the value of the goods stolen, as damages. But no damages were awarded by that statute till after conviction. It was a *forfeiture adjudged* upon *conviction.* And by the latter statute the owner of the goods stolen might in certain cases receive the value of his goods, by the services of the thief, but in no case till after *conviction and sentence.* This particular method of remuneration, it is contended, negatives the supposition of any other remedy against the offender; and as the Legislature have subjected the gaoler to a fine, at the discretion of the Court, for a negligent escape, it is reasonable to presume that they contemplated the existence of no other remedy against him. And this is consistent with the policy of the law, which inclines against enlarging the liability of the Sheriff. 3 *Rep.* 44.

Ames, against the motion.

The statute gives the plaintiffs a right, as between them and the thief; that by pursuing the course there directed, the party injured may be remunerated by the services of the offender. In the present case the plaintiffs pursued the method which the defendant himself admits to be the only direct mode of private redress, until farther pursuit was rendered fruitless by the escape. It was a legal right, of which no individual could lawfully deprive him; and if he has suffered damage by the escape, the defendant, and he alone, is bound to answer. 1 *Chitty on Pleading*, 84. *Stat.* 1784. *ch.* 66. 2 *Bac. Abr. Escape D.* 7 *Mass.* 185. If the gaoler is liable to a fine at the discretion of the Court, it does not thence follow that he is liable no farther. The fine is to be regarded as a satisfaction to the public; and a civil action being permitted to the party grieved, the remedy is thus made commensurate with the wrong.

The fact of the plaintiffs' having sustained damage has been settled by the verdict of the jury.

[*Mellen C. J.* Suppose the person escaped should be retaken, tried and acquitted.]

Ames. We cannot ascertain the grounds of the verdict. It is enough that the jury have found damages, though much less than the value of the goods lost. It is true there must be a conviction of the thief, before the plaintiff could be entitled to his services. But the plaintiff had already acquired an inceptive right to those services, by securing the person of the offender, preparatory to his trial and conviction. He had already incurred damage and expense in the pursuit of his right, and would have pursued it to complete effect but for the malfeasance of the deputy;—and the amount of this damage and expense has been ascertained by the jury.

Smith, in reply.

The Statute gives the plaintiffs no right to remuneration until after conviction and sentence to hard labour. Prior to this there is no debt due,—no right vested. *Alexander v. Macauley*, 4 *D. & E.* 611. In escape in civil cases, if no debt be proved, no verdict can pass for the plaintiff;—and the present action is founded on a mere possibility; too remote and uncertain to be noticed by the law.

Mellen C. J. afterwards delivered the opinion of the Court, as follows:

From the facts stated in the declaration, it is contended by the defendant that there appears no cause of action. The case is certainly a novel one; but this circumstance can afford no answer, provided legal principles can be found to support it.

It is argued by the counsel for the plaintiffs that as it appears that the prisoner, for whose escape this action is brought, when first arrested pleaded guilty before the magistrate; and as an indictment was afterwards found against him, there was sufficient proof that a conviction would have followed, had not the prisoner, by his escape, avoided a trial:—And that as the defendant, by the neglect of his deputy, deprived the plaintiffs of the power of realizing their right to the services of the prisoner, to which they would have been entitled by the sentence of the

Court against him, he, the defendant, was liable in damages, to the amount of the value of this right or prospect, which the jury have estimated at twenty dollars.

The first reply to this argument is, that though the prisoner pleaded guilty before the magistrate, yet on a trial by jury it might have appeared that this confession was improperly obtained;—by the use either of threats, or persuasions, of such a nature as would have rendered the confession inadmissible as proof against him.

But another and decisive answer is, that as there was no conviction of the prisoner, no right to his service could possibly accrue to the plaintiffs; because there could be no sentence without a previous conviction. Such is the language of the statutes which have been cited. It is provided that if a prison-keeper shall, through negligence, suffer any prisoner accused of any crime to escape, he shall pay such fine as the Justices of the Court shall, in their discretion, inflict. This fine is to be disposed of, for the use of the county in which the offence may have been committed. The escape being a public evil, the Sheriff, or rather the prison-keeper, is answerable to the State; but no right is given to any individual, by any Statute provision, to prosecute for the escape of a person charged with a crime, before conviction.

If this suit be compared to an action for the escape of a prisoner committed on mesne process in a civil action, it will throw some light on the question before us, and aid in forming the conclusion whether the plaintiffs have any right, at common law, to maintain the present action. If a plaintiff demand damages against a Sheriff for an escape on mesne process, he must prove a good existing cause of action, at the time of the commitment, against the prisoner who has escaped; and unless he can establish such a cause of action, and shew that he has actually sustained damage, he can recover none. *Alexander v. Macauley*, 4 *D. & E.* 611. *Gunter v. Cleyton*, 2 *Lev.* 85. No action can be maintained for an escape on mesne process, unless the plaintiff could have maintained the original action against the prisoner. He could not, for instance, *anticipate* a right of action, as by sueing a bond or note before it has become payable; or a conditional bond before the contingency has happened, and

committing the defendant to prison; and then, for the escape of a person committed under such circumstances, sustain a suit against the Sheriff; for in both the cases put, the action would not lie against the original defendant. Now, according to the argument of their counsel, can the plaintiffs' supposed right of action, or rather their right to the service of the prisoner, be more perfect than the right of the plaintiffs in the cases which I have stated? Had the present plaintiffs, at the time they commenced this action, any claim, or shadow of claim, against the prisoner? We think the answer to these questions must be in the negative.

Still the plaintiffs contend that they have lost at least a *prospect*, or *possibility*, for which they are entitled to damages. But the truth is, they have not even lost so much; because the prisoner may still be arrested, tried, and convicted; and the plaintiffs may then, by virtue of the sentence of the Court, realize all those advantages, and obtain all that compensation, for the supposed loss of which they are seeking damages in the present action.

Without pursuing the argument any farther, we are all of opinion that the action cannot be maintained. We know of no principles which can sanction it—and therefore

Judgment is arrested.

BARRETT *v.* THORNDIKE.

There is a difference between contracts, or bonds, and deeds of conveyance of land, as to the effect of alterations made in them.

If a grantee voluntarily destroy his title-deed, or fraudulently make an immaterial alteration therein, his title to the land is not thereby impaired.

If the grantee, not having recorded his deed, voluntarily and without fraud surrender it to the grantor, this may be effectual, as between the parties, to revest the estate in the grantor, but cannot affect the rights of third persons.

In an action of trespass *quare clausum fregit*, the defendant, to prove his title to the land, read a deed from the *Twenty Associates* to one *Molineaux*, under whose administrator he claimed; to the validity of which deed it was objected on the part of the plaintiff that it had been altered after its delivery. It was proved by the plaintiff that the land was estimated, at the time

of the conveyance to contain four hundred acres, and had been so described in the deed; in which it was also fully described by metes and bounds; but that the word *four* had been erased, and *five* inserted in its stead. There was circumstantial evidence offered to the jury, raising a strong presumption that *Molineaux*, at the time of the conveyance, had represented the tract as containing only *four hundred* acres; that the proprietors, giving credence to this false representation, had conveyed it to him as containing that quantity; and that he had afterwards fraudulently altered the deed in the manner alleged.

The judge before whom the cause was tried at *nisi prius* instructed the jury that if the alteration had been fraudulently made by *Molineaux*, it would render the deed void as to him and his heirs, though such alteration did not materially change the legal construction of the deed. And thereupon a verdict was returned for the plaintiff, which the defendant now moved the Court to set aside.

Thayer, in support of the motion, contended that the alteration in this case was not material, it being of a word wholly inoperative; and that if immaterial, it was no matter with what intent it was made. *Henry Pigot's case*, 11 *Co.* 26. *Smith v. Crooker*, 5 *Mass.* 538. *Hunt v. Adams*, 6 *Mass.* 521. He also adverted to the distinction between contracts executory, and contracts executed, as conveyances of land, &c. to which last, it was argued, the cases respecting alterations did not apply. *Hatch v. Hatch*, 9 *Mass.* 307.

Orr, for the plaintiff.

It seems to be taken for granted that formerly it was holden that *every* alteration avoided a deed. But the fact is not so. Nor do the cases which have been cited reach the case at bar, none of them turning on the question of fraud, and they all being cases of immaterial alterations. The question of fraud can be tried only by the jury, to whom it has been very properly referred; and finding the fact of fraud, they rightly returned their verdict for the plaintiff.

[*Mellen C. J.* Suppose the alteration to be ever so material, or fraudulent, or the deed to be destroyed by the grantee, could this *reconvey* the land to the grantor?]

Orr. That question seems to be decided in the case of

Goodwin v. Hubbard, 15 *Mass.* 210. But here, the only question was, whether the alteration was made fraudulently, or not; and this question is settled by the only tribunal competent to try it.

Longfellow, in reply.

The materiality of the alteration was a question of construction, merely; and it was decided by the Court, who alone could judge of it, to be immaterial. But if immaterial, though made by the grantee, and with a fraudulent intent, yet it could not operate to divest an estate already vested. It would be unjust to permit a grantor thus to control an estate which he had already absolutely conveyed; and it would overturn the principle of law which forbids the grantor to defeat his own deed.

The old distinction, relating to the person making the alteration, has no solid foundation to support it. It seems now to be settled that the alteration, if immaterial, does not affect the deed, even though made by the grantee. The only inquiry now is, whether the alteration is essential or not; and this is plainly the doctrine of common sense.

There is good reason for the distinction stated between contracts executory and executed. If the party will defeat his own remedy on a contract not executed, it is his own folly; but he ought not to be suffered to infringe the rights of others.

The estate in question vested in *Molineaux* by his title-deed from the proprietors; and had he torn off the seal, or destroyed the deed altogether, this would not revest the estate in the grantors; nor could it pass from the grantee but by deed, descent, or levy. But the direction of the judge goes to sanction a mode of conveyance differing from either of these, and hitherto unknown in the law.

Mellen C. J. The motion is that the verdict which has been given in this case for the plaintiff may be set aside and a new trial granted, on account of a misdirection of the Judge who sat in the trial of the cause. In the opinion of the Judge, the alteration made in the deed was immaterial, as having no legal effect in its construction; but he instructed the jury that if they should believe the alteration to have been made by *Molineaux*, and *fraudulently*, it would render the deed void as to him and

his heirs. *Thorndike*, however, did not claim to hold the lands as *heir* to *Molineaux*, but as a purchaser under his administrator; but no notice seems to have been taken of this distinction in the trial of the cause. Admitting the opinion of the Judge to be correct as delivered, it would not follow that such alteration, with whatever intention made, would render the deed void as to *Thorndike*. Hence it becomes important to examine this point more closely.

As to the general effect produced by an alteration or erasure of a deed, bond, or other written instrument, the law has undergone some material changes. Ancient strictness has given place to more liberal and rational principles, and doctrines more consonant to sound common sense have gained the ascendancy.

In *Pigot's* case, 11 *Co.* 27. it was decided that an immaterial alteration made by the grantor or obligee himself, avoids the deed or bond, unless by consent of the grantor or obligor. This appears to be a leading case on this subject.

In the case of *Markham v. Gonaston*, *Cro. El.* 626. the Court decided that the addition of a condition to a single bond, though for the benefit of the obligor, being done by the obligee, avoided the bond.

In 1 *Shep. Abr.* 541. it is stated thus: "If a deed be altered by the party who holds it and claims under it, though in a part immaterial, it shall avoid the deed; though the alteration be to his own disadvantage, and to the advantage of the grantor."

In *Shep. Touchstone*, 69. the doctrine of *Pigot's* case is laid down distinctly to be good law.

In the case of *O'Neal v. Long*, 4 *Cranch.* 60. it was contended by *Mason* in the argument, that the interlineation which had been made was not material; and, being made by a third person, without the privity of the obligee, did not avoid the bond. He cited *Pigot's* case, and seemed to admit that if such alteration had been made by the obligee, it would have been fatal: and the Court seemed satisfied with the principle as thus stated.

Judge *Story*, in the case of *Cutts* plaintiff in error *v. The United States*, 1 *Gall.* 69. recognizes the principles of *Pigot's* case, as to the effect of a material and an immaterial alteration, made by an obligee.

In the case of *Smith v. Crooker & al.* 5 *Mass.* 538. Chief Jus-

tice *Parsons*, in delivering the opinion of the Court also quotes *Pigot's* case as to the effect of a material alteration; and afterwards observes that "an alteration by erasure or addition made by the obligee or a stranger, which will avoid a bond, must be in some *material* part;" and then he proceeds to shew the immateriality of the alteration which had been made in the bond in that case by the obligee, and concludes with judgment in favour of the bond.

Afterwards, in the case of *Hunt v. Adams*, 6 *Mass.* 521. the same Chief Justice observes, "as to an alteration, it is an old rule that any alteration, *whether material or not*, in an instrument, made by the party *to whom it is given*, shall avoid it, unless made by the consent of the party who executed it." Here the strictness of the old rule is evidently approved.

In the case of *Hatch v. Hatch*, 9 *Mass.* 307. Chief Justice *Sewall*, in delivering the opinion of the Court, observes,—"In executory contracts, proveable by written instruments, the remedy is sometimes lost by the loss of the evidence; and bonds and notes which have been altered in a *material* part by the *obligee* or *payee*, are no longer proof of an obligation or contract. This rule might possibly, though I doubt it, be extended in strictness, even at the present day, to alterations wholly *immaterial*, if made at the instigation of the party entitled by the instrument, although it were done innocently, and to no injurious purpose."

Notwithstanding the changes which have taken place in the course of judicial decisions, as to the effect of tearing off a seal, and of erasures made under certain circumstances, and the mode of deciding as to this effect; still, as it regards the effect of an *immaterial* alteration, made by the *obligee* in a bond, the balance of authorities seems to be clearly in favour of the proposition that it avoids the bond, especially if made fraudulently; although our Courts, in some instances, have expressed doubts as to the principle, and manifested an inclination to escape from its operation, whenever the facts of the case could be found to warrant it.

But however we might decide the question if it arose upon an *immaterial* alteration, made in a bond or other *contract* by the obligee or with his privity, yet we are not called upon to decide

this cause upon the principles applicable, to such a question; as we consider the case of a *deed of land*, altered by a stranger, or even by the grantee himself, after its execution and delivery, as a case of a different nature; and on this distinction our opinion in the present action is founded.

It was admitted in the argument, though not stated in the report, that *Molineaux* entered into possession under his deed, as well as caused it to be recorded; and that his administrator, by virtue of a license duly obtained, sold the land for payment of debts, and that the defendant purchased it. It becomes material, then, to inquire what effect the alteration made in the deed by *Molineaux* could produce as to his *title*.

A deed made by one having good and lawful right, and duly executed, delivered, and recorded, passes the estate to the grantee;—he becomes seized of it. If the deed be lost, or destroyed, the title is not impaired; and the grantee might maintain an action upon it, making *profert* of a copy. *Reed v. Brookman*, 3 *D. & E.* 151. If he had destroyed the deed himself, there would seem to be no effect produced, prejudicial to the title which had vested in the grantee by virtue of the deed. Surely then an immaterial alteration in such a deed, though fraudulently made, could not, in any manner, injure the title of *Molineaux* himself. His fraudulent intent could not *reconvey* the estate to the proprietors. We know of two methods only, in which he could voluntarily divest himself of the estate which had thus vested; viz. by *deed* of reconveyance, or by *will*. It is true, if his deed had not been recorded, he might have restored it to the *Proprietors;* and if this were done fairly and without impairing or intending to impair the rights of third persons, the transaction might have been effectual, as between the parties, to revest the estate in the *Proprietors;* according to the principles laid down in the case of the *Commonwealth v. Dudley*, 10 *Mass.* 403.

In the case of *Hatch v. Hatch* before cited, an alteration was made in a deed by, or in presence of the grantee; and the question as to its effect upon the deed was under examination. The Chief Justice, speaking of the principles of law applicable to erasures and alterations in bonds and contracts, observes,—"But these rules have not the same operation where a

title to real estate is in question. The cancelling of a deed will not divest the property, which has once vested by a transmutation of possession. A man's title to his estate is not destroyed by the destruction of his deed. 2 *H. Bl.* 259. 10 *Co.* 92."

But in the present case, if the alteration by *Molineaux* could divest the estate, then *Thorndike*, who had no knowledge of the fraud, would suffer by it, and this without any fault on his part. But we must look to still farther consequences. If an alteration by a grantee avoids his deed, it seems immaterial at what time the alteration is made; whether before or after he shall have sold and conveyed the estate to a third person. To give an alteration such an effect, would subject after-purchasers to loss of title, and lead to confusion. It would be contrary to the established principle, that a grantor cannot, by his own actions or declarations, defeat a deed which he has before made to one who is claiming and holding under it.

On the whole, we are satisfied that according to the principles of justice and sound policy, as well as to adjudged cases, the plaintiff is not entitled to retain the verdict which has been returned in his favour; and it is therefore set aside, and a new trial granted.

THE PRESIDENT, &c. OF LINCOLN & KENNEBEC BANK,
v.
RICHARDSON.

A statute granting corporate powers is inoperative till it is accepted; but when accepted, it becomes a contract.

If the charter of a banking company be expired, it may be revived, in all its original force, by a subsequent statute.

And such subsequent statute merely revives the former corporation; but does not create a new one.

Assumpsit upon a note of hand, called, among bankers, a *stock note*, given by the defendant to the plaintiffs. The writ was sued out *October* 23, 1818.

In a case stated for the opinion of the Court, the parties agreed that the *Lincoln & Kennebec Bank* was incorporated *June*

23, 1802, to continue for ten years from the first *Monday* of *October* 1802:—that by an act passed *June* 1, 1812 entitled "an act to enable certain banks in this Commonwealth to settle and close their concerns," it was enacted that all banks incorporated, "whose corporate powers are limited to or at any time before the last day of *October* 1812, shall continue with all their powers, *till the first Monday of October* 1816, *and no longer*, for the sole purpose of enabling said banks gradually to settle and close their concerns, and divide their capital stock":—that *on the 14th day of December* 1816 another law was passed in which it was enacted "that all the banks mentioned in the act of *June* 1, 1812, "shall be and hereby are continued bodies corporate *for all the purposes for which said act was passed*, for the *further* term of *three years* from the passing of this act, and that the said act be, and the same is hereby continued in force until the expiration of said term of three years."

Mellen C. J. This case comes before us upon an agreed statement of facts, and was submitted without argument, on the ground that all the general reasoning in relation to the subject had been gone into in the case of *Foster v. the Essex Bank*;* which cause has been recently decided by the *Supreme Judicial Court of Massachusetts*; and we are now merely called upon to decide whether the difference between the two cases as to *some* of the facts will vary the principles of law by which the case must be determined.

There are only two points in which the cases differ. In the case before us a bank is plaintiff—in the other a bank was defendant;—and in the *present* case the act of *June* 1, 1812 continued the powers of this and other banks until the first *Monday* of *October* 1816; and the *second* act for continuing or reviving the powers of banks did not pass till *December* 14, 1816, more than *two months after* the first extending act had ceased to operate;—whereas in the other case the extending act was passed some weeks *before* the expiration of the charter of the *Essex Bank*.

We have examined the opinion of the Court in the latter case, and are perfectly satisfied with their reasoning and con-

* Since published in 16 *Mass.* 245.

clusion; and we are of opinion that the same principles ought to govern both cases. The Chief Justice, in pronouncing the decision of the Court in the action against the *Essex Bank*, observes—"We think it no objection that this additional term should be granted by an act made *subsequent* to the time when the charter was granted. A debtor to the bank could not object to a suit on the ground that the original term of the charter had expired; for the very bringing of the action would be an acceptance of the charter." We apprehend that the same principle of law applies to an act *continuing* a charter beyond its original term, as to the act which *granted* the charter; that is, in both cases the grant or chartered powers, must be *accepted:* because a charter, and the extension of it, are, till so accepted, inoperative; but *when accepted*, they become contracts. Nor do we perceive that, on this principle, it is of importance whether the extending act is passed *before* or *after* the expiration of the original charter. Acceptance is necessary, in both cases.

By bringing the present action the plaintiffs have declared their acceptance of the new powers granted to them by the extending or reviving act of *December* 14, 1816; and of course are liable to be sued by their creditors, as well as empowered to enforce payment by their debtors. It would be a harsh and unjust principle, which would compel them to pay their debts because they have accepted the new powers; and yet deny them the use of legal process to enable them to collect the funds necessary for the purpose. If it should be urged, as it has been, that there is no assent on the part of the debtors of the bank to the extension of the charter, and that the bringing of this suit, though it may be proof of acceptance on the part of the bank, is not so on the part of *Richardson;* it may be replied, in addition to what has been before observed, that it appears by the agreement of the parties that the note in suit is a *stock note*, and of course *Richardson* is a *stockholder*. He is then bound by the *act of acceptance* on the part of the directors,—the prosecution of this action.—The stockholders are bound by their official acts, within the limits of their ordinary duties. Besides, it is for the interest of the defendant, as one of the

stockholders, that the debts due to the corporation should be faithfully collected and applied.

We all are of opinion that the action is maintainable, and according to the agreement of the parties the defendant must be defaulted.

R. Williams for the plaintiffs.

Longfellow and *Ames* for the defendant.

THE INHABITANTS OF BRISTOL
v.
THE INHABITANTS OF MARBLEHEAD.

The *Stat.* 1817. *c.* 13. removes the disability of a Deputy Sheriff to serve process in which the town where he resides is a party, not only from the deputy resident in such town, but from the Sheriff, and from all his other deputies.

The defendants in this case pleaded in abatement of the writ, that it was served by a Deputy Sheriff in the county of *Essex* who was an inhabitant of *Salem;* and that at the time of the commencement of the action and service of the writ, there was another Deputy Sheriff for said county by the name of *Rhea*, who was an inhabitant of said *Marblehead; by whom*, or by some Coroner of the county of *Essex*, the writ ought to have been served. To this plea there was a demurrer and joinder.

Bellard, in support of the demurrer, contended that the *Stat.* 1817. *c.* 13. merely enlarged the powers of the Sheriff and his deputies, authorizing them to do acts, which before the statute, they were disabled to do, by reason of their interest. The Sheriff, before the Statute, might serve process on any corporation of which neither he nor his deputy was a member. Wherever the deputy alone was a corporator, the Sheriff was disabled to serve, because of his connection with the deputy, they constituting in law but one person. This interest the Statute removes as to the deputy; and of consequence removes it as to the Sheriff also; and as to every other deputy; for whatever one deputy of the Sheriff may do, every other may do, being equally disinterested.

Allen, for the defendants.

Before the *Stat.* 1817. *c.* 13. the writ must have been served

by a Coroner, if the Sheriff or his deputy lived in the town. The disability of these officers arose from their being members of the corporation, not from their relation to each other. The Statute enlarges the powers of corporators *only;* but gives no new powers. Before the Statute, the Sheriff could not serve process on a corporation, if his deputy were a corporator. The law has removed this restriction, so far as regards the officer resident in a town which is interested, or party to the suit; but leaves it on all others as it was before.

Mellen C. J. The *Stat.* 1783. *c.* 43. describing the duty and power of Coroners, declares that "every Coroner within "the county for which he is appointed, shall serve all writs and "precepts, when the Sheriff or either of his deputies shall be a "party to the same." In the case of *Brewer v. New-Gloucester*, 14 *Mass.* 206. it was decided that each inhabitant of a town is a *party* within the meaning of the Statute. In that case the writ was served by the Sheriff of *Cumberland*, one of his deputies being an inhabitant of *New-Gloucester* at the time of the service. Soon after this decision, the *Stat.* 1817. *c.* 13. was passed, empowering Sheriffs, Deputy-Sheriffs, Coroners and Constables to make service and return of all writs and processes to them duly directed, in which towns or districts *of which they are inhabitants are parties or interested*, any law to the contrary notwithstanding.

By the *letter* of this last act, no power was given to any other deputy sheriff in the county of *Essex* to serve the writ in this action, except a deputy living in *Marblehead;*—that is, to one of the parties to this suit. But to construe the act in this restricted manner, would seem disrespectful to the legislature which passed it. We cannot believe that they intended thereby to declare that a *disinterested* deputy, living in any *other* town in the county, could not be considered so well qualified and so suitable an officer to serve the process, as an inhabitant of the town sued, and one, of course, directly *interested in the event of the suit.* By a fair and reasonable construction of the act, therefore, taken in connection with the *Stat.* 1783. *c.* 43. we must consider it as intended generally to remove the disability arising from the interest which an inhabitant of a town has in a suit in favour of or against the corporation of which he

is a member; and to enable a deputy sheriff to serve a writ or execution against or in favour of a town, though another deputy sheriff might be one of the inhabitants. The construction contended for by the defendant would lead to singular consequences, and seem to involve absurdities. For instance, a deputy sheriff living in *Marblehead* could *legally* serve the process, and yet the Sheriff, living in *Haverhill*, and being the officer from whom the deputy has received his commission, and derived his official authority, could *not* make such service.

Indeed we can find no other sensible mode of construing the law than that which we have adopted; and according to this view of it, the writ was legally served.

Respondeat ouster awarded.

ULMER & al. *v.* PAINE.

A sum of prize-money, claimed by several owners, having been deposited with an agent, to be kept until it should be "legally determined" to which of them it belonged; it was holden that no action would lie against the stakeholder until the question of property was first settled among the claimants by a judgment of law.

Assumpsit for money had and received to the use of the plaintiffs as owners and outfitters of the private armed schooner *Fame*. At the trial of this action, which was upon the general issue, before WILDE J. at the last *September* term in this county, the plaintiffs gave in evidence a receipt signed by the defendant dated *March* 15, 1815 in the form following;—

"Received of *T. G. Thornton*, Marshal of *Maine*, fourteen hun-
" dred and sixty-one dollars, being the amount claimed by *John*
" *Gleason* and *Charles Pope*, as owners of one share each in the
" private armed schooner *Fame*, which amount is their proportion
" of the prize schooner *Industry* and cargo, as they say, and which
" *I agree to hold, until it is legally determined whether the said sum*
" *belongs in any part or the whole to said Gleason and Pope, or either*
" *of them, or whether it belongs to the other owners*, in consequence
" of the refusal of said *Gleason and Pope* to fit out said schooner
" *Fame* as a privateer:—Also of *Robert G. Shaw* five hundred
" eighty-eight dollars fifteen cents, which together make what is
" estimated to be full two shares of the prize schooner *Industry*

" and cargo, as settled with the other owners, amounting in the " whole to the sum of twenty hundred forty-nine dollars fifteen " cents; subject, however, to any subsequent charges of the at- " torney for the owners for money paid to lawyers or the other " persons not before allowed by the marshal."

Signed, *John Paine.*

It was proved that the privateer was duly registered and commissioned, and belonged to the plaintiffs, together with *Charles Pope*, *John Gleason* and *Snow Paine*; who refused to aid in fitting out the vessel, or to have any share or concern in the risk or the profits of the cruise; but caused their vessel to be appraised, for the purpose of recovering the value, if lost.

It also appeared that the defendant was agent for the owners and crew of the privateer, and knew the facts respecting the refusal of *Pope* and *Gleason*, and *Snow Paine* to fit out the vessel as above mentioned; and that he had repeatedly declared that they were entitled to no part of the proceeds of the captured vessel. The capture of the prize, its condemnation and sale, and a demand of the money by the plaintiffs on the defendant, were all regularly proved; and it appeared that on demand of the money, no bond of indemnity was offered to the defendant nor requested by him. But it did not appear that it had ever been legally settled to whom the prize money above mentioned belonged, nor that there had ever been any judicial inquiry into this subject.

Upon this evidence the Judge directed a nonsuit, subject to the opinion of the whole Court, upon the question whether the plaintiffs were entitled by law to recover in this action.

Orr, for the plaintiffs.

The right of action depends upon the construction of the writing given by the defendant, who is a stakeholder. All the events have happened, which were considered and anticipated when the writing was given. A *suit* was then contemplated, as appears from his agreement to hold the money till it should be " legally determined" to whom it belonged:—a suit—not against the Marshal, for he, by consent of all parties, had paid over the money to the defendant as their agent;—nor by one part-owner against the other, because, upon these facts, no such action would lie;—nor by *Pope* and *Gleason* against the other

owners, as is manifest from the terms of the writing, they having agreed to the deposit of the money with the defendant:—but a suit against the defendant by the owners in fact of the prize-money. It is true a stakeholder ought not to be mulcted in costs, unless he voluntarily subjects himself to that liability, which the present defendant has done. The plain intent of the transaction manifestly was that the defendant should stand as party litigant for whom it might concern, and pay over the money to the winner. Nor can it now be objected that a suit in the courts of admiralty jurisdiction was intended; for though the defendant might have limited the remedy to a particular tribunal, yet he has not done this in the present case, but has left it at large, at the election of the claimants. *Kerr v. Osborne*, 9 *East* 378.

Longfellow, for the defendant.

Though there may be cases in which a stakeholder may be exposed to the costs of a suit, yet in this case the defendant has not placed himself in that situation. He has merely consented to hold a sum of money deposited in his hands, until it should be determined, by legal process, to which class of the claimants it belonged. The defendant himself pretended *no* title to it.

The question then is, has the event happened, on which the defendant was bound to restore the money? Clearly not, because there has not yet been a "legal determination." Such determination lies at the basis of any claim which the plaintiffs can lawfully set up:—and yet they have founded their action, not on a precedent judgment of law between the adverse claimants, but on a mere demand of the money. If the defendant was bound to restore upon such demand, he was equally bound the instant he received the money. But such a construction as this renders the contract an absurdity. The true intent was, that the defendant should hold the money until the parties should have determined the right to it, by suit among themselves. But no such determination has been had. The remedy by application to the admiralty is still open to all parties, except the defendant; and this remedy will be effectual. Yet the present plaintiffs call upon the defendant to decide this momentous question, and this too, at his own peril. Had it been

intended that he should be a party to the suit, a proviso would doubtless have been inserted in the writing, permitting him to deduct the costs of the process against him;—but the absence of any such provision shews that no action against him was intended.

Orr, in reply.

Had the defendant pointed out the jurisdiction which should be resorted to, the plaintiffs would be bound by it. But this he has not done.—He has received money, and promised to restore it to the right owner.

[*Weston J.* Could the defendant have contemplated any other decision than one which would have bound all parties? Now the admiralty may call in all parties, which this Court cannot do. A decision here would leave the defendant still exposed to a suit by *Gleason* and *Pope*.]

Orr. This Court is not to be ousted of its jurisdiction without an express engagement to that effect. If the defendant has placed himself in an inconvenient dilemma, the fault is his own. His undertaking is a voluntary agreement to stand between all parties; and he probably considered the use of the money as a compensation for his trouble.

PREBLE J. afterwards delivered the opinion of the Court as follows.

The defendant is the stakeholder of two thousand forty-nine dollars fifteen cents, part of the proceeds arising from the sales of the Schooner *Industry* and cargo prize to the private armed Schooner *Fame*. This amount was paid to the defendant in consequence of a controversy having arisen between the plaintiffs on the one part, who are such of the part-owners of the *Fame* as fitted her out for the cruise, and *Gleason* and *Pope* on the other part, the two remaining part-owners who refused to aid in fitting her out, respecting the claim of *Gleason* and *Pope* to share in the prize money. The defendant, being general Agent for the owners and crew, received the stake, being the amount of the claim in controversy, and by a written memorandum by him signed, agreed to hold it "*until it is legally de-*
"*termined whether the said sum belongs in any part or the whole to*
"*said Gleason and Pope or either of them, or whether it belongs to*

"*the other owners.*" Without having taken any measures to have it judicially or legally determined to whom the money belonged, the plaintiffs made their demand upon the stakeholder, and, on his declining to pay the money over to them, commenced the present action.

It could not, we think, have been the intention of the parties interested, that *Paine*, by accepting the stake, should subject himself to the expense and vexations of a lawsuit to settle a controversy between the part-owners of the *Fame*,—a controversy in which *Paine* had no interest. Without doubt *Paine* might have assumed this burthen; but we apprehend from a fair construction of his agreement he did not intend so to do. In the case of *Kerr v. Osborne* cited from *East*, the stakeholder received the money by consent of all, but in trust and for the use of the person who might be legally entitled to it. He received it generally,—for the benefit of whomever it might concern. Of course if the party entitled made his demand, and the stakeholder refused to pay, he thereby rendered himself liable in an action for money had and received. In the case at bar the express written stipulation on the part of the stakeholder is to hold the money until it is *legally determined* to whom it belongs. There the stakeholder was to pay or refuse to pay at his peril. Here he is not to pay until the question of property is legally determined. The remedy open to the plaintiffs is plain and adequate. The Court, before whom the decree of condemnation as prize was had, may on proper application cite all the parties in interest before them; and by a supplemental decree legally determine the question of property. *Home v. Camden*, 2 *H. Bl.* 533. The *Dash*, 1 *Mason* 4. That question never has as yet been determined; and that it has not, is the neglect of the plaintiffs. Until it is so determined *Paine* would not be justified in paying over the money.

We are therefore of opinion with the learned Judge who presided in the trial that this action was prematurely brought and accordingly the nonsuit is confirmed.

Motion to set aside the nonsuit overruled.

Note. The Chief Justice, having formerly been of counsel with the defendant in this cause, gave no opinion.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE COUNTIES OF

KENNEBEC AND SOMERSET.

SEPTEMBER TERM,

1820.

BRACKET *v.* NORCROSS.

A tenant in common who has ousted his co-tenant, is entitled, in a writ of entry against him, to have a moiety of the increased value of the premises by reason of his improvements ascertained by the jury, under the Statutes of *Massachusetts* of 1807, *chap.* 75. and 1819, *chap.* 269. and Statute of *Maine* of 1820, *chap.* 28.

Of the evidence of an ouster of one tenant in common, by his companion.

IN this case, which was a *writ of entry*, possession was demanded of an undivided moiety of two several tracts of land in the town of *Chesterville*. At the trial, which was had on the general issue before WILDE J. at *October* term 1819, the demandant's title was admitted; as was also the tenant's title to the other undivided moiety of the land, the two tracts having been granted to the parties about twenty-one years since, to hold in equal moieties, as tenants in common.

It was proved that in *May* 1808, the demandant authorized one *Gorden* to demand possession of the premises described in the writ, and that he accordingly did at that time make the demand, which he has since repeated:—but that the tenant has uniformly refused to admit the demandant to enter on either of the tracts of land, or to suffer *Gorden* to occupy them in his behalf; and at one time he denied the demandant's title to the land, and has ever since retained the exclusive possession and occupation of it.

The tenant's counsel objected that this evidence was not sufficient proof of an ouster of the demandant; but this objection the Judge overruled.

The tenant claimed allowance for one half of the improvements made by him on these tracts of land, and for one half of the expenses incurred in erecting and repairing the buildings thereon. This claim was resisted by the demandant, on the ground that the tenant could not entitle himself to such allowance under *Stat.* 1807, *chap.* 75. because there was no evidence that he ever held the demanded premises previous to the passage of that Statute;—that he had possession of the two tracts of land with the consent of the demandant, the tenant having made the purchase by his request in their names, and that he had a perfect legal right to take possession; but that until *May* 1808, he never claimed the demandant's moiety, which, until that time, in estimation of law, was held by the demandant.

Intending to reserve this question for the consideration of the whole Court, the Judge admitted the evidence offered on the part of the tenant, and a verdict being found for the demandant, the moiety of the improvements and buildings on the land were accordingly estimated by the jury.

If this evidence was rightly admitted, and the tenant, in the opinion of the Court, should be entitled to allowance for such improvements, then it was agreed that judgment should be entered on the verdict;—otherwise, the verdict was to be set aside, and the tenant be defaulted; unless the Court should be of opinion that the demandant was not entitled to recover upon the point first made.

The case was briefly spoken to, before the Reporter entered on the duties of his office, by *R. Williams* for the demandant, and *Bond* for the tenant; and the opinion of the Court was afterwards delivered as follows: by

PREBLE J. The first question submitted in this case, though not much pressed in the argument, is, whether there was sufficient evidence of *actual ouster* to enable the demandant to maintain his action.

On adverting to the evidence as reported by the Judge, who presided in the trial, we find, "*The agent of the demandant had* "*repeatedly demanded possession*"—"*the tenant uniformly refused* "*to admit the demandant to enter*"—or "*to suffer demandant's* "*agent to occupy*"—he also "*denied demandant's title* and has "*ever since held the exclusive possession and occupation.*" "If, "says *Ld. Coke*, tenant in common drive out of the land any "cattle of the other tenant in common or not suffer him to enter "or occupy the land, this is an ejectment or expulsion." *Co. Litt.* 199. *b.* And *Ld. Mansfield* in *Doe v. Prosser*, *Cowp.* 217. remarks,—"Some ambiguity seems to have arisen from the term "*actual ouster*" as if it meant some act accompanied with real "force, or as if a turning out by the shoulders were necessary; "but this is not so. A man may come in by rightful posses- "sion and yet hold over adversely without a title; if he does, "such holding over, under circumstances, will be equivalent to "actual ouster." Again "if upon demand by the co-tenant of "his moiety [of the rents and profits] the other denies to pay "and denies his title saying he claims the whole, and will not "pay, and continues in possession, such possession is adverse, "and ouster enough." A bare perception of the whole profits does not of itself amount to an expulsion. *Fairclaim v. Shackleton*, 5 *Burr.* 2604. Yet even an undisturbed and quiet possession for a great length of time is sufficient ground for a jury to presume an actual ouster. *Doe v. Prosser*, *supra.* These authorities are decisive of the question in the case at bar, as to the sufficiency of the evidence of ouster.

The question, whether one tenant in common, in an action brought against him to recover possession by a co-tenant who had been ousted, can avail himself of the provisions of the *betterment Act* so called, was settled by the Supreme Judicial Court of *Massachusetts* soon after that Statute was passed. In *Bacon v. Callender*, 6 *Mass.* 303. the Court held that tenants in common are, in regard to the *Stat.* 1807. *ch.* 75, or *betterment Act*, placed upon the same footing with other persons holding lands by virtue of a possession and improvement. That Statute, however, extends only to cases of possession actually existing at the date of its passage. And the possession of one tenant in common being the possession of his co-tenants until

actual ouster, and there being no evidence of an ouster prior to *May* 1808, the demandant contends that the case at bar is not within that Statute.

We have already seen that there was sufficient evidence of actual ouster in *May* 1808, which is more than six years before the commencement of the present action. Now the legislature of *Massachusetts* by *Stat.* 1819. *chap.* 269. extended the provisions of the *Stat.* 1807. *ch.* 75. to all cases where the possession has continued for six years or more next before the commencement of the suit. This Statute, by express terms, applies as well to actions which had already been commenced, as to actions that might thereafter be instituted. Since the establishment and organization of this State, the same provisions have been reenacted by our own legislature in the *Stat.* 1820, *chap.* 28. In extending the provisions of the Statute to actions pending, the intention of the legislature was, not to interfere with the vested rights of the parties, but merely to give a remedy for the right to betterments, which already existed in equity and good conscience, and which there had been no means before provided by law for enforcing. If the power of the legislature thus to extend the provisions of the Statute should be questioned, this point was also before the Court in the case of *Bacon v. Callender.* In delivering the opinion of the Court, Chief Justice *Parsons* remarks, "if it were compe-"tent for the legislature to make these provisions to affect ac-"tions after to be commenced, the same provisions might ap-"ply with equal authority to actions then pending."

Judgment on the verdict.

Note. The Chief Justice, having been of counsel with the plaintiff, gave no opinion.

THE INHABITANTS OF HALLOWELL
v.
THE INHABITANTS OF GARDINER.

A slave, resident out of his master's family, in a plantation, at the time of its incorporation, gained no settlement by such incorporation.

Neither could the wife, nor the minor children of such slave, gain a settlement, in such case, in their own right.

By the words "*all persons*" in *Stat.* 1793. *ch.* 34. in the *ninth* mode of gaining a settlement, are intended only those persons who are legally capable of gaining a settlement, in their own right, in any *other* mode.

Minor children cannot have a settlement distinct from the father; nor can a wife acquire one separate from her husband.

Assumpsit for the support of a pauper alleged to have her legal settlement in *Gardiner*. In a case stated for the opinion of the Court, the following facts were admitted. *Harriet*, the pauper, was the grandchild of *Isaac Hazard Stockbridge* and *Cooper* his wife. *Hazard* was a negro man, imported from *Africa* about the year 1740, when a child, and was claimed as a slave by purchase by *Doctor Sylvester Gardiner*, and as such ever considered himself; and resided with his master, in *Boston*, from the time when he was imported, until about the year 1766. In the year 1765, *Hazard*, with the consent of his master, was legally married to *Cooper Loring*, a free black woman, as far as a marriage between a slave and a free woman can be considered legal. The place of *Cooper's* legal settlement, at the time of this marriage, does not appear.

After the marriage *Hazard* continued in the service of *Dr. Gardiner* and resided in his house as before, for about a year; when being suspected of attempting to set fire to his master's house, he was ordered to repair to an estate of his master in a plantation then called *Gardinerstown*, and afterwards *Pittston*, there to remain till permitted to return to *Boston*. The master of the vessel in which he was transported was charged to deliver him at *Gardinerstown*, which he did; and his wife and children were soon after sent to him. For the first year or two of his banishment *Hazard* resided on the east side of *Kennebec* river, in the service of a tenant of *Dr. Gardiner;* after which, by order of his master, he resided with his wife and

children, among whom was *Lucy Stockbridge*, mother of the pauper, on the west side of the river, now *Gardiner*, on a new farm of *Dr. Gardiner's*.

In the year 1776, *Dr. Gardiner* left the province of *Massachusetts*, to which he never returned. He arrived at *Newport* in the State of *Rhode-Island* in the year 1786, where he died on the eve of his departure for the *Kennebec*. During his absence the *Doctor* intrusted the care of his estates at *Gardinerstown* to his son *William*, who from time to time required the services of *Hazard* upon his father's estate, and frequently furnished him with supplies for his family, until the death of *Hazard* in the year 1780.

The plantation of *Gardinerstown* was incorporated by the name of *Pittston* in the year 1779, *Lucy* being then about ten years of age. About two years after that time, and a year before the death of her mother, *Lucy* went to *Augusta*, where she resided until the year 1792, during which time she became the mother of *Harriet*, the pauper, who is illegitimate. She then returned to that part of *Pittston* which is now *Gardiner*, where she dwelt until the year 1809.

Pittston was divided *February* 17, 1803, that part lying on the west side of *Kennebec* river being incorporated by the name of *Gardiner*.

Bond, for the plaintiffs.

1. The grandfather of the pauper, though imported a slave, was *emancipated* prior to the incorporation of *Pittston*.

Slavery, in *all* its forms, was never tolerated in *Massachusetts*. It was forbidden by the colony law of 1641, except in certain cases, as capture in war, voluntary servitude, or purchase from another citizen, &c. Ever since that period slavery has been regarded as an evil; and was never recognized expressly from that time till the adoption of the Constitution. In the first article of the bill of rights prefixed to that instrument, it was not intended to set forth new rights, to be enjoyed in time to come; but generally to assert the existence of certain inalienable rights; and among them the right of personal liberty. Slavery, therefore, being but reluctantly tolerated, slight evidence of manumission is sufficient. No deed is necessary; it is enough if the master do any act from which that intent can be fairly inferred.

Here the master in 1776, left the slave, and his whole property, and abandoned the country till 1786. It is true he left his estates generally in the care of his son, but he did not specify this slave; and though the son occasionally took notice of him, yet he resided at a distance of two hundred miles, and left him at his own disposal.

The relation of master and servant is reciprocal. The one owes protection, the other service. But here, the master having ceased to protect, the slave was free.

If therefore *Hazard* was free, and resident in the plantation of *Gardinerstown* at the time of its incorporation in 1779, he gained a settlement by the incorporation, both for himself and for the members of his family, of which the mother of the pauper was one; and this settlement was transferred to *Gardiner* by its separation from *Pittston* and its erection into a distinct town in 1803.

Pittston, it is true, was incorporated prior to the Statute of 1793. *ch.* 34. which speaks of the effect of residence on a territory incorporated into a town; but that part of the Statute is to be regarded as declaratory, merely, of the law as it had before stood. *Bath v. Bowdoin*, 4 *Mass.* 452. *Buckfield v. Gorham*, 6 *Mass.* 445.

2. Admitting *Hazard* to be *still a slave*. His marriage with *Cooper Loring* was void, for that cause. *Andover v. Canton*, 13 *Mass.* 547. *Middleborough v. Rochester*, 12 *Mass.* 363. A slave has no civil rights, and of course can make no civil contracts,—much less one so solemn as that of marriage. If the marriage was void, then the wife acquired a settlement in *Pittston* by the act of incorporation, which settlement is extended to the children, both by residence on the territory at the time of its incorporation; and by birth, they being illegitimate. But supposing the marriage legal, and *Hazard* still a slave; he could for that reason communicate no settlement to his wife; and therefore she might acquire one herself by the incorporation of *Pittston*.

It may be objected that though the husband could give no settlement to the wife, he being a slave, yet, the marriage being legal, the children could derive none from the mother, because not illegitimate. But if the child could derive no settlement

from either parent, then she might gain one in her own right, though a minor. The Statute of 1793, is universal in its provisions. None are excluded, either by sex or age, who are resident on a territory at the time of its incorporation. And it has been decided in this county,* in the case of *Fairfax v. Vassalborough*, that the Statute applied to a resident *non compos*, who had no parents, and who thus gained a settlement in *Fairfax*.

Allen, for the defendants.

Slavery has been recognized as lawful in *Massachusetts*; however dishonourable to the State, or repugnant to our feelings. In this case the ancestor, *Hazard*, continued a slave. There was no express manumission; and the intent of the master was manifestly otherwise. He ordered him to his estate here, and fixed him on his own soil; evidently intending to retain him as a slave, and to prevent him from perpetrating the mischief he had threatened. The *Stat.* 2 *Ann. c.* 2. *Ancient Charters*, *app. c.* xvii. is a sufficient answer to any argument of implied manumission; it being, by that Statute, expressly forbidden, except upon the execution of a bond of indemnity by the master, which in the present instance was never done.

But though a slave, *Hazard* might lawfully contract marriage, as appears from the Provincial *Stat.* 4 *Ann. c.* 5. *Ancient Charters*, *app. c.* xix. which forbids any master unreasonably to deny marriage to his negro "with one of the same nation."

The incorporation of *Pittston* has no effect in the present case. —Not on *Hazard*, because he was a slave, and had the settlement of his master. Though the language of *Stat.* 1793. *c.* 34. is broad enough to include slaves, yet it is construed to extend only to persons capable of acquiring a settlement in their own right, which slaves are not supposed to be. *Winchendon v. Hatfield*, 4 *Mass.* 123.—Neither on his *wife*; for she could gain no settlement separate from that of the husband, *Shirley v. Watertown*, 3 *Mass.* 323. even though not warned. *Somerset v.*

* *May term* 1814, *per Sewall C. J. Parker, Thacher* and *Dewey J.* There is no record of the judgment in this case, it having been compromised by the parties out of Court, after the opinion given by the Court upon the facts stated; which was agreed at the bar to have been as related by *Mr. Bond.*

Dighton, 12 *Mass.* 383. And if the wife alone could gain a settlement by the incorporation, she could not impart it to the children; for no children derive their settlement from the mother, except those who are *illegitimate*. *Andover v. Canton*, 13 *Mass.* 547. Neither on the *children*, to give them a settlement in their own right.—If the law were otherwise, infants, of the tenderest age, might be settled in one place, and their mothers in another. And to fix the settlement of children in a place whence the parents are liable to be removed by process of law, is a rule which ought not to be adopted but upon urgent necessity;—it is a violation of the best feelings of the heart.

The rule that all persons dwelling in a plantation are *ipso facto* settled there by its incorporation, must of necessity be subject to many exceptions. A woman, by marriage, takes the settlement of her husband. But if, before she leave her father's house, the plantation in which he dwelt be incorporated, her husband residing in another town, will it be contended that she thus loses the settlement derived from her husband and acquires a separate settlement in her own right? The same absurd consequences will ensue from a universal application of the rule, if applied to minor children, placed in a plantation at school, at board, or confined by sickness.

It would be a great hardship on the plantation to be thus compelled to adopt the wife and children, the part of the family least productive of any public benefit, without any advantage from the master or father. The obligation to support paupers is supposed to rest upon services rendered and taxes paid. But what services could a feme covert and infant children render, or what taxes could they pay? The slave was not, and his wife and children could not be assessed. Children, it is true, acquire a settlement with their father, by incorporation of the plantation in which he dwells; but they gain it derivatively from him; on the same principle as if he gained a settlement in any other mode.

Perhaps the soundest construction of the rule is that which has been adopted in relation to the Provincial Statutes of 4 *W. & M. c.* 13. and 12 & 13 *W.* 3. *c.* 10. *Winchendon v. Hatfield*, 4 *Mass.* 123. *Ancient Charters*, *c.* xv. lxxvii. by which slaves, femes covert, and children are excluded. If there be any dif-

ference in the present instance, it is that they are the wife and children of a slave; but such persons have certainly no greater privileges than the wives and children of freemen.

Bond, in reply.

The case cited in which the wife could gain no settlement apart from her husband, is where all the parties were free. But here one was a slave.

If the child gained no settlement by the incorporation of *Pittston*, she presents a case anomalous and unreasonable. She has no settlement by the father, he being a slave;—none by the mother, she being lawfully married;—and none in her own right;—and yet she is a native of this State.

MELLEN C. J. delivered the opinion of the Court, as follows.

The counsel for the plaintiffs rests his cause on four distinct grounds: and if either of them be substantial the settlement of the pauper and her children must be adjudged to be in the town of *Gardiner*.

The four grounds are these:

1. That *Hazard*, the slave, was manumitted by *Dr. Gardiner*, his master; and thus being free, and residing in a place called *Gardinerstown* in the year 1779, when that plantation was incorporated into a town by the name of *Pittston*, he gained a legal settlement in *Pittston*:—that there was a division of *Pittston* in the year 1803, and that part of the town on the west side of *Kennebec* river was incorporated by the name of *Gardiner*; and as *Hazard* lived on the west part of *Pittston*, his daughter *Lucy*, the mother of the pauper *Harriet* became legally settled in *Gardiner*.

2. That if *Hazard* were not manumitted as before supposed, the result would be the same, because his marriage with *Cooper Loring* was void.

3. That if the marriage be not void, *Cooper*, the wife, residing in *Pittston* at the time of its incorporation in 1779, gained a settlement there in her own right; and that from her *Lucy* the daughter, and *Harriet* the grand-daughter have derived their settlements.

4. That if the marriage be not void, and if *Cooper*, the wife of *Hazard*, did not gain a settlement in *Pittston* by residence,

as above supposed, still, her daughter *Lucy* though then a minor of only ten years of age, gained a settlement by her residence in *Pittston* at the time of its incorporation; and that her settlement is communicated to the pauper *Harriet* and to her children.

As to the *first* point, we do not perceive any facts which shew that *Dr. Gardiner* ever did, or intended to emancipate his slave. He was placed at *Gardinerstown* under the command of his master; was in part supported by him; and was left under the care of an agent, who was directed to require the services of the slave. In this situation he remained when *Dr. Gardiner* himself went to *Europe*. There can be no ground therefore, for presuming an emancipation.

But no manumission of a slave, however express and formal, could be availing, unless a bond of indemnity were given, according to the provisions of the Provincial *Stat.* 2 *Ann. c.* 2. *Ancient Charters, app. ch.* xvii. As no such bond of indemnity was given by *Dr. Gardiner* in the case of *Hazard*, the plaintiffs' first ground is not maintained.

As to the *second* point;—though it is said in the case of *Andover v. Canton* that slaves have no civil rights, except that of protection from cruelty, and can make no contracts for the acquisition or disposal of property without their masters' consent; still, they have, or at that time had the capacity to make the marriage contract: as minors have, though they are not bound, generally by their other contracts. And lest masters should, from improper motives, undertake to control their slaves in the article of marriage, it is provided by the Provincial *Stat.* 4 *Ann. c.* 6. cited by the defendants' counsel, that "no master shall "unreasonably deny marriage to his negro with one of the "same nation, any law, usage, or custom to the contrary notwithstanding." We can perceive no reason, therefore, for pronouncing the marriage void.

The *third* point is of more importance. Could the wife of a *slave* gain a settlement by residence in a town with her husband at the time of its incorporation, though her husband could not; he being the slave of a master living, and having his settlement, in another town; and of course being settled in the same town with his master?

In the case of *Shirley v. Watertown*, 3 *Mass.* 322. it was decided that a wife could not gain a settlement separate from her husband; and of course that a warning of the *husband only*, prevented his wife and child from gaining a settlement. In that case all the persons were free; and the plaintiffs' counsel contends that a distinction between that case and the present arises from that circumstance.

It is true it seems to be settled that a *slave* can neither acquire nor communicate a settlement, like a free man. But still, if the *wife* of a *slave* could gain a settlement in her own right, without her husband, it might lead to a separation of the husband and wife, as effectually as if the wife of a free man could gain a settlement distinct and separate from *her* husband; which, it is admitted cannot be done. In both cases the settlement of the husband might be in one town and that of the wife in another. The free husband could gain a settlement himself and the master of the slave husband would gain or retain one for him. Now as the reason assigned by the Court in the case of *Shirley v. Watertown*, why a wife cannot have a settlement separate from her husband, is, that it would lead to a separation of husband and wife; and the same reason exists with equal force in the present case; we consider the law in both cases to be the same. Therefore the wife of *Hazard could not and did not* gain a settlement in her own right, by her residence with her husband in the town of *Pittston* at the time of its incorporation.

The *last* point for consideration is, whether *Lucy*, the daughter of *Hazard*, being about *ten years old*, and residing with her parents in *Pittston* at the time of its incorporation, did, in virtue of that circumstance, gain a settlement in that town.

If a minor of ten years of age could gain a settlement in such circumstances, the youngest infant could, upon the same principle; because, so long as they remain a part of the family of their parents, there can be no difference with respect to the power of gaining a settlement, between an infant of one year old and one of twenty years. The same principle applies to *children* under these circumstances, as to a *wife;* they cannot have a settlement distinct from their father, nor she from her husband. The reason of the law is the same in both cases; and both these principles are recognized and settled in the case of *Shirley v. Watertown*.

It is true, the language of the second section of *Stat.* 1793. *c.* 34. in the *ninth* mode of gaining a settlement, is general. "*All* "*persons*, citizens as aforesaid, dwelling and having their homes "in any unincorporated place, at the time when the same shall "be incorporated into a town or district, shall thereby gain a "legal settlement therein." And in the cases of *Bath v. Bowdoin*, 4 *Mass.* 452. and *Buckfield v. Gorham*, 6 *Mass.* 445. the Court decided that such incorporation had the same effect before the Statute just mentioned. But notwithstanding the generality of the language—"*all persons*"—the clause must be understood with such limitations as the legislature must have intended;—and they seem to have intended that all persons legally capable of gaining a settlement in any *other* mode, should, *ipso facto*, gain one in the method mentioned in *that* article; but not, that a married woman, or a slave, should thus obtain a settlement.

Besides, the statute speaks of those *dwelling and having their homes* in such unincorporated place; implying persons, not under the control of others, but acting from their own volition. This distinction is particularly made by the Court in the case of *Somerset v. Dighton*, 12 *Mass.* 382. in giving a construction to the language of the Provincial *Stat.* 4 *W. & M. c.* 13. and the first section of *Stat.* 1789. *c.* 14. In the latter Statute it is enacted that "*all persons* who, before the 10th day of *April* 1767 re-"sided or dwelt within any town or district in the then Prov-"ince of the *Massachusetts Bay* for the space of one year, not "having been warned to depart therefrom, according to law, "shall be deemed and taken to be inhabitants of the same town "or district, to every intent and purpose." In that case, the pauper, being *eleven years old*, removed from *Dighton* in 1758, into that part of *Swansey* which is now *Somerset*, and had ever since remained there, not having been warned to depart therefrom. It was contended that the pauper had been *emancipated* by her mother; but the facts did not prove it; and therefore the Court decided that *such* a residence in *Swansey* did not gain a settlement. She was considered as belonging to her mother's family, and therefore not embraced in the general language of "*all persons*." In the case at bar, *Lucy* lived *in the family* with her parents at the time of the incorporation, which marked her

unequivocally as not emancipated, and so not capable of gaining a settlement.

If a child, under the age of twenty-one years, living in her father's family in a town one year before the 10th day of *April* 1767, without being warned to depart, could not gain a settlement in such town when the parent gained none; we do not perceive upon what principle *such* child could, in *such* circumstances, gain a settlement by living in a town at the time of its incorporation.

After a careful examination and review of the able arguments on both sides, we are all satisfied that the present action cannot be maintained.

Plaintiffs Nonsuit.

BALDWIN *v.* McCLINCH.

A person elected by a Methodist Society to be one of their local preachers, and ordained as a deacon of the Methodist Episcopal Church, is a *minister of the gospel* within the meaning of *Stat.* 1811. *c.* 6. § 4. though he have no authority to administer the sacrament of the communion.

It is sufficient if such minister be settled over any religious *society*, though it be composed of members resident in *several towns.*

It is not necessary that such society be under any legal obligation, as such, to pay him any fixed salary.

Trespass for taking and carrying away two cows, the property of the plaintiff. The defendant justified as collector of taxes for the town of *Fayette.*

It was admitted that the defendant was duly chosen and qualified as collector; and that in the voting of the money by the town—its assessment on the inhabitants—the commitment of the tax-bill to the collector—and his proceedings in the distress and sale—the forms of law were regularly observed. It was also admitted that the plaintiff was an inhabitant of *Fayette* when the taxes were voted, assessed, and collected.

But the plaintiff claimed exemption from taxation, as being a settled ordained minister of the gospel; and proved that in *June* 1814, he was ordained in *Durham*, in the county of *Cumberland*, as a *deacon in the Methodist Episcopal Church, having the*

right to administer all the ordinances except the Lord's supper:—that previous to that time he had preached four years to the *Livermore society*, so called, by licence for that purpose, and with a view to ordination; such previous licence and preaching being necessary for that purpose, according to the established rules of that church:—that he was recommended to the Bishop of the Methodist Episcopal Church for ordination, having before that time, been duly *elected by the Livermore society* as *one* of their *ministers*, or *local preachers*; there being several other *ordained deacons* who had been in like manner elected as local preachers over the same society, and who administered the ordinances of religion to them by turns, according to the usages of that church.

It appeared that the members of the *Livermore* society considered the plaintiff as ordained and settled over *their society*, and bound to preach and officiate as such, *to them*, until he should be regularly dismissed:—that ever since his ordination he had continued to discharge the duties of a local preacher to that society; and that they were *bound to regard him as such* in affairs of church discipline, and in religious meetings:—and that until he was regularly dismissed and recommended *by them*, he could not be admitted as a local preacher to any *other* society.

The plaintiff had no fixed salary, nor the possession of any temporalities of the church, it being the universal custom of the Methodist Episcopal Church to support their clergy by voluntary contributions.

The "*Livermore* society" was composed of persons living in *Livermore*, *Fayette* and some other adjacent towns; but there had been no preaching in *Fayette* for some years, the members resident in that town having attended public worship in the neighboring towns.

Upon this evidence *Wilde J.* who presided at the trial of the cause, instructed the jury that the plaintiff must be regarded in law as a settled ordained minister: and a verdict was thereupon taken for the plaintiff, subject to the decision of the Court upon the correctness of that opinion.

Bond, for the defendant.

The Statute of 1811. *c.* 6. made no other alteration in the

law applying to this case, than to place ministers of unincorporated societies on the same foundation with the ministers of regularly incorporated parishes, as to exemption from taxation. But to entitle themselves to this exemption they must now, as before, be ordained, and settled over a particular parish or society. *Ruggles v. Kimball*, 12 *Mass.* 337.

1. The plaintiff is not, within the meaning of the law, an *ordained* minister of the gospel. He has only limited powers, not being authorized to administer the sacraments. He has taken, as yet, but a *part* of the priestly office; the whole of which is exercised by clergy of a higher grade in the Methodist Church; and to *these* alone can the law apply.

2. But even if *ordained*, yet the plaintiff is not a *settled* minister, within the meaning of the law. He officiated, as a local preacher, in divers towns; but never preached in *Fayette*, the town in which he claims exemption. One principal ground of the exemption of a minister from the burden of public taxes, is, that the services he is supposed to render to the town in his clerical character are regarded as a fair equivalent. But it is absurd to suppose one man capable of rendering such equivalent to eleven towns; and yet over so many is the plaintiff *settled*, if settled at all. The clergy in this respect are to be classed with preceptors of academies and school-masters; and being exempted from taxes for the same reason, they ought to have a settlement as strictly local as those.

By *Stat.* 1799. *c.* 87. the town of *Fayette*, if of sufficient ability to support a protestant teacher of piety, is liable to an indictment, not having been supplied with any stated public ministry of religion within the town for several years. Upon this ground, therefore, the plaintiff cannot claim to be a settled minister; nor ought he, as such, to be exempt from paying taxes to a town which his ministerial character, whatever it may be, could not protect from indictment.

To constitute a settlement, there ought to be a contract of service and reward; or at least a legal right to the labours of the minister, vested in some society. But here is no legal obligation on the part of the plaintiff to officiate in any place, nor at any time. No society is entitled by law to his services, nor bound to pay him.

Emmons, in reply.

The *Stat.* 1811. *c.* 6. was the result of a strong excitement, felt in all parts of the Commonwealth; and its object was to place all denominations on a footing of perfect equality of privileges. It gives to ministers ordained at large, according to the usages of their own sect or communion, the same right of exemption as is given to ministers ordained over a particular town.

The first section of the Statute expressly recognizes as valid any ordination made in the forms of the sect, to which the party ordained may belong; even though the parochial charge extend to several religious societies. It regards the clerical character, rather than the extent of territory over which the minister may be called to preside. If he discharge the office of a clergyman, after the usages of his own sect, it is enough. It has been held that a person officiating as a reader in an Episcopal church, but not in orders, was a public teacher, within the constitution; *Sanger v. Inhabitants of the third parish in Roxbury*, 8 *Mass.* 265. *à fortiori* a person admitted a deacon of the Methodist Church, and having authority to preach, is to be regarded as *ordained*, within the meaning of the law.

The plaintiff is also a settled minister. He was elected by the *Livermore* society, was received by them as their stated pastor, and was bound to continue in that relation till regularly dismissed. If a contract for service or reward be necessary, here was one sufficiently explicit and binding;—a religious obligation voluntarily to furnish all needful support to their minister. Nor is it now requisite that he be settled over a particular town or society, the Statute of 1811 *c.* 6. *sec.* 4. having in this respect changed the law.

The ground of the exemption claimed is not merely the benefit conferred by the ministers of religion upon the people constantly attending upon their ministry; for this would entitle them to exemption from none but parish taxes; but it stands on the broader basis of public good; the whole community being deeply interested in the instruction of its members in the principles of virtue and religion.

[A doubt being suggested by the *Chief Justice* whether the Plaintiff had not misconceived his remedy, and whether trespass

would lie against the collector acting under a lawful warrant; the counsel agreed to waive that objection.]

MELLEN C. J. The plaintiff claims an exemption from taxation in the town of *Fayette*, as an ordained minister of the gospel, within the meaning of the fourth section of the act of 1811. *c.* 6. At the trial of the cause he obtained a verdict for damages, under the instructions stated in the report of the Judge before whom the trial was had. If those instructions were correct, judgment is to be entered on the verdict, otherwise it is to be set aside and a nonsuit entered.

The object, in part, which the legislature had in view, in enacting the law just mentioned, is expressed in the preamble, in the words of the Constitution. Under the provisions of the Constitution, before the act of 1800. *c.* 37. was passed, it was the duty of assessors in the several towns to assess the polls and estate of all the inhabitants, with some exceptions distinctly stated; and those who were thus assessed, and were really of a different sect or denomination from the minister for whose support they were assessed, were compelled to pay the sums assessed on them, and then draw the same out of the treasury, into which it had been paid. If repayment was refused, the teacher on whom the persons usually attended for religious instruction, could maintain an action against the town or parish, under whose authority the money had been assessed and collected.

With the view of avoiding this circuity of proceeding, and to enable those entitled *eventually* to exemption from taxation for the support of public worship, and public teachers, in any other religious corporation, to attain this exemption *at once*, and with as much facility as possible, the fifth section of that Statute was introduced. Other reasons also had influence on the legislature which enacted the law of 1811. *c.* 6.—The Supreme Judicial Court had decided in the case of *Barnes v. the first parish in Falmouth*, 6 *Mass.* 401. that none but the teacher or minister of an *incorporated* religious society could maintain an action of the kind above stated, to recover the taxes assessed upon and collected from those who usually attended on his instructions. The legislature considered the constitution as not intending, by

the word *teacher*, to exclude teachers of religious societies not incorporated. It will be seen that the Statute of 1811 makes provision for those who are *hearers* as well as *teachers*. The first section provides that all monies paid by any citizen for the support of public worship, shall, if he require it, be applied towards the support of the teacher of his own sect or denomination; whether he be a teacher of an incorporated or of an unincorporated religious society; if ordained and established according to the forms and usages of his own sect or denomination, although his parochial charge or duties may extend over other religious societies according to such forms and usages. The second section provides that when any person shall become a member of any religious society, whether incorporated or not, such membership shall be certified by a committee, and filed with the Clerk of the town where he resides; and such certificate shall exempt such person afterwards from *taxation* for the support of public worship in every other religious society. The third section authorizes unincorporated religious societies to take and hold and manage any property given or granted to them, and to sue for any right vesting in such society in virtue of such gift or grant. The fourth section, on which the plaintiff more particularly relies for the support of this action, provides that "all *ministers*, ordained agreeably to the usages of the sect "or denomination to which they severally belong, whether over "corporate or unincorporate society *or societies*, shall have the "same exemptions from taxation as are given to *stated* ordained "ministers of the gospel in the town or district, parish or plan-"tation, where they are settled; subject, however, to the same "restrictions and penalties."

It is contended in the *first* place, by the counsel for the defendant, that the plaintiff is not a minister of the gospel, within the meaning of the fourth section of the act; not having the power of administering *all* the ordinances. It appears that he was ordained in 1814 as a deacon in the Methodist Episcopal Church, over the *Livermore* society, having a right to administer all the ordinances except the Lord's supper;—and that he had the same powers as other ordained deacons, and preached and administered the ordinances according to the regulations of that Church. The Statute speaks of ministers ordained

according to the usages of the sect or denomination to which they belong; and grants the exemption to them, without any reference to their *powers*, except so far as is implied in a general reference to the usages peculiar to their sect or denomination. Besides, by comparing the first and fourth sections of the Statute, it would seem that the word "*teachers*" in the first, must be understood to mean the same as "*ministers*" in the fourth. In both sections they are only mentioned as *ordained;* and the whole act has an immediate relation to the constitution, which speaks of teachers of piety, religion, and morality. The first section gives certain exemptions to the hearers,—the fourth, to the teachers or ministers. We therefore consider this objection as no bar to the plaintiff's right of action.

In the *second* place it is objected that the plaintiff, though ordained, is not a settled minister; and of course not excepted from the operation of the general tax act. In reply it may be observed that although the tax act was passed since the Statute of 1811, we must presume that the legislature intended that the words used in the tax act should be understood in the manner in which they are used and understood in the act of 1811, when speaking of ministers exempted from taxation;—and not that they meant, in this dark and unusual manner, to change any of the provisions of the former general law.

But it is urged that he must be ordained and settled in a *particular parish*, to be entitled to the exemption claimed. It is true that by the Judge's report it appears that the plaintiff is ordained as minister or deacon over the *Livermore* society; that this society is composed of persons living in several contiguous towns; and that this society is not incorporated. But it further appears that the plaintiff was *elected* by this society as one of their ministers;—that he is considered as ordained and settled over it;—that he is so connected with its members, as that he is bound to preach to them, and administer the ordinances to them until he shall be regularly dismissed;—and that they are bound to regard him as their minister in affairs of discipline, and in their meetings and conferences.

But the argument of the defendant's counsel on this point is objectionable on another ground, as it goes to deny to the plaintiff a right given him in express terms by the act so often men-

tioned. By that Statute his parochial charge may extend over *several* religious *societies*; *à fortiori* it may extend over *one* society, though composed of members residing in *several towns;* provided the minister be ordained agreeably to the forms and usages of his own denomination, as the plaintiff was in the present case. The Statute surely was designed to give new rights to ministers of this description.

But it is further contended that the question presented to us for decision, has already been settled by the Supreme Judicial Court of *Massachusetts* in the case of *Ruggles v. Kimball*, 12 *Mass.* 337. and this decision has been pressed upon us. Wherever that Court has decided a question, we are disposed to respect its authority. But we believe it will be found, on examination, that the case cited differs essentially from the case at bar. The facts in that case are very few and simple. *Ruggles*, in 1810, had been ordained a Baptist Elder, or Evangelist, according to the usual Baptist form;—that is—he had been ordained *at large*, and on Sundays and other occasions continued the practice of preaching at several places, but not constantly at any one place. Upon these facts the Court decided that he could not maintain his action; considering him as not coming within the provisions of the act of 1811. He had no connection with any society whatever, corporate or unincorporate; and until he should form such connection, although ordained, he could have no claim to exemption from the payment of taxes. The Court observed in that case, that a minister, to be entitled to the exemption, must be ordained over some particular society, incorporated or unincorporated; but they have not intimated that such a society should be composed of members all resident within the limits of any particular town or parish. Indeed, this Statute takes no notice of the usual division into towns and parishes; but establishes divisions of its own, called religious societies, corporate or unincorporate; but no limits affecting corporations existing at the time of passing the act seem to have been contemplated by the legislature. Numberless instances may be found in the Statute-book, where religious societies have been incorporated by *special* acts, and the members composing them belong to several towns; and it seems equally reasonable that under the Statute

of 1811, which operates as a kind of general act of incorporation, for certain purposes, of the unincorporated religious societies in the State, such societies may be formed and exist, though composed of inhabitants of different towns.

Another objection is made against the claim of the plaintiff, and the case of *Ruggles v. Kimball* is relied upon for its support. In that case the Chief Justice, in delivering the opinion of the Court says that a minister, to be entitled to the benefit of the Statute of 1811, must not only be ordained over a particular society, incorporated or unincorporated, but such society must be *obligated to him* for his support, in some form or other. We must suppose the Chief Justice intended a *legal obligation*, which could be enforced in a Court of law. It is clear *this point* was not necessarily before the Court. The other facts in the case authorized and required such a decision as was given on the main question; and we are disposed to consider the obligation to support the minister as not the point adjudged; because nothing in the case called for this opinion. Besides, the Statute is profoundly silent on this head; leaving the amount and mode of compensation, if any be required, to be adjusted by the parties to be affected by it. The first section declares that "it *shall be sufficient* to entitle any such teacher,—to receive "the monies which have been assessed,—that he has been "*ordained* and *established*," &c. As the *Act* requires no more than *ordination* over a society according to usages, &c. to enable him to demand and receive sums which *have been assessed* on those who attend on his instructions; why should *we* require any thing more to enable him or his hearers to claim an *exemption* from assessment?

We do not perceive how an *unincorporated society*, *as such*, can obligate themselves to their minister in such a manner as to create a legal liability on their part. The legislature must have known this principle; and the construction contended for by the counsel for the defendant would lead us to conclusions which they never contemplated.

It is true the members of the society might contract in their *individual* capacities; but as societies are continually changing their members, by additions, by removals, or by death, no compensation thus secured could be certain or permanent;

certainly not more so than the support afforded by voluntary contribution, flowing from a sense of moral and religious duty.

With these views of the cause—of the facts before us—and of the Statute of 1811, *c.* 6. we are all of opinion that the plaintiff is legally entitled to the exemption which he claims; and therefore there must be

Judgment on the verdict.

BETHUM *v.* TURNER.

The Selectmen of a town have no authority by law to lay out a public landing, or place for the deposit of lumber.

A general usage, like that of depositing lumber on the banks of a river, not accompanied by a claim of title, or an intention of occupying the land to the exclusion of the owner's rights, cannot furnish any legal presumption of a grant.

THIS was an action of trespass *quare clausum fregit*, to which the general issue was pleaded, with a reservation of liberty to give any special matter in evidence. At the trial of this issue before WILDE J. at the last *September* term in this county, a verdict was taken for the plaintiff, for nominal damages, by consent of the parties, subject to the opinion of the whole Court upon the following facts which appeared in evidence.

The facts stated in the declaration were admitted to be true. But the defendant proved that at the time of the alleged trespass, and for more than thirty-five years previous, there had existed a public highway leading from *Dudley's* mills in *Pittston*, through and over the *locus in quo* which fronts on the eastern side of *Eastern* river:—that after entering upon the plaintiff's close by the highway, it had been customary for the inhabitants of *Pittston*, having occasion, to proceed with their teams and lumber from the highway to a place on the east bank of the river which had been used by the inhabitants during the above period, as a landing place for their boards and other lumber;—that there were no definite limits to the passage-way between the highway and the river; but that immediately after leaving the highway, it had been the practice of the inhabitants

to turn to the right or left, as most convenient to deposit their lumber on the bank of the river. No definite limits were proved to any particular landing place, but it appeared that it had been usual for the inhabitants to deposit their lumber four or five rods above the plaintiff's north line, along the front of his close, a distance of nearly forty rods. It was also proved that the *locus in quo* was owned by persons residing out of this State, until *May* 7, 1818, previous to which time it was neither improved nor fenced:—that nearly the whole front of the close had been used as a landing place more than twenty years previous to the alleged trespass:—that it had been customary for the inhabitants to turn off from the highway by various passages, and to deposit their lumber at various places, on the plaintiff's close:—and that there were four other places on the same great lot of which the plaintiff's close was a part, and within one mile of said close, which were denominated public landing places, and had been used as such for the last twenty years. It also appeared that the Selectmen of *Pittston*, by direction of the inhabitants, laid out a landing place on the plaintiff's close in the year 1804, which included the place where the lumber in question was deposited:—and that the path by which the defendant conveyed his lumber from the highway to the landing place was an ancient path or cart-way, having been used as such for more than thirty years past.

Bond, for the defendant, argued from the tenth article of the Declaration of rights in the Constitution of *Massachusetts*, that the plaintiff's land was lawfully appropriated by the Selectmen of *Pittston* in 1804, to a public use. The power, it is true, is not expressly given to Selectmen; but several statutes seem to contemplate its existence, and it is most beneficial to the public that such power should exist. Landing places for the deposit of lumber are as necessary as highways; and the right of conveying property on our numerous rivers will be rendered of little value, if the owner must become a trespasser as soon as he lands it on the bank.

[*Mellen C. J.* Suppose, for the sake of argument, that such a right exists in the Selectmen, yet this case does not find a legal exercise of the right, as the laying out was never accepted by the town.]

Bond. The case finds a public highway or landing-place *de facto;* and for such highways, when out of repair, the towns are indictable. The citizen has no means of knowing whether such places are legally appropriated to the public use or not, and therefore is not to be regarded as a trespasser for passing over them. *Aspenwall v. Brown*, 3 *D & E.* 265.

The easement claimed by the inhabitants of *Pittston* has been used by them thirty-five years. But the use of such a privilege twenty years supposes a grant; *Strout v. Berry*, 7 *Mass.* 385. 3 *Saund.* 175. *in notis. Holcroft v. Peale*, 1 *Bos. & Pul.* 400. *Daniel v. North*, 11 *East* 374. *Read v. Brookman*, 3 *D. & E.* 151. *Peake's Ev.* 326. and this in cases of private rights, where every party must be supposed to know the origin and extent of his title; *à fortiori* it ought to avail the public, who, finding an open highway, have a right to suppose it legally laid out.

It appears farther that the plaintiff's close was an uncultivated waste, of which, in order to maintain this action, he ought to have taken some visible possession, inconsistent with the continuance of the usage stated. *Bro. Trespass pl.* 365. *Roll. Abr.* 553. *Durand v. Child*, 2 *Bulstr.* 157. *The King v. Russell*, 6 *East* 427. The defendant was as justifiable in using the landing, as in travelling over any highway used freely by the public, but not legally laid out.

Allen, for the plaintiff.

The facts stated in the declaration being admitted to be true, the action is maintained unless the defendant has shown something to avoid it. He does not claim a private easement, used by himself only for more than twenty years; but asserts a privilege in the citizens at large. He does not claim a right of way by grant, nor by prescription, nor from necessity; but founds his right in the existence of a way *de facto*. If these facts were stated in a special plea, by what rule of law could it stand? The existence of such a way presupposes no length of duration. It may have been but for a day, and therefore not immemorial. Nor is it a sufficient justification for the defendant to say that many others have used the same landing place. Such a defence is in the nature of a custom, yet it is not alleged to be universal. *Wilkes v. Broadbent*, 1 *Wils.* 63.

If it may be argued, that the land having been so long dere-

lict, shews an intention in the owner to surrender it for public uses; yet the argument does not apply to the present case, the land never having been reclaimed from a state of nature.

There are modes provided by law for laying out highways where necessary; and the defendant has only to apply for one, and if expedient, it will be granted. But there is no law authorizing the laying out of a *landing place:* and if there were, the application to the selectmen negatives the idea of any prior grant or right by prescription; for if the inhabitants had the right of way already, they would not have applied for the laying out of a way *de novo.*

MELLEN C. J. delivered the opinion of the Court.

In this case a new trial is moved for, on two grounds;—1. that the *locus in quo* is a public landing, in virtue of a location of it for that purpose in the year 1804 by the Selectmen of the town of *Pittston:*—2. that after the lapse of thirty-five years, during which time it is said to have been actually used as a public landing, a grant ought to have been presumed to have been made of it for that purpose: in either of which cases it is contended that a verdict should have been returned in favour of the defendant.

As to the *first* point, we know of no authority given by law to the Selectmen of towns to lay out public landings. The constitution provides that private property may be taken for public purposes in certain cases, on payment of an equivalent therefor; but the mode of proceeding is to be designated by law. The legislature, and not a board of selectmen, or the inhabitants of a town, are to decide as to the cases in which this power is to be exerted, and the manner of using it. In certain cases the legislature has exercised this authority, as in the case of public highways, &c. But even if selectmen had the power contended for, as in the case of town roads, it does not appear that the location of the landing in the present case was ever *approved* by the town and accepted by them, as is necessary in the case of town ways.

As to the *second* ground of the motion, it is necessary to attend to some facts in the report of the Judge respecting the ownership of the *locus in quo*, the former owners of it, and the

situation of the adjoining lots. It appears that there is a highway leading to the river through and over the land in question; that there were no definite limits to the supposed public landing; that it was usual for any persons to deposit their lumber on the lot adjoining the plaintiff's for many rods on the bank of the river; that within one mile of the disputed close there were four other places denominated public landings and used as such; and that until a few months before the commencement of the present action the *locus in quo* was owned by persons not inhabitants of this State. Under these circumstances the land now belonging to the plaintiff was used as a public landing; and this user is urged as the foundation of a legal presumption that the place in question had formerly been granted as a public landing.

Numerous cases have been cited by the counsel for the defendant to establish this position, and shew that grants have been presumed after a user of little more than twenty years. With respect to these cases it may be remarked that they relate to claims of a private nature—of privileges or easements enjoyed by individuals—cases in which there was an exclusive enjoyment of the easement on the one side, and a knowledge of it and assent to it on the other.

In order to ascertain the nature of this kind of presumption, we must look to the reason of it. It is founded on *implied consent*. Thus if *A.* for a series of years permits *B.* to pass over his land, and makes no objection to it, it is presumed that this enjoyment is rightful; and if the user be continued a sufficient length of time, the legal presumption will be that *A. granted* the easement to *B.*—after which *A.* shall not disturb *B.* in this enjoyment.

Generally speaking, the cases in the books relating to this subject cannot be safely applied to lands a great portion of which has never been improved,—where proprietors reside at a distance;—where settlements are made on small portions of large lots, without the knowledge of the owners, or any claim of title on the part of the settler;—or where the usages of the country are such as to collect people near the margin of a river for the more easy transportation or more ready sale of their lumber;—and where the persons thus resorting have no inten-

tion to appropriate the banks of the river to any other than a temporary use, on account of the facilities thus furnished.

In *England*, where the decisions alluded to were made, the lands generally are under improvement, under the inspection of some landlord or his agent, where any encroachments on the land, or improper appropriation of it, must be known. There, if undue indulgence is shewn, and these encroachments acquiesced in, there is room for presumptions of consent, or of a grant, to be allowed against those who will not guard their estates and protect them from legal conclusions affecting their rights. But the manner in which the shore of the river, in the present case, has been used, shews the intention of those who have used it for the purposes which have been mentioned. Several landings of the same kind being thus used, we cannot consider the user as any claim of right, or as intended to prejudice the rights of the true owner. For as a man ought not to be considered as disseized until he has the means of knowing that a person has unlawfully entered into his lands and claims to hold them adversely; so no man can be considered as a disseizor, unless by election, whose possession was not really adversary. And for the same reason a usage like that of depositing lumber on the banks of a river, when the usage is general, and not accompanied by a claim of title, or an intention of appropriating the soil to the exclusion of the owner's rights, cannot furnish any legal ground for the presumption of a grant.

It has been urged that the plaintiff cannot maintain this action, not being in possession. But it is clear that the plaintiff has never been disseized by any of the acts stated in the report. To constitute such a disseizin, the land must have been inclosed by a fence, by persons claiming to hold the land adversely to the owner.

On the whole, we are all satisfied that for the reasons which have been stated the action is well maintained, and that there must be

Judgment on the verdict.

RICKER & AL. *v.* KELLY & AL.

The owner of land having, for valuable consideration, given license to another by parol to build a bridge on his land, an action of trespass will lie against him for taking away the bridge without the consent of him who erected it.

If there be a parol agreement for a right of way, or other interest in land, and any acts be done in pursuance thereof which are prejudicial to the party performing them, and are in part execution of the contract, the agreement is valid notwithstanding the Statute of frauds.

Trespass for cutting down and destroying part of a wooden bridge, the property of the plaintiffs. The defendants, in justification, pleaded that the bridge was erected on the land of *Kelly*, without his license and against his will, and that he removed it from his close as he lawfully might do.

The plaintiffs replied that on a certain day, in consideration of their promise to perform certain work and labour, &c. for *Kelly*, he gave them license and authority to erect a bridge on his land, and to have a right of way over the same to the bridge;—that by virtue of said license they erected the bridge; and that afterwards they performed the work and labour, &c. which they had promised him, and which he accepted in full discharge of their promise.

To this replication the defendants demurred in law; because the plaintiffs had not set forth any legal conveyance of title to them to build said bridge on the land of *Kelly*, nor to enter upon or pass over the land for any other purpose; and because it did not appear that said license was in writing, nor how long it was to continue in force.

Rice, in support of the demurrer.

The replication does not shew a license *in writing;* without which the license is void by *Stat.* 1783. *c.* 37.

The plaintiffs claim an interest in land, but they do not show *how* they obtained it; which they ought to have done, that the Court might see whether it be good or not. *Cook v. Stearns*, 11 *Mass.* 533. *Pomfret v. Ricroft*, 1 *Saund.* 321.

The action stands as if brought by the defendants against the plaintiffs for erecting the bridge without permission from the owners of the soil. It is by persons who have unlawfully built a bridge on another's land, against the owner of the soil,

for pulling it down; and *such* an action, it will be readily agreed, cannot be supported.

Boutelle, for the plaintiffs.

The plaintiffs having erected the bridge at their own expense, the materials were their own, and they might remove them at their pleasure. *Wells v. Banister*, 4 *Mass.* 514. *Taylor v. Townsend*, 8 *Mass.* 411.

The license given by the defendants was not revocable after the bridge was erected. It stands on the ground of a part execution. *Davenport v. Mason*, 15 *Mass.* 92. Upon this authority the plaintiffs are justified in maintaining the bridge against the defendants. Having permitted its erection, they cannot now recall the license, it being already acted upon. The case at bar is as if the defendants had sued the plaintiffs for a nuisance, and is identical, in its principles, with *Winter v. Brockwell*, 8 *East* 308. *Vid. Cook v. Stearns*, 11 *Mass.* 533. *Crosby v. Wadsworth*, 6 *East* 602. *Harrison v. Parker*, 6 *East* 154.

MELLEN C. J. It appears by the pleadings in this case, that the *locus in quo* belongs to the defendants;—that sometime before the trespass, they had, for a valuable consideration paid to them, licensed the plaintiffs, by parol, to enter into said close and erect the part of the bridge which the defendants removed.—It does not appear that this license was ever revoked, if revocable; nor that any notice was given to the plaintiffs to remove the bridge, prior to the removal of it by the defendants.—Under these circumstances, is the action maintainable?

The justice of the plaintiffs' claim for indemnity is very apparent.—But it is contended that no rights were conveyed to the plaintiffs by the license of the defendants because it was not *in writing*; that it is nothing more than a *lease at will*, according to the Statute of conveyancing. *Stat.* 1783. *c.* 37.—To this it may be replied, that a lease at will is good, until the will is determined; and the lessee's rights remain until that time.—This objection therefore cannot avail the defendants, because it does not appear that such lease was determined by the lessors before the removal of the bridge.

Again it is contended by the defendants that as the plaintiffs claim an *interest in the close*, within the meaning of the Statute

of frauds; and the proof of *this interest* not being in writing, the permission of the defendants to the plaintiffs to enter upon the close and build said bridge, and enjoy a right of way over the close, to the said bridge, is void and ineffectual. In support of this objection, the counsel for the defendants has cited the case of *Cook v. Stearns*, 11 *Mass.* 533. We consider that case as materially different from the case at bar. In the case of *Cook v. Stearns* the defendant claimed a permanent interest in the plaintiff's close, and a right to maintain the bank, dam, &c. and at any time to enter on the land to make necessary repairs;—and *such* a right the Court decided could not pass without deed or writing. In the present case the plaintiffs placed their own materials in the form of part of a bridge, on the defendants' land by their express consent; and if a right of way over the close to the bridge did not pass by parol, still the defendants had no right to seize and carry away the plaintiffs' property and destroy its value. As well might the owner of a ship-yard, permit another to build a ship in it: and when the ship was on the stocks, cut it in pieces and carry it away with impunity.—Again, in *Cook v. Stearns*, the license relied upon by the defendant was never given by *the plaintiff Cook*, but by the *former owners* of the land; and it did not appear that *Cook* ever assented to and ratified such license, or ever knew of it. In the present case the license was given by the *very persons* who have violated it, to the prejudice of the plaintiffs.—So far, *at least*, as regards the *building of the bridge*, the authority given by a license is good and sufficient, according to the decision in that case, and the authorities there cited. The license stated in the replication was to do a particular act; it was not intended to give a right to hold the defendants' land,—to enter upon it at all times, and exercise dominion over it. Such an interest the Statute requires should be passed by some writing. In *Cook v. Stearns*, the defendant claimed an *easement* without any deed or writing, and without prescription.—Such a claim the law does not sanction.—Not so in the present case.

But if the case before us should not be considered as presenting the question whether the defendants' permission is, in in technical language, a *license* and operating as such; still, the counsel for the plaintiffs contends that it may operate as con-

veying a right to build the bridge, and a *right of way;* and is not within the Statute of frauds; inasmuch as the contract set forth in the replication was *executed on both parts:*—the consideration was received, and the bridge was built.—In support of this principle, the cases of *Davenport v. Mason*, and *Winter v. Brockwell* have been cited; and they support the principle advanced.—In fact there are numerous decisions establishing the distinction between agreements *executory* and agreements *executed* in whole or in part.—The Statute of frauds is applicable to the *former*, but not to the *latter.*

We are all of opinion that the replication is good and sufficient and that there must be

Judgment for the plaintiffs.

See *acc. Buckmaster v. Harrop*, 7 *Ves. jr.* 341. *Gunter v. Halsey*, *Ambl.* 586. *Earl of Aylesford's case*, 2 *Str.* 783. *Pyke v. Williams*, 2 *Vern.* 455. *Lacon v. Mertins*, 3 *Atk.* 1. *Wetmore v. White*, 2 *Caines' Ca.* 87.

ALDRICH *v.* ALBEE & AL.

If there be a promise in writing to deliver specific articles at a day certain, and no place be mentioned in the note, the creditor has the right of appointing the place.

A plea of tender of specific articles must state that they were kept ready until the uttermost convenient time of the day of payment.

If a promise be in the alternative to deliver one article at one place, *or* another at another place, at the election of the debtor, it seems he ought to give the creditor seasonable notice of his election.

Assumpsit on a promissory note made by the defendants, for forty-seven dollars, payable to the plaintiff in English hay, hemlock bark, *or* good shingles. The defendants pleaded in bar, "that the plaintiff, at the time when said note was made and delivered, named and appointed the defendants' barn in *Malta* as the place for the delivery of the hay, and the public road between their house and —— *Herriman's* in said *Malta* as the place for the delivery of the bark: and that on the day when said note became due and payable, they had, in their said barn, good English hay of a sufficient value to pay said

note, and were ready at their said barn in *Malta* to deliver and pay to said *Aldrich* the sum mentioned in said note with interest then due, in hay, according to the tenor and effect of said note; but neither the said *Aldrich* nor any other person for him were present to receive the same; and this," &c.

To this plea the plaintiff demurs in law; alleging for cause, that the defendants by their plea attempt to contradict or vary a written contract, perfect and intelligible by itself, by means of parol evidence;—that it is not in the plea alleged that the barn and road were the places agreed to by the parties as the places of delivery;—nor that the defendants had any quantity of hay or bark at said barn or in said road, ready to be delivered in payment of said note, at the uttermost convenient time of the day of payment;—nor that the defendants ever gave notice to the plaintiff which of the articles mentioned in said note they would deliver in payment of the same, nor at what place they would deliver them, nor that they were requested by the plaintiff to appoint such place;—nor that any bark or shingles were ever at any place ready to be delivered to the plaintiff in payment of said note.

Sprague, in support of the demurrer.

1. The place of delivery not being named in the note, by the parties, the law has fixed it for them; and any parol agreement made at the same time, and varying the legal construction, is inadmissible. *Robbins v. Luce*, 4 *Mass.* 474. A subsequent appointment might be good, though by parol; but not if made at the execution of the note. *Thompson v. Ketcham*, 8 *Johns.* 189. Yet here, the proof went to shew the original agreement to be different from the writing.

2. The articles said to be tendered, are not set forth, nor described either in quantity or kind. If taken away by a stranger, the plaintiff could not identify them in replevin, nor describe them in trover. They were never severed from any other of the defendant's goods. *Newton v. Galbraith*, 5 *Johns.* 119. *Peake's Ev.* 258. *note W.*

3. If it was the right of the plaintiff to elect in what kind of the goods he would receive his pay, the defendants should have had enough of *each* kind there ready. But if the right of election was with the defendants, they ought to have given notice to

the plaintiff what kind of goods they would deliver, that he might come prepared to receive them. *Rogers v. Van Hoesen*, 12 *Johns.* 221. Here the defendants claim to have had a choice of two places; and at the day of payment the plaintiff could not know at what place, or in what goods the payment would be made. *Hallings v. Conant*, *Cro. El.* 517. 5 *Rep.* 22. *b. S. C. Am. Prec. Decl.* 82.

4. The plea does not allege a tender at the uttermost convenient time, nor at any time of the day. And if an issue were taken on the plea, it would be enough for the defendants to show that the goods were at the place a single moment, in the morning. *D. of Rutland v. Batty*, 2 *Stra.* 777. *Co. Lit.* 202. *a.* 206. *b. Peake's Ev.* 253. *Lancashire v. Killingworth*, 2 *Salk.* 623. 1 *Com. Rep.* 116. *Ld. Raym.* 686. *Wade's case*, 5 *Rep.* 113. *Com. Dig. Pleader*, 2 *W.* 49. *Pinser v. Proud*, *Cro. Jac.* 423.

R. Williams, for defendants.

The legal construction of the contract is, that the defendants were bound to pay at such place as the plaintiff should reasonably appoint. It was the plaintiff's duty to fix the place, and this is all we have attempted to shew in the plea. No matter when the plaintiff made the appointment, if he made it at all. Having designated the place, it was his duty to be present at the time of payment, to receive the goods. His absence all the day, is equivalent to a tender and refusal. He might have replied his being there, ready to receive the articles tendered; but failing to do this, it was enough for the defendants to say that they had the hay there on the day. *Bac. Abr. Tender, H.* 2. *Huish v. Philips*, *Cro. El.* 755. *Co. Lit.* 207. *a.*

MELLEN C. J. In the decision of this cause we do not think it necessary to examine particularly all the causes of demurrer which have been assigned by the plaintiff; as we consider one of them as presenting a decisive objection to the plea in bar.

No place being specified in the promissory note declared upon, it was the right of the plaintiff to name the place for delivery of the articles promised. *Co. Lit.* 210. 3 *Leon.* 260.

And he might appoint the place immediately after the note

was signed, as well as at any other time; because such appointment and notice were for the benefit of the promissors.

Proof of this appointment, therefore, is no alteration of the contract, within the meaning of the cases cited upon this point, by the counsel for the plaintiff. It is only the addition of a fact, to enable the promissors more conveniently to perform the contract.

We are inclined to the opinion that the plea is defective, as it contains no averment that the defendants, before the day appointed for payment of the note, gave notice to the plaintiff which of the articles mentioned they elected to deliver;—because, as different places were appointed for the delivery of the articles, it would seem reasonable that the plaintiff should know in season at which of the appointed places he should attend to receive them. A case in *Cro. El.* 517. appears to support this principle; but the authorities relative to this point do not appear very clear or precise. We therefore do not give any express opinion on this cause of demurrer, nor profess to decide the cause upon it.

The principal and fatal defect in the plea is, that it does not appear that the defendants had the articles at the respective places appointed and ready to be delivered, at the uttermost convenient time of that day. On this point the authorities are numerous and decisive. *Duke of Rutland v. Hudson*, 1 *Ld. Raym.* 686. 2 *Stra.* 777. *Wade's case*, 5 *Rep.* 115. 1 *Plowd.* 70. 3 *Shep. Abr.* 2. 3. 4. 5. 2 *Chitty's Pleading* 499.

The rule in pleading is this;—the party must allege in his plea those facts which shew that he has done all in his power to perform his contract. If on the day and at the place appointed, the debtor meet his creditor, at any hour of the day, he may tender the money or article which he promised;—and if the creditor refuse it, he can do no more than keep the money ready, and bring it into Court when sued. If the creditor do not attend at the time and place appointed, the debtor must still do all in his power to perform the contract; he must have the money or articles promised in readiness to be paid or delivered to the creditor; and if he do not appear, the debtor must remain there *during the day*, in person or by agent, and to the uttermost convenient time of the day, that is, till after sun-

set, waiting for the creditor; and having done this, he can do no more except retain the money for the purposes before mentioned.

Such is the distinction between the cases where the creditor appears, and where he does not appear, at the time and place appointed. And this distinction runs through all the cases on the subject. It is founded in plain common sense, and substantial justice, as the rules and principles of special pleading generally are.

In the plea under consideration, it is not stated that the articles promised were procured by the defendant, and kept ready at the time and places appointed, until the uttermost convenient time of the day of payment, and on this account the plea is defective. It may be that the defendant had the articles at the time and places at *sunrise*, and not *afterwards;* and still the plea would be true;—but the plaintiff had the *whole* day to receive the articles in, and of course the defendant ought to have been ready the whole day to deliver them.

It is said that a different opinion is given by the Court in the case of *Robbins v. Luce*, 4 *Mass.* 474. But upon examination it will be found that the two cases are not precisely similar. In that case, the demurrer to the plea in bar was general;—here it is special. There the defendant averred that "*always* since giving the note, and particularly on the 20th day of *September* (the day appointed) he had, and still has the barrels ready at his house, to deliver," &c. This averment amounts to a declaration that he had the barrels *all the day* appointed. It is important to notice the observation of the Court. They say that if the defendant had gone on, and averred that the plaintiff was *not there to receive them*, the plea, if true, would be a good bar, and well pleaded. But they considered the want of that averment as a *matter of form*, and not being assigned as a cause of demurrer, they were inclined to sanction the plea as containing a *substantial fact*, viz: the possession of the barrels at the time and place appointed, and a readiness to deliver them; and this fact being admitted, was allowed as a bar to the action.

On the whole, we are all satisfied that, for the reasons stated, the

Plea in bar is insufficient.

JEWETT & AL. *v.* THE INHABITANTS OF THE COUNTY OF SOMERSET.

The Court of Sessions may lawfully order the location of a county road, to be at the expense of the petitioners. *Semble.*

The law will not imply a promise, against the protestation of him who is attempted to be charged with it.

THE Legislature of *Massachusetts*, in order to open a communication between the District of *Maine* and the British province of *Lower Canada*, passed a Resolve *June* 12, 1817, directing the Commissioners for the sale and settlement of the public lands in the District of *Maine* forthwith to *cause to be opened and completed* a suitable road from the lands known by the name of *Bingham's Kennebec purchase* to *Canada* line; and to take such measures as they might find necessary to obtain the location of a road, by the county Courts, *over Bingham's purchase*, if the proprietors of that tract should neglect to do it; and authorizing the Governor to draw his warrant on the treasury for the money necessary for completing this object, not exceeding a limited sum.

In compliance with this resolve, the Commissioners preferred their petition to the Court of Sessions for the county of *Somerset*, at *August* term 1817, praying for the location of a county road over *Bingham's purchase;* and after due notice to all persons interested, the Court adjudged it to be of common convenience and necessity that the road prayed for should be laid out and established as a public highway, and appointed the plaintiffs a committee to lay it out accordingly; "*the service to be performed at the expense of the petitioners.*" The plaintiffs, having laid out the road agreeably to the commission issued for that purpose, made report of their doings, which the Court accepted and ordered to be recorded. And the petitioners refusing to pay the expense of locating the road, on the ground that it was a public service, and chargeable to the county, this action was brought to recover the amount of those expenses; and the foregoing facts were agreed in a case stated for the opinion of the Court.

The cause was argued at this term by *Boutelle* for the plaintiffs, and *Rice* and *Allen* for the defendants.

Arguments for the plaintiffs.

1. The expenses of laying out county roads are chargeable to the county, because these expenses necessarily arise in the discharge of a duty imposed by law on the counties. The *Stat.* 4 *W. & M. ch.* 12, authorized the Courts of Sessions to assess money on the several towns for the repair of bridges, &c. and all other proper county charges: And by *Stat.* 1781. *c.* 22, it is made the *duty* of the Justices to make an estimate of monies sufficient to meet those expenses which have "been usually considered as county charges:"—and such had been the expenses of laying out highways, for more than a century.

Upon an application to the Court of Sessions for a new county road, the Court is bound by law to determine on the expediency of granting the petition. If the way be adjudged of common convenience and necessity, it is the duty of the Court to carry this adjudication into effect, by appointing commissioners to lay out the way. To the time of this adjudication, the expenses of the petition are usually borne by the petitioners: after this, they cease to be parties,—have no voice in the appointment of the commissioners,—no interest distinct from the rest of the public. If then the commissioners are appointed by the Court, to perform a service for the public, and not for the sole benefit of private persons, it is reasonable that they be remunerated out of the public purse. *Stat.* 1787. *c.* 67. *sec.* 4. *proviso.*

2. As to the *condition.* No Court can lawfully render a conditional judgment, but by express warrant of law. Here the condition imposed on the petitioners, that they should pay the expense, is void, and the adjudication good for the residue. Nothing is to be presumed in favour of inferior jurisdictions. 4 *Mass.* 641. 497.

3. No action can be maintained against the Commissioners for the sale of Eastern lands, because they acted in the character of public agents. *Hodgdon v. Dexter*, 1 *Cranch* 345.

4. If it be objected that the commissioners laid out the road *on the credit of the petitioners*, it is answered, 1. that the Court not being authorized to annex that condition to the warrant, it

is to be presumed that the commissioners did not rely on it:— and 2. that if they did rely on it, yet it being void because illegal, they may now well resort to the county; on the principle that one, assuming to be the agent of another, and making a contract in the name, and on the credit of his pretended principal, is liable personally on the contract, if he were not clothed with authority to bind his principal. *Sumner v. Williams*, 8 *Mass.* 189.

For the defendants, it was contended that there was nothing in the facts agreed on, from which the law could imply a promise. An implication of that kind would not only be unsupported by the facts in the case, but would be directly repugnant to the condition expressed in the judgment of the Court of Sessions. This condition, which is by no means uncommon, was not only a part of the judgment, but was recited in the commission which issued to the plaintiffs, and under which they performed the service in question.

It is not for the plaintiffs, then, to urge that they performed that service upon the faith or expectation that they should be paid by the defendants, since the contrary was expressly stated in the commission under which they acted. *Whiting v. Sullivan*, 7 *Mass.* 107.

But the defendants cannot be liable in this case, however they might be, under other circumstances. The purpose for which the road was made is very evident from the *Resolve* of *June* 12, 1817. It was to open a communication between the *Commonwealth of Massachusetts* and the *Province of Lower Canada;* and the agents of *Massachusetts* were directed, in their public capacities, to take suitable measures to carry this purpose into effect, and, if necessary, to solicit the aid of the Court of Sessions. That aid was solicited, in their public character as agents, and was granted upon such terms as the agents were content to accept, and as the plaintiffs in this case were content to act under. The condition being recited in the commission, the plaintiffs must necessarily know that the service they were about to perform was to be performed at the expense of the petitioners, who were the authorized agents of the *Commonwealth of Massachusetts*, at whose instance and direction and for whose benefit the road was located, and upon whose sense of justice the plaintiffs may doubtless very safely repose.

MELLEN C. J. This is an action of a new impression, and we are not aware of any legal principles on which it can be supported.

It is well known that the Legislature of *Massachusetts* considered that a public road through a part of the county of *Somerset*, to the line dividing this State from *Canada*, would be of vast importance to this section of the country;—that it was an object demanding public patronage and public exertion;—that the contemplated extent and expense of such a road would be such as to render it improper that that county should be burthened with this expense. Under these impressions a resolve was passed authorizing the location and completion of the road, under the authority of certain commissioners,—money was granted them for the purposes then in view,—and the commissioners were directed to apply to the Court of Sessions for the interposition of its powers. With these instructions the commissioners applied to the Court of Sessions for the county of *Somerset* to lay out the intended road. The Court adjudged it expedient that the road should be laid out *at the expense of the petitioners*. A committee was appointed to lay it out,—and to prevent all mistakes and improper conclusions, it was expressly stated, in the warrant to the committee, that they were to perform the service assigned them at the expense of the petitioners. The return was accepted,—the petitioners refused to pay the expense,—and this action is brought against the county for the purpose of compelling payment from their treasury.

This action is resisted on several grounds; but we do not think it necessary to examine all of them, nor to inquire whether an action will or will not lie against the petitioners;—nor whether the Court of Sessions have or have not power to assess money to defray the expense of laying out roads;—nor whether such Court is *bound* to lay out county roads. The single question is, whether this action can be maintained;—and we are all very clear that it cannot. No *express* promise is pretended to have been made. Does the law *imply* one? In a declaration upon a promise on a consideration which is *past*, it is always necessary to allege that the act performed, or sum paid, was performed or paid at the request of the defendant. 1 *Chitty* 297. *Livingston v. Rogers*, 1 *Caines* 583. But in the

present case all implication is rebutted by the adjudication, and the warrant;—in both of which it is declared that the *petitioners*—not the county—are to defray the expense. Instead of a request, there is an express refusal; and notice of this refusal given to the plaintiffs before they entered on the service. They were under no obligation to proceed, until their fees and expenses were paid them; and if they have imprudently given credit, it is not the fault of the county. The principle of the case of *Whiting v. Sullivan* is sound and familiar. The law will not imply a promise, against the protestation of him who is attempted to be charged with it.

No eventual loss will accrue to the plaintiffs. The Legislature of *Massachusetts* will unquestionably indemnify them, according to their original intention.

Plaintiffs nonsuit.

THE INHABITANTS OF HALLOWELL *v.* THE INHABITANTS OF BOWDOINHAM.

The annexation of part of one town to an adjoining town, has the same effect as the incorporation of a new town, so far as regards the legal settlement of the persons resident on the territory thus annexed.

But such annexation does not transfer the settlement of any persons except those who *actually dwell and have their homes* upon the territory set off, at the time of its separation.

Assumpsit for the support of a pauper. In a case stated for the opinion of the Court, the parties agreed that *Betsey Watson*, the pauper, and her father, had their lawful settlement in *Litchfield* prior to and on the seventeenth day of *June* 1817; at which time, by an act of the Legislature, a portion of the territory of *Litchfield*, [including the farm on which the pauper's father had dwelt until within a *few months previous* to that day,] together with the inhabitants thereon, was annexed to *Bowdoinham*;—that said *Betsey* lived on said farm in her father's family, about nineteen years, and removed therefrom about three years before the annexation;—and that said farm was the last dwelling place and home of the pauper or her father.

Bond, for the plaintiffs.

By the *Stat.* 1817. *c.* 48. a part of *Litchfield* was taken off, and annexed to *Bowdoinham*. By this division and annexation *Litchfield* lost all jurisdiction over this territory, and could not afterwards derive any advantage from the land or from the services of the inhabitants who then lived or might afterwards live on it. And by the same act *Bowdoinham* acquired authority over the soil thus annexed, and the right to assess taxes upon the land and upon its occupants. *Bowdoinham* having thus succeeded *Litchfield* in the jurisdiction over the land, succeeds also to its burdens and liabilities. *Groton v. Shirley*, 7 *Mass.* 156.

The farm on which the pauper and her father had resided for at least nineteen years before the division of *Litchfield*, and on which they had their last dwelling place and home, was in the territory annexed to *Bowdoinham*. The *Stat.* 1793. *c.* 34. in the tenth mode of gaining a settlement, provides that on the division of towns, every person having a legal settlement therein, but removed therefrom at the time of such division, and not having gained a legal settlement elsewhere, shall have his legal settlement in that town wherein his former dwelling place or home shall happen to fall upon such division. The dwelling place here intended, is that from which the pauper removed out of the town. *Salem v. Hamilton*, 4 *Mass.* 679. Before the *Stat.* 1793. upon the division of a town, and the incorporation of a part of its inhabitants into a new town, the obligation to support the poor then out of its limits remained unaltered. The law in this respect is now, by that statute, for good reasons, materially changed. *Windham v. Portland*, 4 *Mass.* 384. The *tenth* mode of acquiring a settlement very clearly comprises all cases where, upon a division of towns, a new town is formed; and where, upon such division, a part of a town is annexed to another existing town, and no new corporation is created. The principal design of this provision was to afford a remedy for the inconveniences experienced under the former law, by which the residue of a town, after the most extensive losses of territory and inhabitants by annexations to other towns, was still obliged to support all paupers returned, provided they were absent when the territory on which they had last dwelt was an-

nexed to another town. The *Stat.* 1793. establishes the settlement of the paupers in the town in which the place of their last residence happens to fall; and thus the town acquiring new territory, is made to sustain the burdens equitably incident to the acquisition.

R. Williams, for the defendants.

The settlement of the pauper was not transferred to *Bowdoinham* by the annexation, because she did not reside on the territory set off to that town. The statute has reference chiefly to persons, not to soil. It takes from *Litchfield* those persons who then actually resided on a certain portion of its territory, and transfers them, with the land, to *Bowdoinham*. This annexation, as it respects the legal settlement of the persons resident on the territory transferred, has the same effect as the creation of a new town. *Groton v. Shirley*, 7 *Mass.* 156. *Westbrook v. Franklin*, 15 *Mass.* 254.

Mellen C. J. We consider this case as virtually settled by the case of *Groton v. Shirley*, 7 *Mass.* 156. It is provided in the *second* section of *Stat.* 1793. *c.* 34. that "upon *division of* "*towns or districts* every person having a legal settlement there- "in, but being *removed therefrom* at the time of such division, "and not having gained a settlement elsewhere, shall have his "legal settlement in *that town or district* wherein his former "dwelling place or home shall happen to fall upon such divi- "sion; and when any new town or district shall be incorporat- "ed, composed of *a part of one or more old incorporated towns* or "districts, all persons legally settled in the town or towns, dis- "trict or districts, of which such new town or district is so "composed, and who shall *actually dwell and have their homes* "within the bounds of such new town or district *at the time of* "*its incorporation*, shall thereby gain legal settlements in such "*new town* or district."

The question in this case is, whether the *annexation* of a part of *Litchfield* to *Bowdoinham* by *Stat.* 1817. *c.* 48. is to be considered as a *division of a town*, or, in its effects, like the creation of a *new town*, so far as regards the settlement of paupers under the act of 1793. As the pauper in question, at the time of the annexation, was *removed* from *Litchfield*; if the annexation is to be considered as analogous to the creation of a *new*

town, then her settlement is *not* in *Bowdoinham*; if as the *division of a town*, then her settlement *is* in *Bowdoinham*.

The first paragraph of the section before quoted seems to have in view such a division of a town as shall produce *two* or *more* towns, composed of the same territory which formed the *original* town. The language is, "he shall have his settlement in *that*" new "town," &c. Again, the very term "annexation" seems to imply, and to be intended to imply something entirely different from "division." But without pursuing the inquiry in this manner, and reasoning as to the import of the terms used in the statute, we are satisfied with resting on the authority of the cases which have been adjudged as to the point in question.

In the case of *Groton v. Shirley* the counsel for the defendants attempted to distinguish the *annexation* of a *part* of one town to another, from the case of a *new* town formed out of *parcels* of two or more existing towns. But the Court decided that there was no ground for such distinction; and Chief Justice *Parsons* said that the annexation of *Stow-leg* (being part of *Stow*) to *Shirley*, must, for the purposes of the statute, be considered as having the same effect as the making of a new town out of *Shirley* and *Stow*. By this expression the Chief Justice may and perhaps should be understood to mean that *such* an annexation, must, for the purposes of the statute, have the same effect as the creation of a new town out of *Stow-leg* and a part of *Shirley*, as mentioned in the foregoing extract from the Statute of 1793.

In the case of *Great Barrington v. Lancaster*, 14 *Mass.* 253. the same principle is recognized, and the same definition is given to the term "annexation,"—and the same effects are produced by it. Chief Justice *Parker*, delivering the opinion of the Court, observes, "The pauper's original settlement was in *Lancaster*. *On the annexation* of that part of *Lancaster where the father dwelt*, to *Shrewsbury*, his settlement was transferred to the *latter* town."

Upon this view of the subject,—annexation operating like the *creation* of a *new* town as already explained, and not as a division of an *old* one;—and the pauper not dwelling and having her home on the annexed part at the time of the annexation, her settlement is not in *Bowdoinham*, as the plaintiffs have contended. *Plaintiffs nonsuit.*

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE COUNTIES OF

HANCOCK, WASHINGTON AND PENOBSCOT.

OCTOBER TERM,

1820.

SMALL, PLAINTIFF IN ERROR *v.* SWAIN.

The original jurisdiction of the Court of Common Pleas over the action of replevin of goods of the value of more than four pounds, given by *Stat.* 1789. *ch.* 26. is not affected by the *Stat.* 1807. *ch.* 123. enlarging the jurisdiction of Justices of the Peace.

The jurisdiction of the Court of Common Pleas in replevin is regulated by the real value of the goods, not by such price as the plaintiff may choose to affix to them :—and if an excessive value be alleged in the writ for the purpose of giving jurisdiction, the defendant may avail himself of it in abatement.

The *Statutes* 1783. *ch.* 42. and 1797. *ch.* 21. cannot be understood to give Justices of the Peace any jurisdiction in actions of replevin.

Error, to reverse a judgment rendered in favour of the original plaintiff, now defendant in error.

The action was replevin of divers beasts, said to have been unlawfully taken by the defendant. The issue being on the property of the plaintiff, it was found against him as to all but one cow, valued in the writ at twenty dollars; and for the taking of which the jury assessed damages at ten cents; and judgment was thereupon rendered for the plaintiff, with full costs.

Several errors were assigned, but the cause was determined upon the first alone;—which was, that "full costs were allowed the plaintiff in replevin, whereas the property replevied and recovered was of the value of twenty dollars only." Plea, *in nullo est erratum.*

Abbot, for the plaintiff in error.

The *Stat.* 1807. *c.* 123. gives to Justices of the Peace original jurisdiction of all civil actions, where the sum demanded as debt or damage does not exceed twenty dollars; and only one quarter part as much cost as damage is allowed, whenever less than that sum is recovered in actions originally commenced in the Circuit Court of Common Pleas. The object of the Statute was to compel parties, at their peril as to costs, to resort to the inferior tribunals for the decision of all petty disputes. In the present case, the only beast belonging to the plaintiff was valued in his writ at twenty dollars; and the action thus falling within the description of suits cognizable by a Justice of the Peace, it ought to have been brought there, or the costs reduced to a quarter part of the damages recovered.

Wilson, for the defendant in error.

Mellen C. J. By the *Stat.* 1783. *c.* 42. which is explained by *Stat.* 1797. *c.* 21. jurisdiction was given to Justices of the Peace, of all manner of debts, trespasses and other matters wherein the title to real estate is not in question, where the *ad damnum*, or damage, was not laid or stated to exceed four pounds: and the Justice was authorized to give judgment "for such damages as he shall find the plaintiff to have sustained," not exceeding eighty shillings, and to award execution thereon in the forms of law. This Statute cannot be understood to give Justices of the Peace any jurisdiction in actions of replevin, in which the principal object of the suit is restitution of the specific chattels taken; because it authorizes no judgment for such return, but only for damages, which, in these cases, are merely incidental to the matter in dispute.

Afterwards the Statute of 1789. *c.* 26. gave to Justices of the Peace original jurisdiction of the action of replevin, when brought by the owner of cattle taken damage feasant, or impounded to obtain a forfeiture supposed to have been incurred for their going at large in violation of law. And by the same Statute, replevin for goods or chattels taken, distrained, or attached, and claimed by a third person, in case they "are of the *value* of more than four pounds," is made originally cognizable by the Court of Common Pleas. This jurisdiction is not, in our

apprehension, affected by the *Stat.* 1807. *c.* 123. which only enlarges the powers granted to Justices of the Peace by the Statute of 1783. so far as they were limited by the *ad damnum;* extending the sum from four pounds to twenty dollars; but embracing no new description of action. Of course the Circuit Court of Common Pleas has original jurisdiction of this class of actions of replevin, if the value of the goods exceed four pounds, though it may be less than twenty dollars; and there is therefore no error, in this respect, in the record before us. Indeed upon the principle assumed by the plaintiff in error, the judgment ought not to be reversed; for the value of the beast, as stated in the writ, together with the damages assessed by the jury, amount to more than twenty dollars. He ought not, in this stage of the proceedings, to object that this value is fictitious. The jurisdiction of the Circuit Court of Common Pleas in replevin is regulated by the *value of the goods*,—not by such price, true or false, as parties may choose to affix to them;—and if an excessive value had been alleged in the writ, for the purpose of giving jurisdiction to the Court, that fact should have been shewn in abatement.

Judgment affirmed.

ULMER *v.* LELAND.

The essential foundation of an action of the case for malicious prosecution, is that the plaintiff has been prosecuted without probable cause.

Probable cause, in general, may be understood to be such conduct on the part of the accused, as may induce the Court to infer that the prosecution was undertaken from public motives.

Whether the circumstances relied on to prove the existence of probable cause be true or not, is a fact to be found by the jury:—but whether, if found to be true, they amount to probable cause, is a question of law.

Trespass on the case, for a malicious prosecution before a military court of inquiry holden at *Portland*, on certain charges preferred by the defendant and two other officers of the 34th regiment of United States' infantry, against the plaintiff, who was Colonel of a regiment of volunteers stationed at *Eastport*, and in 1812, and 1813, was commandant of all the troops sta-

tioned at the latter place. Of these charges the plaintiff had been honourably acquitted.

At the trial of this action at the sittings after *June* term, 1818, before *Parker C. J.* the jury were instructed that if they should believe that the prosecution before the military court was preferred from motives of malice or revenge, still, if they were satisfied that the defendant had probable cause for believing that the charges were true, their verdict ought to be in his favour: —and whether probable cause was fully made out or not, was left to the jury to decide, as a matter of evidence. A verdict being thereupon returned against the defendant, he moved for a new trial, alleging that the jury ought to have been instructed, as a matter of law, whether the facts proved amounted to probable cause or not;—and that the verdict was against evidence.

Leland, in support of the motion.

There are two points on which the action for malicious prosecution is founded;—1. want of probable cause,—2. malice. If either of these be wanting, the action cannot be maintained. The latter point is the exclusive province of the jury; and in the present action they have found it to exist. But the former belongs, partially at least, to the Court; and is never to be left at large to the jury, as it was in this case.

Probable cause is a reasonable ground of suspicion against the party accused, arising from existing facts, from which the Court may infer that the prosecution was undertaken from public motives. *Johnston v. Sutton*, 1 *D. & E.* 529. *Manns v. Dupont De Nemours*, 4 *Hall's Law Journal No.* 1. *p.* 102. *Smith v. McDonald*, 3 *Esp.* 7. *Paine v. Rochester*, *Cro. El.* 871. *Reynolds v. Kennedy*, 1 *Wils.* 232. *Whitney v. Peckham*, 15 *Mass.* 243. *Cox v. Winall*, *Cro. Jac.* 193. *Yelv.* 105. *Rol. Abr.* 113. cited in *Gilb. Ca.* 188.

And what shall be deemed probable cause, is a matter upon which the Court, not the jury, shall decide. *Buller N. P.* 14. *Selwyn N. P.* 943. 1 *Wils.* 232. 1 *Camp.* 207. *note.* *Johnston v. Sutton*, 1 *D. & E.* 545. 4 *Hall's Law Journal* 102.

If the prosecution were ever so maliciously carried on, yet if there be probable cause, this action does not lie. 6 *Mod.* 25. 73. *Gilb. Ca.* 185. 3 *Bl. Com.* 126. 2 *Munf.* 10. *Selwyn N. P.* 943. 4 *Burr.* 1974. It is an action not to be favoured, be-

ing against the policy of the law. 1 *Salk.* 15. *Saville v. Roberts*, 2 *Esp. N. P.* 536. 1 *D. & E.* 493.

Here *Leland* examined the facts as contained in the Judge's report, contending that they fully substantiated sufficient probable cause for the prosecution, and that the jury ought to have been so instructed by the Court.

Abbot, for the plaintiff.

It is not for the defendant to say that he had probable cause, because he suspected the charges to be true. He ought to have known the fact, with certainty. It appears that he was an officer in the plaintiff's own regiment at the time when the transactions complained of took place;—and his situation gave him the means of certainly knowing whether the plaintiff was guilty of any military misconduct or not. Besides, such military prosecutions of a superior officer by a subaltern are not to be tolerated. They are contrary to public military policy, and subversive of the discipline of the army. *Johnston v. Sutton*, 1 *D. & E.* 529. And the authorities cited, relating to prosecutions at common law, are inapplicable to the case at bar.

But admitting this action to stand on the same foundation and to be governed by the same principles with actions for malicious prosecution generally; yet it is observable that here are no facts stated in the declaration from which probable cause might or might not appear. It was a matter of evidence to come out upon the trial;—and the Court must now be considered as having been fully satisfied that the evidence did not amount to probable cause, since they left it generally to the jury.

Weston J. after stating the facts, delivered the opinion of the Court as follows:

Whether this action can be sustained for a prosecution of this kind, is a question not now presented to the consideration of the Court.

The essential foundation of an action of this nature is, that a legal prosecution has been resorted to and pursued *without probable cause*. From the want of probable cause, malice is implied; but the former is not implied from the latter. If probable cause do exist, however malicious may have been the motive

in which the prosecution originated, this action cannot be sustained.

Probable cause in general may be understood to be such conduct on the part of the accused, as may induce the Court to infer that the prosecution was undertaken from public motives.

It is of importance that the rights of the citizen should be protected; but public policy also requires that prosecutions for offences should not be discouraged. Hence there has been a liberality of construction on the question of probable cause, in favour of the prosecutor, wherever he could be fairly understood to have been influenced by a presumption of guilt on the part of the accused. Thus where an inferior tribunal, first regularly resorted to, has convicted, probable cause has been decided to have been sufficiently established, although a Court of appellate jurisdiction has acquitted the accused, upon the most satisfactory demonstration of his innocence. 1 *Wils.* 232. 15 *Mass.* 243. And even where the evidence in support of the prosecution has been such as to induce the jury to pause, it has been ruled to be probable cause. *Smith v. McDonald*, 3 *Esp.* 7.

Whether probable cause exist or not, is a question involving law and fact. Whether the circumstances relied on to prove its existence are true or not, is a matter of fact;—but if found to be true, whether they amount to probable cause is a question of law. 1 *D. & E.* 493.

The defendant moves for a new trial upon the ground that the jury were not properly instructed by the Judge, who presided at the trial, as to the law of the case; and because the verdict is against evidence.

Upon the second point we give no opinion.

From the report of the Judge it appears that certain facts were proved, and that there was testimony in support of other facts; but there is nothing in the case from which it can be inferred that the latter were or were not found to be true. The facts being thus imperfectly exhibited, we have it not in our power to determine with precision the question of probable cause as applicable to this case; and upon this point therefore it is at this time neither necessary nor proper that we should intimate any opinion. It further appears from the report that the defendant insisted at the trial that the jury ought to be instructed, as a mat-

ter of law, that probable cause was fully made out. We have no doubt, from the principles and authorities which govern cases of this kind, that it was the duty of the Judge to have stated his opinion distinctly to the jury whether probable cause was or was not established, if the evidence introduced by the defendant proved, to their satisfaction, the truth of the facts upon which he relied. It does not appear, however, that the Judge gave any instructions to the jury upon the question of law involved in the case; but it does appear from his report, that he left it to them to decide as a matter of evidence. This omission on the part of the Judge is assigned by the defendant as the principal ground upon which to support his motion for a new trial; and we are satisfied that for this reason the motion ought to prevail.

New trial granted.

Note.—The Chief Justice gave no opinion in this case, having formerly been of counsel with the plaintiff.

NELSON, JUDGE, &c. *v.* JAQUES & AL.

No administrator is to be considered as refusing or neglecting to account, under oath, for such property of the intestate as he has received, within the meaning of *Stat.* 1785. *ch.* 55. until he has been cited by the Probate Court for that purpose.

Whether an action ought to be brought on an administration-bond, without the express permission of the Judge of Probate, *quære.*

If an administrator, under license for that purpose, sell real estate of the intestate to a certain amount, for payment of debts, and afterwards *refuse to receive* the purchase-money and to execute deeds of the land sold, this is mal-administration; to which, however, his administration-bond, given under *Stat.* 1783. *ch.* 36. [*Revised Statutes ch.* 51. *sec.* 7.] does not extend; but the remedy is by petition to the Judge of Probate for his removal.

Debt on a bond, conditioned for the faithful administration of the estate of *Joshua Woodman.* To the general plea of performance, the plaintiff replies that the former administrator on said *Woodman's* estate represented the same as insolvent;—that property to the value of 4000 dollars came to the hands of the

defendant as assets;—that pursuant to license duly obtained, authorizing him to sell the real estate of said *Woodman* to the amount of one thousand and twenty-five dollars, he did, after giving due notice, on the 15th day of *January* 1817, sell several parcels of real estate at auction to sundry persons, to that amount;—that the purchasers offered to pay and tendered to the defendant the amount of the purchase-money, and requested deeds of the parcels so purchased;—*which money, so tendered,* the defendant *refused to receive*, and to give deeds of said lands, and to render any account thereof to the Judge of Probate. To this replication the defendant demurred generally, and the plaintiff joined in demurrer.

Abbot, in support of the demurrer.

Before a creditor can sustain an action on a Probate bond, he must have the amount of his claim ascertained by a judgment of Court, and make a demand thereof on the administrator; or, if the estate be represented insolvent, he must produce a copy of the order of distribution, and shew a demand of his particular dividend, unless the administrator has neglected, for more than six months after the commissioners have made their report to the Judge of Probate, to render his account.—But the replication in this case neither alleges that the claim of the creditor, for whose benefit the suit is brought, has been ascertained by a judgment, nor that it has been allowed by commissioners; and it is therefore insufficient.

But waiving, for argument's sake, this objection, and admitting that the land was actually sold, and the money paid to the administrator, yet he is not liable upon the general administration-bond for the proceeds of such property, the faithful administration of *this* fund being secured by another bond specially given on the taking of license to sell the land. This question is considered as settled in favour of the defendant by the cases of *Henshaw v. Blood*, 1 *Mass.* 35. and *Freeman v. Anderson*, 11 *Mass.* 190.

Orr and *Hale*, for the plaintiff.

Real estate, in the hands of the administrator of an insolvent estate, after it is struck off at auction, is, by a fair construction of the statute, to be regarded as assets.

It will not be denied, that after real estate is sold and conveyed, and the commissioners have returned a schedule of debts to the Judge of Probate, the proceeds of the real and personal estate, of which he is about to decree a distribution, form in fact but *one fund.* The whole becomes assets upon the settlement of the administrator's account, at farthest; and an action lies upon the bond, for the dividend decreed by the Judge.

It is then for the defendent to show wherein this case differs, in principle, from the case where the money has been received and admitted in the administrator's account.

By the *Stat.* 1784. *ch.* 2. it is made the duty of the Judge to order the residue of the estate of an insolvent, both real and personal, to be distributed among the creditors. Such decree is a sequestration of the estate for that purpose. It is not for the defendant to object that in this case no such decree has been made, after having actually sold the estate, and neglected to account for the proceeds. The tender of the purchase-money is so far payment, as to render him liable for the amount tendered; and his refusal is bad faith towards the purchaser, and a fraud on the creditors. The decree being thus prevented by his own wrong, he is not to be suffered to profit by it.

Nor can the objection be maintained, that the proceeds of the sales of real estate are secured by another bond, under *Stat.* 1783. *ch.* 32.; for no bond is necessary, by that statute, except where license is obtained to sell the *whole* real estate, when by a partial sale the residue would be injured; and it is required only for the security of the *surplus* in the hands of the administrator after payment of the debts. The reason why the legislature required no bond upon license to sell only enough for payment of debts, was because the administration-bond, originally given, was considered as extending to all transactions of the administrator, except to such surplus proceeds of real estate as might be remaining in his hands.

Mellen C. J. delivered the opinion of the Court as follows.

The question is, whether the replication contains a sufficient assignment of any breach of the condition of the bond. The facts disclosed in the replication, all which are admitted by the demurrer, present a case in some degree uncommon,

and authorize us to draw conclusions much to the disadvantage of the administrator. For we can perceive no good reason nor apology for his nonacceptance of the purchase-money which was tendered to him, nor for his refusal to execute deeds of the land he had sold. His conduct seems to exhibit him as purposely and unfairly delaying the settlement of the estate, with a view to withhold and enjoy the property, at the expense of the creditors. But our inquiry, at present, is not so much into his motives of action, as into the propriety of the remedy pursued against him.

The counsel for the defendants has contended that the administrator was under no legal obligation to inventory the *real* estate of *Woodman*, according to the condition of the bond; nor in any manner to account for it; and has cited the cases of *Freeman v. Anderson* and *Henshaw v. Blood.* In the former of these cases the question was, whether the administrator had subjected himself to the forfeiture of the penalty of his bond, by *neglecting to procure license to sell the real estate* of the deceased for payment of his debts; and the Court decided that he had not. That case was different from this; yet the Court proceeded upon the principle that the administration-bond had no relation to the *real estate* of the deceased. In the latter case the question was, whether by the condition of the bond, the administrator was bound to *inventory the real estate;* and they decided that he was not. Chief Justice *Dana*, in giving his opinion, stated that a case had been decided in *Middlesex*, in which an administrator had sold the real estate of the intestate, and *actually received the money;* yet the Court held that the administrator was not holden, *on his bond*, to account for it.

Without making any observation, at present, upon this last opinion, it may be remarked that the case at bar presents a different question; because the purchase-money has not been received by *Jaques* the administrator.

The counsel for the plaintiff does not deny the principle of law, that the condition of an administration-bond does not extend to real estate; but he contends that after the administrator has sold it by proper authority, and *received its value*, this sum becomes assets in his hands, for which he is responsible on his bond. But here again we are met by the fact stated by the

plaintiff himself, that *Jaques has never received* the price of the lands sold, nor any part of it. Admitting his principle to be correct, the facts do not bring his case within its operation.

But the counsel has further urged that the administrator is as much answerable on his bond for the purchase-money which he *refused* to receive, as if he had actually *received* it; because no man shall be permitted to take advantage of his own wrong. It is true, generally speaking, that a tender and refusal of a sum of money, give to him who made the tender the same rights and advantages which he would acquire by actual payment; but these rights and advantages belong to him *only*;—third persons cannot avail themselves of them. Should any one of the purchasers bring his action against *Jaques* for not executing and delivering to him a deed of the lands he purchased, a tender of the price of the land and a refusal would avail him as much as payment, in maintaining his action. As it is admitted that the penalty of an administration-bond is not forfeited by his neglecting or refusing to procure a license to sell the estate; why should it be, by his neglecting or refusing to give deeds after he has sold? In both cases the estate remains as it was;—the fee has not been transferred;—no rights have been changed;—the prejudice to creditors is as great in the one case as in the other;—and improper motives may operate in both to produce the delay.

But is there no remedy in such case? Shall an administrator, by refusing to complete the sale of the real estate, delay and defraud the creditors with impunity,—his sureties not being liable on the bond, and he destitute of property? The answer to these questions as given by the Chief Justice in pronouncing the opinion of the Court in *Wildrage v. Patterson*, 15 *Mass.* 148. "Admit that the administration-bond, furnishes "none, and that an action of waste would be fruitless, still there "is no defect of remedy; for on a representation of a refusal to "administer such estate, and satisfactory proof thereof to "the Judge of Probate, he has the authority, and would be "bound to execute it, to remove such administrator and ap-"point another, even one of the creditors, whose interest as "well as duty it would be to do justice in this respect."

But if it were true that no remedy existed in the case, it

might prove the necessity of legislative interference, but would not authorize us to sustain an action, unless upon legal principles.

If, however, we adopt the principle advanced, and consider the purchase-money, as, in legal contemplation, received by the administrator; another question arises as to the plaintiff's right to maintain this action. We presume that the decision of the Court, in the case of *Middlesex* before mentioned, was founded not only upon the language in the condition of the bond, which language relates exclusively to personal estate; but also on the *intention* of the law, and of the parties to the bond; that is, that the fidelity of the administrator in collecting or appropriating the personal estate of the deceased, according to law, was all which the obligors undertook to insure, or were considered as insuring. This construction seems to be supported by the circumstance that previous to the sale of lands by an administrator, under license of Court to sell the *whole*, where the sale of a part would be prejudicial, he is required to give a *new bond* to account for and legally apply the proceeds of such sale; and also by the *usage* which has prevailed, to require such bond in *all* cases. By this it would seem that the bond of administration was not contemplated as furnishing any security as to the *proceeds of the sale of real estate*, any more than as to its *inventory* or *disposal*.

In aid of this construction it is worthy of particular observation that the *Stat.* 1817. *ch.* 190, relating to Probate Courts, contains a new form of a bond of administration, which provides expressly for the inventory of *real* estate, as well as personal; and binds the administrator or executor and their sureties for the faithful administration of *all* the estate of the deceased. In all cases it is the duty of the Court, in the construction of a contract, to ascertain the meaning and intention of the parties, and give it effect as far as is consistent with legal principles.

But there is another view of the cause which presents, to our minds, a fatal objection to the action. The suit is brought for the benefit of a creditor, who has proved his claim before commissioners, the estate having been represented insolvent. No decree of distribution has ever been passed. If there had been, the dividend of this creditor must have been demanded

of the administrator before commencement of the action. The plaintiff then attempts to support the action on the ground that the administrator has refused or neglected to account upon oath for the property he has received, belonging to the intestate. By *Stat.* 1786. *c.* 55. regulating the proceedings in suits on Probate-bonds, it is provided that "when the administrator shall "refuse or neglect to account, upon oath, for such property of "the intestate as he has received, *especially if he has been cited* "*by the Probate Court for that purpose*, execution shall be award- "ed against him for the full value of the personal property of "the deceased that has come to his hands, without any dis- "count, abatement, or allowance for charges and expenses of "administration, or *debts paid.*" This provision is highly penal, and, according to the settled rule, should receive a strict construction; and no man should be considered as liable to its severity, unless he *has been cited by the Probate Court* to account, upon oath; and until then, he should not be deemed to have *refused* or *neglected*, within the true intent and meaning of the Statute. Unless this construction be given, every executor and administrator may be exposed, not only to unreasonable expense, but to heavy, and in some instances immense losses. According to the known mode of conducting the settlement of an estate, the executor or administrator usually settles several successive accounts on oath in the Probate office; and this is done because property is coming into his hands and possession continually, by collection of debts or otherwise; and it may be frequently necessary also to settle an account, for the purpose of obtaining license to sell all or a part of the real estate; in which case another account must be rendered, on oath, after the sale shall have been made. But if the doctrine contended for by the counsel for the plaintiff be correct, then it follows that if any property shall come to the hands and possession of the executor or administrator, as by the sale of land, or the receipt of a debt, he is at once liable, without any notice, to a suit on his administration-bond, because he had not accounted on oath for the amount thus collected; and this although he had no intention to misappropriate any portion of the estate;— execution, moreover, is to issue against him for the whole amount of the personal property which has come to his hands,

and he must actually lose all the debts which he has paid. Can such be the law? We think not.

It may be urged that no action of the kind just mentioned will lie on the administration-bond, unless the administrator has *unreasonably* refused or neglected to account on oath for the property received; and that the circumstances of each case must be examined, to ascertain whether the delay or refusal was unreasonable or not. We admit that the refusal or neglect must be *unreasonable*, to authorize such suit; but we apprehend that this is a fact more immediately within the province of the Judge of Probate, who must know the situation of the estate; and that the statute has therefore wisely provided that he should originate the inquiry as to the reason of his neglect or refusal, and by his *citation* summon the administrator before him to perform his duty. If the administrator disobey this citation, or can give no satisfactory explanations, and render no account, then the Judge may authorize a suit on the bond. There is no statute expressly requiring such permission of the Judge of Probate; though a Probate-bond given in the Supreme Court of Probate cannot be put in suit without permission of the Court. But there appears to be the same reason in both cases. Some Judges of Probate do require it; and it is desirable, in all cases, that such permission be obtained.

We have thus far endeavoured to support this construction of the statute by arguments drawn from its reasonableness and expediency, and its tendency to preserve distinct the respective powers and jurisdiction of the Probate Courts and Courts of Common law. But some cases have also been decided in *Massachusetts*, which recognize the same doctrine and mode of proceeding. In the case of the *Selectmen of Boston v. Boylston*, 4 *Mass.* 318. the powers of Probate Courts as to disputed questions, and the propriety of exercising those powers, were considered. *Boylston*, the administrator, had been cited by the Judge of Probate to account, on oath, for certain property, and had refused. Judge *Jackson*, then of counsel for *Boylston*, observed in argument, and the reasoning seems to be sanctioned by the Court, that "all the Probate Court can do, is to cite the "party to render an inventory or account. If he comes in vol- "untarily, and renders a satisfactory inventory or account, it

" is well;—but if he will not come in, or, having come in, will " not satisfy the Probate Court, the jurisdiction of this latter " is at an end. It will record his neglect or refusal, and furnish " the injured party with the means to pursue him on his bond." The Court, it is true, do not say their jurisdiction is at an end when an account is exhibited by the administrator; but they may then proceed to require an allowance of assets not inventoried or credited; and in this one point they do not sanction the arguments of the counsel; but when no account is rendered, they admit the law to be as stated in the argument. In that case the Court refused to proceed, and authorized a suit on the administration-bond, the administrator having been already cited as before mentioned. In 11 *Mass.* 337. we find the action *Dawes*, Judge, &c. *v. Boylston*, on the administration-bond, in which there is the general plea of performance. The replication alleges monies received by the defendant, as executor of the will of *Moses Gill*, and not administered,—" and that the defendant had not exhibited any account thereof *although thereunto cited.*" Chief Justice *Sewall*, in the close of a long and able argument observes,—" Upon the whole, the defendant's " refusal to acknowledge assets in his hands as administrator, " and to account for the effects received and collected upon the " judgment recovered by him against the executor of the last " will of *Moses Gill* deceased, *confessed by the pleadings*, is a for- " feiture of the bond declared on." Here, the same pleadings by which the receipt of the money was acknowledged, shewed that the defendant had been *duly cited* to render an account, and had refused. In both cases the citation to *Boylston*, and his *refusal* thereupon to account, were the foundation of the proceedings.

Upon this view of the cause before us, considered in all its relations, we are of opinion that upon legal principles it cannot be maintained, and that the

Replication is insufficient.

PERKINS, APPELLANT FROM A DECREE OF THE JUDGE OF PROBATE
v.
LITTLE & AL. RESPONDENTS.

If a widow waive the provision made for her in the will of her husband, she may have her dower assigned in his real estate; but she can receive no part of his personal estate, if he has disposed of it by will.

THE appellant was the widow of *Joseph Perkins* deceased; who, by his last will, devised to her one third part of his real estate, to hold during the term of her life; and after providing for payment of his debts, and giving certain legacies to his children, bequeathed to his wife one third part of the *residue* of his personal estate. The widow waived the provision thus made for her by the will, and claimed her dower at law; which was assigned to her out of the real estate; whereupon she filed a petition to the Judge of Probate, praying him to order and decree to her "such portion of the personal estate of the de-"ceased as, according to her rank and condition in society, "and by the law of the State, she was entitled to." The Judge of Probate, considering her legal claims to be already satisfied by the assignment, decreed that she take nothing by her petition; from which decree she appealed to this Court, alleging, for cause of appeal, that by law she was entitled also to one third part of the personal estate.

Orr, for the appellant.

By the *Stat.* 1783. *c.* 24. *sec.* 8. "the widow, in all cases, may "waive the provision made for her in the will of her deceased "husband, and claim her dower, and have the same assigned "her, *in the same manner as though her husband had died intestate.*" Had he died intestate, in the present case, the widow would have been entitled to one third part of the *personal* estate forever, by *Stat.* 1805. *c.* 90. *sec.* 2. in addition to her life estate in one third part of the lands. And this part she claims upon her waiver of the provision made for her in the will.

Abbot, for the respondents.

It is provided by *Stat.* 1783. *c.* 24. *sec.* 8. that "the widow, "in all cases, may waive the *provision* made for her in the will

"of her husband, and claim her *dower*, and have the same as-"signed to her in the same manner as though her husband had "died intestate." The question then is upon the meaning of the term "*dower*." It is defined to be that portion of the lands and tenements of the husband, to which the wife is entitled for her life, after his decease. *Co. Lit.* 30. *b.* The *Stat.* 1783. *c.* 39. recognizes this definition. It is there made the duty of the heir "to *assign* to the widow of the deceased her *dower*, or one third "part of and in all the lands, tenements and hereditaments "whereof by law she is or may be dowable." And it is observable that the terms *assign*, and *dower*, are used as well in the former as in the latter statute.

At common law the widow took no share of the personal estate; and the only rational construction to be given to the Statute of 1783. *c.* 24. is, that the legislature intended to give the widow the liberty of choice between such provision as the husband might make in the will, and her life estate in one third part of his lands;—she might rely on the kindness of the husband, or of the common law. And this construction, it is understood, has been judicially given in several cases which formerly occurred in *Norfolk* and in *Barnstable*.

Orr. The principles of the common law respecting dower were modified and enlarged in this country more than a century since, by *Stat.* 4. *W. & M. c.* 2. which gave a portion of the personal, as well as real estate, to the widow. Dower, means nothing more nor less than that portion of the husband's estate, to which the widow is, by law, entitled. By the common law that portion was in lands only. But the legislature, intending to protect the widow against the caprice or the tyranny of the husband, enlarged it to include a third part of the personal estate also. The statutes have, in this respect, given to the widow and the creditor an equality of rights, by putting it out of the power of the husband to defraud either of them. His estate is chargeable with the payment of his debts, and with a certain provision for his widow. He may, by will, set apart too small a proportion of his estate for these objects;—and they may acquiesce—or either of them may appeal to the justice of the law, rather than to that of the husband. The refusal of the widow to accept the provision made for her in the will, defeats

it, *pro tanto.* It is merely an election to consider her husband as dying intestate, so far as her own rights are concerned.

MELLEN C. J. The language of the appellant's application to the Judge of Probate is rather too vague and uncertain. The petition is, that "he would order and decree to her such "portion of the personal estate aforesaid, as, according to her "condition and rank in Society, and by the *laws* of the Com- "monwealth, she is entitled to." If the application be considered as made to the discretion of the Judge, for an *allowance* out of the personal estate, suited to the appellant's condition and rank in life, then the appeal certainly cannot avail her; because no document or fact is before us whereon to proceed, or whence to draw any conclusions in support of her claim. We have no inventory of the estate, and no amount of debts or legacies. In *this* view of the cause we could do nothing except affirm the decree of the Judge of Probate.

But it is said that the application was intended as a claim of her *legal rights*, and a petition that the Judge would decree to her that portion of the personal estate which *by law* belonged to her; and in this view, and on these principles the cause has been argued. The question then is, what are the rights of a widow in and to the estate of a deceased husband, when she has waived the provision he made for her in his last will and testament?

The language of *Stat.* 1783. *c.* 24. *sec.* 8. in relation to this subject is this;—"also the widow in all cases may waive the "provision made for her in the will of her deceased husband, "and claim her *dower*, and have the same assigned to her in "the same manner as though her husband had died intestate; "in which case she shall receive no benefit from such provis- "ion, unless it appears by the will plainly the testator's inten- "tion to be in addition to her dower."

What then is *dower?* The counsel for the appellant admits that according to the common law definition of the term, it has relation to *real* estate only; but he contends that we are, in this State, to give the term a more liberal construction; and that it now legally means *all* the property and estate which belongs to the widow of an intestate husband, whether real or personal.

Such, certainly, is not the import of the term in *England;* nor has its meaning been changed since the Statute of distributions was enacted in that country, by which a widow's rights in the estate of an intestate husband are the same as those secured to her by our own laws. We do not perceive any authority for thus changing the meaning of a well known term, and the nature of a well known estate, and adopting a construction leading to uncertainty and confusion of principles.

The argument of the appellant's counsel seems to be founded on the idea that in *all* cases the widow is entitled, not only to her dower in the *real estate*, but in what may be considered, in his view of the subject, as dower in the *personal* estate of the deceased husband. The *Statute* of 1805. *c.* 90. *sec.* 2. contains an answer to this argument, in the following words—" that when " any person shall die possessed of any personal estate, or of " any right or interest therein, *not lawfully disposed of by last* " *will*,—if the intestate shall leave a widow and issue, the widow " shall be entitled to *one third part* of the residue; or if there " be no issue, to *one half part* thereof." The *legal rights* of the widow in and to the personal estate of the husband, exist, therefore, only in cases of intestacy; and so do not exist in the present instance.

The whole doctrine upon this subject is founded upon the well-known principle that the right of dower can never be taken away or impaired by any act of the husband:—it is beyond his control, and is guarded by the law with care and vigilance. But the personal estate of the husband is under his absolute dominion. He may dispose of it as he pleases, in his life time, wisely or foolishly; and he may by his will bequeath it according to his own judgment or caprice, without the consent of the wife, and in opposition to her will. On this principle of law the provisions of our statutes are founded. If, therefore, a widow is not satisfied with such provision as her husband has been pleased to make for her, she may at once reject it, and resort to her *legal* rights; and demand whatever she could have been entitled to, at *all events*, and in defiance of all his acts,—that is,—her *dower* in his estate, over which he had no control. This is all which the act of 1783 allows her to claim under such circumstances.

It has been contended by the counsel for the appellant, that inasmuch as the widow in this case waived the provision in the will which the testator had made for her, as to the *personal* estate given her, and which she refused, he must be considered as having died *intestate;* and that therefore she comes within the provisions of the act of 1805. In reply, it may be observed that the widow's right to the personal estate is confined to those cases where the husband *has not disposed of the same by will.* In the present case he did so dispose of it. He did not die *intestate* as to any part of his property. Besides, the general clause in the will operates upon the personal estate given to the widow and *refused*, to pass it away in another direction.

We are all satisfied that the opinion of the Judge of Probate was correct, and accordingly his

Decree is affirmed.

DOLE, PLAINTIFF IN ERROR *v.* HAYDEN.

Where upon a settlement of mutual accounts a promissory note was given for the balance supposed to be due, but by a mistake in the computation of the accounts the note was made for twenty dollars more than in truth was due, it was held that the debtor might recover this sum against the creditor, although the note still remained unpaid.

THIS was a writ of error brought to reverse a judgment rendered upon the report of referees appointed by a rule of this Court. The original action was a general *indebitatus assumpsit* upon an account annexed to the writ, which, by the agreement of the parties, was referred in common form at *September term* 1819, "the report to be made as soon as may be in any county, "judgment thereon to be final, and execution to issue according-"ly." On the twenty-first day of the same *September*, the referees made a special report, which was returned, read and accepted *February term* 1820, in the county of *Norfolk.*

The report made on the back of the rule was in these words —"Pursuant to the within rule the referees within named met "at the office of *Bradshaw Hall*, Esq. in *Castine*, on the twentieth "day of September instant, and having fully heard the parties.

"it appears that a full settlement was made between them on "the fifth of *October* 1816, when a balance was found due "*Daniel N. Dole* of $207,83, for which sum *Hayden* gave his "note payable on demand, and which note was exhibited to us "by said *Dole* as unpaid, except an indorsement thereon of fifty "dollars; and it further appears to the referees that a mistake "was made in said settlement, against said *Hayden*, of twenty "dollars. The referees therefore report that the said *Hayden* "recover against the said *Dole* the sum of twenty-three dollars "and fifty-five cents, being the said sum of twenty dollars "with interest thereon to this date, with costs of Court, and "costs of reference." This report was signed by all the referees.

Among the errors assigned were the following:

1. The record shews that the suit was instituted upon an account annexed to the writ, and that the referees found that a full settlement was made of said account and all demands between said parties long before the commencement of this suit, and that a large balance was due to the said *Dole*, yet the referees have awarded the sum of twenty-three dollars and fifty-five cents against him.

2. It appears from the record that on the settlement mentioned in the first error assigned, a note of hand was given by the said *Hayden* to the said *Dole* for the balance found due him, amounting to $207,83, which is still unpaid, and that an error was made in this settlement, of twenty dollars, which sum with the interest, the referees awarded to the said *Hayden*, whereas the award ought to have been for said *Dole*.

3. It appears by the rule that the report was to be made as soon as may be, and in any county, whereas it was delayed five months after the award, and was then made in the county of *Norfolk*, without notice to the said *Dole* or his attorney.

Plea, in *nullo est erratum*.

Abbot, for the plaintiff in error, contended, as to the two first errors, that no action would lie against him, until *Hayden* had *paid* the note given on the settlement; for until *payment* of the whole sum, the excess could not be considered as *money* in the hands of *Dole*, had and received to the plaintiff's use. And had the

note been sued, the mistake complained of might have been shewn as a good defence, *pro tanto*, against it.

Orr for the defendant.

Weston J. after reciting the facts in the cause as before stated, delivered the opinion of the Court as follows:

There being mutual demands between these parties at the time of the settlement stated in the report, the whole account of the defendant in error may be understood to have been discharged, except twenty dollars, which, by mistake was not allowed to him; for in whatever manner the mistake originated, his account remained virtually unsatisfied to the amount of the excess allowed to the plaintiff in error. This balance the original plaintiff might well recover in an action upon his account, it being an amount omitted to be allowed in the settlement.

As to the note of hand held by the plaintiff in error which remained unpaid at the time of the commencement of the action against him, and at the time of the award, although it gave him a right of action against the defendant in error, yet it could not avail him by way of set off. This could have been effected only by instituting a suit upon the note, in which case, if the two suits had gone *pari passu* to judgment, the one might, by a rule of Court, have been set off against the other.

Had the plaintiff in error, prior to the commencement of the original action against him, upon discovering the mistake, endorsed upon his note the amount which should have been allowed to the defendant in error, and given the latter notice that the mistake was thus corrected, his demand would have been fully satisfied, according to the original intention of the parties, and he could not afterwards successfully have maintained an action upon it. The plaintiff in error, however, did not take this course, but continued to resist the claim of the defendant, which we are of opinion was rightfully allowed to him by the referees in their award.

That part of the rule which provides that the report is to be made as soon as may be in any county, is a stipulation for the benefit of the prevailing party, that he may the sooner obtain judgment and execution. If the defendant in error therefore did not procure this to be done at the earliest possible period

he waived an advantage secured to himself, by which the plaintiff in error was not injured, and of which he has no right to complain. The Court at which it was returned accepted the report, and rendered judgment for the defendant in error, upon a full view of the merits of his case, specially exhibited to them by the award of the referees.

We are all satisfied that neither of the errors assigned can prevail to reverse the judgment.

Judgment affirmed.

See *Taylor v. Higgins*, 3 *East* 171. *Johnson v. Collins*, 1 *East* 102. *Israel v. Douglas*, 1 *H. Bl.* 239. *Barclay v. Gooch*, 2 *Esp. Rep.* 571. *Cumming v. Hackley*, 8 *Johns.* 202.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE COUNTY OF

YORK.

APRIL TERM,

1821.

HEARD *v.* MEADER, ADMINISTRATOR DE BONIS NON.

To an action against an administrator *de bonis non*, upon a promise made by the intestate, it is a good plea in bar, that four years since the original taking out of letters of administration, elapsed during the life of the former administrator.

THIS was an action of *assumpsit* brought to recover a debt due to the plaintiff from one *James Boyd*, the defendant's testator. The defendant pleaded in bar that one *Paul Rogers* was appointed executor of the last will and testament of said *Boyd*; —that he gave due public notice of his appointment and acceptance of the trust;—that said *Rogers* continued to be executor of said will more than four years after his appointment and acceptance of the office of executor;—that the plaintiff's demand accrued to him at or before said *Rogers'* said appointment;—and that the plaintiff did not institute any suit on his said demand against the said *Rogers* at any time within the period of four years aforesaid.

To this plea the plaintiff demurred in law; assigning for cause, among other things, that the plea did not shew that four years had elapsed since the appointment of the *defendant* to the office of administrator of the goods and estate of said *Boyd*, not administered by said *Rogers*.

Wallingford, in support of the demurrer, argued that the lapse of four years under the first administration could not avail the

administrator *de bonis non*, to bar the action; because there was no privity between them;—they were two distinct and independent administrations, of several parcels of estate. *Grout v. Chamberlain*, 4 *Mass.* 611. 613.

J. Holmes, being about to reply, was stopped by the Court; whose opinion was afterwards delivered to the following effect, by

Mellen C. J. It appears by the plea in bar that *Rogers*, the executor of the will of *Boyd*, continued in office more than four years after accepting the trust, and giving bond and notice of his appointment according to law:—so that sometime before the death of *Rogers* the plaintiff's demand was completely *barred* by the *Stat.* 1791. *ch.* 28. [*Revised Statutes*, *ch.* 52. *sec.* 26.] by which actions against executors and administrators are limited to four years next after their acceptance of the trust, and giving notice of their appointment and qualification. And in the case of *Dawes, Judge, &c. v. Shed & al. ex'rs.* 15 *Mass.* 6. it was decided that a claim thus barred could not be revived, even by an express promise of the executor or administrator, so as to be answerable out of the estate of the deceased.

But it is contended by the plaintiff's counsel that there is no privity between *Rogers*, the executor, and the defendant as administrator *de bonis non*;—in support of which he has cited the two cases of *Grout v. Chamberlain*, 4 *Mass.* 611. 613.—The present action, however, is not brought *by* an administrator *de bonis non* to enforce a judgment or reverse one, recovered by a former administrator;—but *against* such an administrator, whose duty it is to administer the estate not already administered, and faithfully to guard the estate from injury and loss, by all lawful means in his power. If *Rogers* in his lifetime had paid the plaintiff's demand, the defendant certainly could avail himself of such payment, and prevent the recovery of the same by action; and for the same reason he may shew by proper plea that the demand was barred in the lifetime of *Rogers* by the limitation, wisely provided by law for the protection of the rights of creditors, heirs and legatees. The defendant has a right, and it is his *duty*, to make the present defence; and upon every sound principle it must be a good and legal one.

If the doctrine contended for by the plaintiff's counsel were admitted as law, the consequences would be extensively injurious. The appointment of an administrator *de bonis non* would at once revive all claims which had become regularly barred,—throw the estate into confusion,—and effectually destroy, or render useless those provisions which have been so carefully enacted, regulating the just and speedy settlement of estates.

The plea in bar is adjudged good and sufficient.

CUTTS *v.* KING.

Debt lies on a recognizance taken pursuant to *Stat.* 1782. *ch.* 21. [*Revised Statutes, ch.* 77. *sec.* 3.] as well *before* as *after* the expiration of the three years mentioned in the Statute.

If a debtor be committed in execution, and the creditor sue out a foreign attachment against his effects supposed to be in the hands of the person summoned as trustee, and thereupon release the body of the debtor from prison, pursuant to *Stat.* 1788. *ch.* 16. *sec.* 4. [*Revised Statutes, ch.* 61. *sec.* 16.] and the trustee is afterwards discharged, having no effects of the debtor;—yet the foreign attachment may still be prosecuted to final judgment against the debtor, and the release of his body is no discharge of the debt; but he may be taken again in execution by virtue of the judgment in the foreign attachment.

In this action, which was debt on a recognizance, entered into before a Justice of the Peace, pursuant to *Stat.* 1782. *ch.* 21. one *D. K.* was summoned as the trustee of the defendant; and denying, in his disclosure in the Court below, the possession of any goods, effects, or credits of the defendant at the time of the service of the writ, was there adjudged not to be trustee. The cause being then brought into this Court by demurrer, and the pleadings below being waived, the defendant pleaded, *first*, that the term of three years was not expired after the money mentioned in the recognizance became due, and before the commencement of the plaintiff's action; and *secondly*, that the plaintiff, having sued out his execution on the recognizance pursuant to the statute, and caused the defendant to be arrested and committed to prison thereon, did voluntarily discharge him from prison and permit him to go at large.

To the *first* plea there was a general demurrer, and joinder.

To the *second* plea the plaintiff replied, that after the issuing of the execution, he discovered goods, effects, and credits of the defendant, in the hands of one *D. K.* which could not be attached by the common and ordinary process of law; whereupon he sued out the original writ in this case, and within seven days after the service thereof he discharged the defendant from imprisonment, by a note or memorandum in writing, directed and delivered to the officer who had him in custody, stating the reason and occasion of his discharge. [*Vid. Stat.* 1783. *ch.* 16. *Revised Stat. ch.* 61. *sec.* 16.]

The defendant rejoined that the plaintiff did not, before the said discharge, nor at any other time, discover any goods, effects or credits of the defendant in the hands and possession of *D. K.* which could not be attached by the common and ordinary process of law.

To this rejoinder the plaintiff answered, that at the time of sueing out his writ, he had good and sufficient reason to believe, and did in fact believe, that *D. K.* had in his hands such goods, effects and credits of the defendant. To which surrejoinder the defendant demurred in law, assigning causes, and the plaintiff joined in demurrer.

J. Holmes, in support of the *first* plea, argued from *Stat.* 1782. *ch.* 21. *sec.* 5. that no action would lie on a recognizance of debt until after the lapse of three years from the time of payment. The remedy within that term is specially given, by an execution; which the statute authorizes to be issued out of the regular course, and beyond the year to which, in other cases, it is limited. And the provision of this extraordinary remedy, indicates the intent of the Legislature to exclude every other.

As to the surrejoinder, it does not support the replication. Issue joined on the fact of *actual discovery* of effects, as mentioned in the replication, would be quite a different issue from any that could be formed upon his *belief* that he had discovered effects, as stated in the surrejoinder; and this therefore is a departure from the replication. It is also an attempt by the plaintiff to place the right to liberate his debtor without discharging the debt, on a different basis from that on which alone it is placed by the *Stat.* 1783. *ch.* 16. *sec.* 4. By this statute, if

a judgment creditor, having caused his debtor to be taken in execution, shall afterwards *discover effects* which might be subject to the process of foreign attachment, he may sue out that process, and discharge the debtor from prison, by a note in writing, specially stating the cause of discharge; which, being thus made, shall not injure the validity of the original judgment. But the case at bar shews that here was no such discovery. The person summoned as trustee has testified that he had no such effects in his hands, and he has been discharged by judgment of law. The case, therefore, which the statute provides has never happened; and of consequence the discharge from prison given by the plaintiff, not being protected by that statute, has the full effect of any other voluntary discharge of a debtor by his creditor; and this, as the authorities abundantly shew, is a release of the debt.

Unless this construction be given to the statute, every creditor, at the trifling expense of such costs as a fictitious trustee might recover, may forever deprive poor debtors of all benefit of the laws for their relief. As often as he is summoned to shew cause why the debtor should not be liberated from prison, he may sue out a new writ, summon a nominal trustee, discharge the debtor by note under the statute, and imprison him again, by virtue of his new judgment; thus harrassing an unfortunate debtor without limit or control.

Shepley, for the plaintiff, in support of the demurrer to the *first* plea, was stopped by the Court.

As to the surrejoinder, it is conceded to be bad; but an earlier fault was committed by the defendant in his rejoinder. The true question presented by the second set of pleadings, viewing them as if terminating in a general demurrer, is, whether the plaintiff is entitled, upon the facts shewn, to the benefit of *Stat.* 1794. *ch.* 65. [*Revised Stat. ch.* 61.] or to the *trustee process*, as it is termed. This the defendant denies, contending that the plaintiff's right to discharge the person of his debtor *sub modo*, as provided by *Stat.* 1788. *ch.* 16. *sec.* 4. is to be limited to cases where he succeeds in obtaining a judgment against the supposed trustee. But the statute does not authorize this restriction. It is true that the latter statute, in express words, permits the action only "whenever any judgment creditor shall *discover* goods, effects or

"credits of his debtor, that are unattachable by the common "and ordinary process of law." Neither does the *Stat.* 1794. *ch.* 65. in express terms authorize the trustee-process, unless "against any person *having* any goods, &c. so entrusted and "deposited in the hands of others that the same cannot be at- "tached by the ordinary process of law:"—yet no person ever supposed that if the plaintiff did not succeed in obtaining judgment against the supposed trustee, the suit was therefore defeated. This would be to suppose a case directly against the whole spirit of the statute. And there is the same, nay greater reason for supporting the action when commenced as in the present case, than when brought in the common and ordinary course;—because, though the expressions of the statute are as strong in its favour in the one case, as in the other, yet the mischiefs which would ensue from a construction strictly literal are much greater in the case at bar. For when the action is commenced in the usual manner, if the plaintiff does not succeed in charging the trustee, he only loses the trustee's costs;—his debt against the principal is still good:—but in cases like the present, upon the defendant's construction, if the plaintiff fails of obtaining judgment against the trustee, he loses his debt forever. He makes the attempt to obtain his debt at the peril of losing the whole, even by the perjury of the person summoned as trustee. But independent of the strong reason in favour of this action, it is considered as resting with perfect security on the authority of *Dunning v. Owen & trustee*, 14 *Mass.* 157.

Mellen C. J. delivered the opinion of the Court, as follows.

By the second section of the *Stat.* 1782. *ch.* 21. the plaintiff was entitled to an execution on the recognizance of the defendant at any time within three years next after the debt thereby secured became payable. Before the expiration of that term the present action was commenced;—and the *first* plea is founded on the position that no right of action then existed, because the plaintiff was entitled to execution. The statute gives the counsel the same remedy, process, action and execution on such recognizance, as are allowed, by law, on a judgment of a Court of record. It is clear that *debt* lies on a judgment, *within, or after* the year. *Com. Dig. Debt, A.* 2. The same prin-

ciple is recognized in the case of *Clark v. Goodwin*, 14 *Mass.* 237. So that if the case before us were not an action against *King and his trustee*, but a common suit against *King* only, the first plea in bar must be considered insufficient.

The facts stated in the second plea, unless avoided by the replication, furnish a legal bar to the action. But on comparing the replication with the provisions of *Stat.* 1788. *ch.* 16. *sec.* 4. [*Revised Statutes ch.* 61. *sec.* 16.] on which it is founded, it presents facts which completely avoid the plea in bar, provided those facts are true, or of such a nature as not to be traversable in the manner attempted by the rejoinder. It is unnecessary to bestow any attention on the surrejoinder; which the plaintiff's counsel frankly admits to be a departure from the replication, and wholly insufficient.

The whole question then depends on the merits of the rejoinder;—in other words it is this,—is it competent for the defendant in *this manner, and independent of the disclosure of the trustee*, to put in issue the existence of effects and credits in the hands of the trustee? The design of the provision in the Statute of Frauds would be defeated if such a course could be legally pursued by the defendant; and we are satisfied that the present action cannot be barred in this manner.

The intent of the law was to give a creditor, whose debt was in execution, an opportunity to make an experiment to save the debt by collecting it from funds which he might believe were deposited in the hands of some trustee, so as to be unattachable by the ordinary process of law. But it was not considered proper that the debtor should be continued in prison while the creditor was making this experiment. The statute therefore provides for the release of the debtor from confinement; and that this release shall not discharge or impair the validity of the judgment. When the experiment on the trustee-process proves unsuccessful and useless, the debtor's body may again be arrested, and committed on the execution issued upon a new judgment which may be rendered upon such process. As no person may know of the existence of effects and credits in the hands of the trustee, but the trustee himself, his *oath* must have been considered as the proof to which a plaintiff in the process should be entitled. But in the case at

bar, the rejoinder is interposed to stop him *in limine*, and to deprive him of the power of obtaining this proof. The rejoinder therefore is bad;—and not being well pleaded, the facts therein stated are not admitted.

Most of the facts in the case of *Dunning v. Owen and trustee*, 14 *Mass.* 157. are similar to those in the case before us:—and the principles settled in that case are direct authorities for our decision in this. It presents a clear and learned construction of the two statutes to which the Court referred; and we are well satisfied of the correctness of that decision.

The *first plea* in bar, and the *rejoinder* in the *second* set of pleadings are adjudged *bad and insufficient*, and there must be

Judgment for the Plaintiff.

SEAWARD *v.* LORD.

Where the maker of a promissory note denied his signature, declaring the note to be a forgery; but said that *if it could be proved that he signed the note, he would pay it;* and it was proved at the trial that he did sign it; this was held sufficient to take the case out of the Statute of Limitations.

Assumpsit on a promissory note for fifty dollars dated *March* 19, 1809, alleged to have been made by the defendant, payable to *George Hamlin* or bearer. The defendant pleaded the general issue, and *non assumpsit infra sex annos*, which issues were joined.

The defendant denying that he signed the note, several witnesses were called who testified to the handwriting, and that they had no doubt but it was his signature. To take the case out of the Statute of Limitations the plaintiff called a witness who testified that about two years since, the plaintiff sent the note to him requesting him to apply to the defendant for payment—that the defendant soon after called on him, and inquired if he held a note against him, and wished to see it—and after looking at it pronounced it a forgery, saying that he never signed it, and never had paid it, and never would pay it:—but also said that if he had signed it, or if it could be proved that he signed it, he would pay it.

On this evidence the Judge who presided at the trial of the cause instructed the jury to find for the plaintiff, if they believed that the defendant did promise that he would pay the note provided it could be proved that he signed it, and that in truth he did sign the note: and they accordingly returned a verdict for the plaintiff, which was taken subject to the opinion of the whole Court upon the case as reported by the Judge.

Emery, for the defendant.

There is a strong current of public sentiment against those cases which go constructively to repeal the Statute of Limitations. They are already repudiated in the commercial world, and ought to be rejected universally. The statute is highly beneficial, and ought not to receive a strict construction.

It is preposterous to treat a denial of the genuineness of a note as a promise to pay it if genuine:—or a denial of debt as a promise to pay:—and yet the evidence in this case amounts to nothing more than a strong asservation on the part of the defendant that the signature was a forgery, and his firm conviction that the plaintiff could never prove it otherwise. 4 *Maule & Selw.* 457.

Burleigh for the plaintiff.

Mellen C. J. delivered the opinion of the Court, to the following effect.

By the report of the Judge it appears that about two years before the commencement of the action, the defendant, in conversation with the plaintiff's agent, denied that he ever signed the note in question, and declared it a forgery:—but at the same time observed that *if it could be proved that he signed it, he would pay it.* The Judge before whom the cause was tried instructed the jury that if they believed from the evidence offered by the plaintiff that the defendant *did* sign the note, *then* the promise which he made to the defendant was binding, and took the case out of the Statute of Limitations;—and we do not perceive any incorrectness in this opinion. When a promise is made *on condition*, if the condition be performed, the promise then becomes *absolute*:—and surely an absolute promise made within six years would be sufficient. The case of *Heylings v. Hastings*, 1 *Salk.* 29. is in point. 1 *Ld. Raym.*

389. 421. *Carth.* 470. 5 *Mod.* 425. *S. C.* cited in 3 *Esp. Rep.* 157. *note* (2) as a leading case.

It was said at the bar in the argument of this question, that the English Courts are adopting more strict rules than they have heretofore admitted, as to the nature of the acknowledgement or promise which is considered sufficient to take a case out of the statute. But however the Courts of a foreign country may judge it proper and prudent to narrow the principles which have been so long established and recognized as correct, we do not perceive any reason for changing the course of decisions here. The case cited from *Maule & Selwyn* is not so strong as the case at bar. In that case, the defendant indeed did admit the signature, but declared that the receipt was barred by the statute—was not worth any thing—and that he never would pay the sum demanded. Surely this could not be considered as a new promise, or an acknowledgement; and the nonsuit was proper.

Judgment according to the verdict.

BROWN *v.* GORDON.

If a Coroner, who is sued for neglect of his duty *as such*, be also a deputy sheriff, the service of the writ by another deputy of the same sheriff is bad.

The rule requiring the defendant, when pleading in abatement, to give the plaintiff *a better writ*, applies to the averment of *facts* only.

Case for neglect of the duty of defendant as a *Coroner*, in the service of an execution in favour of the plaintiff against one *J. S.* whereby the plaintiff lost the benefit of his judgment.

The defendant pleaded in abatement that he was a deputy sheriff, and that the writ was served on him by another deputy of the same Sheriff. The plaintiff replied that the defendant was also a Coroner, duly commissioned and qualified; to which replication the defendant demurred, and the plaintiff joined in demurrer.

Shepley, for the defendant, relied on *Gage v. Graffham*, 11 *Mass.* 181. as decisive of the question.

Emery, for the plaintiff, contended that the Sheriff not being liable for the misdoings of his deputy while acting in the office of Coroner, the interest and privity which might otherwise render the service illegal did not exist; and cited *Colby v. Dillingham*, 7 *Mass.* 475.

Mellen C. J. afterwards delivered the opinion of the Court.

By the plea in abatement it appears that the defendant, at the time of the service of the writ, was a deputy sheriff; and that the officer who served it was also a deputy,—both under the same Sheriff. The replication states that the defendant was also a Coroner at that time. There is no doubt that the replication is bad. The defendant is not less a deputy sheriff for being also a Coroner;—and the statute is express that one deputy cannot legally serve a writ on another deputy, nor on the Sheriff;—the service must be by a Coroner, or by a Constable if within the limit of his authority.

Some doubt was entertained and expressed when the case was first examined, whether the *plea* was not also bad, because it does not state how the writ should have been served, and so give the plaintiff a better writ. But we are satisfied that the plea is good, though containing no such averment. It discloses facts shewing that the officer who made the service was not by law authorized so to do, and consequently that the service was illegal:—and seeing these facts, we are bound to take notice of the public statute which directs that in such cases the service should have been by a Coroner or Constable, though the plea does not aver that it should have been so served. The rule as to giving the plaintiff *a better writ*, as it is termed, applies only to the disclosure or averment of *facts*;—no man is bound to aver to the Court what the *law* is;—they must take judicial notice of it.

Writ abated.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

CUMBERLAND.

MAY TERM

1821.

WARREN *v.* CRABTREE.

If money be loaned on a usurious contract, and on maturity of the note it be partially paid, and a new note, similar to the former, be given for the balance, such new note is void for the usury.

And if the borrower be not a party to the usurious note, being neither maker nor indorser, but the security is such, both as to parties and time of payment, as had been previously agreed between the borrower and lender; the indorser, in an action against him, may shew the usury in bar of the action.

ASSUMPSIT by the indorsee against the indorser of a promissory note dated *May* 17, 1812, signed by *Ebenezer Mayo*, and made payable to the defendant or order, for one hundred and fifty dollars in sixty days with grace, and by the defendant indorsed to the plaintiff. The defence was *usury*.

It appeared that *Hugh M'Lellan*, some time in the year 1811, having occasion for a sum of money, applied to the plaintiff for the accommodation:—That it was agreed between him and the plaintiff that if he would procure a good note for five hundred dollars payable in ninety days, he, the plaintiff would discount it, at the rate of one *per cent.* per month:—That in pursuance of this agreement *M'Lellan* did procure a note signed by *Ebenezer Mayo*, and made payable to the defendant or his order, for five hundred dollars in ninety days, which note the defendant indorsed; and *M'Lellan* thereupon obtained the money of the plaintiff at a discount of one *per cent.* per month, which was the market value of the note. At this time it was the intention of

M'Lellan to pay the note at its maturity, which he had undertaken to *Mayo* and *Crabtree* that he would do. But before that time arrived, finding that he should not be able to pay the whole of the sum as he had intended, he agreed with the plaintiff that he would pay two hundred dollars upon the note when it should become due, and for the remaining three hundred dollars he would procure another negotiable note from the same parties and indorsed as before, payable in sixty days; which he accordingly did, and paid the plaintiff the same rate of discount as before. This last note also, he expected to pay at its maturity; but being unable to do it, he again agreed with the plaintiff, before this note became due, to pay one hundred and fifty dollars thereon, and for the remaining moiety he was to procure another note signed and indorsed as before, paying the same discount. Accordingly he procured the note now in suit, and passed it immediately to the plaintiff. *M'Lellan* did not indorse either of these notes; and it was proved that the plaintiff paid their fair market value; and that *Mayo* and *Crabtree* were secured against their liability on this note, by another note made by *M'Lellan* and indorsed by another person to them.

Upon this evidence the Judge who presided at the trial of this cause directed a nonsuit; it being agreed by the parties that it should be set aside, if, in the opinion of the Court, the law was with the plaintiff upon the evidence reported by the Judge.

Kinsman and *Greenleaf* for the plaintiff attempted to maintain these two positions:

1. That as *M'Lellan* gave the defendant his own negotiated note for the note in suit, he is to be considered as the indorsee of the defendant, and so a party to the note: and thus holding it, and selling it without his own guaranty, and for its fair market value, it is no usury. *Churchill v. Suter*, 4 *Mass.* 156.

2. That even if the transaction between *M'Lellan* and the plaintiff in the sale of the note were usurious, yet the defendant, not being a party to that transaction, ought not to be admitted to take advantage of it. *Bearce v. Barstow*, 9 *Mass.* 45.

Hopkins, on the other side, replied as to the *first* point, that the doctrine was applicable only to those cases where the *holder* of the note, *doubting the solidity of the parties*, sold it for

what it would bring, without the guaranty of his own signature. But here the note was obtained for the express purpose of covering a usurious loan previously agreed upon; and was admitted to be a sufficient security for that purpose. *Ord on Usury* 98.

As to the *second* point, he denied that it was supported by the case cited; and contended that in all cases where the lender is a party to the record, usury is a good defence, as it brings the loss on the person offending; who is punished for the usury by the loss of his money. *Bridge v. Hubbard*, 15 *Mass.* 96.

Mellen C. J. delivered the opinion of the Court, as follows:

The sum demanded in this action is part of a debt contracted in the year 1811. [Here the Chief Justice recapitulated the facts in the case as before stated.]

In examining the question presented in this case, it does not seem material whether the note in suit be considered as a *substitute* for a usurious note, and given to secure the balance due on the *second* note; or, as being *usurious in itself*, and in its *origin*, by reason of the verbal agreement to pay *twelve per cent.* interest.

It is a principle well settled, that if the "*original* contract is "usurious, any *subsequent* contract to carry it into effect is also usurious:" 3 *D. & E.* 531. 15 *Mass.* 96. and if the substituted security be given to the party to the original security, or his representative, it is void, according to the doctrine of *Cuthbert v. Haley*, 8 *D. & E.* 390.

The plaintiff opposes the defence on two grounds:—1. Because the plaintiff must be considered as having purchased the notes in the market, at a fair discount, and under such circumstances, that, according to the case of *Churchill v. Suter*, the contract cannot be deemed usurious.——2. Because the contract, if usurious, was not made by the defendant; and of course, that he is not entitled, by law, to set up such defence.

With respect to the *first* objection, when we look at the evidence in this case, we are not able to discover how the notes can be considered as having been *purchased in the market* by the plaintiff, so as to protect them from the operation of the statute. In cases of such purchase, the note is fairly made

without previous concert, or any stipulations relating to interest, and without reference to any one in particular as the intended purchaser. The note being signed and indorsed, is offered for sale. Its value in the market must depend on the responsibility of the parties to it, the time of payment, and the scarcity of money:—and the purchaser takes these particulars into consideration, and makes the purchase at what is supposed a fair discount. But in the present case, all was arranged beforehand. The loan was agreed upon,—the rate of usurious interest settled, between the plaintiff and *M'Lellan*, for whose use the loan was to be made,—and the names of the promissor and indorser were known and accepted as good. Surely if such a mode of doing the business could change the whole transaction into a *fair and innocent purchase of the note in the market*,—the law would be worse than useless, and such an evasion no honour to our Courts of justice.

The plaintiff's *second* point is entitled to more respect;—but we apprehend it does not, in reality, possess any more merit or solidity than the former.

In the case of *Chadbourn v. Watts*, 10 *Mass.* 121. the substituted security was given to *Lancaster*, and afterwards indorsed to *Chadbourn* the plaintiff, who had no notice that usury had infected any of the preceding securities which had been given up;—and in this respect it differs from the case at bar.

In *Cuthbert v. Haley*, before cited, *Grose J.* expressly states that if the bond, which was the substituted security, had been given to *Plank*, who was the party to the original security and lender of the money on usurious interest, it would have been void:—and the Court proceeded on this principle.

In *Young v. Wright*, 1 *Camp.* 139. the contract for usury was not made by the defendant, but between third parties;—but *Lord Ellenborough* decided the defence to be good.

According to the decision in the case of *Bridge v. Hubbard*, 15 *Mass.* 96. cited at the bar, it is of no importance that the contract for the usury was made by *M'Lellan* with the plaintiff and the notes signed by *others*,—*he* being no party to them:—because it was known by all concerned that the loan was for his *exclusive* benefit, and the mode of securing the sum was agreed to by the plaintiff. It is true the Court were divided in

opinion in that case; but the division was upon a question that does not seem to arise in the present case. Two of the Court there considered the *former contract*, which all admitted to be usurious, as *cancelled and extinguished* by payment. In the case before us it expressly appears that the *last* note was given to *secure the balance due on the second.* But if this distinction did not exist, we might refer to the case of *Maddock v. Hammet*, 7 *D. & E.* 184. to shew that such substitution of securities does not amount to payment:—and also to *Davis v. Maynard*, 9 *Mass.* 242. by which it appears that a new, and even higher security, given for a debt secured by mortgage, does not discharge the mortgage.

If the note declared on be considered as unconnected with the preceding notes, the result must be the same;—because, at the time it was given, there was an express promise on the part of *M'Lellan* to pay *twelve per cent.* interest, and all was executed according to the wishes of the plaintiff, and by a preconcerted arrangement with him for the usury, and for the kind of security. If the principal and interest are secured by distinct notes, or the usury by a parol promise only, and all are executed at the same time,—all are void;—because such promise to pay interest constituted a part of the contract *for the loan;* and the statute declares the *whole contract void.* If such a device could protect the lender from the penalties of the statute, it would always be evaded with impunity.

We are therefore all of opinion that the motion to set aside the nonsuit must be overruled, and that there must be

Judgment for the defendant.

GREELY *v.* BARTLETT.

If goods be consigned to a factor to sell, generally, and he sell them on credit, to a merchant in good standing, who becomes insolvent before the day of payment arrives,—it is the loss of the principal, and not of the factor; —and this though the factor had taken a note for the price, payable to himself.

If the principal draw on his factor before sale of the goods, and the factor, to raise funds to meet his acceptance of such bills, sell the goods of his principal on credit, and take the note of the purchaser payable to himself, which note he indorses and sells for money, and the maker becoming insolvent before its maturity, the factor pays the note to the indorsee; he may recover this money in an action against the principal.

Assumpsit, brought to recover the balance of an account annexed to the plaintiff's writ. A verdict was taken for the plaintiff, by consent of the defendant, subject to the opinion of the whole Court upon the facts stated in the report of the Judge who presided at the trial, which were as follows.

The plaintiff, being a ship and merchandize broker in *Portland*, on the tenth day of *March* 1819, by order of the defendant, sold one quarter part of the defendant's ship called the *Jewel*.

The sale was made to *John P. Thurston* for 1000 dollars, on a *credit of six months*,—*Thurston* to have the benefit of the insurance which had been previously ordered by the defendant to be procured on the ship by the plaintiff;—and being at that time a merchant of good credit. The sale was considered as a good sale, it being for the full value of the property sold;—and the plaintiff, in payment of the purchase-money, took *Thurston's* two several promissory notes for 500 dollars each payable to himself or order in six months after date.

The defendant's instructions to the plaintiff as to the sale of the ship were,—"*sell my part as you think proper*":—and—"*I "hope you can sell the ship after loaded. If the accounts are all "fairly settled, and her freight is good, and you can depend on the "new captain, I shall not be so anxious, but still wish to get clear of "her. Use your own judgment.*"

Previous to the sale of the ship, viz. *November* 23, 1818, the defendant drew a bill of exchange of that date on the plaintiff

for 550 dollars, payable in ninety days *after sight*, which the plaintiff accepted *December* 8, following. And on the 27th day of *November* 1818, the defendant drew another bill of that date on the plaintiff for 471 dollars and 70 cents, payable in ninety days *after sight*, which the plaintiff accepted *December* 4, following. When these bills became due, the plaintiff, having no funds of the defendant in his hands, and having received the abovementioned notes from *Thurston*, indorsed and sold them in the market; and having thus raised the necessary funds, paid and took up the bills of exchange which he had accepted. The notes were sold for 940 dollars which was their fair market value; the usual discount on such securities being one *per cent.* per month. And the defendant was afterwards heard to say that he would rather have suffered a loss of twenty per cent. than that the bills should be protested.

On the 3d day of *August* 1819, before the notes became due, *Thurston* stopped payment: in consequence of which, the plaintiff, being duly called upon as indorser of the notes, paid the amount to the holder, and took them up.

It did not appear that the plaintiff did or was to derive any benefit whatever from the entire transaction, excepting his ordinary commission as a commission-merchant of one and a quarter *per cent.* on the amount of sales of the defendant's part of the ship. It was also proved that the premium and commission paid by the plaintiff for the insurance on the ship ordered by the defendant was twenty-five dollars, with one dollar more for the policy.

The first notice which the plaintiff gave to the defendant of the sale of the ship was by letter dated *April* 3, 1819, in which, after informing the defendant that his two drafts were duly paid, he states that he had sold the defendant's quarter of the ship *for* 915 *dollars*, and thought it a good sale;—that the accounts of the former captain of the ship were not settled;—promises to forward the defendant's account as soon as possible;—but *gives no notice whatever that the ship was sold on credit, nor to whom it was sold*:—nor did it appear that the plaintiff ever notified the defendant that the sale was made on credit, nor who was the purchaser till *August* 19, 1819, sixteen days after the failure of *Thurston*, and about three weeks before the notes

aforesaid became due; at which time he wrote him a letter stating that the sale was made on credit, to *Thurston*, who had stopped payment, and whose notes he had sold to raise money to pay the defendant's drafts;—and requesting the defendant to make provision to meet those notes when they should become due.

It further appeared by an account current stated by the plaintiff between him and the defendant, and forwarded to the latter *May* 11, 1819, that the defendant was therein credited "*By sale of one fourth part ship Jewel*, $915," and no charge was therein made of the 60 dollars discount on the sale of *Thurston's* notes, or of the 25 dollars for premium and commissions for making insurance, the benefit of which was transferred with the ship to *Thurston*. So also in the same account the defendant was credited with the *nett proceeds* of a bill of exchange on *Bristol* sold by the plaintiff for the defendant's benefit, no charges being made of discount or expense of sale, or other deduction. And in the same account the defendant was charged with "*commissions on sale one fourth ship Jewel at one and one fourth per cent. twelve dollars and fifty cents.*" It was also proved by inspection of the plaintiff's books that he credited the defendant *March* 10, 1819, with "*sale one fourth ship Jewel to J. P. Thurston, at 6 mo.* 1000 *dollars*," and charged him with "*discount on sale of Thurston's notes* 60 *dollars*";—but there was no charge in said books *at that date* for the premium and commission for insurance effected on the ship; and it farther appeared, by referring to the bill of the broker, that this bill was not paid by the plaintiff till *April* 27*th*, then following, though the insurance was made *February* 22*d*, preceding.

It also appeared that on the 3d day of *August* 1819, *Thurston* transferred all his visible property to two of his sureties to secure them, and others, of whom the plaintiff was one, against their liabilities on bonds for duties at the custom-house, and as indorsers for him on notes where they had lent him their names as friends, for his accommodation only, and expressly excluding all *business-notes*, whether due to the assignees aforesaid, or to others; to which transfer the plaintiff was knowing and consenting;—and from the proceeds of this property, thus transferred, the plaintiff and others had realized a dividend of *seventy-*

two per cent. on the amount of the sums for which they stood accountable as the friendly indorsers and sureties of *Thurston*:—the assignees, with respect to all notes taken or indorsed by them in the way of business, standing on the same footing with all other business-creditors.

Accompanying the letter of *August* 19, 1819, the plaintiff transmitted to the defendant a corrected account current; by which it appeared that the plaintiff, on the 3d day of *June*, 1819, had remitted to *Dorr*, an agent for the defendant, the balance of the account as then stated by the plaintiff.

The verdict was for the amount of *Thurston's* notes, and interest thereon from the time of making the payment.

Emery, for the defendant.

1. The plaintiff having assumed the demand against *Thurston* as his own, or at least become a guarantor of its payment; if a loss has arisen, he alone must bear it. The agreement made between *Thurston* and his creditors, of whom the plaintiff was one, was, that his property assigned to them should be applied to the payment of their respective demands against him "by "reason of suretyship as indorsers or joint obligors at the Cus-"tom-House, *or as sureties in any manner.*" The plaintiff had taken the notes of *Mr. Thurston*, and put them into the market with his own indorsement; thus becoming his surety for the payment of the debt;—and having, as the case states, received at least 72 *per cent* of the general amount for which he was liable, he is indemnified for at least so much of this debt;—or, if he is not, it is because he has neglected to bring this claim into the composition;—the fault is his own, and the loss is justly chargeable on him only.

It is not competent for the plaintiff to avoid his liability as factor by the want of funds. Having voluntarily assumed to act, if a loss ensues, it is the loss of the factor, *Wallis v. Telfair* cited in *Smith v. Lascelles*, 2 *D. & E.* 188. *Tickell v. Short*, 2 *Ves.* 239.

2. If the plaintiff be not liable to the loss as guarantor, he is culpable to the same extent for negligence of his duty as factor.

If any respect is to be had to the principle of law laid down as to a factor, that when he has bought or sold goods pursuant

to orders, he must give notice forthwith to his principal, lest the former orders be contradicted, and so the reputation of the party suffer;—it cannot be less necessary to advise his principal of a sale on credit. The same reason holds in both cases. *Jacob's Law Dic. tit.* "Factor." *sec.* 4. Yet here no notice whatever was given of the facts most material for the defendant to know, until more than five months after the sale. Until then, he had every reason to believe the sale to have been for cash. Had he been advised of the facts without delay, as he ought to have been, he might have sold the notes without his own liability as indorser,—or otherwise have converted them into money. *Simpson v. Swan*, 3 *Campb.* 292.

The case where a factor may compel his principal to refund money is where he has advanced cash before the sale. Here no mistake is made by the principal. He is advised of all the facts. But if after a sale on credit, and a payment by the factor, he may reclaim the money, because the sale was on credit and the vendee is become insolvent, it may be in his power to ruin the principal with impunity;—and this too, by means of his own neglect to advise him of facts important for him to know.

This case is not harder for the plaintiff than where one authorized his servant to dispose of goods, who took them out of the ship before the duties were paid, and for this cause they were seized. The defendant resisted the owner's claim of indemnity, because he had no funds to pay the duties with,—yet he was held liable. It was said he might have sold them—obtained advances—and paid the duties:—which neglecting, the fault was his own. *Lewson v. Kirk*, *Cro. Jac.* 265. 1 *Comyn on Contracts* 234.

Longfellow, for the plaintiff.

As to the *first* point made by the defendant;—there are no facts in the case from which an implied guaranty can be raised. Not from the plaintiff's commissions—these being only one and a quarter per cent, and not amounting to *del credere* commissions:—nor from the terms of the sale;—for his discretion in this particular was unlimited, and was exercised with prudence and good faith:—nor from the payment of a balance of account to the defendant's agent;—for that was the balance

of certain bills of exchange remitted by the defendant to the plaintiff long after the sale of the ship:—nor from the negotiation of the notes by the plaintiff;—because at the time of this negotiation, it had become necessary that funds should be provided to pay the defendant's drafts accepted by the plaintiff, and these notes afforded him the only means. Neither does the course of trade authorize the defendant to charge the plaintiff as guarantor. *Van Allen v. Vanderpool*, 6 *Johns.* 69. *Scott v. Suman*, *Willes* 458. *Goodenow v. Tyler*, 7 *Mass.* 36.

As to the *second* point, he denied the fact of negligence on the part of the plaintiff, and minutely examined the evidence in the case, contending that the defendant was duly advised of all things material to him; and that any earlier intelligence of the failure of *Thurston* would have been fruitless, the notes wanting nearly a month of maturity when the notice of that event was forwarded. The sale, in any light, can be treated only as a sale for reimbursement of funds, or for the creation of funds to meet acceptances;—in which case the factor, having conducted fairly, is entitled to a reimbursement, on failure of the funds, from the principal himself.

Whitman, in reply.

It is of the utmost consequence to the commercial world that every factor be distinct in his accounts, and early in his intelligence. There is a high degree of confidence reposed in his statements; which renders it important that they should be always correct, distinct, and clear. He is the agent of all parties; holding an office of the deepest trust and most delicate nature among merchants.

But the accounts of the plaintiff want this essential character of distinctness, as is apparent from inspection of the account of *May* 11. Nor was he early in his intelligence, having never advised the defendant of the name of the purchaser, the time of credit given, nor the sale of the notes. If he is to be regarded as a fair factor, we must conclude that the reason why he did not give this intelligence was because he considered the debt as his own. Here an account was settled,—the balance paid over to the defendant,—and no notice given of the sale, or even the existence, of any notes whatever. This closes the transaction,—puts all suspicions of the principal at rest,—

and leaves the loss where it ought to be, with the factor. He ought, if he intended ever to resort to the principal, to disclose to him all the material facts, that he might be vigilant, and prevent a loss.

MELLEN C. J. afterwards delivered the opinion of the Court as follows:

The plaintiff as the agent and factor of the defendant, having sold his part of the ship *Jewel* to *Thurston* on credit, and received his promissory note in payment; and having sold the note, and indorsed it, to raise money to pay the defendant's drafts; and having been obliged to pay the amount to the indorsee, in consequence of the failure of *Thurston* before the note became due; in this action demands the sum thus paid, as money paid and advanced to the defendant's use. A verdict having been returned in favour of the plaintiff for that amount and interest, the defendant now moves that the verdict should be set aside and a new trial granted.

The claim of the plaintiff to reimbursement of the sum thus advanced is resisted by the defendant on two grounds.

1. Because the plaintiff has voluntarily assumed the debt which has been lost by the failure of *Thurston*, and made himself responsible.

2. If not;—yet his conduct, as factor, has been such, and he has been guilty of such neglect in his agency with respect to the transaction, that the law renders him liable to sustain the loss himself.——If either of these propositions be supported, the defendant's motion must prevail.

The relation subsisting between principal and factor is of such a nature as necessarily to require great confidence on one part; and great care, attention, and fidelity on the other. Without all these, it is impossible that the extensive concerns of the commercial part of the world can be managed with advantage, or even preserved from confusion. Hence the importance of continuing, in their full force, those legal principles which have been established for the protection of the rights of both parties, and of third persons who may be engaged with such factor in the transaction of commercial business.

Some of these general principles may be stated.—By the

law-merchant, a factor may sell the goods of his principal on a reasonable credit; unless he is restrained from so doing, either by his instructions, or by the usage of the trade to which the transaction relates.

A sale made under such circumstances is at the risk of the principal; and if a loss happens, he must bear it.

But he is not authorized to give credit, except to such persons as prudent people would trust with their own property.

He may receive securities in his own name, for goods sold, without subjecting himself to liability merely by so doing.

But he must deliver such securities to his principal if he demand them;—or, in case of loss, he will be answerable as for a breach of trust, though in such case the principal should pay him his usual commissions.

If through carelesness, or want of proper examination and inquiry, he give credit to a man who is insolvent; should a loss happen, he must indemnify the principal.—And if a debt be lost, by the inattention of the factor, in omitting to collect it when in his power so to do, he will be liable for it.

He must be honest and faithful, and must give his principal all necessary or useful information respecting the concerns of his agency.

Many of these principles are applicable to the case under consideration.

The first inquiry is, whether the plaintiff was authorized to sell the defendant's part of the vessel on credit?—He was not forbidden by his instructions; nor is there any proof in the case tending to shew any usage forbidding it. On the contrary he had directions to sell the defendant's part "*as he thought proper*",—and to "*use his own judgment*".—Under this power the plaintiff was fully justified in selling on credit as he did;—the fair value seems to have been obtained; and the credit of *Thurston* at the time of the sale being perfectly good, the plaintiff was warranted in receiving his personal security. Indeed little or no objection is made to the plaintiff's conduct on this account.

But it is contended that, as the plaintiff took the note from *Thurston* payable to himself, and did not disclose to his principal the name of the purchaser nor the particular terms of the contract of sale, for some months,—he must be considered as

the surety of *Thurston*,—as guarantying the debt, and assuming on himself any eventual loss of it. But the manner in which the note was made payable can be of no importance in this instance. The cases cited by the plaintiff's counsel, and the case of *Goodenow v. Tyler*, 7 *Mass.* 36. are direct to this point.

With respect to the other branch of the objection, viz. the plaintiff's neglect to give early notice of the terms of the sale, and his giving no notice at all till after the failure of *Thurston*, no authority directly in support of this objection has been cited, except the case of *Simpson v. Swan*, 3 *Campb.* 292. which will presently be examined and compared with the case at bar. The commissions charged furnish no proof of guaranty:—and we are well satisfied that if the defence be substantial, it must be on the ground of negligence on the part of the plaintiff. As the sale was made under a sufficient authority,—to a merchant in good standing,—on credit,—and as the purchaser failed before the day of payment had arrived;—it is not very easy to perceive how the omission to disclose the name of the purchaser before that day did or could prejudice the defendant; or why it should now prejudice the plaintiff. No imputation of fraud is even suggested.—The case cited from 2 *D. & E.* 128. of the neglect of a factor to make insurance, rests on principles different from those which apply to the case before us. In the case from *Cro. Jac.* 265. the agent exposed the goods of his principal to forfeiture by a direct violation of a public statute, as well as of his duty as a factor.

The case of *Simpson v. Swan* has been pressed upon us as a strong authority in favour of the defendant;—and though it was only a *nisi prius* decision, yet it is entitled to respect from the character of the learned Judge who pronounced it, and the acquiescence of the counsel in his opinion. But this case is in several particulars different from the case before us. *Simpson*, the factor, sold the leather consigned to him to a man notoriously insolvent *at the time*;—and according to his usual practice, without naming the purchaser to his principal, he received a bill of exchange for the price, payable to himself; and then made and sent his own note to the defendant for the neat proceeds. *Lord Ellenborough* said that the factor's remitting his note to his principal for the proceeds naturally seemed to close

the concern, and that it could not be unravelled without danger. The sale to an insolvent was also considered by the Court as a fatal objection to the action, as the loss had been occasioned by the gross negligence of the plaintiff himself. There was also a distinction taken by the same Judge which is deserving of notice, as it seems to present a principle in aid of the present action. His words are—"If the principal draws "before the sale, it is very reasonable that he should repay the "money when the consideration fails on which the factor grant-"ed the acceptance. Then the principal is deprived of no in-"formation, and is led into no error." Now in the case at bar it appears that in the month of *November* before the sale, the defendant drew bills on the plaintiff for upwards of 1000 dollars, which were accepted in *December* following, payable in *March*, a short time before the sale. This seems to be the precise case stated by *Lord Ellenborough*. For the purpose of raising money to pay these bills, the note of *Thurston* was sold and indorsed by the plaintiff;—and the payment of this note to the indorsee is the ground of the present claim of *Greely* on the defendant. There is another fact appearing in the case which seems to shew the defendant's recognition of the propriety of the sale of his share of the ship, and of the disposal of *Thurston's* note, and his approbation of the whole. We allude to his declaration, when he was informed that the note had been negotiated at a discount of *twelve per cent.* that he would rather have given *twenty per cent.* than that his drafts on the plaintiff should have been protested. This declaration must have been made after the receipt of *Greely's* letter of *August* 19, and sometime after the failure of *Thurston*.

It is contended that the information respecting the sale, when given, was not correct;—that the plaintiff stated the sale to have been for 915 dollars, whereas it was for a thousand. This, however, is explained by other facts. The commissions, and discount on the note, amounted to eighty-five dollars; so that the neat proceeds were exactly 915 dollars. This is only an inaccuracy in the method of stating the account. It was the conclusion, instead of the premises from which that conclusion was drawn. There is also a small variance or disagreement in the charge of 25 dollars for premium, &c:—but this is explain-

ed by the fact, that at the time of drawing out the account, the premium had not been paid.

The last fact relied on by the defendant as proof of culpable neglect in the plaintiff, is the assignment of *Thurston's* effects to certain trustees, and the plaintiff's connection with that transaction. This assignment was made to secure seventy-five *per cent.* of the demands of several creditors, whose claims arose from suretyship for *Thurston* at the custom-house, or as friendly indorsers without consideration. It was not designed to embrace any debts arising in the ordinary course of business, and none such were embraced. The plaintiff, in this concern, guarded his own *business-debts* no better than that of the defendant. Besides, the assignment was made of a vessel *at sea*,—not in a situation to be attached by the plaintiff for the benefit of the defendant: and he could not have compelled *Thurston* to make the assignment in any other form.

On the whole, after a careful examination of the subject, we cannot discover any legal principles by which the plaintiff is bound to sustain the loss which has happened,—or which forbid his reimbursement of the sum he has paid: and we are all of opinion that there must be

Judgment on the verdict.

LYMAN, ADM. *v.* ESTES.

An equitable claim, against an insolvent estate, though never presented to the commissioners, may still be shewn by way of set-off to an action of *assumpsit* brought by the administrator.

Assumpsit upon a promissory note made by the defendant, payable to *Moses Lyman* the plaintiff's intestate. In a case stated for the opinion of the Court the parties agreed upon the following facts.

The consideration of the note was the warranty-deed of the intestate to the defendant, of certain lands in the town of *Brunswick*. These lands were part of a tract sold to the defendant and others by the intestate, and which was conveyed with the

usual covenants of warranty. After the sale, and delivery of the deeds, it was ascertained by the grantees that the whole tract thus sold had been previously mortgaged by *Lyman* for a large sum, and that the mortgage deed had been duly registered before the conveyance to the defendant and others; and after the death of *Lyman* the mortgagee entered into said tract for breach of the condition of the mortgage, and obliged the grantees, in order to redeem the land, to pay the balance due to him from *Lyman*, of which the defendant's proportion was one hundred and one dollars and nineteen cents. *Lyman* died insolvent, and a commission of insolvency was duly taken out, but the defendant never had exhibited his demand before the commissioners.

The question submitted to the Court was—whether the money thus paid by the defendant to extinguish the title of the mortgagee might be offset against the demand of the administratrix in this action.

Emery for the plaintiff.

Mitchell for the defendant.

MELLEN C. J. delivered the opinion of the Court as follows.

The equity of this case is clearly with the defendant; and if the deduction claimed by him cannot be made, the most manifest injustice will be the consequence. In a Court of equity there would not be a moment's hesitation. The plaintiff's counsel seems to admit all this; but contends that *by law* it is not competent for the Court in this action to make the allowance and deduct it from the sum due on the note.

Our statutes relative to the settlement of insolvent estates, contemplate a fair adjustment of all demands subsisting between the deceased and his creditors at the time of his death; so that the balance *justly due* to the estate may be collected, and then fairly distributed among the creditors. In the case of *M'Donald v. Webster*, 2 *Mass.* 498. the Court decided that a sum due on account from such an estate, which had never been presented to the commissioners, and was therefore barred *as a claim*, may still be good by way of *set-off*, in an action brought by the administrator, against the person having such a claim.

A creditor cannot maintain an action against the administrator of an insolvent estate, except to decide the merits of a

claim rejected by the commissioners. If, in the present instance, the defendant could support an action on the covenants of the intestate to recover the sum paid to the mortgagee, no injustice could be done. The Court would so control the proceedings as to give the defendant an opportunity to bring a cross action and obtain his judgment. The mutual judgments might then be set off against each other;—or, if executions were issued, the officer holding the execution against the defendant would be bound to offset the defendant's execution against the plaintiff, and deduct the amount therefrom. But as such a course cannot here be legally pursued, we ought to allow the same justice to the defendant, by considering the sum paid to the mortgagee, as to all equitable purposes, paid to the administrator. And no principle of law forbids this construction in the present case. The sum paid has already gone to the benefit of the estate, because it has discharged a debt which the estate owed, and removed an incumbrance which lessened its value; and neither law nor justice requires that it should be paid a second time; and by him, too, who has paid it already. The strict principles of the common law, and technical rules of pleading must not be applied to cases where the parties have not mutual remedies at law, which they can enforce, as in cases of insolvency.

In the action of *Sewall & al. v. Sparrow*, administrator of *John Thacher*, decided in this county and not yet reported,* the Court recognized a principle which sanctions the dictinction we make between solvent and insolvent estates. *Sewall & al.* declared on a judgment recovered against *Thacher* the intestate, which had been presented to, and rejected by, the commissioners on the estate, which was deeply insolvent;—and the action was pursued according to the provisions of the statute in such cases. The defendant pleaded that the intestate had paid a part of the judgment to the creditors, and that they thereupon entered into an agreement with him in writing, *not under seal*, never to demand the balance, or sue execution. On demurrer to this plea the Court decided that it was an equitable bar, and unquestionably good before the commissioners, and ought to be a substantial bar to the action; and so it was adjudged. The

* Since published in 16 *Mass.* 24.

injustice which would have been the consequence of rejecting such defence in cases of insolvency, was the principal ground of the decision.

We are not aware that our present opinion violates any principles of law as heretofore applied in other cases. We mean only to decide that such principles are not applicable with the same strictness and to the same extent in those cases where one of the parties represents an insolvent estate under administration; and when such application interferes with the design, or opposes the spirit of our statute-provisions relating to the equitable settlement and distribution of such an estate.

Accordingly the sum of one hundred and one dollars and nineteen cents paid to the mortgagee must be deducted from the note declared on, and judgment be entered for the plaintiff for the balance.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

LINCOLN.

MAY TERM

1821.

BAILEY, JUDGE, &c. *v.* ROGERS & AL.

In debt on a guardian's bond to the Judge of Probate, the general plea of performance is a good plea.

The English *Stat.* 8. & 9. *W. & M. ch.* 11. was never adopted in this State, but the pleadings in our Courts in debt on bond continue to be governed by the rules of the common law.

Where a guardian neglects to account, a citation from the Judge of Probate requiring him to render his account is a necessary preliminary in order to charge the guardian on his bond for refusing to account.

DEBT on a bond given to the plaintiff in his capacity of Judge of Probate, by one *Ridley* and the other defendants his sureties, as guardian to certain minors. The defendants prayed *oyer* of the condition, which was that if the said *Ridley* "shall "and do well and truly perform and discharge the trust and of- "fice of guardian unto the said minors, and that in and by all "things according to law, and shall render a plain and true ac- "count of his said guardianship upon oath, and all and singular "such estate as shall come to his hands and possession by vir- "tue thereof, and all profits and improvement of the same, so "far as the law will charge him therewith, when he shall there- "unto be required, and shall pay and deliver what and so much "of the said estate as shall be found remaining upon his ac- "count, the same being first examined and allowed of by the "Judge or Judges for the time being of the Probate of Wills, &c. "within the county of *Lincoln* aforesaid unto the said minors

" when they shall arrive at full age *or otherwise*, as the said " Judge or Judges by his or their decree or sentence pursuant " to law shall limit and appoint, then this obligation is to be void, " otherwise," &c. and thereupon they pleaded in bar that the said *Ridley* " from the time of the making of the said writing " obligatory and the said condition thereof, *hath well and truly* " *observed, performed, fulfilled and kept all and singular the matters* " *and things* in the condition of the said writing obligatory men- " tioned and specified," &c.

To this plea the plaintiff replied that the father of the minors died seized and possessed of a large tract of land, and of certain personal property, which descended by law to the minors, and which, on the date of the bond, came to the hands and possession of *Ridley* their guardian, for their use and benefit, " *which* " *estate real and personal, and the rents, benefits and improvements* " *thereof, the said Ridley for a long time*, to wit, for the space of " fifteen years next after the date of the said writing obligatory, " *wasted and suffered to be wasted and wholly lost to said minors*, " and has ever *neglected and refused to render a just and true ac-* " *count thereof* when thereunto lawfully required, and to *pay the* " *sum justly due* to the said minors when they arrived at full " age," &c.

Whereupon the defendants demurred in law, assigning for causes, 1.—" because the said replication is double in this, that " it contains assignments of several supposed breaches of the " condition aforesaid, different and distinct in their nature, so " that they cannot all be put in issue;—also in this, that the " plaintiff has alleged the supposed breaches by the alleged ne- " glect of said guardian to render a just and true account of his " guardianship when lawfully required thereto, and also to pay " the sum justly due to said minors when they arrived at full " age, and also that real and personal estate to a large amount " came into the hands and possession of said guardian, and also " that the said guardian wasted and suffered to be wasted and " wholly lost to said minors the said real and personal es- " tate, and the rents, profits and improvements thereof, all " which are distinct and several alleged breaches:—2.—Be- " cause the plaintiff in said replication has not alleged that said " guardian was ever cited or required by the Judge of Probate

" for said county to render and settle any account of his guar-
" dianship :—3.—Because it is not alleged in said replication
" that said minors or either of them have arrived to the age of
" twenty-one years." And the plaintiff joined the demurrer.

Hasey, in support of the demurrer, observed that the first and great fault in the proceedings was that the guardian had never been summoned to account before the Judge of Probate. Until this is done there could be no refusal, and of course no action could lie on the bond for not rendering an account. *Stat.* 1786. *ch.* 55.

Orr, for the plaintiff.

The principal objection as exhibited in the pleadings is, that the replication is double. But the assignment of breaches in the condition of a bond in debt, is of the nature of allegations in a declaration; and if one be well assigned, it is enough. Duplicity, in such case, in the replication, is not good cause of demurrer. However the law may formerly have been, it is changed by *Stat.* 8 & 9. *W. & M. ch.* 11. *sec.* 8. which puts debt on bond upon the same footing with actions of covenant, where the rule is to set out as many breaches as the plaintiff sees fit. *Collins v. Collins*, 2 *Burr.* 824. *Barton v. Webb*, 8 *D. & E.* 459.

But if duplicity in the assignment of breaches in debt on bond were bad, yet here is no duplicity; for the whole replication is but one series of facts, following each other to one point. *Robinson v. Rayley*, 1 *Burr.* 316. *Shum v. Farrington*, 1 *Bos. & Pul.* 640.

As to the want of a citation to account, it is to be presumed that the Judge of Probate has summoned the guardian for that purpose, because it is his duty so to do; and this the defendants ought to have shewn in their plea, that the plaintiff might have assigned farther breaches.

But the plea itself is bad. In debt on a guardian's bond, the general plea of performance is not good, for the conditions are in the disjunctive, to account to the minors, *or otherwise*, &c. The defendants should have shewn a specific performance of the one or the other. If part of the plea is to consist of the proceedings of a Court, they ought to be certainly and truly alleged; for the Court must judge of the record. But the tendency and effect of this plea is to bring the records of the Pro-

bate Court to trial by jury; which is a violation of the rule that the record is to be tried by itself, it not being matter *in pais*. *Co. Litt.* 303. *a. b. note* (*m.*) *Freeland v. Ruggles*, 7 *Mass.* 511.

Hasey, in reply.

The *Stat.* 8. & 9. *W. & M. ch.* 11. has never been adopted here, and ought not to be. Our bonds, as to the rules of pleading, stand at common law. The course of proceeding with a delinquent guardian depends altogether upon our own statute, which must be strictly pursued. It is in the power of the minors to call the guardian to account at their pleasure, and the statute requires that this should first be done. Had he refused, it would have been a breach of the bond, and then, but not before, an action might be sustained.

The cause after argument having stood over to this term for advisement, the opinion of the Court was now delivered as follows by

Preble J. If the objection taken to the defendant's plea, that *omnia performavit* is not a good plea in debt on bond, be supported, the plaintiff is entitled to judgment, even if his replication be defective or insufficient, on the well known principle, that judgment will be rendered against the party, who commits the first fault in pleading.

In *covenant* the plea of performance generally, where all the covenants are in the affirmative, is a good plea. But, if any of the covenants are in the negative, such a plea is not good. *Co. Litt.* 303, *b.* [*a*]. *Cropwell v. Peachy*, *Cro. Eliz.* 691. The mere occurrence of negative words however is not sufficient to determine the nature of the covenant; for if the negative be but an affirmance of a precedent affirmative, or if to an affirmative negative words be added of the same import, the whole clause is taken together, and considered an affirmative. 1 *Sid.* 87. *Com. Dig. Pleader*, (*E.* 26.) From analogy to the pleadings in covenant it has long been settled by all the Justices of England, that *in debt* on bond conditioned for the performance of covenants, where all the covenants are in the affirmative, the same plea of performance generally is a good plea. *Per Popham C. J. in Mints v. Bethil*, *Cro. Eliz.* 749. But in order to entitle himself to plead such a plea, the defendant having

craved oyer of the condition of the bond declared on, sets out at length with a profert the indenture or other writing containing the covenants, referred to in the condition. Having thus spread the covenants upon the record and made them a part of the case, he may, as in covenant, plead performance generally. 2 *Saund.* 409. *note* 2. *and cases there cited. Kerry v. Baxter*, 4 *East* 340. But in debt on bond, other than those conditioned to perform covenants if the condition be to do several enumerated things, the defendant should not plead performance generally, though all be in the affirmative; but should answer specially to every particular mentioned in the condition. *Com. Dig. Pleader* 2 *W.* 33. Thus also in the case of *Freeland v. Ruggles*, SEWALL *J.* suggested that the plea of *omnia performavit* is not a sufficient answer in debt on bond. Where however the language of the condition is general in terms, but extends to and comprehends within its meaning a multiplicity of matters or multifarious particulars, all the particulars being in the affirmative, to avoid prolixity the plea of performance generally is allowed. *Co. Lit.* 303. *b.* [*c*]. 1 *Saund.* 116. *note* 1. As where the condition was to deliver *all the fat and tallow* of *all the beasts* he might kill, it is sufficient to say he had delivered *all*, &c. *Cro. Eliz.* 749. *Mints v. Bethil.* So performance generally is a good plea to a bond conditioned to account for *all monies received*, &c. 8 *D. & E.* 459. *Barton v. Webb.* So in regard to the official bond of a deputy postmaster, KENT *C. J.* in *Postmaster General v. Cochran*, 2 *Johns.* 413. remarks, "the usual "course of pleading upon these bonds has been, for the plaintiff "to declare in debt for the penalty, the defendant to crave oyer "and plead a general performance, and the plaintiff to reply "and set forth particular breaches." And in *Dawes v. Gooch*, 8 *Mass.* 488. the Court held the plea of performance generally to an administration-bond a good plea on special demurrer.

But, it is said, the clauses in the condition of the bond in suit are in the *alternative*. In debt on such a bond the plea of performance generally is bad; and, it would seem, on general demurrer. *Cro. Eliz.* 233. *Oglethorp v. Hyde*, *Cro. Jac.* 559. *Lea v. Lothell.* For whether the condition embraces many, or few particulars, if any of the acts to be done are in the alternative, as the obligor is not bound to perform all, but the performance

of one, in so far as respects such alternatives, is a compliance with the condition; he is held to show in his plea, which of the alternatives he did in fact perform. *Co. Litt.* 303. *b.* [*b.*] *Com. Dig. Pleader, E.* 25. But, as the mere use of negative words does not render negative a clause, *substantially affirmative*, so the use of disjunctives does not necessarily make a clause an alternative one within the meaning of the rule under consideration. Thus, "if he shall pay to them *or* one of them." So "to pay *or* cause to be paid to them *or* any *or* either of them" are not disjunctive. *Barton v. Webb, supra, Aleberry v. Walberry*, 1 *Stra.* 231. 1 *Saund.* 235. *note* 6. So in the condition of an administration-bond among other clauses we have the following, viz. "Shall deliver and pay," &c. "unto such *person or* "*persons respectively*, as the said Judge or Judges by his or their "decree or sentence pursuant to law shall limit and appoint." Now, if for the words "*person or persons respectively*" we substitute the words "*minors when they arrive at full age, or otherwise*," we have the precise language of the clause, upon which the counsel for the plaintiff relies, as constituting an alternative. It is difficult to perceive why the clauses in one condition should be considered as disjunctive, and those in the other not so. Further, the Judge of Probate may dismiss the guardian *before the minor arrives at full age;* and may order the balance in his hands to be paid over to the guardian, appointed in lieu of the one dismissed. And *after the ward's arrival at full age*, unless the business is amicably adjusted between him and his guardian, the accounts are first to be exhibited to, and to be audited, examined, and allowed by the Judge of Probate, who will thereupon decree the balance to be paid. There is therefore no disjunctive or alternative clause. The meaning of these parallel clauses in the administrator's and guardian's bond is the same, viz. that the administrator or guardian shall pay and deliver over the balance, &c. remaining in his hands after the adjustment of his accounts, as the Judge of Probate *by his decree*, made pursuant to law, *shall limit and appoint.* It is not easy therefore to see why the plea of performance generally should be a good plea to one, and not to the other. At all events, as the condition is not in the disjunctive, the exception, taken by the plaintiff's counsel, can only prevail on special

demurrer. *Oglethorp v. Hyde, supra.* Our opinion accordingly is that the plea of the defendant is good and sufficient.

Proceeding therefore to the consideration of the objections, taken to the replication, it appears on oyer, that the bond is conditioned for the performance of duties, embraced under three distinct clauses: viz.

"That of well and truly performing and discharging the trust and office of guardian in and by all things according to law."

"That of rendering a plain and true account of his guardianship upon oath, and all and singular the estate, and all profits and improvements of the same, that shall come to his hands and possession as guardian, so far as the law will charge him therewith, when he shall thereunto be required."

"That of paying and delivery, what and so much of the estate, as shall be found remaining on his account, the same being first examined and allowed of by the Judge of Probate, unto the minors, when they arrive at full age, or otherwise, as the Judge of Probate by his decree pursuant to law shall limit and appoint." Neglect on the part of the guardian to perform the duties, embraced within the meaning of either of these clauses, is a forfeiture of the bond.

By the *Stat.* 8. & 9. *W.* 3. *ch.* 11. the plaintiff may assign as many breaches as he thinks proper. Under this statute, although the several breaches relied on may be embraced in one plea, yet each must be separately, and distinctly, and formally, assigned; each of itself constituting a breach at common law. Previous to that statute the plaintiff could assign but one breach, and that being proved, he had judgment and execution for the whole penalty. 1 *Saund.* 58. *note* 1. The hardship and injustice, arising out of this principle of the common law, led our provincial legislature by *Stat.* 5. *W. & M. ch.* 26. to provide that "where the forfeiture of any penal bond is found," the Court, where the action is pending, "shall chancer the same unto the just debt and damage." [*Ancient Charters p.* 274.] Hence probably it was that the statute of 8. & 9. *W. & M.* was never adopted here; but the pleadings in our Courts in debt on bond continue to be governed by the rules of the common law. *Sevey v. Blanklin*, 2 *Mass.* 541. And though in covenant the

plaintiff may assign several breaches, in debt on bond he can assign but one. *Symms v. Smith*, *Cro. Car.* 176. *Munro v. Alaire*, 2 *Caines* 328. So, if the defendant plead performance generally, the plaintiff in his replication can assign but one breach. *Cornwallis v. Savery*, 2 *Burr.* 772. *Otis v. Blake*, 6 *Mass.* 336. *Sevey v. Blacklin*, *supra.* The assignment however of more than one breach can only be objected to on special demurrer, pointing out wherein the duplicity consists, and assigning it for cause. *Hancocke v. Proud*, 1 *Saund.* 337. But a plea is not double, merely because it puts more than one fact in issue; for it may put in issue several facts, where they amount to only one connected proposition. *Robinson v. Rayley*, 1 *Burr.* 316. *Story v. Smith*, 3 *Caines* 160: yet, if it alleges several distinct matters, requiring several answers, it is double. In regard to the case at bar, carelessly and improperly neglecting to take possession of his ward's property, whereby it is lost, such property having through such negligence and carelessness never in fact come to the hands and possession of the guardian, is a breach of the first clause of the condition. Neglecting and refusing to render a just and true account of the property, which has come to his hands and possession, when thereunto lawfully required, is a breach of the second clause. And if, when called upon to account, he has wasted and suffered to be wasted the property that came to his hands and possession, so that he cannot render an account of it, that amounts in law to a neglecting and refusing to account. So, after his accounts have been rendered and adjusted, neglecting and refusing to pay and deliver over, what remains in his hands agreeably to the order of the Judge of Probate, made pursuant to law, is a breach of the third clause of the condition. In this case it is not alleged that the guardian neglected taking possession of the property; but it is alleged, that it did come to his hands and possession, and that he wasted and lost it, and refused to account for it. The supposed breach therefore does not apply to the first clause. Nor could it be intended to apply to the third; for the only expression applicable to that clause is the one, charging the guardian with having neglected to pay the sum justly due to the said minors, when they arrived at full age, which, regarded as the assignment of a breach of the

third clause, is so imperfect and totally insufficient, that it could not be sustained even on general demurrer. The breach assigned therefore, if good and sufficient at all, is so, only as applied to the second clause of the condition.

To constitute a good breach it must be certain and express. *Com. Dig. Pleader, C.* 48. It should be assigned in the words of the contract either negatively or affirmatively, or in words having the same import and effect. And in general if a breach be assigned in words containing the sense and substance of the contract it is sufficient. *Com. Dig. Pleader, C.* 45. 46. But if the breach assigned vary from the sense and substance of the contract, and be either more limited, or larger than the covenant, it will be insufficient. *Com. Dig. Pleader, C.* 47. And whenever it is essential to the cause of action, that the plaintiff should have requested the defendant to perform his contract, such request must be stated. In such a case the request stated must be a *special request*,—it must be shown by and to whom the same was made, and the time and place of making it. *Bach v. Owen*, 5 *D. & E.* 409. *Birks v. Trippet*, 1 *Saund.* 33. *Hostler's case*, *Yelv.* 66. *Selman v. King*, *Cro. Jac.* 133. *Devenly v. Welbore*, *Cro. Eliz.* 85. The common allegation, "though often requested," without stating the time and place of request, is of no avail in pleading. Its omission never vitiates, and its insertion never aids. 1 *Chitty on Pleading*, 325. Now, when property of the ward has actually come to the hands and possession of the guardian, the proper mode of instituting a judicial inquiry, whether the guardian has used and improved it for the benefit of his ward, or wasted and lost it, is to call on the guardian to render an account of his guardianship; who by the very terms of his bond is not bound to render such account "*until he shall thereunto be required.*" It is not sufficient therefore to allege, "that property came to the hands and possession of the guardian," and that "he has ever neglected and refused "to render a just and true account thereof, when thereunto "lawfully required." An actual request to account is necessary; otherwise he would be liable on his bond the moment the ward's property came to his possession; and the condition would be adjudged broken without the least misconduct on the part of the guardian. But the request contemplated by law in

such a case, is not a mere demand, made by the ward or some person in his behalf. The statute of 1786, *chap.* 55. regulating proceedings in suits on probate bonds provides that "when "the administrator [or guardian] shall refuse or neglect to ac- "count upon oath for such property of the intestate [or ward] "as he has received, *especially if he has been cited by the Probate "Court for that purpose*, execution shall be awarded," &c. Under this statute in *Dawes v. Bell*, 4 *Mass.* 106. the Court held, that a refusal on the part of the guardian to account, *when cited* for that purpose, was a forfeiture of his bond, though nothing in fact remained in his hands. In *Nelson v. Jaques*, [*ante page* 139.] this Court intimated an opinion, that in order to charge *an administrator* with a breach of his bond for neglecting to account he should be first cited to render an account by the Judge of Probate. And in revising the statutes the Legislature of this State have sanctioned that construction by the adoption of language in conformity with it. *Revised Stat. chap.* 51. *vol.* 1. *page* 225. It is the Judge of Probate, from whom the guardian received his appointment, in whom is confided the power of removing the guardian for misconduct, to whom the guardian is by law to account, by whom those accounts are to be examined and allowed, and in accordance with whose decree, made pursuant to law, the balance, remaining in the guardian's hands, is to be paid. We hold therefore that, where the guardian neglects to account, a citation from the Judge of Probate requiring him to render his account, is a necessary preliminary in order to charge the guardian on his bond for refusing to account. In the case at bar no special request to account is alleged—it does not appear that the guardian ever was cited. There is therefore no sufficient breach assigned.

The replication is bad.

NOTE. The *Chief Justice* did not sit in this cause, having formerly been of counsel with the defendants.

THE INHABITANTS OF JEFFERSON v. THE INHABITANTS OF LITCHFIELD.

An *alien*, resident in a plantation at the time of its incorporation, gains no settlement thereby; that method of gaining a settlement being limited to citizens of this or some other of the United States.

A wife gains no settlement, during the coverture, where the husband gains none.

Assumpsit for the support of *Abigail Mowry* and her infant illegitimate child. In a case made by the parties for the opinion of the Court, it appeared that *Philip Mowry*, the father of the pauper, was an *alien*,—that he was married in *Topsham* in this county to one *Polly Hunter* whose legal settlement was then in *Topsham*, and by whom he had *Abigail*, the pauper,—that he resided, with his wife and daughter, in *Litchfield* in 1795 at the time of its incorporation,—and that he was never naturalized in this country.

Bailey, for the plaintiffs.

Whatever may be the construction of the statute on this subject, as to the father, yet the wife residing in *Litchfield*, gained a settlement by its incorporation, and the child, derivatively, from her. The language of the Court in *Bath v. Bowdoin*, 4 *Mass.* 452. is "*every one* then inhabiting there;"—and it is equally strong in *Buckfield v. Gorham*, 6 *Mass.* 446.

Allen, for the defendants.

Mowry, the father, not being a citizen of the United States, could not be a citizen of any town therein, and therefore could gain no settlement; the *Stat.* 1793. *ch.* 34. being limited to *citizens* only. *Boston v. Charlestown*, 13 *Mass.* 469.

The persons who gain a settlement by residence in a plantation at the time of its incorporation into a town, must, by a reasonable construction of the statute, be such as have power to elect their place of residence; which a *feme covert* and minor children have not. *Watertown v. Shirley*, 3 *Mass.* 323. *Somerset v. Dighton*, 12 *Mass.* 385.

MELLEN C. J. delivered the opinion of the Court as follows.

It is admitted that the pauper's father never gained a settlement in *Litchfield*, unless by his residence there at the time of

its incorporation in the year 1795. It is very clear that this could not give him a settlement, he being an alien; for in the *ninth* mode of gaining a settlement, prescribed in *Stat.* 1793. *ch.* 34. aliens are, by necessary implication, excepted. With respect to the wife, who was residing with him in *Litchfield* in 1795, it is equally clear that she could not gain a settlement by such residence; because a wife cannot gain or have a settlement distinct and separate from her husband, as was settled in *Watertown v. Shirley*, 3 *Mass.* 323.

We have examined this question particularly in the case of *Hallowell v. Gardiner*, in which the plaintiffs relied on several grounds; one of which was that the grandmother of the pauper gained a settlement in *Gardiner*, by residence in that part of *Pittston* which is now *Gardiner*, at the time of its incorporation; she then being a married woman and living with her husband. We there decided that she gained no settlement by such residence.

Since the argument of this cause we have been furnished by the Reporter, with a copy of the case of *Newry v. Bethel*, decided in the county of *Cumberland* in 1817, but not reported. The facts were these. The pauper was originally an inhabitant of *Bethel*. Previous to the incorporation of *Newry* she was married to one *Burk*, an alien, not naturalized; after which they removed to the place which is now *Newry*, and there resided at the time of its incorporation, and until the commencement of the action, at which time *Burk* was supported as a State-pauper. On these facts the Court decided that *Burk*, being an alien, could gain no settlement; that his wife's settlement in *Bethel* was not lost or suspended by the marriage;—and that she gained none by her residence in *Newry* with her husband at the time of its incorporation. This case is precisely in point, and leaves the case before us without a question.

Plaintiffs Nonsuit.

DAGGETT *v.* ADAMS.

The fraudulent purchaser of the goods of a judgment-debtor has no right to contest the regularity of the doings of an officer, who has seized them as the goods of the debtor, by virtue of an execution against him.

If an officer, in the service of an execution, conduct irregularly, yet if the goods taken in execution be fairly sold, and the proceeds be applied in payment of the execution on which they were sold, the officer is responsible to the debtor for nominal damages only.

But if, by the officer's misconduct, the goods were sold under their fair value, he is responsible for the difference between the fair value and the amount of sales.

Trespass de bonis asportatis. The defendant pleaded the general issue, and filed a brief statement pursuant to *Stat.* 1792. *ch.* 41. therein alleging in justification, that he was a deputy sheriff of this county, and that having in his hands three several executions, in favour of several creditors, against one *James Daggett*, by virtue thereof he took and sold the hay mentioned in the declaration, as the property of said *James*.

At the trial the plaintiff, *Samuel Daggett*, objected to the admission of the executions and of the returns thereon, in evidence, there being divers irregularities in the returns; but the Judge who presided at the trial, reserving the consideration of the sufficiency of the returns, overruled the objection.

The plaintiff then read a bill of sale under seal, from *James Daggett* to him, conveying the hay in question, together with his stock of cattle and sundry other chattels; the validity of which conveyance the defendant impeached, by testimony, shewing it to be fraudulent—and upon this evidence the Judge instructed the jury that the cause depended on the question whether there was fraud or not, in the conveyance to the plaintiff; and that if the conveyance was fraudulent, the plaintiff had no right to look into the officer's proceedings at all, and their verdict must be for the defendant;—and they found for the defendant accordingly.

The plaintiff then filed a motion for a new trial, for the following reasons:—viz.—1. because the defendant's plea was a special plea; and having failed in that, he ought not to have availed himself of any other defence under the general issue;—

2. because his proceedings under the executions not being agreeable to law, the defendant was a trespasser *ab initio*, and so had no right to impeach the plaintiff's title.

Sheppard, in support of the motion, argued at some length that the general issue, with a brief statement, is in the nature of a special plea; and cited among other authorities, 1 *Chitty on Pleading* 496. *Co. Lit.* 283. *a. Millman v. Dolwell*, 2 *Campb.* 378. *Vaughan v. Davis*, 1 *Esp.* 257. *M'Farland v. Barker*, 1 *Mass.* 153. *Bangs v. Snow*, 1 *Mass.* 181. *Jackson v. Stetson*, 15 *Mass.* 48.

The defendant, then, having by his plea admitted the taking of the goods out of the plaintiff's possession, in which they rightfully were, he is a trespasser *ab initio*, unless he has made out a perfect justification, by pursuing strictly the requisites of law, in the taking and disposal of the property. If he would have contested the fairness of the plaintiff's title in its origin, he should have done this under the general issue. But this defence he has voluntarily waived, by setting up a right to take, under the authority of law, and to this justification, the books explicitly agree, he must be confined. But the Judge having admitted the defendant to depart entirely from his special plea in bar, and to rest his defence on other grounds, there ought, for this reason, to be a new trial.

Bailey and Thayer, against the motion.

If the general issue with a brief statement, is to be treated as a special plea, the beneficent purposes of the statute enabling officers to adopt this mode of defence will be totally defeated. But that they are not so to be treated, is evident from the statute itself, 1792. *ch.* 41. which gives the right to file a brief statement, *or* to plead specially.

But it is not material to determine this question, because the verdict having found the transfer of the goods to the plaintiff to be fraudulent, the plaintiff himself, and not the defendant, is the wrong doer, in attempting to place the effects of the judgment debtor beyond the reach of the process of law.

Mellen C. J. delivered the opinion of the Court.

In this action the plaintiff complains that the defendant has violated his rights, in seizing and carrying away certain

articles of personal property alleged to belong to him.—The defendant pleads the general issue, and, in the brief statement filed in the case, states that he, being a deputy-sheriff, by virtue of certain writs of execution, took and disposed of said articles as the property of *James Daggett*.—The plaintiff claims under a sale from him.—The defendant contends that the sale is void on the ground of fraud; and that, representing several of the creditors of said *James Daggett*, he had a right to seize the property to satisfy said executions. The Jury have decided the sale to be fraudulent and that the property, when seized, belonged to *James Daggett*.

The plaintiff's counsel still contends, that the proceedings of the defendant in the sale of the property, appears, by the returns on said executions, to be irregular and illegal;—that he could not justify his own conduct by a special plea of justification, nor by the mode of pleading adopted in this case; and that of course he has no legal right to contest the fairness of the sale to the plaintiff.—In short, that he must be considered as a *mere stranger*, violating the plaintiff's possession.

Several irregularities appear in the defendant's returns on the executions; but the question is, whether the plaintiff has any right to complain of them; as the verdict has determined the question of property, and negatived all pretence of claim on his part.

The counsel for the plaintiff, with commendable assiduity and attention, has collected and cited numerous authorities, to shew that the general issue, with a brief statement, is, in essence, the same as a special plea of justification, and that, in the present case such justification could not be supported by the facts. However applicable and pertinent those authorities may be, in support of the principle assumed by the counsel; still, in the view we take of the cause, it is not deemed necessary particularly to examine them.

It does not appear to us that, in the present case, any special plea of justification, or brief statement, is required by the statute of 1792, *ch.* 41. The general issue denies that the defendant has been guilty of taking the plaintiff's property.—The defence proceeds on the ground that this property belonged to *James Daggett* and that the defendant had legal authority to

take *his* property.—The verdict establishes the truth of the plea.—But when a *debtor*, from whom property has been taken by an officer on mesne process or execution, sues such officer for such taking, a *mere general issue* would not be sufficient; because proof of property in the plaintiff and of a taking by the defendant would maintain the action.—If, therefore, in such case, the defendant claims a right to take away and dispose of the property, he must either set forth that right in the form of a *special plea* of justification, or accompany the *general issue* with a *brief statement*, which must contain, though in a less formal manner, the nature of his authority and the manner in which he has exercised it.—This is a good substitute for a plea in bar.—In cases of this description, if the officer has conducted irregularly, he stands responsible in damages to the debtor, whose property he has illegally disposed of.—However, even in such cases, if it should appear that the property has been fairly sold, and the proceeds applied in payment of the execution on which they were sold, nominal damages only could be recovered. And if, by the officer's misconduct, the property was sold under its fair value, then damages should be given equal to the difference between the fair value and the amount of sales.—In this manner the rights of the *true owner* are protected; and *his* rights only require protection. The *fraudulent* purchaser *has no rights*, as against the creditors of his vendor.

In an action of replevin, it is not necessary for the defendant, who is an officer, to make an avowry, and to set forth all his authority particularly, in the seizure and detention of the property. He needs do nothing more than allege property in the man whom he considers the true owner, and *deny the plaintiff's* property and pray a return. In the trial of a cause when *this is the plea*, the plaintiff opens, and offers the evidence of his title;—for example, a sale from *J. D.*:—The defendant then shews that he was an officer, and that he, by virtue of a legal precept in favour of a creditor of *J. D.* took the property; and thus, representing such creditor, he has a right to contest the validity of the sale under which the plaintiff claims.—The plea of *non cepit*, with leave to give special matter in evidence, mentioned by the plaintiff's counsel, was condemned as inconsistent.—It would be absurd to *deny the taking*, and *pray a return*.

In the case at bar, the defendant proceeded in the same manner as would be proper in replevin, where the plaintiff's right is traversed. The defendant proved his authority to *seize* and *dispose* of the property in question, as the property of *James Daggett;* and he proved, to the satisfaction of the Jury, that it *was his.* Surely then, he had a right to *seize* it though in the plaintiff's possession. If, in the *disposal* of the same, he has not proceeded according to the directions of the statute in such cases, and any injury has been sustained, he stands answerable to *James Daggett*, and not to the plaintiff.—We therefore think the opinion and directions of the Judge who presided at the trial are correct.

We have been thus particular in giving the reasons of our opinion, from a desire to render the proper course of proceedings in similar cases more known and understood and to introduce uniformity of practice. The motion for a new trial is overruled, and there must be

Judgment on the verdict.

STIMPSON *v.* GILCHRIST.

Where the plaintiff, in an action of the case for not transporting certain goods, declared that he loaded the goods upon the defendant's vessel, to be transported to a certain port and there delivered to a third person for a stipulated freight, to be paid by the receiver; the declaration was held well after verdict, though it contained no averment who was the owner of the goods, nor that a reasonable time for the transportation had elapsed after the lading of the goods.

The objection that such action should have been brought by the consignee and not by the consignor, cannot arise after verdict.

After a verdict every promise in the declaration is to be taken as an express promise.

This was an action of the case, in which the plaintiff declared that he, on the 21st day of *June* 1815, at *Thomaston*, loaded in and upon the schooner *Fanny*, whereof the defendant was master, five tierces and one half barrel of *manganese*, of a certain weight and value, in good order and well conditioned, from

thence to be transported by the defendant and to be delivered in like good order and well conditioned, (the dangers of the seas only excepted,) at *Boston* unto *David Stanwood* or his assigns;—eleven dollars, freight for said *manganese*, to be paid by said *Stanwood* to the defendant, with primage and average accustomed;—and that the defendant in consideration of the premises, promised the plaintiff that he would transport said *manganese* in said vessel from *Thomaston* to *Boston*, and well and faithfully deliver the same to said *Stanwood* or his assigns, in like good order and well conditioned, the dangers of the seas only excepted: and the plaintiff averred that although the schooner with the *manganese* on board sailed from *Thomaston*, and the dangers of the seas did not prevent the defendant from proceeding in the vessel to *Boston*, yet the defendant, contriving to injure and defraud the plaintiff, did not transport the same *manganese* to *Boston*, and there deliver the same to the consignee or his assigns.

The defendant pleaded the general issue; and the plaintiff obtaining a verdict, the defendant moved, in arrest of judgment,

1. "That by law the said action is not maintainable by the "plaintiff; but the action on the said bill of lading, if any can "be maintained, should and ought to be brought by *David Stan-* "*wood*, the consignee named in the bill of lading mentioned in "the declaration."

2. "That no cause of action is set forth in the declaration."

This motion was argued at the last term in this county by *Orr*, for the plaintiff, and *Longfellow* and *Bailey*, for the defendant, and was continued for advisement, to the present term.

For the motion.

Bailey. The action should have been brought by the consignee. It appears by the declaration that he was liable to pay the freight, which is a sufficient indication of his ownership. It may also be well presumed that the bill of lading was duly indorsed and forwarded to *Boston* according to the usage of merchants in similar cases. And in either view the property was vested in the consignee. If he could maintain the action, then the remedy pursued in the name of the consignor is misconceived. *Evans v. Martlett*, 1 *Ld. Raym.* 271. *Abbot on Ship-*

ping 416. *Dawes v. Peck*, 8 *D. & E.* 330. 1 *East* 4. *Barrett v. Rogers*, 7 *Mass.* 297.

Against the motion.

Orr. As to the objection that the declaration shews no cause of action, in other words, that there is no allegation or proof of property in the plaintiff; that was a matter of fact, which the jury have already settled by their verdict. Without such ownership, proved to the satisfaction of the jury, the plaintiff could not have had a verdict. It is true that the possession of the bill of lading is evidence of property in the consignee; but it is only *primâ facie* evidence;—not conclusive; and in this stage of the cause it is to be presumed that this evidence was successfully rebutted.

As the consignee, therefore, does not appear to have been a *purchaser* of the goods, he is to be treated as a mere factor of the plaintiff, in whom no property could vest without actual possession; and having neither property nor possession, he could maintain no suit respecting the goods. The shipper, and he alone, has the right to stop *in transitu*, except where the factor may have assigned the bill of lading to an innocent purchaser. In all other cases he may follow the goods into the hands of any person, even to the assignees of the factor, if he become bankrupt. *Lickbarrow v. Mason*, 2 *D. & E.* 63. *Abbot on Shipping*, [371.] 420. *Ellis v. Turner*, 8 *D. & E.* 531. 2 *Wheat. app.* xxxiii.

The case of a shipper of goods differs in nothing from that of a carrier of goods in any other vehicle. *Buffinton v. Gerrish*, 15 *Mass.* 156. The true question in both cases, as to the right to stop *in transitu* is, whether the goods were paid for or not. He who *owns* and consigns, has this right;—he who *sells* and consigns, has not. *Wright v. Campbell*, 4 *Burr.* 2050. *Feise v. Ray*, 3 *East* 93. *Moore v. Wilson*, 1 *D. & E.* 659. *Davis & al. v. James*, 5 *Burr.* 2680. *Laclouch v. Towle*, 3 *Esp.* 115.

If therefore the plaintiff was, as the case finds him to be, owner and consignor of the goods, he alone could sue for not transporting them, the ship-master being *his* servant.

Longfellow, in reply.

A verdict finds the facts alleged in the declaration, and nothing more: and in this case it finds nothing as to the title of the plaintiff, because no such title is alleged in the de-

claration. If any thing is to be inferred from it, it would shew property in *Stanwood*, the goods being consigned to him, "or his order or assigns." If the plaintiff ever had any interest in the goods, he parted with it on the execution and indorsement of the bill of lading. Where this instrument is general, the legal presumption is that the property is in the consignee. A delivery of the bill to him passes the property; and such delivery, it is to be presumed, was made. The transaction being commenced regularly, the law will presume that it was completed according to the custom of merchants,—that the bill was transmitted and received according to the course of trade;—and if legal presumptions may be taken as facts, the consignee, and he alone, is entitled to maintain this action.

But whether the property was vested in the consignee or not, plaintiff cannot recover in this suit, his writ being materially defective in not setting forth any cause of action. The *gravamen* is, that the defendant did not deliver the goods in *Boston*, as he had stipulated to do. But the obligation to deliver, depended, by the terms of the contract, on the payment of the freight by the consignee; and this payment, or a tender of it, should have been alleged in the declaration. The verdict only finds that the defendant did not perform an act, which it does not appear that he was bound to perform.

The action having stood over to this term for advisement the opinion of the Court was now delivered as follows, by

Preble J. The objection to the sufficiency of the declaration, that it is *not* averred that *the plaintiff was owner of the manganese*, cannot in *this form of action* avail the defendant. Suppose the property to have been that of *Stanwood* for instance, or of any other person, *Stimpson* might well make a contract with *Gilchrist* to transport it to *Boston* or elsewhere, and it would not be competent for *Gilchrist*, when called upon for not fulfilling his contract, to set up by way of defence, the fact merely that *Stimpson* was not the owner. *Anonymous, cited in Laclouck v. Towle*, 3 *Esp.* 115. *Moore v. Wilson*, 1 *D. & E.* 659. *Joseph v. Knox*, 3 *Campb.* 321. If there were no special agreement, no express contract, entered into by *Gilchrist* with *Stimpson*, but the question with whom the carrier contracted, whether with

the consignor or consignee, were left to be determined by the general principles of law applicable to such cases; the fact to whom the property belonged, had, as a matter of evidence, a most material bearing upon the issue. *Dawes v. Peck* cited in argument. *Dutton v. Solomonson*, 3 *B. & P.* 581. *Brown v. Hodgson*, 2 *Campb.* 36. *Lickbarrow v. Mason*, 6 *East* 23. *note. Potter v. Lansing*, 1 *Johns.* 215. *Christy v. Row*, 1 *Taunt.* 300. *Sargent v. Morris*, 3 *Barn. & Ald.* 277. But that question, though it may have arisen in the progress of the cause, is not now before us. On a motion in arrest of judgment no question can be considered excepting such as appears on the face of the record itself. In the case at bar the declaration expressly alleges the contract to have been with the consignor. There is no mention of a bill of lading, as supposed in the defendant's motion. We have no knowledge, nor can we have any, of the nature of the evidence adduced on the trial. If *Gilchrist* intended to rely on the objection that his contract, if express, was with *Stanwood*, and not with the plaintiff; or, in case there was no express promise, that his implied contract was by intendment of law with the consignee and not with the consignor; he should have objected at the trial that the evidence did not support the declaration. No such objection appears to have been made. Now *after verdict* every *promise* is taken to be an *express one;* 1 *Cranch* 341. per MARSHALL C. J. and no *assumpsit* can be presumed to have been proved on the trial but that, which is alleged in the declaration. *Spiers v. Parker*, 1 *D. & E.* 141. And every fact necessary to be proved at the trial in order to support the declaration must be taken to have been proved. per KENYON C. J. *Mackmurdo v. Smith*, 7 *D. & E.* 522. We cannot therefore now presume that the engagement on the part of the defendant was merely an implied one arising out of the nature of the transaction, or that there was any other contract in relation to the subject matter than the one which the declaration discloses.

On looking into the declaration we find set out with sufficient certainty a contract, entered into by the defendant with the plaintiff to transport to *Boston* certain *manganese*, laden by the plaintiff on board the *Fanny*, of which the defendant was master, and there to deliver the same to one *Stanwood* on payment

of an agreed freight. It is not objected that the consideration set out is not a valuable and sufficient one. The plaintiff then alleges in terms as broad as the contract set out that the defendant did neglect to *transport* and deliver the *manganese*, in violation of his contract. The defendant was entitled to a reasonable time, in which to perform his contract. *Lorillard v. Palmer*, 15 *Johns.* 14. But although this is not noticed in the declaration, yet it must be presumed it appeared at the trial that a reasonable time had elapsed before the suit was brought, and that whatever else was necessary to be done on the part of the plaintiff, had been done; otherwise the plaintiff could not have obtained a verdict. All such defects are cured by the verdict. 1 *Saund.* 288. *note* 1. *by Williams.* It appears to us therefore that there is a sufficient cause of action set forth in the declaration. The motion in arrest of judgment is accordingly overruled.

Judgment on the verdict.

Note. The Chief Justice, having formerly been of counsel in the cause, gave no opinion.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

KENNEBEC.

MAY TERM

1821.

THE INHABITANTS OF THE FIRST PARISH IN WINTHROP
v.
THE INHABITANTS OF THE TOWN OF WINTHROP.

Where lands, which had been originally granted to a town for the use of the ministry, were sold by virtue of a resolve of the legislature, and the money put at interest by the town, the annual income to be applied to the use of the ministry; and afterwards, a number of the inhabitants being incorporated into a separate religious society, the residue became a distinct parish; it was holden that this residue, thus forming a distinct parish, succeeded to all the parochial rights and duties of the town, and were entitled to recover of the town the money and interest arising from the sales of such land.

ASSUMPSIT for money had and received. In support of the action the plaintiffs read a deed from the *Proprietors of the Kennebec purchase*, dated *July* 9, 1777, by which they granted a certain lot of land in *Winthrop* to the town of *Winthrop*, for the use of the ministry in said town forever. They also read the statute of *Massachusetts* 1790, *cap.* 46, incorporating a part of *Winthrop* into a new town by the name of *Readfield*, and enacting that the new town should receive its proportionable part of all public lands, and of all other public property whatever, which belonged to the town of *Winthrop* at the time of their separation;—and a Resolve of the Legislature of *Massachusetts* passed *March* 1, 1799, on the petition of the towns of *Winthrop* and *Readfield*, authorizing the treasurers of those towns jointly to sell and execute a conveyance of lot No. 57, it being the

joint property of said towns; and the said towns were, by said Resolve, "further authorized and required to loan their re-"spective proportions of the monies arising from such sale, and "apply the interest thereof to the use of the ministry in the "same."

They also proved that in the course of the same year 1799, the treasurers of the two towns sold said lot agreeably to said Resolve, and received promissory notes for the consideration, amounting to about fifteen hundred dollars; about eight hundred of which were payable to the treasurer of the town of *Winthrop*;—and that said notes have been kept by the successive treasurers of *Winthrop*, separate and distinct from the other property of said town, and constantly on interest; the notes being renewed yearly, and still due for the whole amount of the sale. And they read to the jury a statute of *Massachusetts* 1810, *cap.* 99, incorporating certain inhabitants of *Winthrop* into a separate religious society, or poll-parish.

It was admitted that the plaintiffs, before the commencement of the action, had demanded of the treasurer of *Winthrop* the eight hundred dollars and interest;—and that when the Resolve of 1799 was passed, and afterwards, until long after the sale and conveyance of said lot, there was no settled minister in *Winthrop*;—but that about thirty-five years ago, and after the grant of 1777, a minister was regularly ordained and settled in that town, where he continued to officiate several years.

The defendants proved that *Mr. Thurston*, the present congregational minister in *Winthrop*, was settled in the month of *February* 1807, in pursuance of a previous invitation given by the inhabitants of the town, who voted him a fixed annual salary, so long as he should continue their minister, and a certain additional sum as a gratuity on his settlement; and that this salary and settlement had been regularly voted by the town, up to the time of the incorporation of the poll-parish in the year 1811,—had been assessed upon the inhabitants, except those of the denominations of *Friends*, and *Baptists*, and duly paid to the *Rev. Mr. Thurston*, amounting to two thousand dollars.

It also appeared that *Mr. Thurston* had demanded of the agent of *Winthrop* the interest accruing from said fund, from

the time of his ordination, to the time of the demand, in *November* 1817.

The defendants offered to prove that the *town* of *Winthrop* had paid the salary of *Mr. Thurston* for two years after the incorporation of the poll-parish in the year 1811; but the evidence of this fact was not admitted by the Judge who presided at the trial; and a verdict was taken by consent, for the plaintiffs for the amount of the fund and interest, subject to the opinion of the Court upon the effect of the evidence before stated.

The cause was argued at the last term by *Orr* and *A. Belcher* for the plaintiffs, and *Allen* for the defendants, and was thence continued to this term for advisement.

Argument for the plaintiffs.

By the grant of *July* 1777 from the proprietors of the *Kennebec* purchase to the town of *Winthrop* of a parcel of land for the use of the ministry, the inhabitants became seized as trustees, to the use of whatever person should become a settled minister of the town.

While the title was thus in the inhabitants of *Winthrop*, that town, with the consent of the inhabitants, was divided, and a part of it erected into a new town by the name of *Readfield*, with a right to an equal proportion of the public property. This "public property" mentioned in the act, can be no other than that which belonged to the corporation, and in which all its members were interested; and of course it includes the lands in question.

This construction is strengthened by the language of the resolve of 1799, which treats this land as public property. It is a legislative construction, and shews the understanding of the parties.

The question then arises, whether the trust thus placed in the hands of the inhabitants of *Winthrop* has been faithfully executed.

It should be observed that the object of this grant was to create a permanent and productive fund for the support of the regular ministry of the gospel. And the intent of the donors is fulfilled with equal exactness by a conversion of the land into money, the use remaining still the same. The legislature

itself has given its sanction to this course of proceeding, having always adopted it where lands were unproductive and insufficient for the purpose intended; and having expressly directed it in the present case, by the resolve of *March* 1, 1799, by which the treasurers of the two towns were authorized to sell the lands, and apply the interest of the money to the use of the ministry. The original intent of the donors has thus been steadily kept in view, and the deeds executed by the treasurers passed the estate to the grantees, they being the agents, and their acts having been ratified by the continued acquiescence of all parties concerned. Being public agents, the deeds very properly shew the public character in which they acted, without particularly naming their constituents.

The estate being thus regularly alienated, and a part of the inhabitants having separated themselves, as to parochial affairs, under the statute of 1810, the residue of the inhabitants became by the operation of law a distinct parish; and succeeding to the parochial duties and privileges formerly belonging to the town, became trustees of the fund raised by the sale of the parish-land, and thus are entitled to maintain the present action.

It will not be contended that the minister could have alienated the land before it was sold. Neither can he possess the principal sum accruing from the sale; for the possessor of money may always alienate it. No action would lie to compel him to pay over the money, if he should recover it by judgment of law; and thus the fund would be abolished, and the intent of the donors be entirely frustrated.

That the remedy is not misconceived, the counsel referred to *Floyd v. Day*, 3 *Mass.* 403. *Young v. Adams*, 6 *Mass.* 182.

Argument for the defendants.

The first question is, in whom was the fee simple of the land granted by the Proprietors of the *Kennebec* purchase? The words of the grant are, "to the town of *Winthrop* to the use of the ministry in said town forever." By the operation of *Stat.* 27. *Hen.* 8. adopted here as part of our common law, the legal estate would vest in the person in whom the use was declared to be, viz. the minister. The provincial *Stat.* 28. *Geo.* 2. *cap.* 9. has also more particularly declared in whom the estate shall vest. The judicial construction of this statute has been, that

every grant of land to the use of the ministry, whoever may be named as the grantee in the deed of conveyance, shall enure to the benefit of the ministry;—that if there be no incumbent, the fee is in abeyance until a person comes *in esse* capable to take;—that the first settled minister shall become seized of it in virtue of his office;—that he holds it to him and his successors;—and that he cannot alienate it, except during his life, without the consent of the town. The statute has expressly prohibited such alienation. No such prohibition on the town has ever been attempted to be enacted by the legislature, because, the fee not being in the town, a conveyance by the town would be merely void. *Weston v. Hunt*, 2 *Mass.* 500. *Brown v. Porter*, 10 *Mass.* 93. *Brown v. Nye*, 12 *Mass.* 285. *Dunning v. Brunswick*, 7 *Mass.* 445. *Austin v. Thomas*, 14 *Mass.* 333. In this last case it is said that the estate vested in the minister and his successors, although the grantee was the treasurer of the town. Any attempt therefore on the part of the town to alienate this land must be ineffectual; and the present or any future minister, notwithstanding the deed in this case, may enter upon the land, and if resisted, may maintain a writ of entry. There is no reason, therefore, that the plaintiffs should receive the proceeds of this void sale, the whole of which must be refunded in an action of covenant, as soon as the grantees of the town have discovered that they have no legal title.

But it is said that the resolve of the legislature has given validity to this conveyance. No act, however, of the legislature can authorize one man or body of men to convey the estate of another without his consent. This estate is private property; and no act of the legislature can alienate it, without the consent of the party in whom the estate is vested. *Constitution of Massachusetts, Bill of Rights, Art.* 10. *Dartmouth College v. Woodward*, 4 *Wheat.* 518.

If there were any efficacy in the resolve, and it was intended to refer to this land, yet it is wholly inoperative, as it describes a lot of land the *joint* property of *Winthrop* and *Readfield*. But the latter town had no interest in it, even if the former had. The claim of *Readfield* is founded in its act of incorporation, which gives that town a certain portion of the *public property*; but as this land is private property, the claim cannot be supported. *Dartmouth College v. Woodward*, 4 *Wheat.* 518.

But admitting the sale under the resolve to be valid, yet the defendants, under the same resolve, would be bound to pay over the annual interest only. They were authorized to invest the proceeds in any funds which would afford that interest. Had they purchased an annuity, or invested the money in public stocks, would not this have been a faithful execution of their trust? Yet they ought not to be held to refund the principal money, from which this interest is to arise.

But this fund, being applicable to the minister, he alone can maintain an action for the money, supposing the estate to have passed by the deed of the treasurer. He has never relinquished his right; his demand in 1817 shews the contrary. Nothing in the terms of his settlement shews any such intention; and if there were, and the equitable interest thus passed to the plaintiffs, yet it being only an assignment in equity, the action at law must still be in the name of the minister.

But if the town, with or without the resolve, had power to sell and convey the estate, yet they have never exercised this power by vote or any other corporate act, either conveying the estate, or authorizing any other person to convey it; and the deed of the treasurer is therefore void, for want of authority in him to make it. Neither does any thing pass by the deed, even if the treasurer had been authorized, the deed not being made in the name of the town, but in that of the treasurer. The law which requires that the acts of an attorney should be done in the name of his principal applies with equal force to the case at bar. *Fowler v. Shearer*, 7 *Mass.* 14. *Elwell v. Shaw*, 16 *Mass.* 42.

If any right of action exists against the defendants, yet the remedy in the present case is misconceived. The action for money had and received will not lie, no money having been received. The defendants were authorized to sell the land and place the proceeds at interest. They have been guilty of no neglect in not collecting the money, having never been required so to do; and they are not liable in trover for not delivering over the notes, they never having been demanded. *Jones v. Brinley*, 1 *East* 1.

But if the plaintiffs are entitled to recover, and in this form of action, the defendants ought to be allowed in offset the sums

they have paid for parochial purposes, and for which they might have applied this money. If they have voluntarily taxed themselves, when they might have used this fund, thereby leaving it to accumulate, there is strong ground in equity for their claim to be allowed the benefit of it against the present demand.

WESTON J. delivered the opinion of the Court as follows.

It is first objected in this action that the grant of the lot of land from the proprietors of the *Kennebec* purchase *July* 9, 1777 having been made to the town of *Winthrop* in trust for the use of the ministry, the legislature could not, without violating the rights of that town, permit the town of *Readfield* to enjoy a portion of it, by the act of *March* 11, 1791 incorporating the latter town, which before constituted a part of *Winthrop*.

It is generally true that upon the division of towns, the rights, duties and obligations appertaining to, and imposed upon, the whole town prior to its division, remain to, and devolve upon the ancient town; and the new town can neither claim the one, nor be called upon to perform the other, unless it be otherwise provided in the act erecting the new town. But as it is perfectly equitable that upon such division, each town should share in the property which before was held by all the inhabitants of the territory divided, and that there should be a division also of the duties and obligations to which they had been jointly liable, a provision to this effect is not unfrequently inserted in the acts by which towns are divided, usually originating in compact between the parties concerned. This authority being founded in justice, and having been long acquiesced in by the defendants, must, so far as it has a bearing upon the present action, be considered as rightfully exercised in the act incorporating the town of *Readfield*. How far indeed, by virtue of that act, this specific property could be considered as forming a part of that which was directed to be divided might admit of some doubt, were it not that by the subsequent resolve passed at the instance of both the old and the new town, the right of *Readfield* to a portion of this land is expressly recognized.

It is next made a question, whether it was competent for the

legislature to authorize the sale of this lot of land by their resolve passed *March* 1, 1799, upon the petition of the towns of *Winthrop* and *Readfield*. By that resolve the respective treasurers of the said towns of *Winthrop* and *Readfield* for the time being were jointly empowered to sell the aforesaid lot of land, and to give and execute a good and lawful deed or deeds of the same, in behalf of their respective towns.

At the time of the passing of the resolve there being no settled minister in *Winthrop*, who might by law be seized of the fee of the land in right of the town, the fee remained in abeyance, and the care, custody and profits belonged of right to the town. 2 *Mass.* 500. Had there been a settled minister, he might have aliened in fee that portion of the land which appertained to *Winthrop*, with the assent of the town, then having parochial rights and duties. But there being none in *Winthrop* or in *Readfield*, whose concurrence could be obtained, and it being apprehended that the beneficial purposes of the grant might be more perfectly accomplished by converting the land into money, with a view to appropriate the income to the use of the ministry, these towns applied to the legislature for authority to sell and convey the land for the attainment of this object. Upon their petition the resolve was passed; the treasurers of the respective towns were jointly empowered to sell and convey, and the said towns were "further authorized and required to loan their respective proportions of the monies arising from such sale, and apply the interest thereof to the use of the ministry." As this was merely a modification of the fund, and not a diversion of it from its original object; as it was put into a condition to afford an income, it not appearing before to have been productive, it was probably presumed that no fair objection to this arrangement could be urged by any future minister. The legislature have frequently interposed their authority in the same manner upon similar applications; and it may well be doubted whether their constitutional power to do so can now be questioned. But however this may be, we are well satisfied that it is not competent for the defendants, upon whose petition the resolve passed, and who have assumed to act in pursuance of its provisions, to urge this objection.

It has been further contended that the treasurers of the

towns of *Winthrop* and *Readfield* have not effectually and legally conveyed; not having acted in the name of their respective towns. But their authority is derived not from their towns but from the resolve constituting them agents for this purpose, and is in our apprehension sufficiently pursued. Besides, the defendants have availed themselves of the monies produced by the sales, the grantees have been in possession many years under them, and they cannot at this time be permitted, in their defence, to question the validity of these proceedings.

We are now to ascertain who were constituted trustees of this fund, if it was rightfully created. And here it may be remarked that numerous instances might be adduced in which trustees of school and ministerial funds have been constituted by legislative authority. This has usually been done by creating a corporation for this purpose, consisting of a board of trustees named in the act, the members being authorized to perpetuate their existence by supplying vacancies among their number by election, as they may happen to arise. In the instance before us, it is sufficiently apparent that it was the intention of the legislature, by their resolve of *March* 1, 1799, to constitute the towns of *Winthrop* and *Readfield*, respectively, trustees of their several portions of this fund. And from the nature of the fund, and the object to which it was devoted, there can be no doubt that the trust was reposed in them in their parochial capacity. So long as the town of *Winthrop* had by law duties to perform in this capacity, they rightfully exercised this trust, which was intended to aid them in the performance of these duties. But when a portion of a town is erected into a separate parish, the parochial character of the town as such ceases. By the statute of *Massachusetts* of 1786 *ch.* 10. *sec.* 5. it is provided, "That in all such towns or districts, where "one or more parishes or precincts shall be regularly set off "from such towns or districts, the remaining part of such town "or district is deemed, declared and constituted an entire, per-"fect and distinct parish or precinct, and shall be considered as "the principal or first parish or precinct." And it has been decided that a poll parish, or a parish composed of individuals living in different parts of a town, without being described by geographical boundaries, is within the meaning of the statute,

and when incorporated is considered as being "set off from the town." 7 *Mass.* 441. 445. 8 *Mass.* 96. By the act therefore of the 26 *February*, 1811, incorporating a poll parish in *Winthrop*, the remaining part of the town became the first parish, and the town as such had no longer any parochial duties to perform. To these duties the first parish succeeded; and it also became entitled by law to all the rights and privileges, which appertained to the town in its parochial capacity. 7 *Mass.* 445. 10 *Mass.* 93. The town could have no further use for a ministerial fund; and it would be a gross misapplication of these monies to permit them to be appropriated to other purposes. The first parish in *Winthrop* became therefore the trustees of the fund under the resolve of *March* 1, 1799, arising from the sale of the land thereby authorized, and to them it ought of right to have been transferred upon the creation of the poll parish.

But it is contended that if the rights of the parties are thus to be recognized and established, the plaintiffs have misconceived their remedy, which should have been, after demand, trover for the notes which were taken upon the loan of the money, and which have been renewed from year to year; adding the accruing interest to the principal. These notes however having been made payable to the treasurer of the defendants for many years after they had ceased to have any rightful control over the funds, and being thus by them claimed and assumed, they must be considered as holding the money to the use of the plaintiffs; and this objection cannot in our opinion be sustained.

We are next to consider whether the defendants are entitled to any deduction by way of offset for monies by them paid for the support of the minister from 1807 to 1812 inclusive. So long as the defendants were under obligation to support the minister, they had an unquestionable right to have appropriated the interest of the fund to that object, according to its original destination. But if they deemed it more provident to suffer the fund to accumulate, with a view to the enjoyment of a larger income from it at a future day, and provided other means for the support of their minister to his satisfaction, they ought not now to be permitted to appropriate to

their own use any portion of the fund thus accumulated, in derogation of the interests of those who have succeeded them in the capacity, in which they then acted. While they continued rightfully trustees of the fund, they might have appropriated the interest to the support of the minister; but having no longer any right to act in that character, it is too late for them to claim the appropriation.

The defendants further contend that they are answerable, if at all, to the minister settled in 1807, in whom the fee of the land would have vested in right of his town or parish, and not to the plaintiffs.

If the resolve of *March* 1, 1799 be invalid as against the minister, he is entitled not to the enjoyment of the money, but of the land. If it be valid, we have seen that by its provisions the town in their parochial capacity, and the plaintiffs by succession, and not the minister, are constituted trustees of the fund arising from the sale. This objection therefore cannot prevail.

It remains to determine the effect of the demand made by the minister in *November* 1817 upon the agent of the town of *Winthrop*, for the interest of the fund, from the time of his settlement in 1807 to the time of the demand, which appears in the case reserved. This demand is certainly strong evidence of a disposition on his part to acquiesce in the validity of the sale under the resolve, if in fact it was ever competent for him to impeach it. By his acceptance of the terms of settlement voted and proposed by the town of *Winthrop* in *November* 1806 which appears in the case, he became entitled to the salary therein stipulated. He could not, by any fair construction, be permitted to claim and enjoy the interest of the fund in question, in addition to the salary thus fixed by the agreement of the parties. Upon the plaintiffs by law has devolved the obligation to pay to him the stipulated salary, and to them belongs the accruing interest of the fund, which was designed to aid them in the fulfilment of this duty. The interposition of this demand therefore on the part of the minister cannot have the effect to impair the right of the plaintiffs to recover in this action.

It is to be regretted that the resolve of 1799 so often referred

to, had not been more explicit in its provisions; but we are satisfied that upon a fair application of the principles of law to the facts in this case, the plaintiffs have entitled themselves to

Judgment on the verdict.

Note. The Chief Justice, having formerly been of counsel with the plaintiffs, gave no opinion in this cause.

THE PROPRIETORS OF THE KENNEBEC PURCHASE

v.

TIFFANY.

When a grant or deed of conveyance of land contains an express reference to a certain plan, such plan, in legal construction, becomes a part of the deed, and is subject to no other explanations by extraneous evidence than if all the particulars of the description had been actually inserted in the body of the grant or deed.

If a deed of land refer to a monument as then existing, which in fact is not yet erected, and immediately afterwards the parties fairly erect such monument with the *express view of conforming to the deed,* such monument will govern the extent, though not entirely coinciding with the deed.

Aliter if such monument be erected for any *other* purpose.

This was a *writ of entry*, brought to recover possession of a parcel of land in *Sidney*, described by metes and bounds, whereof the tenant was said to have disseized the demandants.

It appeared from the report of the Judge who presided at the trial, that the tenant admitted that the title to the premises was in the demandants, unless the tract was to be considered as *part of lot No. 72, according to Nathan Winslow's plan*, and in virtue of certain acts done by the demandants.

It further appeared that *Nathan Winslow*, in 1761, was employed by the demandants to survey and lay out three tiers or ranges of lots, in that part of their tract of land which lies in *Sidney*, extending up and down the river *Kennebec*, and westwardly from the river three miles;—that *Winslow* accordingly surveyed the tract, and made a plan of it, on which each lot is represented as *one mile in length and fifty rods in width*;—that he *marked trees on the river* for the corners of all the lots, but *did not actually run any lines*, nor mark any corners, *west* of the

river;—and that many of the lots on the river, measuring from one to the other of the original corners made by *Winslow*, are in fact fifty four rods in width.

In the year 1768, *Dr. McKecknie* was employed by the demandants to survey and lay out for *Ebenezer Bacon* a lot of land in *Sidney*, containing 500 acres, in *the rear* of the third tier or range of lots on *Winslow's* plan, at the distance of three miles from the river; and was *instructed to keep clear of the lots on Winslow's plan. McKecknie* measured from the river, to ascertain the westerly line of the third tier of lots, and marked trees on the southeast and northeast corners of the lot surveyed for *Bacon*, which are now well known, and are in the rear of the lots *No.* 75, 76, 78 and 79 on *Winslow's* plan, but appear, by recent admeasurement, to be three miles *and seventy two rods* west of the river.

The demandants accepted the survey of *McKecknie*, and according to that survey granted the tract of 500 acres to *Bacon*, bounding it thus;—"a tract of land lying on the west side of "*Kennebec* river *at* the rear of the settlers' back lots, containing "500 acres, butted and bounded as follows, to wit,—beginning "*at the west end of the north line of settler's back lot No.* 75, thence "south-south-west forty poles, thence west-north-west three "hundred and forty poles to a pond, thence northerly on the "east side of said pond so far as to make two hundred and "forty poles at right angles, thence running east-south-east *to* "*the settlers' back lots*, thence southerly, *on the settlers' back line* "two hundred poles, to the first mentioned bounds."

In the year 1774, *John Jones* was employed by the demandants to survey and lay out in lots the land in the rear of *Winslow's* lots, *beginning at the east line of the Bacon-tract, and extending southerly to the south end of Snow's pond;* and he accordingly laid out the land from the *Bacon-lot*, southerly, to the south end of the pond, fronting the lots on the pond; and made a plan, representing the *Bacon-lot* as the northern boundary, the pond as the western boundary, and a line drawn from the south east corner of the *Bacon-lot* southerly as the eastern boundary. This plan he *returned to the demandants*, who thereupon *requested him to lay upon his plan the lots on Winslow's plan*, so that they might see the whole territory between the pond and the river,

at *one view*, and he accordingly copied the plan of *Winslow* upon his own.

The demandants afterwards granted the lots adjoining the pond, *by Jones' plan;* but *Jones* never run nor marked any of the lines represented on his plan, except fronting the lots on the pond, and did not ascertain by actual measure, nor did he know, the western boundary or line of the lots laid down on *Winslow's* plan.

In 1777 the demandants granted the lot No. 72, *according to Winslow's plan*, to *Levi Robinson*, as a settler, under whom the tenant claims.

Robinson claimed this lot as extending as far west as the east line of the *Bacon-lot*, but never made any actual improvements within seventy-two rods of it, and never inclosed any part of it *within fences.* In 1789 *Robinson* conveyed one hundred acres of the *west end* of lot No. 72, to the tenant, who has ever claimed to hold as far west as the east line of the *Bacon-tract*, as represented on *Jones'* plan; but no part of the land demanded was ever inclosed within fences, until within thirty years before the commencement of this action.

The Judge instructed the jury that as the tenant claimed under the plan of *Winslow*, the survey and plan of *Jones* were not to be regarded as evidence in the case;—that the location of the *Bacon-lot*, being subsequent to *Winslow's* plan, could have no effect to fix the western limit of the third tier or range of lots laid down by *Winslow;*—and that the tenant could not hold, as part of lot No. 72, any land beyond three miles west of *Kennebec* river;—and a verdict was returned for the demandants, subject to the opinion of the Court upon the correctness of those instructions.

Bond, for the tenant, contended that monuments erected and locations actually made by the parties, after the execution of the deed, were equally binding and conclusive upon the parties, as if expressly mentioned in the deed. A subsequent location of land not described in the deed by visible monuments, is only the completion of what the parties had previously commenced. It is a practical exposition of their own meaning in the deed, by which they both ought to be bound.

Such was the location in 1768, by *Dr. McKecknie*, who was

directed to go *to the end* of the third range of *Winslow's* lots, but had no authority to go *beyond* it. Under these instructions he made a survey and marked corners as the western limits of the third range of lots on *Winslow's* plan, and which are to be regarded as the *agreed* bounds, made by the proprietors themselves, they having accepted the survey, and expressly adopted it as correct in their grant to *Bacon.*

The survey by *Jones* in 1774, may be considered as a confirmation of *McKecknie's ;* for he too, at the request of the proprietors, made a plan of his own survey, as *adjacent* to *McKecknie's* and *Winslow's ;* and they have recognized its correctness, by referring to it in their subsequent grants.

In support of this position were cited *Jackson v. Ogden*, 4 *Johns.* 140. 7 *Johns.* 238. *S. C. Jackson v. Murray*, 7 *Johns.* 5. *Jackson v. McCall*, 10 *Johns.* 377. *Jackson v. Dieffendorf*, 3 *Johns.* 269. *Jackson v. Vedder*, 3 *Johns.* 8. *Makepeace v. Bancroft*, 12 *Mass.* 469. *Pernam v. Wead*, 6 *Mass.* 131. *Howe v. Bass*, 2 *Mass.* 380.

R. Williams, for the plaintiffs.

As the lot No. 72, in the original grant by the demandants, was described with express reference to *Winslow's* plan, that plan must be regarded as part of the deed. And no survey having been actually made by *Winslow* of any lines running back from the river, the distance to which they may be extended, is to be ascertained by application of the scale to the plan. All the surveys except *Winslow's* are subsequent transactions, and cannot, consistently with legal principles, be admitted to affect a prior deed. If they could, every grant would be left in the power of the grantor. The case from 12 *Mass.* 469, does not militate with this position ; as it only shews that where a monument is referred to in a deed, as then actually existing, when in truth it is not yet erected, and the parties afterwards erect it by common consent, they are bound by the location thus made.

Mellen C. J. delivered the opinion of the Court as follows:

The motion for a new trial is grounded upon the rejection of certain proof offered by the tenant; and the particulars of this proof are stated in the report of the Judge who

presided in the trial.—If this proof was improperly rejected, the verdict must be set aside and a new trial granted; otherwise judgment must be entered for the demandants.

The demanded premises are claimed by the tenant as a part of lot No. 72 and in no other manner; and the question is, how far that lot extends westwardly.—It is admitted that *Winslow*, when he made his plan of the *first*, *second* and *third* ranges, only measured the *width* of the lots on the *first* range and set up monuments by the river; and then made his plan of the three ranges; each to be one mile wide; or in other words the *lots in each range* were to be *one mile* in length: and that the extent of the lots in all the ranges was then to be ascertained by length of line only.

The counsel for the tenant admits that the true *west line* of the *third* range is only *three miles* from *Kennebec River*, unless it has been placed either *expressly* or by *implication farther* west, and so *located* by the Proprietors or their agents, as to give extension to the lots in that range as far westwardly as the *Bacon-lot*, and so far as to include the demanded premises as part of lot No. 72.——This lot was granted to *Robinson*, *according to Winslow's plan*; and the tenant holds what was granted to *Robinson*, and nothing more.

When land is granted or conveyed *according to a certain plan*, such plan, in legal construction, becomes a *part of the deed*, and is subject to no other explanations by extraneous evidence, than if all the particulars of the description had been actually inserted in the body of the grant or deed. Now it is clear that according to *Winslow's* plan lot No. 72 extends only *three* miles from the river; and if the grant to *Robinson* had been made *before* the *Bacon-lot* was located and *Jones'* survey completed, the lot would not have been extended so as to embrace the land in dispute. We are then to inquire whether the location of the *Bacon-lot* by *McKecknie*, or the survey and plan of the rear lands made by *Jones* do in legal contemplation alter the case.

When *McKecknie* located the *Bacon-lot*, he measured *for himself*, to ascertain the west line of the *third range*, or in other words the *end* of the three miles from the river; and it appears by the plan taken in the present case, that he made seventy-

two rods *large measure:* and therefore, though in the description of the bounds of that lot, it is *said* to adjoin the lots in the *third range*, it is *in fact* seventy two rods to the westward of that range.—This was evidently an error on the part of *McKecknie:* and the lot was located by mistake seventy two rods farther west than was intended.—It seems that the proprietors were not aware of this error when they employed *Jones* to survey and make a plan of the lands *south* of the *Bacon-lot* and westward of the third range of *Winslow's* lots; and it is equally clear that *Jones himself* was not conscious of it at the time he executed the duty assigned him. He proceeded on the mistake made by *McKecknie* and when he copied *Winslow's* plan and laid those lots down on his own plan, he *continued* the mistake by representing those lots as extending westward as far as the *Bacon-lot.*—It is not contended that *Jones* knew the *rear* line of the setttlers' lots or in other words the *west* line of the third range: he never run that line or attempted by any correct process to ascertain its true position.

We do not question the correctness of the decisions on which the counsel for the tenant relies.—In the cases cited from *Johnson* the lands had been surveyed and certain monuments erected *before* the deeds were executed; and the description was variant from the previous survey. The Court there decided that the generality of the language of the deed as to the lot, should be explained and corrected by the actual survey which had been made in contemplation of the conveyance.

In the case of *Makepeace v. Bancroft* the monument referred to in the deed did not exist at the time of the execution, but afterwards the brick wall, being the monument described, was erected, and was intended to conform exactly to the deed, though it did not. Yet the Court decided that this monument must govern the construction. It was intended to govern it.—The language of the Court in that case is this "If a deed of "land pass at a distance from the premises granted and reference "should be made to a stake and stones for the termination of one "of the lines, no such monument actually existing, and the par-"ties should afterwards fairly erect *such* monument with *intent to* "*conform to the deed*, we think the monument so placed would "govern the extent, although not entirely coinciding with the

" line described in the deed."—The case at bar differs from that case in two important particulars :

1. The deed referred to a *certain monument* at the end of the line; but there is none referred to on *Winslow's* plan at the end of the third mile.

2. In the case of *Makepeace v. Bancroft*, the *monument named* in the deed, was erected with the *express* view of conforming to the deed.—In the case before us the acts done by the agents of the Proprietors, which are relied upon as proof of an *extension westward* of the lots in the third range, and a *location of the west line* of said range, were all performed for *other* purposes, and without any intention to settle the western boundary of the range.

It is admitted, or not denied, that the tenant holds the lot which he purchased, and has his complement of acres. The lot is a mile long, exclusive of the demanded premises; and as *wide* or *wider* than represented on *Winslow's* plan. No injustice then is done to the tenant.

We do not perceive any principle of law and certainly none of justice, which calls upon us to pronounce that such a *mere mistake* of a surveyor of the Proprietors, of which they had no knowledge until after the lapse of many years, and which has not violated the rights of any who claim under their grants, has had the effect completely to divest those Proprietors of their legal right and title to a valuable tract of land. The location of the *Bacon-lot* was not made with *the intent* to settle the western line of the third range, nor was *Jones'* survey made for that purpose. There is then no *express* location or extension of the lots in the third range as the tenant's counsel contends; and if such effect is to be considered as produced by *implication*, it is an implication resulting from *ignorance* instead of *knowledge*—from *mistake* instead of *intention*.

It is known to some of the Court that several years since a question similar to the present arose respecting a tract of land in *Vassalborough*.—The facts in the case alluded to were nearly the same as in this;—a similar error was committed by the surveyor who run out and made a plan of the lands in the rear of the third range, surveyed before by *Winslow*.—Upon accurate admeasurement, it was found that the *fourth* range did not ad-

join the *third*, as was supposed when it was located. The cause was tried before the Supreme Judicial Court of *Massachusetts*, and they were clearly of opinion that the lands situated between the termination of the *third tier of lots* in *Winslow's* plan, or the end of three miles from the river, and the *fourth* range as located by monuments, were the property of the Proprietors—and the decision was conformable to this opinion. It is understood that all concerned have acquiesced in it.

For the reasons we have assigned we are all satisfied that the evidence offered by the tenant was properly rejected and of course that there must be

Judgment on the verdict.

See *Lunt v. Holland*, 14 *Mass.* 149.

KANAVAN'S CASE.

To cast a dead body into a river, without the rites of christian sepulture, is indictable, as an offence against common decency.

Kanavan was indicted for that he counselled and advised *M. E.*, then pregnant with a bastard child, to bring it forth alone and in secret; which child afterwards, by reason of the advice and procurement of the defendant, was born of said *M.* alone and in secret, and afterwards was found dead, concealed in the *Kennebec* river.

The second count stated that the defendant unlawfully and indecently took the body of said child from said *M.* and threw it into the river, against common decency, &c.

The defendant being convicted on the second count, a motion was made in arrest of judgment, on the ground that the offence charged was not indictable at common law.

By the Court. We have no doubt upon this subject, and do not hesitate a moment to pronounce the indictment to be good and sufficient, and that there must be sentence against the prisoner.

From our childhood we all have been accustomed to pay a reverential respect to the sepulchres of our fathers, and to attach a character of sacredness to the grounds dedicated and inclosed as the cemeteries of the dead. Hence, before the late statute of *Massachusetts* was enacted, it was an offence at common law to dig up the bodies of those who had been buried, for the purpose of dissection. It is an outrage upon the public feelings, and torturing to the afflicted relatives of the deceased. If it be a crime thus to disturb the ashes of the dead, it must also be a crime to deprive them of a decent burial, by a disgraceful exposure, or disposal of the body contrary to usages so long sanctioned, and which are so grateful to the wounded hearts of friends and mourners. If a dead body may be thrown into a river, it may be cast into a street:—if the body of a child—so, the body of an adult, male or female. Good morals—decency —our best feelings—the law of the land—all forbid such proceedings. It is imprudent to weaken the influence of that sentiment which gives solemnity and interest to every thing connected with the tomb.

Our funeral rites and services are adapted to make deep impressions and to produce the best effects. The disposition to perform with all possible solemnity the funeral obsequies of the departed is universal in our country;—and even on the ocean, where the usual method of sepulture is out of the question, the occasion is marked with all the respect which circumstances will admit. Our legislature, also, has made it an offence in a civil officer to arrest a dead body by any process in his hands against the party while living:—it is an affront to a virtuous and decent public, not to be endured.

It is to be hoped that punishment in this instance will serve to correct any mistaken ideas which may have been entertained as to the nature of such an offence as this of which the prisoner stands convicted.

The prisoner having been in close confinement four months, was sentenced to a farther term of four months imprisonment.

Emmons, for the prisoner.

THE INHABITANTS OF GREENE
v.
THE INHABITANTS OF TAUNTON.

Where the town in which a pauper had his settlement, being duly notified pursuant to the statute, paid the expenses of his support and removed him, but before he reached the place of his settlement he returned to the town where he had been removed, where he again became chargeable; it was holden that the town in which he had his settlement was not liable for the expenses accruing after his return, without a new notice.

This was an action of *assumpsit*, brought to recover the expenses of supporting a female pauper. Plea, the general issue.

It appeared that on the last of *June* 1817, the defendants paid the expenses incurred prior to that time, and also in advance up to *July* 10, 1817. The plaintiffs then gave written and formal notice, on the last of *June*, that the pauper was expensive to them, and that the expense was and would be charged to the defendants, and requesting the defendants to pay the expenses and remove the pauper. The defendants afterwards, and before the 10th day of *July*, having entered into an agreement with one of the inhabitants of *Greene* whom they constituted their agent for that purpose, at their own expense, removed the pauper from *Greene* as far as *Boston;* from which place, instead of proceeding to *Taunton*, she returned, after an absence of two or three weeks, to *Greene*, and again became expensive to that town. The overseers of the poor of *Greene* thereupon, on the first day of *September* 1817, wrote a letter to the overseers of the poor of *Taunton*, which was duly received by them, stating that they had formerly written to them "respecting the *Williams* girl," as the pauper was called,—that she had been sent to *Boston*, but "*had returned*,"—that her brother-in-law had offered to support her at a low price, which was less than the plaintiffs could support her at,—and requesting them to forward a contract for that purpose, or make other arrangements, and give information to the plaintiffs as soon as convenient. To this letter there was no reply.

Upon this evidence the Judge who presided at the trial of the case directed a nonsuit; reserving, for the consideration of the

whole Court, the question whether the letter of *Sept.* 1, could be considered, under the circumstances of the case, as a sufficient legal notice; and whether the notice given on the 30th of *June* 1817, prior to the removal, could be considered as extending to the expenses incurred after the pauper's return to *Greene.*

A. Belcher, for the plaintiffs. The defendants having neglected to reply, or having taken away the pauper, are estopped to contest her settlement forever;—and the object of notice, being only to give the town an opportunity to ascertain the settlement of the pauper, is answered as soon as the settlement is fixed. *Embden v. Augusta*, 12 *Mass.* 307. *Westminster v. Barnardston*, 8 *Mass.* 104.

Bond, for the defendants.

There is no moral obligation upon towns, to support the poor; it is merely the creation of a positive statute; and the forms of the statute must be strictly pursued. These forms constitute a condition precedent to the plaintiffs' title to recover. Here, all the prior debt was cancelled by payment, and the pauper was actually removed by the defendants. So far therefore as respects subsequent expenses she was a new pauper, and notice should have issued *de novo.* *Sidney v. Augusta*, 12 *Mass.* 316. *Hallowell v. Harwich*, 14 *Mass.* 186.

The Court observed that the objects sought by the first notice were obtained by the removal of the pauper at the expense of the defendants, and the admission of her settlement in *Taunton.* But after her return to *Greene*, the defendants could not know that she was again chargeable as a pauper, without new notice, which in this case was not given, the letter of *September* 1, being materially defective, and insufficient for the purpose for which it was intended. And even if the question as to settlement were at rest, yet a new notice is not the less necessary in cases of this kind, that the town notified may have opportunity to elect whether they will support the pauper in another town, or remove her to their own.

Judgment for the defendants.

JOHNSON'S CASE.

In all criminal prosecutions, an appeal lies from the sentence of a Justice of the peace, who tries without a jury, to the Circuit Court of Common Pleas, where a trial by jury may be had; by necessary construction of the *Constitution of Maine, art.* 1. *sec.* 6.

Johnson being brought into Court upon a writ of *habeas corpus* sent to the prison keeper of the county of *Cumberland*, it appeared by the officer's return that he had been prosecuted before a Justice of the peace, under *Stat.* 1793. *ch.* 59. *sec.* 8. for keeping a house of ill-fame, and sentenced to imprisonment in the common gaol as a house of correction, for a term which was not yet expired.

Bray, for the prisoner, shewed a copy of the Justice's record, by which it appeared that, *Johnson* on being sentenced by the Justice, had claimed an appeal to the Circuit Court of Common Pleas, tendered the fees, and offered sufficient sureties for the prosecution of his appeal:—but the Justice, considering that no appeal would lie in a summary proceeding of this kind, refused the application.

Per curiam. By the law of *Massachusetts*, *Stat.* 1783. *ch.* 51. an appeal was granted, in all criminal cases, from the sentence of a Justice of the peace. This right has been abridged in some instances, by particular statutes;—but in all other cases has been understood to exist in full force.

The right, however, in this State, is placed on a more durable basis than the pleasure of the legislature. The Constitution of *Maine*, *art.* 1. *sec.* 6. declares that "in all criminal prosecutions the accused shall have a right —— to have a speedy, public, and impartial trial, and, except in trials by martial law or impeachment, by *a jury of the vicinity.*" In order to give effect to this provision, the accused must, of necessity, be entitled to an appeal from the sentence of a Justice of the peace, who tries without the intervention of a jury, to the Circuit Court of Common Pleas, where a trial by jury may be had.

The present case being a criminal prosecution, and not within the exception in the Constitution, is of course within the rule;

—and the prisoner must be discharged, on entering into such recognizance before the magistrate, as he would have entered into for the prosecution of his appeal had it been allowed.

STINCHFIELD *v.* LITTLE.

Where a contract is entered into, or a deed executed, in behalf of the government, by a duly authorized *public agent*, and the fact so appears, notwithstanding the agent may have affixed *his own name and seal*, it is the contract or deed of the government, and not of the agent.

But the agent or attorney of a *private person or corporation*, in order to bind the principal or constituent and make the instrument his deed, must set to it *the name and seal of the principal or constituent*, and not merely his own.

If the agent describe himself in the deed or contract as acting *for*, or *in behalf*, or *as attorney* of the principal, or *as a committee to contract for*, or *as trustee* of a corporation, &c., if he do not bind his principal, but *set his own name and seal*, such expressions are but *designatio personæ*, the deed is his own, and he is personally bound.

In an action of *covenant* upon the issue of *non est factum*, the plaintiff offered in evidence the deed declared on, which was in these words: "Know all men by these presents, that I *Josiah* "*Little* of, &c. by virtue of a vote of the Pejepscot Proprietors, "passed on the first day of *September* 1784, authorizing and "appointing me to give and execute deeds for and in behalf of "said proprietors, for and in consideration of the sum of thirty-"seven pounds to me in hand paid by *Thomas Stinchfield* of, &c. "the receipt whereof I do hereby acknowledge, have given, "granted, released, conveyed and confirmed unto him the said "*T. S.* his heirs and assigns forever two hundred acres, &c. "To have and to hold the above granted and bargained premis-"es with all the privileges and appurtenances thereof to him "the said *T. S.* his heirs and assigns forever, as an absolute es-"tate of inheritance in fee simple forever: hereby covenanting "in behalf of said Proprietors, their respective heirs, executors, "and administrators to and with the said *T. S.* his heirs and "assigns to warrant, confirm and defend him and them in the "possession of the said granted premises, against the lawful

"claims of all persons whatsoever. In testimony that this "instrument shall be forever hereafter acknowledged by the "said Proprietors as their act and deed, and be held good and "valid by them, I the said *Josiah Little* by virtue of the afore-"said vote, do hereunto set my hand and seal this nineteenth "day of *February*," &c. with the defendant's name, and a seal. To this the defendant objected that the deed, and the covenants therein, were the deed and covenants of the Pejepscot Proprietors, and not of the defendant; and so not proving the declaration. And *Thacher J.* before whom the cause was tried, thereupon directed a nonsuit, with leave for the plaintiff to move that the nonsuit should be set aside and the action proceed to trial, if the Court should be of opinion that the deed and covenants therein were the deeds and covenants of the defendant.

The motion was argued at the last term in this county by *Belcher* and *R. Williams* for the plaintiff, and *Little* and *Longfellow* for the defendant, and was thence continued to this term for advisement.

For the plaintiff, it was insisted that the nonsuit ought not to have been ordered, until the defendant had first shewn his authority to bind the proprietors, that it might appear that the authority was pursued; because, if it were not, it would still be *his own* deed.

But if he had sufficient authority to bind the proprietors by deed, yet he has not executed it in such a manner as to bind them, and therefore has bound himself. *Fowler v. Shearer*, 7 *Mass.* 14. *Tippets v. Walker*, 4 *Mass.* 595. *Appleton v. Binks*, 5 *East* 148. *Barry v. Rush*, 1 *D. & E.* 691. *Frontin v. Small*, 2 *Ld. Raym.* 1418. *Willes* 105. In all these cases the agent professed to act for others, but signed his own name, as he did in the present case. Upon authority, therefore, the nonsuit ought to be set aside.

Little and *Longfellow è contra.*

Proprietors of lands, incorporated by the provisions of our statutes, have no common seal, and must always grant by vote, or convey by deed, executed by agent or attorney authorized for that purpose. No particular form of words is necessary for an agent to bind his principal, if he expresses in the contract the capacity in which he acts. *Wilks v. Back*, 2 *East* 142.

Deeds are to receive a construction from the whole taken together; and every deed ought to be so construed, if it be legally possible, as to effect the intent of the parties. *Browning v. Wright*, 2 *Bos. & Pul.* 12. *Wallis v. Wallis*, 4 *Mass.* 135. *Ellis v. Welch*, 6 *Mass.* 246. *Davis v. Hayden*, 9 *Mass.* 514. *Bott v. Burnell*, 11 *Mass.* 163. By the rules laid down in these cases the deed declared on must be taken to be the deed of the Pejepscot proprietors, and not of their agent. In its commencement it declares the character in which he acts, "by virtue of a vote of the Pejepscot proprietors," appointing him "to give deeds for and in behalf of said proprietors." In pursuance of which authority he "gave and granted" the lands described in the deed, "covenanting in behalf of said proprietors *their heirs* and assigns"; and in the conclusion it is again designated as the deed of the proprietors in these words;—"In testimony that this deed shall be forever hereafter acknowledged by said proprietors as *their act and deed*, and be held good and valid *by them*," &c. The deed in its whole form and tenor purports to be only a conveyance of the Pejepscot proprietors' lands, and no other, and the covenants are expressly intended for them alone.

In *Stackpole v. Arnold*, 11 *Mass.* 27. *Mayhew v. Prince*, *ib.* 54. and *Afridson v. Ladd*, 12 *Mass.* 173. there were no words in the instruments which shew an agency, or disclose any intent to bind any person other than the person executing them.

This deed purporting to convey proprietors' lands, and the covenants purporting to be made in their behalf, it must be considered as their deed, and not the deed of the defendant.

If the deed is not properly executed by the agent, as the deed of the proprietors, then it is not a deed, and conveys nothing, being a void instrument; and the grantee can have no benefit from the covenants. *Fowler v. Shearer*, 7 *Mass.* 14.

If the deed is properly executed, and passes the estate of the proprietors, then, according to the principles settled in *Sumner v. Williams*, 8 *Mass.* 162. the agent is not liable personally for covenants in a deed purporting to convey an estate not his own, unless he sustains a character competent to convey, and executes an instrument of conveyance legal in its forms, explicitly assuming the covenants himself. In the case at bar it was competent for the proprietors to delegate authority to convey, and

to enter into covenants of warranty; and the deed supposes such authority given to the defendant. The only question, therefore, is whether he has properly executed that authority.

It was said in *Sumner v. Williams*, that the covenants must be considered as personally binding the executors, because, in entering into them, they exceeded the limits of their duty as executors. In *Tippets v. Walker* the defendants sealed the contract with their own seals, and not with the seal of the corporation, having a common seal; nor did it appear that they had sufficient authority from the corporation to enter into the contract. And the reason of the judgment in *Appleton v. Binks* was that the defendant, upon some supposed indemnity, undertook for his principal, and personally entered into the covenants; which in the present case does not appear.

Preble J. at this term delivered the opinion of the Court, as follows.

In this case two questions are presented for the consideration of the Court. 1. Is the deed declared on, the deed of the Pejepscot proprietors? 2. Admitting it not to be the deed of the Pejepscot proprietors, is it the deed of *Josiah Little*, the defendant?

Where a contract is entered into, or a deed executed in behalf of the government by a duly authorized public agent, and the fact so appears, notwithstanding the *agent may have affixed his own name and seal*, it is the contract or deed of the government, who alone is responsible; and not of the agent. *Unwin v. Wolseley*, 1 *D. & E.* 674. *Macbeath v. Haldimand*, *idem* 172. *Hodgson v. Dexter*, 1 *Cranch* 345. *Dawes v. Jackson*, 9 *Mass.* 490. *Sheffield v. Watson*, 3 *Caines* 69. But the same rule does not obtain in relation to the agent or attorney of a private person or corporation. It seems to have been settled or recognized as law in Courts of justice by judges, distinguished for their wisdom and learning, in successive generations, and under different governments, that in order to bind the principal or constituent, and make the instrument his deed, the agent or attorney must set to it the name and seal of the principal or constituent, and not merely his own. In the year 1614 it was resolved in *Combes' case* 9 *Co.* 76. that "when any has authority as an "attorney to do any act, he ought to do it in his name, who

"gives the authority; —— and the attorney cannot do it in his "own name, nor as his proper act, but in the name, and as the "act of him, who gives the authority." There, however, the act, done by attorney, was the surrender in Court of certain copyhold lands, in doing which, as is well known, neither signing nor sealing constituted any part of the ceremony. A case where a question, relating to the receiving of such a surrender, was agitated, came before the Court of K. B. in 1701, *Parker v. Kett*, 1 *Ld. Raym.* 658. in which *Ld. C. J. Holt* seems to be dissatisfied with the rule in *Combes' case*, and expresses an opinion that, though the act were done in the attorney's own name, provided he had sufficient authority, it would be good without reciting his authority, though not so regular and formal. The rule however, as laid down in *Combes' case* is cited by *Ld. Ch. Baron Comyn*, as good law. *Com. Dig. Attorney* (C. 14.) *and* 1 *Rol.* 330. *l.* 35. is quoted as supporting it. Upon the same authority it is stated, that if an attorney has a power by writing to make leases, if he makes a lease in his own name, it will be void. This latter principle was recognized as law in 1726 in *Frontin v. Small*, 2 *Ld. Raym.* 1418. In that case also the attorney in the body of the instrument *for*, and *in the name*, and *as attorney of* the principal, demised, &c.; but the Court held, that a person, empowered by warrant of attorney to execute a deed for another, must *execute it* in the name of the principal. In conformity with this decision is the language of *Ld. C. J. Kenyon* in 1795 in *White v. Cuyler*, 6 *D. & E.* 176. "In executing a deed "for the principal under a power of attorney, the proper way "is to sign in the name of the principal." And at a still later period in 1802 in *Wilkes v. Back*, 2 *East* 142. the doctrine, that an attorney must execute his power in the name of his principal, and not in his own name, was recognized by the whole Court, as sound law. The same rule seems to obtain also in the courts of law in this country. Thus in *Simond v. Catlin*, 2 *Caines* 66. *C. J. Kent* not only admits the authority of *Frontin v. Small*, but adds "when a man acts in contemplation of law by the author-"ity, and in the name of another, if he does an act in his own "name, although alleged to be done by him as attorney, it is "void." So also in *Fowler v. Shearer*, 7 *Mass.* 14. *C. J. Parsons* in delivering the opinion of the Court says, "If an attorney has

" authority to convey lands, he must do it in the name of the " principal. The conveyance must be the act of the principal, " and not of the attorney; otherwise the conveyance is void. " And it is not enough for the attorney in the form of the convey- " ance to declare, that he does it as attorney, for, he being in the " place of the principal, it must be the act and deed of the prin- " pal, done and executed by the attorney in his name." This, it is manifest, is only a combination of the principles of the two cases of *Combes* and *Frontin v. Small*, and as such is a recognition on the part of the Court of the law, as laid down in those cases. But in the case of *Elwell v. Shaw*, 16 *Mass.* 42. this subject was again brought in review before the court. There the deed in question commenced with a recital at full length of the power of attorney from *Jonathan* to *Joshua Elwell;* and the attorney, professing to act only in virtue of that power, proceeds to convey, &c. and then concludes "*In testimony whereof* " *I have hereunto set the name and seal of the said Jonathan*," *&c.* but affixes *his own name* and a seal. In delivering their opinion the Court say, it is *impossible that any one should doubt the intention of the parties*, but, yielding to the weight of the authorities, they *held the deed not to be the deed of Jonathan.* Now, when we advert to the deed under consideration, we find the case of *Elwell v. Shaw* a much stronger one than the present. There the attorney *professing to set the name and seal of the principal*, set a seal, but *signed his own name:* Here the attorney did *not even profess to set the name or seal of the principal* but *professedly as well as actually set his own.* It has indeed been intimated in argument that the case of *Elwell v. Shaw* is an extreme one, bordering at least exceedingly near on the line. Be it so. All cases bordering exceedingly near on the line are extreme cases. We do not rest the decision of this cause upon that case merely, however safely we might do so, but upon well settled and established principles in other cases which have been too long and too often recognized to be now called in question. Applying those principles to the case at bar we are of opinion that the deed in question is not the deed of the Pejepscot proprietors.

This is not the case of a deed good in point of form but void for want of power in the person assuming to act as attorney. In such a case whether the attorney is bound by the instrument

itself, or only responsible in an action on the case, it is not necessary for us now to consider. For the purpose of this inquiry, and in the form in which the question is presented for consideration, it is granted that *Little* had sufficient authority to bind the Pejepscot proprietors. If he had properly exercised the powers confided to him, it will be readily admitted he could not have been made personally responsible whatever injury the plaintiff might have suffered for any breach of the covenants contained in the deed. It would then have been the deed of the Pejepscot proprietors and not *Little's;* whereas as the case now stands, it is not their deed, but his own. Thus *C. J. Parker* in *Stackpole v. Arnold*, 11 *Mass.* 27. "It is also held that, whatev-" er authority the signer may have to bind another, *if he does not* " *sign as agent or attorney, he binds himself* and no other person." See also *Mahew v. Prince, idem* 54. So in *Afridson v. Ladd*, 12 *Mass.* 173. "It is not sufficient that a person in order to dis-" charge himself from a promise in writing, should shew that he " was in fact the agent of another, but it should be made to ap-" pear, that he treated as agent, *and actually bound his principal by* " *the contract.*" Nor is it sufficient that the agent describe himself in the deed or contract, as acting *for*, and *in behalf*, or *as attorney of* the principal, or *as a committee to contract for*, or *trustees of* a corporation, &c.; for if he do not bind his principal, but *set his own name and seal*, such expressions are but *designatio personæ* —it is his own act and deed, and he is bound personally. *Fowler v. Shearer, supra. Appleton v. Binks*, 5 *East* 148. *Tippets v. Walker*, 4 *Mass.* 595. *Tucker v. Bass*, 5 *Mass.* 164. *Taft v. Brewster*, 9 *Johns.* 334. See also *Thacher v. Dinsmore*, 5. *Mass.* 299. *Barry v. Rush*, 1 *D. & E.* 691. *Sumner v. Williams*, 8 *Mass.* 162. *Long v. Colburn*, 11 *Mass.* 97.—Besides, since the deed cannot *proprio vigore* operate as the deed of the Pejepscot proprietors, the last clause of it might well be considered perhaps as is contended by the plaintiff's counsel, under a fair construction of it, the personal covenant of the defendant, that the Pejepscot proprietors should acknowledge that instrument to be good and valid, and equally obligatory on them, as though it were their own act and deed. See *Mann v. Chandler*, 9 *Mass.* 335.—*Appleton v. Binks, and Tippets v. Walker, supra.* But without resorting to such construction, we are of opinion that the

deed is the deed of *Josiah Little* the defendant; and accordingly the nonsuit is set aside, and a

New trial granted.

Note. The *Chief Justice*, having formerly been of counsel with the defendant, gave no opinion in this cause.

HATHORNE *v.* HAINES.

A local action must be brought in that county which claims and exercises jurisdiction over the place which gives rise to such action:—Nor is it competent for a defendant, merely with a view to avoid the jurisdiction on the principle that the action is local, to shew that *de jure* the line of the county ought to be established in a different place from that in which it is actually established and known.

If the *grantee* of one who was disseised at the time of the conveyance enter on the land, he is a trespasser; and having gained possession by his own tortious act, he cannot avail himself of his deed to render his continuance in possession lawful.

THIS action was brought to recover seisin and possession of a tract of land, described in the writ as being in the town of *Pittston* in the county of *Kennebec*. The demandant, in support of his action, gave in evidence sundry deeds, deriving his title ultimately from the Proprietors of the *Kennebec* purchase to a lot of land bounded southerly by a road which formed the northern boundary of the town of *Dresden*, formerly *Pownalborough*, in the county of *Lincoln*, and adjoining the town of *Pittston;* and he gave some evidence of an ancient line situated south of the demanded premises, which might be supposed to be this boundary.

The tenant then offered evidence of a line still more ancient, situated about *twenty-five rods north* of the line first proved, and also proved that the lot of land contained in the demandant's deeds was actually located north of and bounded by the line last testified to; which several witnesses testified was the true northern boundary of *Pownalborough*. And by this location the Judge was of opinion that the demandant was bound.

The demandant thus failing to support his title by deeds, attempted to prove a title by possession; and shewed that from

the year 1812, he had kept about one acre of the premises inclosed within a fence, claiming and improving it as his own, until the tenant entered and ousted him. The tenant then gave in evidence his own title, derived by mesne conveyances from the same Proprietors, and particularly a deed, dated *August* 24, 1815, conveying to him the lot of land, *No.* 23, in *Pownalborough*, which he contended covered the demanded premises, and which was described as bounded "northerly by the old town line," which was the name usually given to the line supported by the tenant; and it appeared by the plans used in the case that the lot *No.* 23 was the most northerly lot in *Pownalborough.*

It was also proved by the demandant that the selectmen of the towns of *Dresden and Pittston*, being in the year 1808 appointed a committee by their respective towns to ascertain and determine the boundary line between them, after due investigation agreed upon the southerly line above mentioned as the true boundary, and perambulated and marked it accordingly; and that the line thus marked had ever since been acquiesced in by the two towns, and the land north of this line accordingly assessed in *Pittston.*

Upon this evidence the Judge who presided at the trial of the cause instructed the jury, that whatever might otherwise have been the tenant's title to the demanded premises, yet if they believed that the inclosure of a part of the land within fences by the demandant was a disseisin of the tenant's grantor of the part thus inclosed, they were bound, as to this part, to find a verdict for the demandant, which they accordingly did.

The tenant thereupon moved for a new trial, alleging 1st, that the jury ought to have been instructed to find for the tenant, if they believed the north line to be the true boundary of *Pittston*, because in that case the demanded premises would be in the county of *Lincoln*;—2d, that the Courts in the county of *Kennebec* have no jurisdiction of the subject matter;—3d, that the deed to the tenant, after entry by him, would operate to confirm his title against the demandant.

Upon this motion, which was opposed by *R. Willaims* for the plaintiff, and supported by *Allen* for the defendant, the counsel submitted their arguments in writing, during the last vacation, in substance as follows.

For the motion, it was contended that the true location of the line was a fact to be derived from all the evidence in the case, was necessary in order to determine the rights of the parties, and was exclusively within the province of the jury; but according to the direction of the judge, had they been unanimously agreed that the north line was the true boundary, with which the north line of the lot *No.* 23 strictly coincided, yet they were bound to find for the demandant if they believed he had inclosed a single acre, prior to the date of the tenant's deed. If, however, a distinction be attempted to be made between a jurisdictional limit *de facto*, and the boundary *de jure*, and it should be thence argued that the marking of the line by the Selectmen in 1808 and the subsequent acquiescence of the two towns, may have effect to give jurisdiction to the Courts; it may be replied that this would go to remove the basis of their jurisdiction in real actions, from the statutes establishing the counties, to the mere pleasure of the selectmen of two bordering towns. Independent of the fact that the tenant and those under whom he claims have uniformly protested against the perambulation by the Selectmen in 1808, it may be observed that the statute of 1785, *ch.* 75, provides that "the bounds of all townships shall be and remain as heretofore granted, settled and established;" and *Pownalborough* was incorporated and its bounds established in 1760, *Pittston* in 1779; and *Dresden*, in 1794, succeeded to this part of *Pownalborough*. What the line of this town therefore was in 1786, it must still remain. The whole power of the selectmen, given by the same statute, is only to *run* and *renew* the bounds of towns; not to alter or change them. This Court must have a right to inquire by a jury *where* is the line between the two towns, and parties interested have a right to prove that the selectmen committed an error in fixing that line where they did, in which error they have constantly persisted. If this court has not the power, in what manner are the errors of the Selectmen to be corrected? If the tenant has not the right to prove their mistakes, then his evidence to that point ought not to have been received, for a jury ought not to hear evidence which they are not permitted to weigh.

If the selectmen cannot alter the town line, *a fortiori*, they cannot change the lines of the two counties. This line was by the

act of *February 20th*, 1799, erecting the county of *Kennebec*, established as the south line of *Pittston;* and wherever this boundary then was, there it must remain. If this be not true, then any two towns, bordering on a county line, might by collusive agreement oust this Court of its jurisdiction over the greater part of either town, at their pleasure.

If this were an action against a collector of the town whose territory is thus enlarged by agreement of the selectmen, for a distress of taxes assessed upon the territory thus acquired, it might be contended with more appearance of good reason that the two towns having agreed upon a disseisor, the collector should be justified. Even in that case, however, it is difficult to suppose that the plaintiff would not have a right to prove that the line thus agreed on was fixed in a wrong place. There can be but one boundary line between the two towns. Either party has an unquestionable right to prove by the best evidence in his power where that line is; and wherever it is proved to be, there is the north bound of the tenant's land.

This is not a case, it is conceived, where the Court may or may not grant a new trial, in the exercise of its discretion; but where, if they are satisfied that the jury were improperly limited by the directions of the Judge, the verdict must be set aside. *Boyden v. Moore*, 5 *Mass.* 365.

It is further necessary that a new trial be granted or the judgment arrested for defect of jurisdiction of the subject matter; for upon the supposition that the north line is the true boundary, the judgment cannot be executed. The demandant, and any Sheriff of *Kennebec* attempting to execute the *habere facias* would be trespassers.

As to the *third* cause, it is contended that the direction of the Judge was erroneous; for however true it may be that a deed of land, of which the grantor is disseised at the time of the conveyance, cannot operate to authorize the grantee to maintain an action against the disseisor; yet if the grantor's right of entry be not lost, and the grantee afterwards gain possession, his deed will operate to confirm his possession against a mere disseisor. The Court will direct the jury to presume, if necessary, that the deed was not delivered till the grantee entered. *Knox v. Jenks*, 7 *Mass.* 488. In the present case the right of

entry was not gone when the tenant entered; and the writ shews that the tenant was in possession of the land.

Against the motion, it was answered that inasmuch as the land demanded is described by metes and bounds, and alleged to be in *Pittston* in the County of *Kennebec*, if the tenant would contend that the premises were in a different town and county, he should have pleaded this in abatement to the writ, and thus have given notice to the plaintiff that the town and county lines were to be controverted. The question whether the land lies in *Kennebec* or *Lincoln* is not to the merits of the action. There is nothing in the record to shew a want of jurisdiction, and the Court will not, after a trial upon the merits, deny the plaintiff the fruits of his verdict, if it can legally be sustained. *Gage v. Gannet*, 10 *Mass.* 176. *Byrnes v. Piper*, 5 *Mass.* 363.

But if it be considered that the matter of this objection need not be taken in abatement, but may be shewn under the plea of *nul disseisin*, then it is contended that the line has been fixed and established by the selectmen of *Pittston* and *Dresden* in 1808, so far at least as to settle the jurisdiction of those towns, and of the courts of the two counties; for it will be recollected that the line of the counties is to be ascertained, according to the statute, only by referring to the lines of those towns. There is no evidence that the northerly old line was ever recognized by *Pownalborough*, *Pittston* or *Dresden*, as the dividing line of the towns; but there is evidence that the old south line was established as the town line, and as such has been long acquiesced in. Admitting, with the tenant, that the power of the selectmen was only to *run* and *renew* the lines of the towns—not to alter or change them; the evidence is that they did the former, and not the latter. The tenant contends that there were two old lines, one of which was the town line, the other not; and so say the selectmen, who, after due inquiry and examination, ascertained the south line to be the true boundary, and as such renewed and marked it. This is neither establishing a new line, nor altering an old one. And if this is not binding and final as to the titles of parties whose lands are bounded upon the line, yet as to the question of jurisdiction it is conclusive. The known lines, settled by the municipal authorities, are alone to be regarded in questions of this nature. If the law were not so,

the perplexities and embarrassments of executive officers would be very great, and the mischiefs incalculable.

But the Court will observe that as no question was made at the trial respecting county lines, so no direction on that subject was given to the jury; and as there was evidence of two lines, the jury were to determine which of the two was best proved; and this fact is settled by the verdict.

The direction of the Judge is to be considered in reference to the demandant's title compared with the tenant's, and not to any question of county lines which had not been even suggested at the trial. If the land, described as it is in this writ, were actually without the county, and the parties, proceeding to trial on the general issue, had exhibited all their title-deeds and other evidence to the jury, and no suggestion being made of the fact that the land was without the county, the Judge had instructed the jury that if they believed the demandant's deeds to be genuine and his witnesses to have testified truly, the cause was with him, but if they doubted these, the cause was with the tenant, and they had thereupon found for the demandant,—would it *then* be competent for the tenant to suggest that the land demanded was without the county, and could a new trial be granted for a misdirection of the Judge in matter of law? Much less can it be in the present case, where the land is in truth within the county.

As to the *third* cause,—that a deed of land of which the grantor is disseised at the time of making the deed, does not operate to convey the land, is a principle too long settled to admit of question. If nothing passed by the deed to the tenant, then any entry of his upon the possession of a disseisor was a trespass: and an inoperative deed to him cannot be construed to change that trespass into a rightful entry and possession against the disseisor. Besides, there is no evidence that the tenant ever did enter under his deed, or gain possession of the land, except what is derived from the bringing of this action; and if the admission of the demandant must be used against him, it is to be taken altogether as it is made, which is, that the tenant *unjustly and without judgment of law* entered and ousted the demandant. As to the argument drawn from the case of *Knox v. Jenks*, the facts in the present case do not support it. In that case the grantor,

his right of entry not being lost, entered on the land and there delivered the deed, which took effect as a feoffment, and thus was supported. But here there was *no entry* by the *grantor*, and no other person had the right of entry.

Allen, in reply, insisted that where the Court has no jurisdiction of the subject, it is not necessary to plead this in abatement, but the objection may well be taken under the general issue. 1 *Chitty on pleading* 270. 427. The jurisdiction of this Court being appellate, it can sustain no action the subject matter of which was not within the jurisdiction of the Common Pleas. That Court, by the statute creating it, had cognizance of all civil actions —— "arising or happening within their county." And though, by a fiction of law, actions transitory may be supposed to arise there, yet it is not so with actions local; and such are all actions of ejectment, where possession of the land in controversy must be delivered by the Sheriff of the county in which it is situated. *Cowp.* 176. *Mayor of London v. Cole*, 7 *D. & E.* 587. Where the Courts are of limited jurisdiction, the cause of action must be alleged to be within its jurisdiction; and if the fact be so alleged, but *not proved*, the plaintiff ought to be nonsuited. 1 *Chitty on pleading* 428. All material facts alleged in the declaration are denied by the general issue; and in this case it is a material fact that the land lies in the county of *Kennebec*.

The true question was, where is the north line of *Dresden?* To this point there was evidence on both sides, which it was the province of the jury to weigh, and according as it preponderated, to adopt the result. It was a fact material in their inquiry, and had they found the northern line to be the true boundary, as it would leave the demanded premises without the county, they could not have found the verdict they did, but ought to have found for the tenant. And whether the Judge was requested or not to give such direction, if, upon the evidence, such direction ought to have been given, and there has consequently been an imperfect trial, the Court will send it again to the jury. It is not contended that the Judge misstated any abstract principle of law, but that no stress was laid by him upon the contingency that the land might fall without the limit o fthe county. The suggestion not having been made at the trial, it is not surprising

it should not have been noticed by the Judge; but yet a new trial is not the less necessary; as in *Page v. Pattee*, 6 *Mass.* 459. *Odiorne v. Maxcy*, 13 *Mass.* 178.

On the *third* point, it appears from all the decisions on this subject, that the Courts will give effect to a deed like that to the tenant from his grantor; *Wallis v. Wallis*, 4 *Mass.* 135. and the cases there cited; 2 *Wils.* 75. and this often has been done under circumstances far less favourable to its operation than the present. A feoffment "cleareth all desseisins, abatements," &c. *Co. Lit.* 9. *a.* In *Knox v. Jenks*, 7 *Mass.* 493. it is said by the Court that "a seisin may be obtained under such a deed *by* "*the grantee* named therein, and his entry under it upon a dis-"seisor *is lawful*, and will *revest the possession according to the* "*title.*" Speaking of the deed as a feoffment, the Court observe that "no precise words are requisite to a feoffment; and "here was a livery in fact according to the deed; or if *that cer-*"*emony had been wanting*, it would have been supplied by the "statute effect from an acknowledgement and registry." But the case of *Pray v. Pierce*, 7 *Mass.* 381. is still more in point, where a similar effect was given to a mere *quitclaim-deed* to land held by an open adverse possession; the Court observing that it was their duty so to construe it, as to give effect to the lawful intent of the parties.

Preble J. at this term delivered the opinion of the Court, as follows.

When an action, local in its nature, is commenced in a wrong county, the defendant is not obliged to plead the fact in abatement. If the objection appear on the record, he may avail himself of it on demurrer; or if it do not appear on the record, as in the case at bar, he may avail himself of it on trial under the general issue. *See the authorities cited in* 1 *Tidd prac.* 369. *and* 1 *Chitty on pleading* 269. 270. 284.

The strip of land in controversy adjoins the county line. There had been some doubt whether that line ran the one side or the other of this strip; but, as the line has been known and recognized by the towns and counties, interested in the question, for the last twelve years, the land lies within the county of *Kennebec.* Now by *Stat.* 1785. *ch.* 75. [*Revised statutes ch.* 114. *sec.*

8.] in order "*to prevent an interference of jurisdiction*" the selectmen of adjoining towns are required once in five years to run the lines and renew the boundaries between their towns. In pursuance of the authority, given to them by this statute, and by the special request and direction of the two towns of *Pittston* and *Dresden*, the selectmen of those towns in 1808, after carefully and in good faith investigating the subject, marked and established the present line, as the true boundary of their towns, which is the line of the counties, not by making a new line, where none existed before, but by marking anew a well known old line, believing it, from all the evidence they could obtain, to be the true one. These proceedings were reported to and approved by the two towns; and the line, thus ascertained and established, has ever since been known and recognized by the adjoining towns and counties, as the line between them. Nay neither the tenant himself nor his counsel thought of questioning that line as the jurisdictional limit, until since the jury returned a verdict against them. But however early the objection had been taken, it could have had no influence on the verdict to be returned by the jury. The proceedings of the two towns, their continual acquiescence, the acquiescence of the two counties, and the consequent exercise of jurisdiction on the part of *Pittston* and *Kennebec*, and the forbearing even to claim jurisdiction from that period to the present day on the part of *Dresden* and *Lincoln*, are facts conclusive upon the parties, in so far as respects the question of locality. We hold that a local action for the very reason why it is made local, must be brought in that county, which claims and exercises jurisdiction over the place that gives rise to such action; and, that it is not competent for a defendant, merely with a view to avoid the jurisdiction on the principle that the action is local, to show that *de jure* the line of the county ought to be established in a different place from that in which it is actually established and known. This principle, it is manifest, does not at all affect the merits of the main question in controversy between the parties. Their lines may or may not coincide with the line of the counties as *now* known and admitted. This doctrine might be illustrated by reference to well known facts not indeed precisely analogous but sufficiently so for the purpose of illustration. Thus part of the line

between *Massachusetts* and *Rhode Island*, and also between *Massachusetts* and *Connecticut*, is still in controversy between those States. Could an individual, sued in ejectment in the Courts of *Massachusetts*, set up as a defence that, although by the line, as existing *de facto* the land lay in *Massachusetts*, and so within the county in which he was sued, yet if the line were run where it ought to be *de jure*, the land would fall within *Rhode Island* or *Connecticut?* See *United States v. Hayward*, 2 *Gal.* 486. Such a principle would lead to infinite perplexity, confusion and uncertainty. It would be calling upon private suitors to settle at their own proper charge the line of conflicting jurisdictions; and when perhaps at the expense of much pains and treasure, they had settled it, it would be settled only as between themselves in that particular action.

Nor do we think there is any thing in the other causes assigned which would justify us in setting aside the verdict. It is one of the first principles of the law applicable to real estate that he who is disseised cannot during the continuance of such disseisin convey to a third person. If he attempts to convey nothing passes by the deed. If the supposed grantee enter he is a trespasser, and having gained possession by his own tortious act he cannot avail himself of his deed to render his continuance in possession lawful. The defendant's motion is accordingly overruled and there must be

Judgment on the verdict.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

SOMERSET.

JUNE TERM

1821.

MORRELL *v.* SYLVESTER.

Upon the choice of a collector of taxes, the town electing him may lawfully require sureties for the faithful discharge of his office.

And the refusal to find such sureties is a non-acceptance of the trust, even after the person chosen has taken the oath of office.

The penalty annexed by law to the refusal to accept a town office, does not extend to a collector of taxes.

TRESPASS de bonis asportatis. The defendant justified the taking as collector of taxes for the town of *Avon.* The cause was brought into this Court by appeal from the Circuit Court of Common Pleas, after the filing of exceptions there in a summary manner, pursuant to *Stat.* 1817. *ch.* 185.

It appeared that the town of *Avon*, at the annual meeting in *March* 1819, elected *John Matthews* as constable and collector of taxes for that year, and voted to accept two persons named as his bondsmen ;—that *Matthews* was thereupon sworn to the due discharge of the office ;—that one of the persons named as bondsman was present and assented to his designation as such ;—but that afterwards both the persons thus nominated and accepted as sureties refused to become bound ;—that thereupon a new town meeting was called in *June* 1819, " to choose a collector in the room of *John Matthews*, whose bondsmen refused to stand, or accept other bondsmen, if said *Matthews* shall offer them ;"—at which meeting *Matthews* refusing to find sure-

ties, the defendant was chosen constable and collector in his stead, and duly sworn as such;—that the taxes for that year being legally assessed, the bills, with proper warrants, were committed to the defendant to collect, by virtue of which he distrained the plaintiff's goods, which he afterwards advertised and sold in the forms of law. Upon these facts the Court below ruled that the defendant was legally chosen collector, to which opinion the plaintiff excepted.

Boutelle and Cutler for the plaintiff. The powers of towns are defined by the *Stat.* 1785, *ch.* 75. *Stetson v. Kempton*, 13 *Mass.* 278. This statute authorizing them to choose their town officers in the months of *March* or *April* annually, an election in any other month is by necessary implication excluded. No injury results to the public by this construction, because *Stat.* 1785. *ch.* 70. provides that if the collector chosen refuse to serve, the taxes shall be collected by the constable, and if the town neglect to choose a collector or constable, the public taxes shall be collected by the sheriff of the county, or his deputy.

It is true that the *Stat.* 1785. *ch.* 75. authorizes the town, at any legal meeting, to fill a vacancy occasioned by non-acceptance, or by the incumbent's death, removal, or becoming *non compos;* but in the present case no such vacancy has happened. The collector *Matthews* having been duly chosen and sworn, and always ready to execute the office, it was not in the power of the town to deprive him.

If it be urged that his election was upon condition of finding sureties, it may be replied that the condition was illegally imposed; the law having affixed a penalty upon the refusal to accept the office. It would be an unreasonable severity, if the person chosen collector must be subject to a penalty for not serving, when the very reason of his refusal may be that he is unable to obtain sureties to the satisfaction of the town. But if they had the right to demand sureties, it was their duty to have required the execution of the bond at the time of election. This right, however, is waived by admitting the collector to the oaths of office.

Greenleaf and *H. Belcher, for the defendant* insisted on the following points.

1. That as towns are bound by law to respond, at the treasury of the State, for all deficiences of their collectors, it was reasonable that they should protect themselves by requiring sufficient bonds of the persons entrusted with the collection of their money; and hence it had been so adjudged in *Smith v. Crooker*, 5 *Mass.* 539.

2. That the refusal to give bond was a non-acceptance of the office; the first election being made on condition of the collector's finding sureties to the satisfaction of the town.

3. That the penalty annexed by law to the refusal to accept certain town offices, applied to offices of no profit, but not to the office of collector, who is usually paid a fixed premium upon the amount of the money collected.

And THE COURT being of opinion with the defendant upon each of these points, the judgment of the Court below was therefore affirmed.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE COUNTY OF

HANCOCK.

JUNE TERM,

1821.

NELSON, JUDGE, &c. *v.* WOODBURY & AL.

It is the duty of the commissioners on an insolvent estate to make their own return to the Judge of Probate.

It is no part of the official duty of an administrator to receive the report of commissioners, and carry or send it to the Judge of Probate; and if he do receive such report and undertake to return it, this is merely a personal engagement for the performance, of which the sureties in his bond are not bound.

DEBT *on an administrator's bond.* The defendants having had *oyer* of the bond, in their plea set forth the condition, and alleged performance generally of the matters therein contained. To this the plaintiff replied that on the first day of *January* 1813 the goods and estate of the intestate to the value of 4000 dollars came to the hands of the administrator as assets for the payment of debts, for which he has never accounted to the plaintiff in his said capacity, so that the same could be administered.

The defendants rejoined, admitting the receipt of sundry sums belonging to the estate of which no account had been rendered to the Judge of Probate, that before such receipt the estate of the intestate had been duly represented insolvent, and commissioners thereupon had been appointed to receive and examine claims, who had never made any report to the Court of Probate of the claims exhibited to them, or of the sums by them allowed.

The plaintiff surrejoined that on the 22d day of *June* 1810, certain persons were appointed commissioners on said estate; that they gave due notice of their appointment; that they proceeded to examine and allow all just claims to them presented, and particularly the claim of *Zadoc Davis*, (a creditor for whose benefit this suit was brought,) to the amount of 1300 dollars, and made a report thereof, and of all other claims by them allowed, in writing, directed to the plaintiff in his said capacity, on the first day of *January* 1812, of which the said *Woodbury* had notice, and received said report of the said commissioners, to be by him duly delivered to the said Judge of Probate, which he then and ever since neglected and refused to deliver, and has wholly prevented the said report from coming to the hands of the Judge.

The defendants, in their rebutter, alleged "that the said "commissioners did not allow the claim of the said *Davis* to the "amount of 1300 dollars, and that said *Woodbury* did not re- "ceive the report of the said commissioners, in manner and "form," &c.

To this the plaintiff demurred in law, assigning for cause that the rebutter is double, and that it presents two distinct and different points in issue; and the defendants joined in demurrer.

McGaw, for the plaintiff, referred to 4 *Bac. Abr. tit. Pleas and Pleading I. page* 52. and 1 *Chitty on Pleading*, 230. 513.

Gilman, for the defendant, contended that the demurrer was bad, in not shewing wherein the duplicity consists, and was therefore to be taken as a general demurrer; and this admitting the facts previously stated to be true, there is no cause of action: for the defendants have shewn that *Davis* was not a creditor, and that no report has been made by the commissioners. Further, the part of the pleadings objected to may be rejected as surplusage; for it is immaterial whether the defendant *received* the report or not. The fact is not issuable; and if issue were taken on it, there would be a mis-trial. *Lenthal v. Cook*, 1 *Saund.* 161. *note*. *Hancock v. Proud*, 1 *Saund.* 337. *b. note* 3. 1 *Bos. & Pul.* 415. 416. 1 *Wils.* 219. 1 *Chitty* 513. 1 *Salk.* 219.

Orr, in reply. If the plea demurred to were multifarious and

obscure, it might be necessary to point out, with greater precision, wherein its insufficiency consists. But here the plea contains two distinct propositions, and no more; and it is enough to say it is double. The Court cannot but perceive it. Nor is either fact immaterial; for if *Davis* is not a creditor he is not entitled to the benefit of this action; and if the administrator received the report, which is suppressed, he alone is the cause why no report has been made to the Judge and distribution of the estate decreed; and he ought therefore to answer upon his bond for the wrong. The case, in principle, is like debt on a bond with condition, where the obligee himself is the cause of the non-performance.

Mellen C. J. after briefly stating the substance of the pleadings, delivered the opinion of the Court as follows:

There seems to be no doubt that the rebutter is double, as it presents two distinct and independent facts, and offers to put them in issue. Duplicity, however, must always be taken advantage of on special demurrer; and a special demurrer for duplicity must always expressly and particularly set forth wherein such duplicity consists. But we do not find it necessary to decide whether the special demurrer in this case be technically precise or not; because, admitting the argument of the plaintiff's counsel to be correct, and the rebutter to be insufficient, it is our duty to look at the first fault in the pleadings, and if, on examination, the surrejoinder should be found insufficient, the defects of the rebutter will be of no importance.

The only new facts alleged in the surrejoinder are, that the commissioners allowed certain claims against the estate, and among them the claim of *Davis;* and that their report was delivered to, and received by *Woodbury* to be by him delivered to the Judge of Probate; which he neglected and refused to do.

By law it is the duty of commissioners to make *their own* return to the Judge of Probate. The commission under which they act contains a mandate to this effect; and it is no part of the *official duty* of an administrator to receive the report of commissioners and carry or send it to the Judge or to the Probate office. No such obligation is imposed by the condition of the administration-bond. It being, then, no part of *Woodbury's* duty,

his engagement to the commissioners to deliver their report to the Judge could only bind him in his personal capacity, and not as administrator; and it could not bind his sureties in any manner whatever.

A point very similar to this was decided in *Waterhouse v. Waite*, 11 *Mass.* 207. In that case the plaintiff demanded damages of the defendant for an alleged neglect of *Thurlo*, one of his deputies, in not returning an execution which he had extended on land, to the registry of deeds, to be recorded within three months, whereby the plaintiff lost the benefit of his extent.—*Thurlo* had charged, with his other fees, the price of recording the execution, and had received the amount of the plaintiff. The Court decided that if there had been an express promise on the part of *Thurlo* to procure the registry of the execution and return, such promise and undertaking could not bind the sheriff, it being merely a personal engagement, and not an official act which he was under any obligation to perform.

But this is not the only difficulty on the part of the plaintiff. If *Woodbury* had returned the report of the commissioners to the Judge of Probate, according to their expectation and his own engagement, containing an allowance of the claim of *Davis*; still this action could not be maintained, unless a decree of distribution had been passed by the Judge of Probate, founded on the report of the commissioners; and unless also the creditor *Davis*, for whose benefit this action is brought, had demanded his dividend of the administrator. This mode of proceeding is directed, and this kind of proof is rendered necessary by the statute regulating proceedings on administration-bonds, prior to the instituting of an action by a creditor for such dividend.

The conduct of *Woodbury* is certainly liable to suspicion. But the creditors are not without remedy, if he be disposed to mis-manage the estate, and has actually used means to suppress the report of the commissioners, or defrauded those concerned. The Judge of Probate may remove him from office, and appoint some person who will faithfully close the administration of the estate.

The surrejoinder is adjudged bad and insufficient; and judgment must be entered for the defendants for their costs.

ERVING, PLAINTIFF IN REVIEW *v.* PRAY.

Where, upon the review of a real action, the land and improvements were each estimated by the Jury at a less sum than by the former verdict, and the demandant thereupon elected to abandon the land, it was holden that the tenant was entitled to his costs of the review.

THIS was a writ of entry, at the trial of which, at *June* term 1818, the jury found a verdict for the demandant; and under *Stat.* 1807. *ch.* 75, found the increased value of the demanded premises by virtue of the buildings and improvements made by the tenant to be *six hundred* dollars, and the value of the land, exclusive of the buildings and improvements, to be *seventy-one dollars and forty cents.* The demandant then sued the present writ of review, on the trial of which the jury again found a verdict for him, and estimated the increased value of the premises at *five hundred* dollars, and the value of the land exclusive of the buildings and improvements, at *fifty-one* dollars. The demandant thereupon elected in open Court to abandon the land, pursuant to the statute: and the question was, whether the tenant should have judgment for his costs on the review, according to *Stat.* 1786. *ch.* 66.

MELLEN C. J. delivered the opinion of the Court to the following effect:

According to the letter of *Stat.* 1786. *ch.* 66, its provisions as to costs are not in strictness applicable to this case, nor could such a case have been contemplated when that statute was enacted. We must therefore look to the spirit of that statute, and the principles on which it is founded.

At the former trial the demandant obtained a verdict, and at the request of both parties the value of the demanded premises and the improvements thereon made were then estimated by the jury. This review is sued by the demandant, and the verdict is the same as before as to the general issue, but in the estimation of value it finds a lower sum, both in the value of the land, and the improvements; and the demandant has abandoned the premises to the tenant at this last estimation.

If the action be considered independent of the estimation of value, there seems to be no reason why the demandant should be entitled to the costs of review, inasmuch as the former verdict, as to the general issue, has not been varied by the latter. If the cause be considered in relation to the estimation of the land and improvements, there seems be as little reason that the demandant should have his costs, because the premises are now abandoned to the tenant at a less value than was estimated by the former verdict;—that is to say, he purchases the land at a less price than the former jury established. The tenant is then the prevailing party, and the former verdict has been altered in a point material to him, that is, in the sum of money he must pay for the land.

On the whole we are of opinion that the tenant is entitled to his costs on the review.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

WASHINGTON.

JUNE TERM

1821.

GRAY *v.* WASS.

The authority of an attorney who has obtained a judgment for his client, continues in force until such judgment is satisfied.

And if the execution is extended on land, the judgment is not satisfied till the debtor's right of redemption is gone: And therefore payment of the money to the attorney, within a year after the extent, is a good bar to a writ of entry afterwards brought by the creditor against the debtor, for the land.

THIS was a writ of entry, in which the demandant counted on his own seisin, and a disseisin by the tenant.

The land was formerly the estate of one *Bucknam;* but the demandant, having recovered judgment in a personal action against *Bucknam*, *Nash* and *Wass*, extended his execution with the legal formalities on the demanded premises, and caused the extent to be recorded according to the statute. Afterwards, and within the year after the extent, *Wass & Nash*, in order to redeem the land, paid the amount of the execution to one *Goodhue*, the attorney who had prosecuted the suit, and obtained the judgment in the demandant's action against *Wass & others*, and who had received livery of seisin of the land extended upon, in behalf of *Mr. Gray*. But it did not appear that the attorney had any other authority than that under which he originally acted in the prosecution of the suit; nor that he had ever paid over the money to the creditor, *Mr. Gray*.

Upon these facts appearing in evidence, a verdict was taken for the demandant, by consent; subject to the opinion of the

Court upon the question whether the land was redeemed by such payment.

The Court having taken time for advisement, their opinion was at this term delivered as follows by

Mellen C. J. In the argument of this cause several points were made by the counsel: but only *two* of them seem to require a particular consideration.

1. Was *Goodhue*, at the time of receiving the appraised value of the demanded premises, &c. the attorney of the demandant, and *as such* authorized to receive it?—and if so, then

2. Did such payment of said value to said *Goodhue*, and his receipt of the same, divest the demandant of all the title to the premises which he acquired by the extent, without any release from him to the original owner, in the manner prescribed in the act of 1783. *ch.* 57.

It was urged by the demandant's counsel that no one was authorized to redeem the premises but *Bucknam* or his representatives or assigns; and that therefore payment of the appraised value by *Wass* and *Nash* was wholly unavailing for the purpose of redemption. It is not necessary to inquire how far this position is correct, because the money was received and accepted by *Goodhue* in satisfaction of the appraised value of the premises demanded: and whether he was *bound* to receive it or not is immaterial.—He *did* receive it; and if, as *Gray's* attorney, he then had *a right* so to receive it, *Gray* is not permitted to make this objection. We must then inquire whether *Goodhue*, at the time of his receiving the money, was authorized to receive it as the attorney of *Gray*. It appears by the report that he was the person who instituted and prosecuted the suit, obtained judgment, and received seisin and possession of the demanded premises on which the execution was extended. Even if this *latter* fact were not expressly stated, still, the commencement and pursuit of this action, in which the demandant founds his claim upon the extent of the execution on the premises, is a ratification of *such* act of *Goodhue*. It is evident that the object of *Gray* in placing his demand in the hands of *Goodhue* was the collection of it; and of course he must be considered as having delegated to his attorney the power necessary to effect his in-

tention: and whatever power was thus delegated, remained unrevoked by any special act on the part of *Gray*, until the receipt of the money of *Wass* and *Nash*.

It is admitted by the demandant's counsel that the power of an attorney continues until he has collected the debt which was committed to him for collection. But it is contended by him that in the present case the judgment which had been recovered through the agency of *Goodhue* was satisfied by the extent; that in this manner the amount of the original debt was then collected; that the demandant could not have maintained an action of debt on the judgment, because the defendant would have pleaded the extent in bar, as a payment and satisfaction of such judgment. To this argument it may be replied that the extent of an execution on real estate is not always a satisfaction, either *absolute* or *conditional*; as in those cases where the estate on which the extent has been made is afterwards found not to have been the property of the debtor at the time of the extent. But even in other cases, where no such difficulty exists, the extent of the execution on *real* estate is not an *absolute* satisfaction of the judgment by such estate; because the creditor's *title* in such estate is not absolute: and until after the expiration of a year next following the extent, during which time the right of redemption exists, it is uncertain whether the judgment will be satisfied by *real* or *personal* estate.—If the estate be *not redeemed* within the year, the title to it becomes *absolute* in the creditor; the judgment is then satisfied by *real* estate, and the attorney's power is at an end. If the estate *be redeemed* within the year, then the judgment is satisfied *in money*.—If then the power of an attorney continues till the original debt is collected, by satisfaction of the judgment or otherwise, why should it not be considered as legally continuing until the question is settled by the debtor whether he intends to redeem the estate or not? And when he has settled this question and redeemed the land by paying the appraised value, &c. why should not the attorney in the suit have the same authority to receive the money in *such* case, as he has to receive it two or three years after judgment, upon a *pluries* or *alias pluries* execution, in the usual mode of collection? or to sue out process against bail, and collect the original debt of them? This he *may* do, and is *bound* to do, according

to the decision in the case of *Dearborn v. Dearborn*, 15 *Mass.* 316.—We are well satisfied that this is the proper construction to be given as to the extent of an attorney's power in cases like the present. This construction is founded on the peculiarity of our laws respecting the mode of satisfying executions by extending them on real estate, and the right of redemption allowed to the debtor—no such right exists in case of *personal* property sold on execution.—And in England no such mode is known of extending executions on *real* estate and *divesting the title* of the debtor, as is established by the laws of *Massachusetts* and of this State. Hence no cases parallel to this can be cited as authorities from any English Reports. From this view of the subject, we are of opinion that *Goodhue* was the attorney of *Gray at the time* and *for the purpose* of receiving the abovementioned sum of *Wass* and *Nash* in satisfaction of the appraised value of the demanded premises.

The counsel for the demandant contends, that this action can be maintained, notwithstanding the payment of the appraised value to the athorized agent and attorney of *Gray*, because the *fee* of the premises still remains in him, he not having released the same to *Bucknam* since the extent of the execution. By examining the before cited act, upon which this argument is founded, it will appear that such a case as the present does not seem to be contemplated.—The provisions of the act are applicable to a case where the creditor is *in possession* in virtue of the extent, and upon tender of the sum due, refuses to execute a deed of release; and in such circumstances it is provided that the debtor may maintain an action of *ejectment* against the creditor to obtain possession. The very nature of the action thus given to the debtor, shews that the *fee* is considered to be in him, after he has paid or tendered to the creditor the sum to which he is justly entitled; otherwise he could not maintain *such* an action. We are not disposed to give to the act so broad a construction as is contended for by the demandant's counsel. Neither the words of it nor the reason of the thing require it.—The *defendant* is in possession of the premises, in the present case; and needs no release from the creditor to protect him.—The judgment in this case *leaves* him in possession, and may be pleaded in bar to any future action.

In case of mortgaged premises, the *Stat.* 1798. *ch.* 77. provides a remedy, by bill in equity, for the mortgagee, in those cases only where the mortgagee *has entered for condition broken.* —It seems not to have been considered as necessary in any other case. If the mortgagor has paid the debt which the mortgage was made to secure, the mortgagee has no right to enter or maintain a writ of entry against the mortgagor.—He may resist such an action, according to the case of *Winship v. Pomeroy*, 12 *Mass.* 514. by shewing payment. Why should he not effectually resist and be permitted to retain his possession? What principle can demand of a Court of justice to sustain such an action, in favour of a man who has no claim which justice can sanction, against one who has paid the debt he owed to the satisfaction of his creditor, in order to relieve his estate from incumbrance?

We can see no legal principles upon which the present action can be maintained; and according to the agreement of the parties the verdict must be set aside and a nonsuit entered.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

YORK.

AUGUST TERM,

1821.

SCAMMON *v.* THE PROPRIETORS OF THE NEW CONGREGATIONAL MEETING-HOUSE IN SACO.

Where several persons were appointed proprietors' agents, and received funds, to erect a meeting-house, some of whom squandered the money entrusted to them; and afterwards they all joined in an action against the proprietors for services performed and monies expended; it was holden that one of them was barred of his separate action for the money by him paid, though the sum far exceeded the general balance recovered in the joint action against the proprietors.

ASSUMPSIT. The plaintiff alleged in his declaration that he had made two notes of 2500 dollars each to the *Saco* bank, and renewed them from time to time, for the use and benefit of the defendants, upon their promise to indemnify him against the payment of said notes; but the defendants had not indemnified him, but suffered him to be sued, and his estate taken to satisfy said notes. Also, that certain persons, for whose doings the defendants are liable, elected the plaintiff one of a committee to build a new meeting-house, and promised that if he would accept the office and execute its duties, they would elect faithful associates with him, for whose doings they would be responsible; but that he had suffered damage by the misconduct of his associates, &c. for which he was not indemnified.

The defendants, besides the general issue, pleaded in bar that the plaintiff, with other persons named in the plea, commenced and prosecuted to final judgment a suit against the de-

fendants, and that the cause of action in this suit was included, in and was part of the same cause of action commenced by the plaintiff and others against the defendants.

The plaintiff replied that the parties in the former suit and the parties in this suit were not the same, and that the cause of action in that suit and in this were not the same; and tendered an issue to the country which was joined.

At the trial of this issue, before *Wilde J.* at *November* term 1819, the defendants read in evidence the copy of record of the former judgment, mentioned in their plea, by which it appeared that the action while pending had been submitted to referees under a rule of Court; and proved by two of the referees that the sum recovered in judgment by the *Saco* bank against *Scammon* and set forth in his declaration, was allowed to *Scammon and others*, plaintiffs in the action mentioned in the plea in bar; and that their award, upon which judgment was rendered, was for the balance due to *Scammon and others*, after allowing them the amount of the judgment in favour of *Saco* bank, and sundry other charges; and it was admitted that the amount of this judgment in favour of *Scammon and others* was paid to *Scammon*.

The plaintiff then offered to prove that certain individuals, for whose doings the defendants are by law liable, on the fifth day of *January* 1802 elected the plaintiff first, and afterwards, at the same meeting, chose four other persons, viz. *Seth Storer*, *Foxwell Cutts*, *James Gray* and *Edmund Moody* a committee to build a meeting-house now owned by the said proprietors;–that the committee proceeded to build the house;—that the proprietors, on the seventeenth day of *September* 1803 at a legal meeting authorized the committee to borrow money to complete the house;—that accordingly they hired of *Saco* bank 5000 dollars, for which they gave two promissory notes signed by some of the committee and indorsed by *Scammon*, who in fact received no part of the money, it being paid to *Gray*, *Cutts* and *Storer*;—that said notes after being several times renewed, were at last taken into one note, signed by *Cutts* and *Gray* and indorsed by *Scammon*, who was sued as indorser, and his estate taken in execution to the amount of 3,341 dollars in part payment thereof;—that *Cutts* is dead leaving no estate, and that *Gray* is insolvent.

The plaintiff further offered to prove by the records of the proprietors that the committee on the tenth day of *April* 1805, were directed to discharge all the debts of the proprietors, except the sum due to *Saco* bank; and that on the second day of *January* 1811 their treasurer was directed to pay in the first place the sum due to *Saco* bank;—and further offered to prove that each member of the committee received and paid out money of the proprietors without the concurrence of his colleagues, and kept his accounts with the proprietors alone; and that these facts were known to the defendants;—that large sums of money were received and misapplied by *Cutts* and *Gray*, but that the plaintiff had been faithful in his office, and had truly accounted for all money by him received.

All this evidence offered by the plaintiff was rejected by the Judge, on the ground that the plaintiff, having recovered, with the other members of the committee, the sum of 3341 dollars in the former action, could not recover it again in this; although it should appear that he had suffered by the unfaithful conduct and insolvency of his colleagues; no evidence being offered to prove that he had sustained any damages beyond the amount of the sum so recovered in the former action. A verdict was thereupon taken for the defendants, subject to the opinion of the whole Court upon the question, whether this evidence ought to have been admitted.

This question was argued by *J. Holmes* and *Shepley* for the plaintiff, and *Emery* for the defendants, before *Weston J.* at the last *April* term in this county, the *Chief Justice* and *Preble J.* having formerly been of counsel, and therefore not sitting in the cause.

Shepley, for the plaintiff. The plaintiff, with other persons, having been chosen a committee to build a meeting-house, and a portion of the funds placed in their hands for this purpose having been misapplied by some of his colleagues, the question is, on which of the parties the loss thus occasioned shall fall?

This question will be answered by considering, *first*, whether the plaintiff would be entitled to recover upon the facts stated, if the former judgment does not operate as a bar;—and *secondly*, whether the money now sued for, has already been recovered in the former action?

As to the *first point*, the plaintiff ought to recover, unless the responsibility of the committee was joint, and not several. But to create a joint responsibility, there must be a joint act, or a prospect of joint gain. The latter there could not be, from the nature of their business; each laboring for his own reward, and entitled, like one of a board of Selectmen, to his compensation according to his individual labour, and not according to the total amount performed by the whole committee. Nor did they act jointly. Each one received and paid money, and kept his own accounts without the concurrence of his colleagues; and even in the act of borrowing from the bank, each received for himself, as he thought proper, though several joined in the security given. But if it was a joint act, yet it was not a voluntary association, for the purpose of joint profit, but merely a concurrent performance of an order of the proprietors, who alone ought to be answerable. The relation in which the committee stood to each other may be likened to the case of joint prize agents, one of whom squanders the money,—as in *Penhallow v. Doane's adm'rs.* 3 *Dall.* 88. 103. 115.—or to joint trustees under a will, as in *Kips, adm'r v. Deniston*, 4 *Johns.* 23. *Cro. Car.* 312. 1 *Eq. Ca. Abr.* 398. 1 *Atk.* 89. 3 *Atk.* 583. 2 *Vern.* 515. *Ambl.* 218. 4 *Ves. jr.* 596.—or to joint managers of a lottery, as in *Gilbert v. Williams*, 8 *Mass.* 476.

And if the legal interest and cause of action be several, although the words of the contract are joint, each may sue separately. 1 *Chitty on Pleading* 6. *Eccleston v. Clipsham*, 1 *Saund.* 153. *note* 1. *Shaw v. Sherwood*, *Cro. El.* 729. *Tippet v. Hawkey*, 3 *Mod.* 263. *Anderson v. Martindale*, 1 *East* 497. *Osborne v. Harper*, 5 *East* 225. *Wilkinson v. Lloyd*, 2 *Mod.* 82.

Justice requires that every man be permitted to seek redress unincumbered with associates, if no injustice is thereby done to others. And the law sustains such separate action on very slight grounds. *Hall v. Leigh*, 8 *Cranch* 50. *Blakeney v. Evans*, 2 *Cranch* 185. *Harris v. Johnston*, 3 *Cranch* 311. *Dunham v. Gillis*, 8 *Mass.* 462. *Wilkinson v. Lloyd*, 2 *Mod.* 82.

As to the *second point*,—whether the sum now sued for has been recovered in the former action,—it is observable that *that* action was brought to settle the whole account between the committee and the proprietors, supposing all to have acted faith-

fully ;—*this* is to recover damages for a loss suffered by the plaintiff by the misconduct of some of his colleagues ;—*that* was to ascertain whether a deficiency had happened in the funds, and how it was occasioned ;—*this* to recover the loss which was discovered by that investigation ;—*that* suit was in the nature of an action of account, to settle the money transactions of the concern ;—*this* is of the nature, and resembles an action of the case for the unfaithfulness of the defendants' servants ;—there was no count, in the former writ, for any cause except the adjustment of the accounts of the parties ;—but the *gist* of the present action is the unfaithfulness of the men whom the defendants appointed to act with the plaintiff, and the money counts only serve to shew his own estimate of the extent of the injury. There was no claim advanced, in the former suit, for any damage to the present plaintiff exclusively ; but this action is brought to recover for a loss sustained by him alone.

Had the committee, in that action, jointly claimed of the defendants a sum squandered by one of themselves, the demand could not have been supported for its absurdity. Is it not equally absurd to permit the defendants to claim the benefit of such a sum by way of offset in this action ?

The objection thus considered amounts to this, that the plaintiff ought not to recover in this action for the misconduct of his colleagues, because he adopted the only measure which could bring that misconduct and his own injuries to light ; by joining with them in a suit against the proprietors, in which all the conduct of the committee might be the subject of investigation.

But in whatever light the plaintiff's claim may be regarded upon the points submitted, yet the verdict ought to be set aside and a new trial ordered, because the question decided by the Judge was a question, not of law, but of fact ; and should have been determined by the jury.

Whether an action can be maintained for a cause already determined in a prior suit between the same parties, is a question of law ; but whether the plaintiff in *this* action has already recovered the subject matter of his suit by a former judgment, was the *fact* to be tried. It was a question of identity of the two causes of action, and might have been given in evidence under *non assumpsit*. 7 *Cranch* 565. It was a fact put in issue to the country, and therefore improperly tried by the Judge.

The evidence offered was rejected, not because it was illegal, or irrelevant; but because, in the opinion of the Judge, it was not sufficient to explain or rebut the testimony offered by the defendants. But no such case existed as authorized the Judge to decide on the weight of evidence. The great point in issue between the parties was, whether the plaintiff or the defendants were responsible for the misconduct of his colleagues; and this question never has been tried.

Emery, for the defendants. It is apparent from the report of the Judge that the committee were all chosen "at the same time"; and if the plaintiff was unwilling to act with his colleagues, he might have declined on the spot. He was under no constraint; and consenting to serve, he consented to risk the fidelity of the others. There is no stronger implication of a request by the defendants to the plaintiff to serve, and a promise on their part to indemnify him, than there is of a request by the plaintiff to obtain the office, and a promise on his part to risk the consequences of the misconduct of his colleagues. The engagement was mutual. It was joint on the part of the committee; they acted jointly; received the money jointly, and might have controled each other in its expenditure, or divided it among them. The injury complained of was the payment of money to *Saco* bank, the borrowing of which was a joint act of all the committee except *Moody*. The money was originally paid over to *Gray* and *Cutts*, and the notes indorsed by the plaintiff as last indorser. The plaintiff therefore had the control of the whole sum taken from the bank, and if it was squandered, it was paid, with his express assent, to the persons who squandered it. All joined in the act; and if only one received the money, yet all are liable. *Toller's Ex.* 485.

As to the identity of the two causes of action; the first suit shews a complete developement of all the concerns of the defendants and of the committee, and a demand of the sum now sued for, which was allowed to the plaintiffs. The former judgment was in effect in favour of the present plaintiff; he elected a joint remedy; the action was brought at his instigation; there was a joint investigation of the accounts, and a joint judgment, and the plaintiff received its amount. If he was not willing that the money thus paid to *Saco* bank should be allowed by the

defendants to the whole committee, he should at least have protested against its allowance before the referees. He has voluntarily placed himself in the situation he complains of; has sought his remedy by another action, and has had it.

Courts regard rather the substance of the action, than any niceties of form. In pleading the pendency of another suit, in Chancery, it is not necessary to aver identity of parties. It is against the policy of the law to permit a party to be twice vexed for the same cause of action; and the law will repress every attempt to try, by any other forms of action, what has once been tried. *Cooper's Plead.* 272. 273. *Calhoun v. Dunning*, 4 *Dall.* 120. *Bird v. Randall*, 3 *Burr.* 1353. *Ferrar's case*, 6 *Rep.* 7. 3 *Lev.* 180. 1 *Com. Dig. Action, K.* 4. *Higgins' case*, 6 *Rep.* 45. *Ward v. Johnson*, 13 *Mass.* 148.

Nor did the Judge, in rejecting the evidence offered, invade the province of the jury. The main question was whether the defendants were *liable* for the misconduct of the plaintiff's colleagues; and this, it is obvious, was a question of law.

J. Holmes, in reply. Where agents are appointed by a corporation, they are not responsible for the conduct of each other. The trust confided is to them or either of them. Here the duties of the committee were necessarily diverse, each performing a distinct part of the service, and responsible to the proprietors for his own misdoings. The committee had no control over the conduct of any one of their number for he was not *their* agent, but the agent of the proprietors. If he squandered the money in his hands, it was not the money of the committee, but of the corporation. Could the committee remove him for breach of the trust? And if he is not amenable to his colleagues, by what rule of law or equity are they to be made liable for his misconduct?

As to the former action; it exhibits a view of the relations between the proprietors and their committee collectively, but nothing more. It shews that the proprietors were indebted to their agents in a certain sum beyond what monies they had advanced. This sum was paid to the present plaintiff, who had a right to receive it as one of the co-plaintiffs in that action; and it has extinguished so much of his claim of 3341 dollars. But that recovery is no bar, unless the cause of action is identical

with this; which it is not unless the same questions can be discussed, the same evidence offered, and the same result obtained.

The trial of the present action had advanced as far as this question,—whether the plaintiff had abandoned his right to maintain a separate action for his own damages by uniting with his colleagues in a joint action?—and it ought to have been left to the jury to determine whether his acts amounted to such intentional abandonment or not.

Weston J. If the evidence rejected by the Judge, who presided in the trial of this cause, could be received, and would legally entitle the plaintiff to maintain his action, his claim in equity against the defendants for indemnity, seems to be sufficiently strong.

It is contended by the plaintiff that from the evidence rejected it would fully appear, that he has been compelled to pay a large sum of money, for what was in fact the proper debt of the defendants; that neither at the time of this payment nor at any time before had he funds of theirs in his hands; nor had he been at any time their debtor. That he is not accountable for the misapplication of money on the part of his colleagues, who were the agents and trustees of the defendants, by them chosen and appointed, and that his claim to be reimbursed, for sums actually expended in their behalf, ought not to be impaired by deducting therefrom monies received by other members of the committee, and by them retained to their own use. That the committee were severally, and not jointly, answerable to the defendants for the amount by them respectively received, and that it would be altogether unjust to throw upon the plaintiff the loss occasioned by the unfaithfulness and insolvency of the persons associated with him, which happened by reason of a trust and confidence reposed in them, not by himself, but by the defendants.

There is certainly much weight in these positions; and they are supported by respectable authorities, cited in the argument of this cause.

But whatever objection might be urged to the right of the committee to claim a reimbursement for their advances, and to be held accountable for monies by them received, in their

several, and not in their joint, capacity; no doubt can be entertained that they might rightfully unite either in adjusting or enforcing their demands, if they elected so to do. It was not competent for the defendants to object to this course, which was not only altogether unexceptionable in itself, but most eligible for them. Now it clearly appears from the pleadings and evidence, and from the verdict in this case, that the cause of action upon which this suit is brought, was included in, and formed a part, of the same cause of action which was formerly instituted by the plaintiff, together with other members of the committee his colleagues, upon which judgment was rendered against the defendants; and the execution which issued thereon by them satisfied and paid to the plaintiff. The amount here claimed constitutes a particular and distinct item in the account, upon which that action was founded. The subject matter of this action having thus, by the former suit, passed, *in rem judicatam*, and the judgment rendered thereon having been satisfied, the defendants are thereby forever discharged from all further liability on this account to the plaintiffs in that suit, or to either of them.

If the course adopted by the plaintiff in uniting in the former action, has given an advantage to the defendants of which they could not otherwise have availed themselves; it was a consequence which he might have foreseen, and which necessarily resulted from the nature of that action. But the plaintiff had probably not made himself exactly acquainted with the state of the account between the parties; and no doubt believed that upon an adjustment of the whole concern, between the committee and the defendants, the latter would have been found indebted in an amount sufficient to reimburse him for the sum he had been compelled to pay, in consequence of the liability he had assumed on their account. In that expectation he has been disappointed; but having sought and pursued his remedy in one mode to final judgment and execution, it is now too late for him to resort to another, which, had it been originally adopted, might have been attended with less hazard, and furnished him with a more complete indemnity for the loss he has sustained.

The liability of the plaintiff for the sum, he was finally compelled to pay, was of many years continuance; during which the death of one, and the insolvency of both those, who had united

in assuming the same liability, intervened. Had he been more vigilant in procuring an early adjustment of the business, confided to him and his associates, he might probably have been protected from a loss, which has become irretrievable, unless from the liberality of the defendants; if they should be disposed voluntarily to recognize the equity of his claim.

Being, therefore, satisfied that the direction and opinion of the Judge, who presided at the trial, was correct, judgment must be rendered upon the verdict.

THE PROPRIETORS OF THE TOWN OF SHAPLEIGH *v.* PILSBURY.

If lands be granted for pious uses to a person or corporation not *in esse*, the right to the possession and custody of the lands remains in the grantor, till the person or corporation intended shall come into existence.

And if, in the mean time, there be a disseisin, the grantor may maintain a writ of entry, counting generally upon his own seisin.

But he cannot resume the grant; nor can he alienate the lands without such consent as is necessary for the alienation of other church property.

The tenant in a real action shall not be admitted to shew a title in any person other than the demandant, unless he can derive title from such person to himself by legal conveyance or operation of law.

ENTRY sur disseisin, wherein the demandants count upon their own seisin within thirty years, of the lots numbered *eleven* and *twelve*, in the first range, and *eleven* in the second range of lots in the town of *Shapleigh*, lying within the limits of the East parish in said town; and a disseisin by the tenant. It was tried upon the general issue.

The demandants proved that at a meeting of the proprietors of *Shapleigh November* 22, 1773, a plan of the general tract composing the town was returned and accepted; and that at a subsequent meeting *September* 8, 1780 they passed the following votes, viz.

"At a meeting of the proprietors of the town of *Shapleigh* in "the county of *York*, held by adjournment *September* 8, 1780, "said proprietors now vote and grant, and it is hereby voted

"and granted that there shall be one other three hundred "acres of land set off from said propriety for the sole use and "benefit of the gospel Congregational ministry, for the sole "use of the ministry, *so soon* as there shall be one ordained and "settled properly in that part of said town which lays on the "eastern side of said *Mousom* ponds or in the ranges 1, 2, 3, 4, "and it is to be understood as a parsonage lot solely for the use "and benefit of the ministry to improve the same—exclusive "of the 300 acres heretofore granted to the ministry on the "western side of said ponds. And it is hereby to be understood "that the minister who shall settle in the said work of the min-"istry in that part of said town lying to the eastward of said "ponds, is not to be entitled to the land or improvement of any "land granted on the western side of said ponds; nor any min-"ister who shall settle on the western side of said ponds with-"in the range lines of ten, nine, seven or six, shall be entitled "to the improvement of any part of the parsonage lot so call-"ed on the eastern side of said ponds."

"*Voted* also, that there be given and granted and it is hereby "given and granted unto the first gospel minister (Congrega-"tional plan) who shall settle in the work of the ministry in the "western part of said township, or to the westward of *Mousom* "ponds: That is to say one hundred acres of land in fee sim-"ple to him his heirs and assigns forever: As also granted to "the first gospel Congregational minister who shall legally set-"tle in the work of the gospel ministry on the eastern side of "*Mousom* ponds, one hundred acres of land in fee simple to him "his heirs and assigns forever."

At a meeting of the proprietors *December* 28, 1784, a plan of a division of the tract on the east side of the pond, (now the east parish,) into lots, was returned and accepted; on which plan the lot numbered *eleven* in the *first* range, containing 100 acres, and the lot numbered *eleven* in the *second* range, containing 200 acres were each marked "parsonage"; and the lot numbered *twelve* in the *first* range, containing 100 acres was marked as "ministerial land".

The legislature of *Massachusetts* passed an act *October* 30, 1782 confirming certain lands to claimants under *Nicholas Shapleigh*, including the town of *Shapleigh*, upon condition that four

hundred pounds be paid to the State, and that the several lots already appropriated to public uses, be truly reserved for those purposes. They also passed an Act *February* 24, 1795, dividing the territory of the town of *Shapleigh* into two parishes.

It appeared that the lots demanded were run out by a surveyor in *May* 1818, before the commencement of this action, by the direction of *Ichabod Lord*, who was afterwards appointed agent of the proprietors to prosecute and defend any suits which might be instituted for or against them. At the time of this survey no person was in the visible possession of either of them, though a very small part of one of them was within a fence. There had formerly been improvements on some part of the land, but the tenant's possession was only of four or five years standing.

A verdict was returned for the demandants by consent of the parties, subject to the opinion of the Court upon the general question, whether the action, upon these facts, is by law maintainable?

This question was argued at the last *April* term in this county, and was thence continued to the present term for advisement.

J. Holmes, for the demandants. The plea of *nul disseisin* admits the tenant to be in possession of the lands demanded; and the principal question therefore is whether the demandants were lawfully seized at the time of the entry by the tenant?

As early as the year 1773 the premises had been surveyed, a plan made, returned to the proprietors, and accepted by their vote:—and these acts sufficiently shew the title to be in them, unless the tenant can shew a better. This possession was recognized by the Commonwealth of *Massachusetts* by their statute in 1782, which operates to release the right of the Commonwealth, and to confirm the title of the demandants, upon the *subsequent* condition of the payment of certain money, and the making of sundry grants to public uses. The conditions of a *confirmation* are necessarily *subsequent* in their nature. But the confirmation of the statute of 1782 has also a prospective reference in its very terms, and in the times therein mentioned for performance of the duties it imposes. The title then is good in the demandants, until condition broken.

If the condition were broken, no person could take advantage of it, but the grantor or his representative. *Rice v. Osgood*, 9 *Mass.* 38. *Newhall v. Wheeler*, 7 *Mass.* 199. But the tenant is neither of these, and is therefore a trespasser. The party entering for condition broken is in of his former estate. But the tenant had no former estate, and in this view also his entry cannot avail him, even upon the principles which he himself assumes. And if he had no title, it is not competent for him to call in question the prior possession of the demandants, nor to inquire whether a stranger has title or not. No cases have gone so far as to permit this to a trespasser. The tenant may show that the title has passed out of the demandant, where one sells land *not in his possession*, and the grantee sues in the name of his grantor;—because this is the sale of a quarrel, and is against the policy of the law.

But it is not so in the present case. Here no person was in possession; and before any person is *in esse* to take the reserved lands, there is an intrusion into them. There can be no remedy, unless this action is maintained.

The grant or reservation has never yet taken effect. Until a person is *in esse* capable to take, no estate passes out of the proprietors, and of course there is no breach of the condition. And if such person were now to appear, he could bring no action in his own name, a stranger being in possession.

The statute of mortmain designates no person capable to take these lands, it being confined to church wardens, vestry, and ministers, neither of which have here existed. Neither can the town claim them. It was never contemplated that they should pass to the town, as such. The reservation is to a certain part of a town,—expected to exist at some uncertain future period, which has never arrived. The minister of the *town* was expressly excluded. The condition is, that if an east parish be created—and settle a minister—and he be a congregationalist—then, and not till then, does the grant take effect.

But if a person were *in esse* capable to take, yet the grant could not operate till the grantee were in possession. *Rogers v. Goodwin*, 2 *Mass.* 475. *Adams v. Frothingham*, 3 *Mass.* 352. *Codman v. Winslow*, 10 *Mass.* 146. *Springfield v. Miller*, 12 *Mass.* 415. A grant to this purpose would be void, if a stranger

were in possession when the grant is to take effect. Nothing could pass by the deed. The estate would therefore remain in the grantor. *Co. Lit.* 6. *a. Smith v. Trinder*, *Cro. Car.* 22. *Welch v. Foster*, 12 *Mass.* 93.

But if the reservation be not void for these causes, yet it is void for the extreme remoteness of the contingency on which it depends. It is not enough to say that it *may* take effect—it *must* take effect in a life or lives in being, and twenty-one years afterwards. See note to *Purefoy v. Rogers*, 2 *Saund.* 382. *n. Carth.* 262. 263. Here the grant is on contingency upon contingency;—1. that the town be incorporated—2. that it be divided into *two* parishes—3. that one of these settle a minister—4. that he be a congregational minister;—all which not only might not happen in the time necessary, but which never have happened, and probably never will take place;—the east parish having but about twenty congregationalists, and nearly two thousand inhabitants.

Is the fee then in *abeyance?* The books are every where clear and explicit that there can be no abeyance created by act of the parties. It arises only by the act of God:—as if there be a conveyance to *A.* remainder to the right heirs of *J. S.* and *J. S.* dies before *A.* the remainder is in abeyance. The doctrine of abeyance is odious, even in *England*,—much more here. *Commonwealth v. Martin*, 1 *Mass.* 347. Here we hold of the State, as lord paramount,—and it is of the highest necessity that there be persons to pay the taxes, and perform the public services which the State has a right to demand. No man is permitted to *throw away* his real estate.

No case can be found which admits an abeyance of the *freehold*, though there may be of the *inheritance*. 2 *Saund.* 382. *note*. *Co. Lit.* 216. *note* 119.

There can be no abeyance where the estate cannot vest within a life or lives in being and twenty-one years afterwards;—neither can it be created to take effect *instanter*, by act of the parties. *Bond v. West*, 2 *Wils.* 164. I am aware that a different doctrine is apparently advanced in *Pawlet v. Clark*, 9 *Cranch* 292; but what is there said by the learned Judge as to abeyance by act of the party, is said *ex arguendo*, but is not the point presented for the decision of the Court.

Neither can there be an abeyance of the inheritance, use, and possession, at the same time. The grant of an use, from its nature, can never be in abeyance. Until the grantee comes and demands the land, the estate is in the grantor. The analogy sometimes stated between parsonage estates in this country and in *England*, though striking, is not altogether strict. Here, the right of presentation is in the parish, the right of institution and induction in the council. Until these concur, the parson is not seized. There, the patron has no right to the glebe;—here, the parish is seized of it. There, if no presentation is made within six months, there is a lapse;—not so here; and therefore here is no reason nor necessity to resort to the doctrine of abeyance. The estate goes from the sole corporation—the parson—to the aggregate corporation—the parish; being, if the expression be allowed, an *alternate fee*. In these cases we have adopted the term *abeyance* from the *English* books, without sufficient consideration. We admit the right of possession and pernancy of profits to be in the parish, when there is a vacancy in the office of minister, but still say that the fee is in abeyance. This cannot be strictly correct; for the right to enter and use the profits is inconsistent with abeyance. 1 *Ventr.* 374. 1 *Bl. Com.* 107. *note* 2. 3. *Portland ed. Fearne on Rem.* 4*th ed.* 513. 526. *Templeton v. Steptoe*, 4 *Munf.* 339. *Weston v. Hunt*, 2 *Mass.* 500. *Brunswick v. Dunning*, 7 *Mass.* 445.

But if the estate *may* pass out of the grantors, by the operation of the grant and confirmation, against the principles advanced, yet it still remains in the grantors until a person be *in esse* capable to take. The conveyances, at most, amount to a covenant on the part of the grantors, to stand seized to uses, deriving its force from the statute of Uses 27 *Hen.* 8. A feoffment to the uses of his *will* is a covenant to stand seized, and the estate is in the feoffor during his life. *Co. Lit.* 112. *a.* So a feoffment without livery is a covenant to stand seized. 2 *Lev.* 213. 225. And the covenantor continues in possession until the lawful use arises, 1 *Mod.* 159, 160. or the contingency happen. 2 *Saund.* 382. *note.* And the contingent uses not having arisen, the profits of the estate are decreed to the heirs of the devisor. *Hopkins v. Hopkins*, 1 *Atk.* 581. *Co. Lit.* 89. *a. note* 231. A conveyance *habendum* after the death of the grantor, is a cov-

enant to stand seized during his life. *Wallis v. Wallis*, 4 *Mass.* 135. So a deed of quitclaim, the releasee not being in possession. *Pray v. Pierce*, 7 *Mass.* 381. The statute of uses is in force here as part of our common law, so far as it is not modified by our statutes,—being brought to this country by our ancestors; is notwithstanding some expressions to the contrary in *Welch v. Foster*, 12 *Mass.* 93. The law on this subject is clearly stated in *Marshall v. Fisk*, 6 *Mass.* 24. by the late Chief Justice *Parsons*, who knew, better than any man living, what *English* statutes were in use here at the adoption of the constitution of *Massachusetts*. See also *New parish in Exeter v. Odiorne*, *New-Hamp. Rep.* 232.

If it be objected that a covenant to stand seized to uses is not good but upon consideration of blood or marriage; it will be replied that a valuable consideration has also been admitted as equally good, by our own tribunals. 4 *Mass.* 135. 7 *Mass.* 381. And here is a valuable consideration implied on the face of the transactions, it being evidently for the benefit of the grantors that a minister should be settled on the land. It is part of the purchase-money. The Commonwealth has paid the consideration in the grant of the residue of the land. But if there be no consideration, the reservation is void, and no use can arise.

This is the nature of a grant to the use of the ministry; or of a private fund reserved for the use of a minister;—a mere eleemosynary donation, to a private institution. In such case there must be a visitatorial power somewhere;—and this not being declared in the grant, it remains in the grantor. 1 *Ld. Raym.* 5. If a fund be consecrated to pious uses, and no trustees created, the grantors are trustees; and this authority, as well as the visitatorial power, permits the expulsion of a stranger. *Dartmouth College v. Woodward*, 4 *Wheat.* 518.

Shepley, on the same side. As the case does not shew that the plaintiffs have broken the conditions of the grant to them, the presumption is that the conditions were performed, and that the plaintiffs were seized in fee of the lands demanded; and the question is, have they *divested* themselves of the estate?

1. The grant of *September* 8, 1780 is to be treated as void; upon the principle that every grant is void, if there is no person *in esse* to take. It does not appear that there was at the time of

the grant, or ever has been, a congregational minister, church, or parish, in the easterly part of *Shapleigh.* 4 *Cruise's Digest* 14. *Pawlet v. Clark*, 9 *Cranch* 318. 330. *Baptist association v. Hart's ex'rs*, 4 *Wheat.* 1.

2. But supposing, for sake of argument, that the grant was good; in whom does the fee continue, until some person be *in esse* capable of taking? There being neither minister nor parish, and it being essential to a grant that the estate be in the care and custody of some person, it follows that the grantors must be seized, to the use of the person or corporation which may come *in esse* to take the land. *Rice v. Osgood*, 9 *Mass.* 44. *Brown v. Porter*, 10 *Mass.* 93. *Pawlet v. Clark*, 9 *Cranch* 318.

3. The words of the grant fortify this conclusion. The lands were appropriated for the use of the ministry "*so soon*" as there shall be a minister ordained and settled. They are *designated* now,—to pass from the grantors when the contingency shall happen. And this is in perfect agreement with the terms of the grant to them of *October* 30, 1782, by which the lands already appropriated to public uses should be truly reserved to those purposes:—in other words, the lands already designated for the use of the gospel ministry, were to be kept in the hands of the proprietors, and protected from waste, until a minister should be ordained, or a parish created, capable to take them. Nor is this construction at variance with the settled principles of the law. *Wallis v. Wallis*, 4 *Mass.* 135. *Pray v. Pierce*, 7 *Mass.* 384.

If we are well founded in these positions, the right of possession has always been in the grantors, and actual possession follows of course till an adverse possession is proved; which, in the present case existed only for a few years. It was of no importance that the proprietors should enter in order to entitle them to this action, because they were in the actual possession at the time the tenant entered and disseized them.

Emery, for the tenant. The proprietors, by their votes of *September* 8, 1780, and *December* 8, 1784, performed every act necessary to pass the whole estate out of their corporation. The estate, therefore, ought not to be supposed to remain in the grantors against the terms of their own grant, unless such a con-

struction is rendered necessary by plain and inviolable principles of law. But these rules, so far from favouring this construction, are against it. It is settled that at common law lands may be granted to pious uses before any person is in existence competent to take them, and in the mean time the fee is in abeyance. *Pawlet v. Clark*, 9 *Cranch* 292. *Weston v. Hunt*, 2 *Mass.* 500.

If then the estate has passed out of the grantors, they cannot resume it unless there has been a forfeiture.

Nor is it left destitute of a guardian. It vested in the eastern parish at its creation, and the inhabitants of this parish have the custody of the land and receipt of the profits, and are bound to protect it from waste, until a congregational minister shall be settled. *Brown v. Porter*, 10 *Mass.* 93. *Dillingham v. Snow*, 5 *Mass.* 555. *Brown v. Nye*, 12 *Mass.* 255. *Brunswick v. Dunning*, 7 *Mass.* 445.

A different construction involves great inconveniences. If the estate has not passed from the proprietors, they may partition it among themselves. Or suppose the corporation dissolved; the land might descend and be divided among their heirs, extensive improvements may be made on it;—and if a minister should be settled and claim the land, shall he hold the improvements also? Or may he abandon the land to the tenant at the value in its natural state, pursuant to the statute of 1820. *ch.* 47. thus effecting a sale without the assent of his parish? And if he elect to retain the land, and pay the tenant for its increased value by reason of the improvements, by what process is he to obtain funds for this purpose?

These positions are fortified by adverting to the *Stat.* 1782. confirming the land to the proprietors upon conditions, to which they assented, and set apart the reserved lands accordingly. The confirmation enures to the benefit of the party for whose use the reservation was made. It could not enure to the proprietors, for their votes are an estoppel; and if not to the *cestui que use*, then it enures to no one, and the fee is not in the demandants, but in the State. In this view of the case, the State, by *Stat.* 1782, consecrated to pious uses such of *its own* lands as the proprietors might designate; and upon the demandants' principles, the State, and not the proprietors, was the grantor, possessed the visitatorial power, and is entitled, if any one is, to maintain the present action.

MELLEN C. J. now delivered the opinion of the Court, as follows.

In those cases respecting grants or donations of lands to the use of the ministry, to which we have been referred in the argument, or to which our researches have extended, the question has been between persons or corporations claiming under such grant or donation, and third persons, *strangers* thereto. In no instance have we found the action brought by the original grantors with a view of reclaiming the estate, or regaining and holding the possession of it, on the ground that the fee did not pass by the grant or instrument intended to convey it.

In the case at bar, the original grantors are seeking to reclaim and repossess the estate granted by them; proceeding on the idea that they are lawfully entitled to take the custody and income, until the event contemplated in the grant shall have taken place,—viz. the existence of a congregational minister and parish, or at least a parish, in the east part of the town of *Shapleigh*, now the east parish. It is admitted that such a parish does not exist, and never has existed there. The question, therefore, which the facts in this case present, does not appear to have been expressly decided; though we apprehend that we are furnished with principles in many decided cases, relative to ministerial or glebe lands, which will lead us to correct and legal conclusions.

It seems to be agreed that the demanded premises *were once* the undisputed property of the demandants; and it appears by the report of the Judge that the tenant has no title to them other than possession.

On these facts it is contended by the counsel for the demandants, in the *first place*, that the grant by the proprietors in the year 1780 of the demanded premises is void, because there was at that time no person or corporation capable in law of taking the estate granted; and that of course the allotment in 1784 is also void as to the lots of land in question:—and in the *second place*, that if the grant and allotment be good and valid, still, in the circumstances of this case the demandants have a right to the custody and possession of the lands so granted and allotted, until they shall be appropriated and possessed in the manner and for the purposes mentioned or intended in the grant; and

of course that they may rightfully maintain this action against a stranger who has intruded himself into the lands, to the prejudice of all who have any legal interest therein.

With respect to the *first point* we apprehend that the objections urged by one of the demandants' counsel are not so substantial as he seems to have considered them. We are not disposed to doubt the correctness of the principles on which the numerous cases he has cited are founded; but we do not consider them as applicable to the present case, or to grants or donations of land to the use of the ministry. It is not necessary therefore particularly to discuss them. We are not aware that such grants or donations were ever considered void and inoperative, either before or since the revolution, on the principle that no person or corporation, capable of taking, existed at the time of the grant. Should such a principle be considered as sufficient to defeat such grants, it would in numberless instances frustrate the benevolent intentions of the legislature, or of generous individuals, in the bestowment of their bounty. But we are not without authorities on this point. In *Rice v. Osgood*, 9 *Mass.* 38. the Court speak of the manner in which estates granted for ministerial purposes vest, when the corporation for whose use and benefit they are intended is not *in esse* at the time of the grant; and in the case of *Brown v. Porter*, 10 *Mass.* 93. the nature of such grants and donations is particularly considered and explained by the late Chief Justice *Sewall*, in delivering the opinion of the Court. To the same point also is the case of *Pawlet v. Clark*, 9 *Cranch* 292. But we need not any farther consider the validity of the grant made by the proprietors, because if the *second* ground on which the demandants proceed can be maintained, the validity or invalidity of the grant is of no importance. If it be void, then the demandants are entitled to judgment: or if the grant be valid, and yet the demandants are in law authorized to hold the possession and custody of the demanded premises till a grantee shall exist capable of taking according to the grant, the same consequence will follow, and judgment must be entered on the verdict.

The demandants contend that the fee of the lands granted still remains in them, because neither the person nor the corporation for whose use the grant was made is yet *in esse*. For the

tenant it is contended that at the time of the grant the fee *passed* from the proprietors, and has ever since remained, and now remains, in *abeyance;* that consequently the demandants cannot now reclaim the estate, or recover the possession and retain the custody of it; and that they have no controling power over the lands granted, or interest in, or right to possess them.

It becomes necessary to examine this doctrine of *abeyance* with some attention, in order to ascertain the merits of the defence as founded on the principle that the fee of the demanded premises passed out of the proprietors at the time of the grant, and has ever since remained and now remains in abeyance.

Abeyance is said to be "a fiction in law —— allowed only "where necessary, and to avoid an absurdity or inconvenience, "and for the benefit of a stranger, to preserve his right." "The "law does not allow it but where the original creation of estates "or where the consequence of estates and cases do in congruity "require it." *Vin. Abr. Abeyance A.* 2. 3.

Devise to *A.* for life, and if *A.* have issue male, then to such issue male and his heirs forever; and if *A.* leave no issue male, then to *B.* in fee. It was held by *Ld. Ch. J. Parker* that since construing the fee to be in abeyance would tend to destroy it, and since *nothing but necessity in any case should occasion a fee simple to be in abeyance*, he should abide by the opinion which had been given, that where the remainder was devised in contingency, the reversion in fee *descended to the heirs at law in the mean time. Vin. Abr. Abeyance B.* 15. 1 *P. Wms.* 505. 511. 515.

In the case of *Vick v. Edwards*, 3 *P. Wms.* 372. lands were devised to *B.* and *C.* and the survivor of them, and the heirs of such survivor, in trust to sell. *Ld. Chancellor Talbot* held that the fee was in abeyance. But it is laid down in note 78. to *Co. Lit.* 191. *a. Title.* "Tenants in common," that notwithstanding the case of *Vick v. Edwards* it seems *now* to be the prevailing opinion that in these cases the fee is not in abeyance, but remains pending and subject to the contingency, *in the grantor and his heirs;*—that there is something *undisposed of*, viz. the intermediate estate, until, by the death of one of the parties the remainder vests; and that therefore this intermediate estate continues in the grantor, the law never supposing the estate to be in

abeyance, unless where it is necessary to recur to this construction for preserving some estate or right. The case of *Purefoy v. Rogers*, 2 *Saund.* 380. and others, are mentioned as strongly favouring this later opinion. "In case of a *devise* to the effect in question, the reversion in fee descends to the heirs of the devisor, during the suspension of the contingency." *Co. Lit.* 191. *a.* [*note* 78.]

Mr. Fearne, in his learned treatise on Contingent Remainders, &c. *ch.* 6. has entered fully into an examination of the doctrine of abeyance, and with much force of reasoning has laboured to shew that in those instances where the estate has been supposed to be in abeyance, the fee does in fact remain in the grantor or devisor or their heirs; and the prevailing opinion is in favour of the conclusions which he has drawn from the adjudged cases. In support of the principle he is establishing he cites *Sir Edward Clere's case*, 6 *Rep.* 17. *b.* *Leonard Lovie's case*, 10 *Rep.* 78. 85. *b.* *Beck's case*, *Lit. Rep.* 159. 253. 285. 315. 344. *Cro. Car.* 363. *Carth.* 262. in which it was said by *Holt* that in case of feoffment to the use of *A.* in tail, remainder to the right heirs of *J. S.* then living, the fee simple is not in abeyance, nor in the feoffees, but results to the grantor and remains in him, until the contingency happens by the death of *J. S.* Also *Plunket v. Holmes*, *Raym.* 28. and 1 *Rep.* 68. *Archer's case*, both of which settle the same principle. Also *Purefoy v. Rogers*, 2 *Saund.* 380. where there was a devise to wife for her life, with contingent remainder to son; and *Hale C. J.* said it was clear that the reversion was in the heir of the testator by descent, and not in abeyance. The case of *Carter v. Barnardiston*, 1 *P. Wms.* 505. was a devise to *C.* for life, and in case *C.* should have issue male, then to such issue male and his heirs forever; and after the death of *C.*, in case he should leave no issue male, then to *D.* in fee. The master of the Rolls considered the fee in abeyance; but on appeal, *Ld. Chan. Parker* "made a point of reprobating and exploding that notion, and held that nothing but necessity could, in any case, support the admission of it; and he overruled the opinion of the master of the Rolls." The case of *Loddington v. Kime*, 1 *Salk.* 224. 1 *Ld. Raym.* 209. supports his decision.

Mr. Fearne contends that the inheritance continues in the

grantor when a remainder of inheritance is created, in conveyances *at common law*, as well as in conveyances by way of use, and dispositions by will. In support of this principle he cites 2 *Rol. Abr.* 418. *Co. Lit.* 216. *a.* 217. 218. *a.* relating to the enlargement of estates upon condition, and the cases there cited, to shew that "there was no such universally allowed absurdity "in the texture of the common law, as to prevent the inheritance "from continuing in the grantor, where there was no passage for "its transition open at the time of the livery." See also *Hale's* opinion in *Colthirst v. Bejushin*, *Plowden* 31. *a.* *Gilbert*, speaking of a lease for life, remainder to the right heirs of *J. S.* then living, and adopting the principle of abeyance, says, "all remain-"ders must pass out of the donor at the time of the limitation". And then considering a case where the remainder could never vest, he observes, "as to the feoffor, he or his heirs were still *in* "*esse;* and since the grantee could not take the remainder, and "no other person had a right to claim it, it *must return back* "*again and settle in the feoffor, as if no disposition had been made.*" Upon this *Fearne* observes, "Now what does such an answer to "the objection plainly amount to, more or less than that the "feoffor and his heirs still continued tenants to the lord; be-"cause neither the grantee, nor any other person in the world, "having any right under the limitation of the remainder, it was "as much out of the case, and the feoffor and his heirs as fully "entitled, as if it had never been made. To whom then could "it ever have passed out of the grantor? and from whom could "it ever return to him? Where is the sense in saying that a "remainder must pass out of the grantor, in a case where you "deny it ever passed at all to the grantee, or any body else? "Would there not be better sense in considering the disposition "itself, in all these cases, as put in suspense till the event or con-"tingency referred to decides its effect? What is there to move "the subsisting estate in the lands from the grantor, before the "alienation takes effect? That *alienation* may indeed vest in "abeyance, or expectation, till the contingency or future event "gives it operation; and it is *that*, rather than the respited *in-*"*heritance*, to which, during its mere potential, undecided opera-"tion, the allusion of *caput inter nubila condit* seems most applica-"ble. In short, to bring this doctrine to the test of reason, we

" may state it thus: A man makes a disposition of a remainder, " or future interest, which is to take no effect at all until a future " event or contingency happens. It is admitted that no interest " passes by such a disposition to any body before the event " referred to takes place. The question is, what becomes of the " intermediate reversionary interest, from the time of the mak- " ing of such future disposition, until it takes effect? It was in " the grantor or testator at the time of making such disposition: " It is confessedly not included in it: The natural conclusion " seems to be, that it remains where it was, in the grantor or " testator, or his heirs, for want of being departed with to any " body else. Who can derive a title to an estate under a pros- " pective disposition, which confessedly never takes any effect?"

Before examining any of the decisions of the Courts in our own country, it may be proper here to observe that in the numerous cases cited, a *portion only* of the estate, viz. a *remainder*, was to vest on a contingency, which contingency was clearly expressed in the conveyance or devise. But in the case at bar no contingency is expressed in terms; and the whole estate was granted and was to vest at the same time, and in the same grantee, whenever such grantee should come into existence to take the estate granted. Still, we apprehend, there is no difference between the cases cited and the case before us, in regard to the application of the doctrine of abeyance, or rather of the principles opposed to that doctrine. The grant of the demanded premises was not expected or intended to take complete effect till, and so soon as, such a grantee should be *in esse* as the grant contemplated, and such an one might never exist; certainly none such is yet in being. The event on which the estate granted was to take effect was known to be distant and contingent; and thus far the present case resembles those which we have examined; and as to the other point of supposed difference, it seems plain that if the fee of a *remainder* continues in the grantor till the contingency happens, because *that only* depends on the contingency; for the same reason the fee of the *whole estate* must remain in the grantor, till the event or contingency happens, when such contingency relates to and is designed to affect the whole estate.

In the case of *Rice v. Osgood*, 9 *Mass.* 38. *Sewall*, *C. J.* in delivering the opinion of the Court, says, "When a patentee ac-

"cording to the condition of the grant to him, makes a grant or "assignment, the estate vests where the appropriation is to a "person or corporation *in esse*, and is accepted by him or them; "and where contingent and to a person or corporation not *in* "*esse*, the estate remains in the patentee until the contingency "happens, and then vests, if accepted." In that case a township had been granted by the General Court to one *Brown*, on condition, among other things, that he should give bond to the treasurer to assign one sixty-fourth part *to the use of the ministry*, and *Rice*, the settled minister, claimed the sixty-fourth part in right of the town, for the use of the ministry.

In *Weston v. Hunt*, 2 *Mass.* 500, the Court say, "the minister "holding parsonage lands in fee simple, holds them in right of "his parish or church; and therefore, on his resignation, depri- "vation or death, the fee is in abeyance." And again—"If "there be a minister, the fee is in him; and if there be a va- "cancy, the fee is in abeyance."

In the case before mentioned of *Brown v. Porter*, *Sewall C. J.* in delivering the opinion of the Court, observes—"Lands thus "given and appropriated to pious uses are holden by the min- "ister of the parish or corporation for whose use and benefit "the gift or appropriation is made, as an estate in fee simple to "him and his successors, taking the same upon a regular settle- "ment and ordination as a sole corporation; and *until such ap-* "*pointment*, and *during vacancies* in the ministry, the estate be- "ing in abeyance,—but in the custody of the parish"—&c.

It will be observed that the Court, in neither of the two last mentioned cases, are explicit as to the situation of the fee between the time of the grant and the creation of the contemplated parish or corporation for whose use the grant is made; or whether during that interval the fee is to be considered in abeyance. Those cases seem to go no further than to show that when a parish has been formed, and had the legal custody of the land, the fee is in abeyance until the appointment of a minister; and so it is after a minister has been seized, and is dead or has resigned, &c.—the fee is in abeyance, and the parish has the custody.

Neither did the facts in *Pawlet v. Clark* render it necessary to draw the line with precision; because some years before the

commencement of the action, a Church existed in the town, of the kind contemplated.

Fictions of law are always designed to answer the purposes of Justice; but are not permitted to prejudice rights or to work injury to any one. Their object is to preserve, not to defeat, an estate;—to effectuate, not to thwart, intentions evidently expressed in a conveyance. Hence the fiction respecting the abeyance of the fee is never to be admitted, when its tendency would be to defeat a remainder. *Fearne* 355. And there is still less reason for viewing the doctrine with favour, in the case before us, where it would not only go to endanger the estate granted, by leaving it without protection and without an owner; and when on the contrary, by considering the fee as remaining in the demandants, they will guard it from destruction and preserve it for its destined uses.

It will be recollected that in the case before us the grant by the proprietors was made in the year 1780; and that on their application the legislature of *Massachusetts* on the thirtieth day of *October* 1782, confirmed to them the lands contained in the town of *Shapleigh* on condition "that the several lots in said "tract before described already appropriated to public uses be "truly reserved for those purposes." So that the lands in question have been granted and secured for the use of the ministry, in effect not only by the proprietors of *Shapleigh*, but by the Commonwealth of *Massachusetts*. And taking the grant by the proprietors, and the confirmation by the legislature into view, in connection, the case seems in essence to be like that of *Rice v. Osgood*, and the grant to be like that to *Brown* upon *condition* to assign a certain part of the granted premises *to the use of the ministry*. And in that case *Sewall C. J.* has declared the fee to remain in the patentee *Brown*, till the contemplated parish and minister were *in esse* to take it.

In the argument the case of *Pawlet v. Clark* has been cited; and it deserves particular consideration, as it furnishes much useful learning on the subject of ministerial lands, and the principles of law applicable to property of that description. Some passages in the opinion of the Court delivered by *Mr. Justice Story* may at first view seem to militate against the opinions of the Supreme Judicial Court of *Massachu-*

setts in the cases before cited; but on a close examination we apprehend there will be found no essential difference. His words are—"From this brief history of the foundation of par-"sonages and churches it is apparent that there could be no "spiritual or other corporation capable of receiving livery of "seizin of the endowment of a church.—There could be no par-"son, for he could be inducted into office only as a parson of an "existing Church, and the endowment must precede the estab-"lishment thereof. Nor is it even hinted that the land was "conveyed in trust; for at this early period trusts were an un-"known refinement. The land therefore must have passed out "of the donors, if at all, without a grantee, by way of public "appropriation and dedication to pious uses. In this respect it "would form an exception to the generality of the rule, that "to make a grant valid there must be a person *in esse* capa-"ble of taking it; and under such circumstances, *until* a par-"son should be legally inducted to such new Church, the "fee would remain in abeyance, or be like *hæreditas jacens* "of the Roman code, in expectation of an heir." He goes on afterwards to observe—"For the reasons, then, which "have been given, a donation by the Crown for the use "of a *non-existing* parish Church, may well take effect by the "common law as a dedication to pious uses.—And after such a "donation it would not be competent for the Crown to resume it "at its own will, or alienate the property *without the same consent* "which is necessary for the alienation of other church-proper-"ty.—Before such Church were duly erected and consecrated, "the fee of the glebe would remain in abeyance, or, at least, "beyond the power of the Crown to alien, without the ordinary's consent." The argument of the learned Judge is intended to establish the point that a grant to a *non-existing* parish and minister is not void; and that the King or the State, after having made such a grant, cannot legally *resume* the lands, and *re-grant* them, without consent. In supporting such a grant, in one place he observes that the fee is in abeyance, or at least is beyond the power of the Crown to alien without consent. Undoubtedly this is sound law; and if the effect of a judgment in this action in favour of the demandants would amount to a *resumption* of the grant, and an authority to convey the premises to any *other per-*

son or corporation, or for any *other uses*, then the case of *Pawlet v. Clark* would be a direct authority in favour of the tenant. But no such authority is claimed in the present instance; no intention of reclaiming the granted premises for the purpose of future disposal is avowed. A right is asserted only to recover possession and retain the custody of the premises, until the contemplated grantee shall be *in esse* to take. But if the demandants did claim to recover the premises with the express intention of alienating them to other uses, still such intention could not affect any legal rights; because, should the demandants obtain judgment and enter into possession of the lands demanded, yet they would be obliged to surrender such possession when such a parish and minister shall appear to take as the grant contemplates; and such minister, declaring on his own seisin in right of such parish, could maintain an action against the present demandants, for the premises which they may recover in this action. The verdict in this action would not be evidence in a suit by the future minister.

The object in view when the grant was made will be attained, and its beneficial purposes accomplished, if the estate be delivered up by the grantors to the contemplated grantees, so soon as they shall come into existence, to take and improve it for the uses specified; and from the very nature of such grants or dedications, it must be presumed that it was the intention of the grantors that the estate should remain in their custody and possession, until it should be wanted and improved for the beneficial purposes prescribed. Until such time shall arrive, who else has any authority to interfere with the property? Who can feel the same disposition to preserve the estate from depredation or injury, as the grantor or donor? Who can have less temptation to impair the value of the lands thus granted, than the man or the proprietors who have made the grant from commendable motives and for wise ends? And why should the Court be called upon to look with a favourable eye to the situation of the tenant, who has no title whatever to the lands demanded, and whose possession may essentially injure the property? He can have no right to the custody of the lands, nor any claims except those of every wrong-doer.

For the purposes, then, of giving full effect to the grant of the proprietors, and preserving the estate granted for the uses intended, we ought to consider the fee as remaining with the grantors; and there seems as good reason for such construction as in the cases before cited. It is a fiction, if it may be so called, giving effect both to contract and intention, and calculated to produce beneficial effects; whereas by considering the fee as entirely out of the grantors, and in abeyance, the estate will be left, during the interval between the grant, and the existence of a grantee to take, in a defenceless state, unguarded and exposed; in the possesion and custody of no one, and liable to depredation by all.

But there is another ground on which the demandants are entitled to judgment. It is either admitted or proved beyond question that at the time of the grant, the general tract, composing what is now the town of *Shapleigh* of which tract the demanded premises are a part, was the undisputed property of the proprietors of *Shapleigh*, the present demandants, whose seisin and possession of the lots in question continued uninterrupted till the entry and occupation by the tenant, which was about five years before the commencement of this suit; and, as before stated, the tenant has no title whatever. On these facts he cannot defend himself. For when the demandants had established their title and seisin within thirty years next before the date of the writ, it was not competent for the tenant to shew that the title was out of them by their conveyance, or by them transferred to any person or corporation, unless he claimed and derived title under such person or corporation by legal conveyance or operation of law. This is a common principle, well known and familiar. We will refer, on this point, to the single case of *Wolcott v. Knight*, 6 *Mass.* 418. The general issue is pleaded in this case as it was in that. Therefore, if the tenant, instead of labouring to shew that the demandants, by their grant of the demanded premises to pious uses, had placed the fee in abeyance for want of a proper grantee to take, had been able to shew a grant to a proper person or corporation then *in esse* and capable of taking, still such proof would have been improper and unavailing, unless he could have legally connected himself with, and derived a title from, such person or corporation.

The result of our investigation is, that the right to the possession and custody of the lands belongs to the grantors, till grantees, of the character designated in the grant, shall come into existence, who will then have a right to enter upon and hold the estate. Accordingly the present action is maintainable and by the terms of the agreement of the parties, there must be

Judgment on the verdict.

SAYWARD *v.* EMERY.

The summary mode of relief provided by *Stat.* 1817. *ch.* 185. *sec.* 5. does not extend to cases where the error complained of appears of record, as in a judgment rendered upon demurrer; but applies only to cases where an appeal lay before the making of the statute, and where, the error not appearing of record, the remedy was by exceptions under the statute of *Westminster* 2. [13 *Ed.* 1. *cap.* 31.]

Scire facias against bail, originally brought before a Justice of the peace, and thence carried by appeal to the Circuit Court of Common Pleas; where, the pleadings before the Justice being waived, and oyer granted of the bail-bond, the defendant pleaded in bar of the action. This plea the Court, on general demurrer, adjudged bad, and rendered judgment for the plaintiff; to which opinion the defendant filed exceptions and brought the action here by appeal, in the summary manner provided by *Stat.* 1817. *ch.* 185.

Wallingford, for the defendant, being about to argue upon the matter of the plea, was stopped by the Court, who, after some consultation, were of opinion that the exceptions were irregularly filed and that the case was not within the provisions of the statute.

Weston J. The statute was made for the purpose of restricting appeals from the Common Pleas in certain cases therein specified; and the provisions of the fifth section are to be applied to those cases in which appeals lay before the statute was enacted, and in which the opinion of the Court does not appear of record. The present action, therefore, cannot be sustained here, it being not regularly brought before us.

PREBLE J. The sixth section of the statute expressly saves the right of any party to bring a writ of error, for any error appearing of record; and this right exists twenty years. Now the error here complained of, if such it be, appears in the record and not in the exceptions; and should we sustain the present application to this Court, either party, I apprehend, may still bring the case before us by writ of error. Nothing we can now do would be decisive of the cause. The summary mode prescribed by the statute seems to be intended to relieve parties from the cumbrous and expensive method of proceeding by exceptions under the statute of *Westminster;* and in my opinion should be limited to cases where exceptions may be filed by our common law. The present not being one of those cases, is improperly brought into this Court, and I am of opinion it ought to be dismissed.

MELLEN C. J. I am of the same opinion, and for the reasons already given. It is worthy of notice that the statute, in allowing this summary proceeding, refers to questions within the cognizance of one Judge of the Supreme Judicial Court, at the time when the act was made. But it is well known that questions of law upon demurrer were never cognizable by one Judge, and could not have been within the intent of the legislature. The Court are also authorized to render judgment, or to grant a new trial at the bar, as law and justice may require. But the case before us is not susceptible of this latter mode of relief. If the defendant is aggrieved, his remedy is by writ of error.

Appeal dismissed.

J. Holmes, for the plaintiff.

GOWEN *v.* NOWELL.

Where divers citizens, being taxed for the support of public worship by a parish of a denomination other than their own, bound themselves in a bond to defray each one his proportion of the expense of defending any suit against any one of their number for the recovery of such taxes, and of the cost of any other *legal* mode of resisting the payment thereof; it was holden that the parties were not guilty of maintenance, and that the bond was good.

Debt on bond. Upon oyer of the condition it appeared that the defendant and divers others, styling themselves members of

the first Baptist Society in *Sanford*, being assessed for the support of the *congregational* parish and ministry in that town, against their religious principles, which taxes they were "determined not to pay unless compelled thereto by law", bound themselves to pay each one his proportion of the expenses of defending any suit which might be commenced against any one of their number for such taxes, and of any other legal mode of resisting the payment thereof; provided the obligee should defend such suit, &c. to final judgment, &c. Whereupon the defendant demurred in law.

Shepley, in support of the demurrer, argued that the obligation was illegal and therefore void.

To carry it into effect the parties must be guilty of *maintenance*. It is true the doctrine of maintenance has formerly been carried to an unwarrantable extent; *Hawk. P. C. ch.* 83. *sec.* 7. *Moore* 715. 814. but its rigor was ameliorated and its true principles stated in *Howard v. Bell*, *Hob.* 91. The rule is, where the parties can be witnesses for or against each other, any assistance is maintenance; but where they cannot, they may lawfully combine and give aid. 3 *P. Wms.* 378. *Master v. Miller*, 4 *D. & E.* 340. *Poor & al. v. Robinson*, 11 *Mass.* 549, Here several persons are assessed, and the legality of the tax is the question to be tried. Some of the obligors might have been witnesses or jurors on the trial, and therefore the combination, is maintenance.

It goes to prevent the due course of justice. 1 *Comyn on Contr.* 31. and authorities there cited. The public had an interest in the services of these obligors as jurors and witnesses; and if a small number may thus combine and disqualify themselves by becoming interested in the event of a suit, any number may. The principle itself is of dangerous tendency, and in times of great public excitement it might lead to the most ruinous consequences.

It is against the maxims of sound policy. *Vid.* the observations of *Ld. Mansfield* in *Jones v. Randall*, *Cowp.* 39. It tends to multiply and promote law-suits, by diminishing their expense; and it gives the people of a State or county the power, by such

an association, to prevent the execution of any law which they may see fit thus to resist.

Emery, for the plaintiff. The statutes against maintenance originated in the determination of the crown to break down the power of the barons, and prevent any extensive combinations of lord and vassal against their prince; and they were directed to that object with marked severity. But the reason of the statutes and of the old decisions has long since ceased to exist. Yet even then, one might gratuitously support the suit of his poor kinsman, his neighbour, or his servant; *Hawk. P. C. ch.* 83. 1 *Comyn on Contr.* 33. because this was not within the mischief which the statutes were designed to prevent. But the obligation in this case is very far from being a conspiracy to subvert public justice, or to obstruct the regular administration of the law. The parties were all of one religious denomination, involved, as they believed, in one common calamity, and having a common *interest* in the question to be tried; and they combined as well they might, to lighten and equalize the burthen of defending their religious rights *by the law of the land.* And how can this be termed a combination to obstruct the course of public justice? Their engagement has merely the effect of an extended application of the rule by which many causes on the docket are *consolidated* into one trial. The case of a policy of assurance is not materially different; being a several engagement of the underwriters, and lawful though signed by a whole community.

The statute of 1811 respecting religious freedom gives the citizens the right to associate for the purpose of supporting public worship; and by a liberal construction these obligors may be considered as a voluntary association, within the spirit of the statute. Had they been incorporated as a religious society, they might doubtless have raised money by vote to defend any law-suit against one of their number for an illegal tax affecting the rights of all; and why may they not voluntarily associate by *covenant* for the same purpose?

Nor is any danger to be apprehended from a covenant of this sort in times of public excitement, which may not also be apprehended from every incorporated religious society. It is as easy,

by our laws, for any number of citizens to become members of a religious corporation, as to sign a bond. Such membership would be strictly lawful, and yet would operate to disqualify, as extensively as any voluntary combination whatever.

At the succeeding term in *Cumberland*, the cause having been continued *nisi*, the opinion of the Court was delivered as follows, by

MELLEN C. J. The payment of the bond in this case is resisted on the ground that the condition is against law, and void; as it was intended to give the plaintiff a reimbursement of expenses which were expected to be incurred in defending one or more suits, under such circumstances as would render all concerned in giving him aid, and furnishing him with pecuniary means, guilty of the crime of maintenance. If this be true, the action cannot be supported.

It may be remarked in the first place that the condition contains a declaration of the obligors that they were determined not to pay certain taxes which had been assessed upon them, *unless compelled by law*. Their object seems to have been, not to oppose the law, but to have the merits of a question in which all professed to be interested legally decided; and the presumption arising from their mode of proceding is that they intended that one action should be contested and decided in the proper tribunal, which would probably settle the question as it respected all placed in the same situation. Hence all engaged to bear their respective proportions of the expense which the plaintiff might incur in effecting the desired object. This appears, from the condition of the bond, to have been the intention of all the parties; and this, the defendant's counsel contends, amounts to the offence of maintenance; and that therefore, according to the case of *Swett & al. v. Poor & al.* 11 *Mass.* 549. the contract founded on these proceedings is vitiated.

Maintenance, in general, signifies an unlawful taking in hand or upholding of quarrels and sides, to the hindrance of common right. *Co. Lit.* 368. *b.* Maintenance in the country, is where one stirs up quarrels or suits in relation to matters wherein he is *no way concerned*. Those who have a reversion expectant on an estate tail;—those who have a bare contingency of an in-

terest in the lands in question, which possibly may never come *in esse*;—heirs apparent, or husbands of such heirs, may maintain and give aid without being guilty of the offence. *Rol. Abr.* 115. 2 *Inst.* 564. *Bro. Maint.* 28. 53. So may those who are bound to warrant the lands in dispute; *Bro.* 51. and those who have an equitable interest; *Noy*, 100. *Sid.* 217. or have a common interest, as of a way, &c. by the same title. *Hawk. P. C.* 252.

From these cases and authorities it is clear that the obligors in the bond before us had an interest in the question referred to in the condition, equal, at least, to an equitable, or a merely contingent one, and that their object was not in any manner to cause a hindrance of common right. But it was contended by the defendant's counsel that the bond in question does operate as such an hindrance, and tends to prevent the due course of justice; because it deprives *others* of the testimony of the obligors relating to the subject matter of the bond. It is true it may have that effect with respect to those who are *parties* to that contract, because a man may waive his own rights at his pleasure; and if the obligee cannot call either of the obligors as a witness, nor the obligors have the testimony of each other touching the question in which they are all interested, it is because by *their own act* they have consented to waive their legal rights. But this transaction cannot affect third persons; and the objection is not well founded as it regards those who are not parties to the bond; it being a principle of law well settled and acknowledged, that a witness, in whose testimony others have an interest, cannot, *by his own act*, deprive them of that testimony; as by laying a wager, or declaring himself interested in the event of the suit, or by any other act, after the interest in his testimony has vested; unless such act be done by the express or implied consent of those who have the interest.

But it was urged further that it is against sound policy and will tend to promote litigation, to support this bond. It is clearly not against morality; and we do not perceive how sound policy can forbid a number of persons interested in the same question, and whose claims depend on the same general principle of law, from agreeing to defray jointly the expense which must be incurred in the decision of such question in a single cause, when

it is contemplated that such decision may and probably will put the controversy at rest. Surely such a course of proceeding ought not to be condemned as promoting litigation, when the obvious tendency and design of it was to prevent a multiplication of contested actions.

The contract into which the defendants have entered seems to be a fair one, with no unlawful intention, and infringing no man's rights; and we cannot but think the defence as far from being entitled to indulgence, as it is from being supported by legal principles.

Declaration adjudged good.

PORTER v. KING, Adm'x.

If a judgment creditor extend his execution on land mortgaged for the same debt, and the debtor neglect to redeem for the space of a year after the extent, the estate is absolute in the creditor, notwithstanding the mortgage.

This was a *bill in equity* brought to redeem certain estate mortgaged by the plaintiff to the defendant's intestate.

It appeared that *August* 25, 1810, the plaintiff executed to *Cyrus King, Esq.* a deed of mortgage of sundry parcels of real estate, of which the estate described in the bill was a part, conditioned to pay $2,935,38 and interest to said *Cyrus King*, or to the *Saco Bank* on or before a certain day, it being the amount of two promissory notes given by the plaintiff to *Mr. King* and by him indorsed to the Bank, for the proper debt of the plaintiff. These notes being paid and taken up by *Mr. King* as indorser, he sued the plaintiff for the amount, and recovered judgment, which was partially satisfied *June* 15, 1812 by extent upon certain real estate of the plaintiff. Part of the estate thus extended upon, was included in the mortgage, and was sold *June* 13, 1815, by *Mr. King* for a sum larger by six hundred dollars than its value as appraised on the extent. And the residue of his debt being unsatisfied, he afterwards entered into the estate described in the bill, for condition broken.

The bill being referred to a master to take an account of rents and profits, he reported the foregoing among other facts, treating the land extended upon as a satisfaction to the amount

of its value as *estimated by the appraisers*, and not as afterwards sold by *Mr. King* at private sale.

And now *Emery*, of counsel with the plaintiff, moved that the report be amended by adding the sum of six hundred dollars, being the difference between the price of part of the mortgaged premises as appraised, and the amount it was afterwards sold for, with interest from *June* 13, 1815 being the time of sale. He contended that the judgment recovered by *Mr. King* being rendered upon the notes for which the property was mortgaged, nothing passed by the extent upon the same property. A mortgagee cannot be admitted to change his character *as such*, and thus to deprive the mortgagor of the avails of the estate thus mortgaged; because, by accepting the mortgage he agreed that the mortgagor, as to that estate, and for that debt, should have rights different from those he would otherwise possess. He is merely a trustee, and must account for every profit; and the amount of the sale by *Mr. King* must therefore be taken as extinguishing so much of the debt. *Hicks v. Bingham*, 11 *Mass.* 300. *Goodwin v. Richardson*, 11 *Mass.* 469. *Dickens' Rep. tit. Mortgage in Index.*

Shepley and Storer, for the defendant, contended that whatever might be the gain on the sale of this particular parcel of land, yet it did not appear but that on a sale of the other parcels there would be as great a loss, which must be borne by the creditor, as he could have no remedy against the debtor for the deficiency. And as to the effect of the extent, it might well change the relation in which the parties stood as to that land; for the creditor might have seized and sold any other of the debtor's goods, or extended his execution upon other lands, and it would be good; and the mortgage was but a *lien* on a *part* of the debtor's estate, and not a selection of that part as a fund to which the creditor was bound to resort; nor did it place this property in any different situation from the other estate of the debtor, all of which was equally liable. It was a privilege secured to the creditor, to make his debt safe; and not a burden imposed on him, to embarrass him, at all events, with an equity of redemption.

The Court (*Mellen C. J.* not sitting in the cause, having formerly been of counsel with the plaintiff,) denied the motion,

They said that the land having been regularly set off to the creditor at an appraised value, according to the forms of law, his title to it became perfect after the lapse of a year from the extent. The mortgage was intended merely to increase the certainty of payment of the debt; not to place any part of the debtor's estate out of the reach of the common and ordinary process of law. He might have redeemed the land at any time within the year; and failing so to do, he must be considered, in this as in all other cases, as assenting to the complete alienation of the fee, at the appraised value. Had this extent been a full instead of a partial satisfaction, and the land, by fortuitous circumstances, become of less value, by what process, or with what reason, could the creditor claim of the debtor the deficiency? Or if, in such case, the land being still in the hands of the creditor, its value should be increased, ought he to be subjected to the action of the debtor for the amount of this increased value? As, therefore, no action would lie between the parties by reason of any change of value in the land while it remains in possession of the creditor, and as he alone must bear the loss should its value become less, it seems reasonable that he should retain to his own use any surplus of money arising from its sale. Besides, as was observed in the argument, though one parcel of the mortgaged premises was sold for more than its appraised value, yet perhaps the other parcels may produce much less; and thus the creditor may eventually suffer a loss.

They accordingly DECREED that the plaintiff have possession of the premises described in the bill; and execution for the balance of rents and profits remaining in the defendant's hands up to the time of the decree; agreeably to *Stat.* 1818. *ch.* 98. [*Revised Statutes ch.* 39. *sec.* 5.]

Note. The report assumed the amount of principal and interest due on the *judgment* at the time of entry for condition broken, as a new capital carrying interest; and applied the nett balance of rents and profits *annually* in extinguishment of this sum; to which the counsel made no objection.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

OXFORD,

SEPTEMBER TERM

1821.

CLEMENT *v.* DURGIN.

An award good in part and bad in part may be sustained for that which is good; unless the bad part is manifestly intended as the consideration, in whole or in part, of that which is good; in which case the whole is void.

THIS was a complaint to the Circuit Court of Common Pleas pursuant to *Stat.* 1795. *ch.* 74. respecting the support and regulation of Mills; in which the complainant alleged that he was seized in fee of a certain tract of land in *Fryeburg*, and that the respondent erected and kept up a mill dam across a brook there, and by means thereof caused the water of the brook to overflow his land, and destroy his timber, wood and grass growing thereon; and praying that a warrant might issue to the Sheriff, to summon and impannel a jury, to appraise the *yearly damages* done to the complainant by such flowing, and *how far the same was necessary*, as the statute directs.

The respondent pleaded in bar an arbitration and award upon the matter of the complaint, setting forth in his plea the arbitration-bond, the condition of which was as follows,—"where-"as the above-named *Daniel Clement* has agreed to [submit] the "damage *he has sustained or may hereafter sustain* in consequence "of having his land flowed, being and lying on *Lovel's* brook, so "called, in said *Fryeburg*, in consequence of a mill-dam erected "by said *Durgin*, said land being a part of his house-lot, and "agrees to receive such sum as shall be awarded him by *Samuel*

" *Charles, Samuel Nevers*, and *John Bradley*, whose opinion and " determination is to be binding upon the said *Durgin* and " *Clement* relative to the damage the said *Clement* has sustained " and *may hereafter* [*sustain*] *by the flowing aforesaid*, and also *all* " *other claims and demands* are submitted to the aforesaid referees, " whose opinion and determination is to be final and conclu- " sive, taxes and notes of hand excepted. Now if the above " named *Clement* well and truly abide by and keep the above " conditions, then", &c. —— and alleged that the referees took upon themselves the burthen of determining the controversy, that they met and heard the parties, and made and published their award in writing under their hands, as follows, viz :—" We the " undersigned hereby agree and determine that the within named " *Joshua Durgin* pay to the within named *Daniel Clement* the " sum of three dollars and fifty cents in full of all claims sub- " mitted as within expressed, and in full of all damage the said " *Clement has sustained or may hereafter sustain* by reason of hav- " ing his land flowed by said *Durgin's* mill-dam ; said *Durgin* " not to raise his dam, or *the dam not to be raised hereafter more* " *than three feet above the present height*",——and averred that his dam has not been raised higher since the date of the bond, and pleaded a tender and refusal of the sum thus awarded by the referees.

To this the complainant replied, setting forth *in hæc verba* a bond and condition, which appeared to be a counterpart to that set forth by the respondent, together with a similar award, " which said award, so made as aforesaid, the said *Bradley*, " *Nevers* and *Charles* had no authority or power by virtue of " said writing obligatory to make, and which said award is not " mutual, certain, or final between the said *Clement* and the said " *Durgin*. And this", &c.

Whereupon the respondent demurred generally, and the complainant joined in demurrer.

Longfellow and Bradley, for the respondent, argued that the replication was bad ; being a discontinuance, because it contained no answer to the plea, and a departure, as it did not support the complaint.

The plea in bar, they contended, disclosed a sufficient and legal answer to the complaint. The agreement was a submis-

sion of all demands between the parties. The complainant demanded damages for the flowing of his land, and the respondent claimed the right to raise a head of water sufficient for his purpose. These conflicting claims would have been settled by a jury pursuant to the statute, but the parties resorted to another tribunal, which it is obvious they intended to clothe with the same powers. The referees, thus substituted for a jury, have proceeded to do what a jury would have done, in assessing damages for the past flowing, and limiting the height of the dam, thus indicating how far such flowing may be necessary; and if they have assessed no *yearly* damages for the future, it must be intended that in their judgment none would be sustained.

Fessenden, for the complainant, contended that whether the replication be well or ill was of no consequence, the award set forth in the bar being materially bad. The question as to the *future height* of the dam was never submitted to the referees, and in attempting to limit it they have exceeded their authority, and the award, as to this part of it, is void. This fault in the award contaminates the whole; for the referees have awarded damages generally, and it does not appear that the permission to increase the height of the dam was not the principal cause why any damages were given. The different parts of the award being dependent on each other, if one is bad, the whole is of no effect. *Pratt v. Hackett*, 6 *Johns.* 13. *Towne v. Jaquith*, 6 *Mass.* 46. *Schuyler v. Van Der Veer*, 2 *Caines* 235. *Peters v. Pierce*, 8 *Mass.* 398. *Winch & al. v. Sanders*, *Cro. Jac.* 584.

Weston J. delivered the opinion of the Court, as follows.

We are well satisfied that by the rules of pleading the replication is bad, it neither traversing nor avoiding the bar; but if the bar be also bad, the complainant must notwithstanding have judgment.

Without considering other objections urged against the plea in bar, it is contended that in the award therein set forth, the arbitrators have exceeded their authority in permitting the respondent to raise his dam to a height not exceeding three feet. That they have assigned to him this privilege, although deducible by inference rather than given in direct terms, we have no doubt is the fair and natural import of the language used. The injury

complained of arose from the flowing occasioned by the dam, as it *then existed*, and the damage which the complainant had then sustained, or which he might afterwards sustain by *that dam*, the arbitrators were alone, by the terms of the agreement of the parties, authorized to determine.

But it is insisted that as the arbitrators were substituted for the jury, and as one of the points to be settled by them as provided by statute is, what head of water it may be necessary for the respondent to raise, the arbitrators might rightfully authorize the raising of the dam. To this it may be replied, first, that it was competent for the parties to settle their controversy upon such terms as might be satisfactory to them, whether they conformed to the usual course of proceedings as regulated by statute or not, and that therefore for these terms we can look only to their argument: and, secondly, that if the arbitrators might and ought to have done what the law prescribes to the jury, they have not done it; not having determined what head of water was *necessary*, and what was the *annual* damage occasioned by the flowing. And we are all of opinion that in permitting the respondent to raise his dam, the arbitrators exceeded their authority. This part of their award is therefore clearly bad.

It is true that an award good in part and bad in part, may generally be sustained for the unobjectionable part; and that which is bad may be rejected. But there is an exception to this rule, where the bad part of an award is manifestly intended as the consideration in whole or in part of that which is good; in which case the whole must be set aside as void. *Pope v. Brett*, 2 *Saund.* 293. and *note* 1. In the present case, the other parts of the award are plainly connected with, and dependant at least in part upon, the unauthorized provision and privilege.

Although the sum awarded to the plaintiff is apparently small, yet as there were other mutual demands between the parties, and this sum being a balance in full of all claims submitted, as well as for damage sustained or to be sustained by reason of the flowing, it does not appear that a much larger sum might not have been allowed on this account, which may have been partially offset by opposing claims. What influence the privilege of raising the dam to a height not exceeding three feet

awarded to the respondent, might have had in the estimate of damages, we have no means of ascertaining. But as a privilege valuable and important to the one, and calculated to occasion further injury to the other, it must be presumed to have had an influence; and being unauthorized and necessarily interwoven with the damages awarded, the whole proceedings are thereby vitiated.

It results therefore that the plea in bar being bad, inasmuch as the award therein set forth and relied upon is to be rejected and void, there must be

Judgment for the complainant.

Vid. Lyle v. Rodgers, 5 Wheat. 394. 406.

FOSTER *v.* BEATY.

In prosecutions under the statute respecting the support and maintenance of bastard children, the complainant must file a declaration in the Circuit Court of Common Pleas, stating that she has been delivered of a bastard child—which was begotten of her body by the person accused—the time and place when and where it was begotten, with as much precision as the case will admit—that being put upon the discovery of the truth during the time of her travail, she accused the respondent of being the father of the child, and that she has continued constant in such accusation. To such declaration the plea to the merits is *not guilty.*

THIS was an application for a writ of *certiorari*, to quash a record of the Circuit Court of Common Pleas in a prosecution there, wherein the petitioner had been adjudged the putative father of a bastard child.

The respondent, it appeared, had made complaint to a Justice of the Peace, charging the petitioner as the father of a bastard child of which she was then pregnant; whereupon he was apprehended by virtue of a warrant issued by the Justice, and gave bond for his appearance at the Circuit Court of Common Pleas in which Court a trial was afterwards had by jury. But no accusation or complaint was filed in that Court, nor was any issue joined or tendered there.

The cause was briefly spoken to at this term by *Greenleaf*, for the petitioner, and *Virgin*, for the respondent; and being continued *nisi*, the opinion of the Court was delivered at the succeeding term in *Cumberland*, to the following effect, by

MELLEN C. J. In all indictments such facts must be stated as, if proved, will justify a conviction and sentence. In civil actions too, the declaration must state a good cause of action, and there must be an averment of all those facts which it is necessary should be proved to entitle the plaintiff to a verdict. In looking into the record produced to support this application, it appears to be grossly defective. Some of the most important facts necessary to justify a verdict against the original defendant are totally omitted. No declaration was ever filed in the cause; no plea given; of course no issue joined; in fact, no foundation for the verdict and judgment is disclosed. There is nothing in the case but the examination taken before the magistrate; and this was considered as the *basis* of the proceeding in the Court below, and as a sufficient complaint, or charge, or declaration, on which the cause should be tried; and yet it appears that such complaint or examination was merely used as proof. Nor does it appear that any child has ever been born. In fact the record is wholly defective and irregular. It is somewhat surprising that such loose practice should be continued by counsel or allowed by the Court below after the decision of the case of *Drowne v. Stimpson*, 2 *Mass.* 444.

In prosecutions under the act on which this complaint was founded, after the action is entered, and before the cause can be put to trial, the complainant must file a declaration, stating all the material facts which are necessary to be proved to support the prosecution. In this declaration she should state that she has been delivered of a bastard child; that it was begotten upon her body by the person accused, and the time and place when and where the child was begotten, with as much precision as she can; that being put upon the discovery of the truth respecting the same accusation in the time of her travail, she did thereupon accuse the defendant of being the father of such child; and that she has continued constant in such accusation.

To this declaration, so filed, the defendant may plead that he is not guilty, and on this plea issue must be joined.

Having thus stated the regular mode of proceeding in such cases, the question is, what order shall be taken on the present application. We have been furnished with proof that though no declaration was filed or issue joined, yet a fair and full trial was had; and that the birth of the child as a bastard, the constancy of the complainant's accusation, and her charging the petitioner with being the father of the child in the time of her travail, were all proved to the jury. No substantial injustice, then, has been done, though much irregularity appears in the record. It is in the discretion of the Court to *grant* the writ;—in which case the proceedings must be quashed, and all expenses incurred by the suffering complainant be wholly lost, and she turned round to a new prosecution;—or to *deny* the writ; leaving the proceedings undisturbed, and the rights of the parties as they were settled by the verdict and judgment. Considering that a fair trial has been had, and that there seems no reason to question the justice of the decision, we prefer the latter course; but in future, similar indulgence will not be shewn by the Court, where such irregularities are allowed to occur. Accordingly the application is not sustained and the

Writ is denied.

PORTER *v.* WHITNEY.

Where lands of non-resident proprietors which are advertised to be sold for taxes, have within three years next preceding such advertisement been taken from one town and annexed to another; the name of the former as well as of the latter town must be expressed in the advertisement, within the meaning of *Stat.* 1785. *ch.* 70. *sec.* 7. [*Revised Statutes ch.* 116. *sec.* 30.]

This was a writ of entry, brought to recover possession of certain lands in the town of *Brownfield.*

In a case stated for the opinion of the Court, it appeared that the title of the tenant was derived from a public sale made by a collector of taxes in *Brownfield*, for the non-payment of taxes assessed by said town of *Brownfield;*—that the land demanded,

with other lots, was formerly part of the town of *Porter*, and was annexed by law to the town of *Brownfield* within three years next before the time of advertising the same for sale; but that the name of the town of *Porter*, within which the land was formerly situated, was not expressed in the advertisement. And the question was, whether this omission was fatal to the validity of the collector's sale?

This question was argued by *Greenleaf* for the demandant, and *Chase* and *Fessenden*, for the tenant; and the opinion of the Court was delivered as follows, by

Mellen C. J. The question in this cause arises upon a part of the seventh section of the *Stat.* 1785. *ch.* 70. which is in these words—"and where the name of *the place* in which "such lands lie may have been altered by any act of this Com- "monwealth, *within three years* next preceding such advertise- "ment, he" (the collector) "shall express not only the present "name, but the name by which the same was last known." The object which the legislature evidently had in view in this enactment was to give effectual notice to all concerned, and prevent any misconception by such an alteration in the name of the place as would essentially alter its description. We ought, therefore, to give such a construction to the law as to attain, as far as may be, the object in view.

In the case before us, it is true the names of the towns of *Brownfield* and *Porter* remain as they were more than three years before the advertisement; but still the name of *the place* where the lands in question lie is changed; it was formerly a part of *Porter*, and is now a part of *Brownfield*. In this view the case seems within the letter of the provision; but if not, it certainly is within its spirit and intention. So far as respects the notice to the proprietor, the annexation of a part of *Porter* to *Brownfield* amounts to the same thing as the formation of a new town, by a new name, out of the tract of land so annexed. The land was assessed, and the notice of sale described it, as situate *generally* in *Brownfield*. The advertisement should have been more particular, and the collector should have gone farther, and stated that it was situate in *that part* of *Brownfield* which was formerly a part of *Porter*, and which had by law been annexed to

Brownfield. This would have put the proprietor on his guard, and prevented all mistake and damage.

The proceeding complained of was only about twelve years since; and in all recent cases of this nature the Courts of law have required a strict compliance with legal provisions on the part of the collector in the execution of his duty. In ancient transactions many presumptions are allowed; but in the case at bar there is nothing to be presumed. We have before us the fact which shews the notice to have been irregular and insufficient; and according to the agreement of the parties there must be

Judgment for the demandant.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE COUNTY OF

KENNEBEC.

SEPTEMBER TERM,

1821.

THE PROPRIETORS OF THE KENNEBEC PURCHASE *v.* DAVIS.

After the demandant has abandoned to the tenant the land demanded, at the value estimated by the jury, the tenant can no longer be considered as holding it by virtue of a possession and improvement, under *Stat.* 1807. *ch.* 75. [*Revised Statutes, ch.* 28.]

Such abandonment has the effect of a conveyance of the estate to the tenant, on condition of his paying the estimated value within the periods provided by law.

And if the tenant do not pay the value within the limited periods, he is considered as yielding to the demandant all his title and claim, both to the soil and his improvements thereon; and he cannot have them again estimated in a *scire facias* brought to revive the original judgment.

Scire facias lies to revive a judgment in a real action, by the common law of this State.

SCIRE facias. The plaintiffs had formerly brought against the defendant a writ of entry *sur disseisin*, upon which a trial being had at *October* term 1808, a verdict was returned for the plaintiffs; and the defendant in that action having prayed an appraisement of his improvements made on the land, and the plaintiffs requesting an estimate of its value without the improvements, the jury appraised both accordingly, pursuant to *Stat.* 1807. *ch.* 75. The plaintiffs then abandoned the land to the defendant at its appraised value, agreeably to the same statute. But the defendant having never paid the value of the land, as required by law, and no writ of *habere facias possessonem* having been issued, the plaintiffs now sued a writ of *scire facias* against the defendant, requiring him to show cause why they should not have execution of the former judgment and costs.

The defendant pleaded that as to part of the demanded premises, describing it, at the commencement of this action he held the same by virtue of a possession and improvement, and had held the same in his actual possession for more than six years before the suing out of this writ: and as to the residue of the premises, he pleaded a *disclaimer*. To this plea the plaintiffs demurred in law.

R. Williams, in support of the demurrer.

Judgment having been rendered on a verdict between these parties at *October* term 1808, and the plaintiffs having neglected to sue out their writ of *hab. fac.* within a year and a day, a writ of *scire facias* to execute that judgment is the proper remedy. *Stat.* 1783. *ch.* 57. *Co. Lit.* 290. *b.* 6 *Bac. Abr.* 105. *Sci. fac. C.* 1.

The object of this *scire facias* is to enforce the execution of the judgment; 6 *Bac. Abr.* 103. *Sci. fac. A.* and the defendant cannot plead any thing which might have been pleaded to the original writ. 6 *Bac. Abr.* 123. *E.* 4 *Mass.* 218. 12 *Mass.* 268.

That the facts now pleaded might have been pleaded to the original writ, is manifest both by *Stat.* 1807. *ch.* 75. and by the copy of the judgment in the case, which shews that a claim for *betterments*, as they are called, was made, and that the jury estimated them, as well as the value of the land in a state of nature.

The judgment was for possession of the land and *costs of suit*. The *scire facias* is to obtain execution of that judgment—as well the costs, as possession—but the plea is no answer as to *the costs* in the former judgment; and a plea bad in part is a bad plea. 2 *Mass.* 82.

Again, what answer to this writ is it to say that the defendant held *a part* of the demanded premises by virtue of a possession and improvement, and had held the same in actual possession for more than six years? Is the action barred by six years' possession? Besides, this is not an action in which land is demanded, and to which a *disclaimer* may be pleaded; it is a writ to obtain execution of a subsisting judgment.

If the plaintiffs are barred of this writ, what remedy have they to obtain possession of land, their title to which the defendant is estopped to deny? Should they bring a new writ of entry, the former recovery, if pleaded, would be a good bar. 6 *Bac. Abr.* 105. *Sci. fac. C.* 1. 7 *Mod.* 64. 66.

The defendant having once had the benefit of the plea, he now offers, and this too upon a fair trial by jury; to admit him again to plead the same plea, and again to draw the same facts into issue, would be a direct violation of legal principles which have been settled for ages.

Bond, for the tenant.

The object of the suit is possession of the land demanded. It is not denied that the judgment in 1808, established the title at that time; but an interest in the land has since accrued to the defendant, which the judgment does not affect. The writ of *scire facias* possesses the qualities of an original writ, and may properly be denominated an action. It is susceptible of defence, and a plea in bar may be made to it. 2 *D. & E.* 46. *Litt. sec.* 505. 2 *Wils.* 251. 2 *Ld. Raym.* 1048.

The present, then, is a real action for the land; and the tenant may well disclaim that portion of which he is not in possession. It would be unjust and unreasonable to subject him to costs for this part of the land, respecting which he has been guilty of no wrong, and into which the demandants might at any time have entered. 1 *Chitty on Pleading* 64. *Hunt v. Sprague*, 3 *Mass.* 312. *Higby v. Rice*, 5 *Mass.* 544. *Prescott v. Hutchinson*, 13 *Mass.* 439. *Parker v. Murphy*, 12 *Mass.* 485. *Otis v. Warren*, 14 *Mass.* 239. 2 *Saund.* 44. *note* 4.

Since the former judgment, and more than six years before the commencement of this action, the defendant entered into a part of the demanded premises, of which he disseised the demandants, and has ever since claimed to hold this portion by virtue of his actual possession and improvement. Of this right it is not in the power of the demandants to deprive him. It is perfect under the statute of this State, [*Revised Statutes ch.* 28.] to hold the land, paying its value without improvements, according to the judgment of a jury. Indeed the law prohibits the demandants from holding the land, under the circumstances of this case, even if the tenant be unable to pay its value. Their only remedy is to extend their execution, when obtained, upon so much land as will pay its original value, without improvements; or to sell so much at vendue. Should they enter and oust the tenant, he might recover of them, by action, the value of his improvements, by the statute of this State. And

if such a measure could not succeed when directly attempted, it is presumed it will meet with no better success when sought in this manner by a *scire facias* to have execution. The legal interest and rights of the tenant are mixed inseparably with the soil, and to their enjoyment possession of the soil is essentially necessary. The interest of a tenant in the improvements he has made on the land is as really and perfectly his estate as any other sort of property he can possess. It is assignable by his deed of conveyance, descendible to his heirs, liable for his debts, and may be taken in execution and sold by his creditors. *Stat.* 1818. *ch.* 115. [*Revised Statutes ch.* 60. *sec.* 19.] Nor have the demandants a better right to take from him these improvements, than he has to take from them the land itself without paying its value.

There is no statute in force here authorizing this process upon a judgment in real actions. The *Stat.* 1783. *ch.* 57. relates exclusively to processes in actions personal. This is manifest from its title, its general diction, and the directions given respecting the issuing, extending, and serving the executions therein mentioned, which peculiarly belong to the class of personal actions in which damages are recovered. This interpretation is confirmed by reference to *Stat.* 1784. *ch.* 28. which gives this writ in actions personal, but is silent as to all others. So in *England*, this writ is given in personal actions, by *Stat. Westm.* 2. 13. *Edw.* 1. *St.* 1. *Cap.* 45. but in real actions it is believed to stand, both in that country and in this, at common law. But the common law is supposed to have been so far modified by our late statutes, as not to admit this process in a case circumstanced like the present; where the object is to draw the question from the jury, who are appointed by law to examine and settle the equitable claims existing between the parties; and thus to defeat the wise and just provisions of the statute.

A *scire facias* being a judicial writ, it may be granted or refused, at the discretion of the Court. Its professed object is substantial justice, and it cannot be supported to the prejudice of right. Being given by common law, the practice at common law will shew whether it ought now to be granted. In *England*, if the judgment be more than ten years old, but under twenty, the writ is not issued but upon motion signed and supported by

affidavit. 1 *Tidd's Pr.* 439. *note* 2. *Tidd's Pr.* 1007. And if in this case, it has been issued improvidently, it ought to be dismissed, notwithstanding the parties have pleaded to an issue of law. *Kendrick v. Wentworth* 14 *Mass.* 57.

As to the sufficiency of the plea:—whether it be good or bad, the first fault is with the plaintiffs, and they cannot have judgment. This process is in the nature of a declaration. 2 *Tidd's Pr.* 982. Now the *Stat.* 1807. *ch.* 75. [*Revised Statutes ch.* 28.] declares that a new action for the same premises shall not be sustained, unless the demandant shall first have paid to the tenant all such costs as would have been taxed for him had he prevailed. Payment of the costs is a condition precedent, and ought to have been averred in the writ; and not containing such averment the writ is bad.

It is true it is said in some books that an entire plea bad in part is altogether insufficient. But this rule is not satisfactory. The *entirety* of the plea, which is the only foundation for the rule, is declared by *Ld. Vaughan* to be "a spungy reason, and not sense; for if the falsehood or badness of the plea be neither hurtful to the plaintiff nor beneficial to the defendant, why should the plaintiff *have* what he ought not, or the defendant *pay* what he ought not?" *Vaugh.* 104. 105. cited in 1 *Saund.* 337. *note* (1.) If the plea were entire, yet it is a good bar to an execution for possession. But it is not entire. It does not assume to answer the whole declaration. It is in bar of execution as to part of the land; and the plaintiffs ought to have taken judgment by *nil dicit* for the residue. But the demurrer is a discontinuance of the whole action, and judgment must be for the defendant. 1 *Chitty on Pleading*, 509. 1 *Saund.* 28. *note* 3. 1 *Bos. & Pul.* 411.

Mellen C. J. at the succeeding term in *Cumberland*, delivered the opinion of the Court as follows.

The defence in this action is certainly a novel one; and because the counsel for the tenant seemed to repose so much confidence in the merits of the plea in bar, we have taken a little time to consider it; and are now satisfied that it is bad, and that the demandants must have judgment.

The plea is unusual in its form; containing a *disclaimer* of *part* of the premises demanded; and other facts as a bar to the action, as to the *residue* of the premises.—These facts, composing distinct answers to distinct parts of the declaration should have been pleaded separately, so that a distinct replication could have been given to each: But as the demurrer is *general*, perhaps no advantage of this irregularity in pleading can now be taken by the demandants.

The object of a *scire facias* is to enforce a judgment; and it is a general rule that a defendant cannot plead any thing to a *scire facias* which he might have pleaded to the original action. 6 *Bac. Abr.* 123. *E.* 4 *Mass.* 218. 12 *Mass.* 268. By inspecting the record, it appears that the facts disclosed in the former part of the plea touching the defendant's possession and improvement of a part of the premises, were actually disclosed on the former trial; or at least a possession and improvement *prior* to that time; by means of which the tenant availed himself of the advantages of the act of limitation and settlement by having his improvements estimated as that act provides. The value of the land in a state of nature also was ascertained, and the premises so estimated were by the demandants abandoned to the tenant. But it is contended by his counsel that he has acquired *new rights* since the former trial: that these rights are founded on *new facts*, and that it is competent for him to plead these new facts in bar of execution. This conducts us to the inquiry whether, after the demandants had abandoned the premises to the tenant at their estimated value, he could be considered as holding them by virtue of a *possession and improvement.* We think he could not. He then held them under the operation of the above-mentioned act and the abandonment of the demandants founded on that act. An abandonment has the effect of a transfer of the estate to the tenant, on condition of his paying the estimated value within a limited time. By paying this value within such time he becomes absolute owner of the estate. If he do not pay the value within the time prescribed, he is considered as yielding up to the demandants all claim to the estate and as consenting that they should enter and hold the same with all improvements thereon made: and he may have by law his writ of possession accordingly. While a person is thus in

the occupation of lands, we do not perceive how he can be considered as holding them by a *possession and improvement* within the meaning of the statute, any more than the man who is in possession under a contract made with the proprietor; and it is settled in the cases of *Knox v. Hook*, 12 *Mass.* 329. and *Shaw v. Broadstreet*, 13 *Mass.* 241. that *such* a possession does not entitle the occupant to any of its provisions.

This construction will appear plainer still if we consider the demandants' rights as to the time and mode of suing out their writs of possession.—By law they might have continued their judgment in full force, by suing out and annually renewing execution, without making any service or attempting to amove the tenant; and if such had been their course of proceeding, and, instead of a *scire facias* they had sued out a *hab. facias*, what could prevent the complete execution of it? Could the tenant resist its execution? Certainly not. How then can the facts he has pleaded bar execution? A *scire facias* to revive a judgment is intended to put the creditor in possession of the same rights, which he would have had and retained by keeping his judgment alive.

The tenant has neglected to avail himself effectually of his rights under the former judgment by paying the estimated value of the land and thus securing his title; and it is now too late for him to present his claim. In fact, he has no claim.

But it is further contended that if the *plea* be insufficient, so is the *declaration*: or, in other words, that no *scire facias* by law lies in a case like the present; it being brought to revive a judgment in a *real action*. Independent of our statute provisions relating to the writ of *scire facias*, it lay in a real action; and in the case of *Withers v. Harris*, 2 *Ld. Raym.* 806. was held to be necessary.—So to revive a judgment in ejectment. 2 *Salk.* 600. 7 *Mod.* 64.—So that if the statute of this State be construed to give and require a *scire facias* to revive judgments, in *personal* actions *only*, the objection does not seem well founded: —We have no statute limiting the term within which such *scire facias* shall issue; nor have any rules been established by our Courts, as in *England*, regulating this subject, and prescribing the mode of application to the Court for permission to sue out the writ. We think there is no irregularity in this particular;

and, on the whole perceive no ground on which the defence can be maintained.

Judgment that the plea in bar is bad and insufficient.

ALDRICH *v.* FOX.

A promise to pay a sum of money "whenever I shall receive or realize the above sum from" a certain fund, is a promise to pay *so much* of the principal sum as may be realized from the fund specified, though it fall short of the whole amount due.

Where goods in the custody of a third person were sold by the owner, and a bill of parcels was made, charging the goods to the purchaser, and crediting his note for the balance due, and an order was drawn on the person having custody of the goods, directing him to deliver them to the purchaser, which he refused to do; in an action on the note, brought by the payee, it was holden that the defendant was not driven to seek his remedy on the order, but that the amount to which he would have been entitled had he pursued his remedy in that mode, might properly be allowed to him by way of defence to the action.

ASSUMPSIT on a note of hand given by the defendant to the plaintiff, of the following tenor:—"*Portland, January* 16, "1815. For value received from *Cromwell Aldrich* I promise to "pay him or order, four hundred twenty-five dollars and sixty-"nine cents, whenever I shall receive or realize the above sum "from a chest of tea I this day purchased of the said *Aldrich*, "and from a demand I have against *Joseph S. Smith* of *Hallowell*, "amounting to three hundred and seventy-three dollars."

At the trial of this cause it was admitted that the demand against *Smith*, mentioned in the note, had been paid to *Fox*, and that the tea was worth, and might at any time have been sold for a sum of money which, added to the money paid by *Smith*, would have exceeded the amount payable to the plaintiff. The defendant, to prove a failure of consideration, offered the deposition of *Charles Fox*, who was present at the execution of the note, and stated that the defendant proposed to purchase a chest of tea which the plaintiff said was at the store of *N. & L. Dana* in *Portland*, provided the plaintiff would discontinue a process of foreign attachment which he had instituted against *Joseph S. Smith*; to which the plaintiff assented;—that the note declared

on was then given, and an account made out, in which the defendant was debited with the tea at one dollar and thirty-four cents the pound and credited with a small balance of account due from said *Deering*, and with a note for the residue. An order was also drawn at the same time by the plaintiff on the house of *N. & L. Dana*, requesting them to deliver to the defendant or his order the chest of tea in their store, belonging to him, it being for value received;—that two days after this the defendant handed this order with his name indorsed thereon, to *Charles Fox*, requesting him to present it and receive the tea;—that he accordingly presented it to one of the firm, who refused to deliver the tea without payment of the sum due for transportation and storage, which *Aldrich* had agreed to pay, and which the deponent therefore declined paying; and that he thereupon returned the paper and stated the reasons for his not receiving the tea, to the defendant.

The plaintiff contended that the making and delivery of the order and the account before mentioned formed a sufficient consideration for the note, and that by the true construction of the note, and the evidence, the defendant was bound to have received the tea upon the terms offered by *Mr. Dana*. But the Judge who presided at the trial, for the purpose of reserving the questions of law in the cause for the decision of the whole Court, ruled that the evidence shewed a want of consideration for the note. The plaintiff then offered to prove that the chest of tea was not the only consideration for the note; but that one *J. D.* who was in fact the agent of the defendant, had purchased the tea a year before the date of the note declared on at the price above stated;—that he had instituted the above mentioned process of foreign attachment against *J. D.* and *Smith* as his trustee, to recover payment of the price, which suit was then pending;—that teas had in the mean time greatly fallen in value by reason of the prospects of approaching peace, being worth no more than eighty cents;—and that when the note was given, it was agreed as part of the consideration that the plaintiff should give up his claim against *J. D.* and discontinue his suit, which he accordingly did. But this evidence the Judge ruled to be inadmissible, as it went to contradict the account stated and signed by the plaintiff.

It was also contended by the defendant, that by the terms of the note the plaintiff could recover no part of the amount till he should have received the whole from the sources mentioned in the note, that being a condition precedent; and the Judge so ruled accordingly, and directed a nonsuit, which was to be set aside if, in the opinion of the Court, it was improperly directed.

Sprague, for the plaintiff. The order drawn by the plaintiff for delivery of the tea to the defendant, was a sufficient consideration for the note. Each party acknowledges a value received, and there is an interchange of their respective liabilities, on which each may sustain his action. *Close v. Miller*, 10 *Johns.* 90. *Martindale v. Fisher*, 1 *Wils.* 88. It may be that the defendant has been guilty of some neglect respecting the order, which cannot be tried in this action. *Tobey v. Barber*, 5 *Johns.* 72. *Chitty on bills*, 83. 108—9. 181.

But if the tea *was* the consideration for the note, the property of the plaintiff in it passed from him and vested in the defendant by the delivery of the order; and the defendant should have discharged the lien upon it, retaining the amount of the lien in his own hands.—So is the law respecting similar incumbrances on land. *Smith v. Sinclair*, 15 *Mass.* 171.

The transaction with *Smith* as trustee of the defendant's agent, and the discontinuance of that suit, formed of themselves a sufficient consideration for the defendant's promise. *J. D.* was the defendant's agent, and not having disclosed his principal, was liable to the plaintiff, and had his own remedy over against the defendant. The suit was therefore virtually the defendant's; yet the plaintiff discontinued it, with the loss of his remedy and his costs. Here then was both a loss to the plaintiff and a gain to the defendant. Nor is this a transaction the examination of which is barred by the tenor of the note, which, in this view of the case, may be treated as a mere receipt of payment for the tea, or an account stated, and open to further explanation. *Stackpole v. Arnold*, 11 *Mass.* 27. *Tobey v. Barber*, 5 *Johns.* 68. *House v. Low*, 2 *Johns.* 378. *Manhattan Co. v. Lydig*, 4 *Johns.* 377. *Rex v. Scammonden*, 3 *D. & E.* 474.

As to the objection made at the trial, that the receipt of the whole sum by the defendant was made a condition precedent to the payment of any part to the plaintiff; the note does not re-

quire that construction, and to admit it would be to open a wide door to fraud, giving the defendant power to receive all but a small fraction of the fund, and to delay the plaintiff at his pleasure. The tea and the demand against *Smith* are only designated as the fund out of which the plaintiff was to be paid; and he is entitled to receive as much money as the defendant, using due diligence, could derive from those two sources. *Sturgis v. Robbins*, 7 *Mass.* 301. *Crocker v. Whitney*, 10 *Mass.* 316.

Longfellow and J. Potter for the defendant, contended, 1. that the contract was conditional. By the terms of the note, the language of which is strong and explicit, the payment of the money was made to depend on the sale of the tea *and* the receipt of another sum from *Smith*; and this was expressly made a condition precedent. Now where a condition is precedent, its performance must be averred and proved; neither of which being the case here, the plaintiff cannot recover. *Glaisbrook v. Woodrow*, 8 *D. & E.* 366. *Colonel v. Briggs*, 1 *Salk.* 113. *Thorpe v. Thorpe*, 1 *Salk.* 171. *Johnson v. Read*, 9 *Mass.* 78. *M'Millan v. Vanderslip*, 12 *Johns.* 166.

2. Here is an entire failure of consideration. It was not the order, but the bill of parcels which formed the consideration for the note; and the manifest intent of the parties, from the nature of the transaction itself was, that the engagement to pay should derive its life and vigor from the delivery of the goods. The want of such delivery may be shewn by parol, and is a good defence to the action. *Frisbee v. Hoffnagle*, 11 *Johns.* 50. *Babcock v. Stanley*, 11 *Johns.* 178. *Porter v. Rose*, 12 *Johns.* 209. 2 *Taunt.* 2.

3. Nor ought the plaintiff to be admitted to allege a consideration different from that which is stated in the note. The consideration is *expressed in writing*, and cannot be denied by parol. The case of *Tobey v. Barber* cited from 5 *Johns.* merely shews that third persons, strangers, might contradict this part of the instrument; but the principle we contend for applies to all *written* contracts, where the parties to the contract are parties to the record. *Schermerhorn v. Vanderheyden*, 1 *Johns.* 139. *Maigley v. Hauer*, 7 *Johns.* 341.

But if the consideration were examinable, yet the debt due

from *Smith* made no part of it; and if the defendant fails on this ground, he will lose a debt due to him, in which the plaintiff never had any interest whatever. It was mentioned in the note for no other purpose than to compel the plaintiff to discontinue his process of foreign attachment.

[*Preble J.* When the note was given, tea had fallen in the market thirty *per cent.* so that the defendant could *never* have received enough from that fund to pay the note. If then he had received the tea, and the money due from *Smith*, ought he not to pay as much as the market value of the tea?]

Longfellow. Not by the terms of the contract. The condition is precedent; and if it has become impossible of performance the defendant is not bound to pay. The parties have chosen to make such a contract, and must be bound by it. If its operation is inconvenient to the plaintiff, still, it was his own election, and is not the fault of the law.

The cause being continued *nisi* for advisement, the opinion of the Court was delivered at the succeeding term in *Cumberland*, to the following effect, by

Weston J. The note declared upon in the action before us is unquestionably not a promise to pay, at all events, to the entire amount therein expressed; but the fund from which payment is to be made is limited to two sources particularly referred to.

It is insisted by the counsel for the defendant that upon a fair construction of its terms, he could not be holden to pay, except upon the condition that he had first obtained the whole amount from the funds, upon which the payment was limited. But we are satisfied that this is not the fair import of the contract, and that the maker of the note must be holden to pay, if there were no other objection to the right of the plaintiff to recover, the sum he may have received, although falling short of the entire amount; the effect of the stipulation relied upon being only to absolve the maker from paying more than he might realize from the funds, if they should not produce an amount equal to the sum expressed in the note. Thus, if the defendant had failed to collect the debt from *Smith*, and the tea, as is probable from the evidence proposed to be exhibited, had produced less than the note, the defendant must have been holden to pay what

he had obtained from the sale of the tea; and his liability would have been limited to that sum. On the other hand, if the debt from *Smith* had been paid, and the tea by reason of its unsoundness, or from any other cause, had produced little or nothing, that circumstance, according to the fair understanding of the parties, would not have the effect to absolve the defendant from his liability to the plaintiff for the sum he had actually realized. The principle of construction adopted in this case, is in conformity with the case of *Crocker et ux. v. Whitney*, 10 *Mass.* 316.

Another ground, taken by the defendant is, that the note was given without consideration, or upon a consideration that has failed. If this position has been sustained, it is a sufficient answer to the suit, it being between the original parties. It appearing from the account stated by the plaintiff, bearing date on the same day, that the tea exceeded by a small amount the sum expressed in the note, which from the same account, appears to have been given for the tea, it is urged that the plaintiff cannot be received to prove that it was in fact given upon any other consideration. To this it may be answered, that the defendant in attempting to prove a want of consideration, relies upon what has usually been deemed an exception to the rule that parol testimony is not to be received to explain, vary, or contradict written evidence; inasmuch as the note in question purports to have been given for value received. He therefore resting upon this equitable ground of defence, opens the whole subject matter for examination, as well in behalf of the plaintiff as of himself. Besides, the account may be considered as an acknowledgement of payment for the tea on the part of the plaintiff, and as such, like other receipts, is not governed by the rule which generally applies to written evidence. We are therefore of opinion that the plaintiff is not precluded from shewing that the note was founded upon other considerations than the sale of the tea; and that evidence to this effect, which was offered and rejected, ought to have been received.

To avoid however circuity of action, the note and the order having been given on the same day, and relating to one transaction, we do not apprehend it to be necessary that the defendant should be driven to his action against the plaintiff upon the

order, but that the amount to which he would have been entitled had he pursued his remedy in that mode, may be properly allowed to him, by way of defence or offset, in the present action. In a suit upon the order, the defendant would have recovered the value of the tea, when it should have been delivered; this sum may therefore go *pro tanto* in discharge of the note, and the balance the plaintiff is entitled to recover.

Thus the parties will be placed in the condition contemplated by their contract, had it been, by the delivery of the tea upon the order, carried into full effect, according to their respective stipulations; the defendant being allowed against the plaintiff all that he could have realized from the tea, if he had received it, and the plaintiff, receiving the difference between that and the amount of the note, will obtain the full benefit of all that he lost by waiving the contract with *Deering*, who was the agent of the defendant, and withdrawing the remedy by which he sought to enforce it. And this difference will be the precise sum at which the loss on the one hand, and the accommodation on the other, must have been estimated by the parties.

In order that the cause may be settled upon these principles, the nonsuit is to be set aside, and the action stand for trial.

MORRELL, PETITIONER FOR REVIEW, *v.* KIMBALL.

Where a witness, whose testimony was in favour of the prevailing party in a cause, is afterwards convicted of perjury in giving such testimony, the Court, in the exercise of its discretion under *Stat.* 1791. *ch.* 17.[*Revised Statutes ch.* 57.] will grant a writ of review.

And this too, although the witness were summoned by the party against whom the verdict was returned.

AT the trial of an action pending between the parties, the respondent obtained a verdict, principally by means of the testimony of one *Philbrook*, whom the petitioner himself had called as a witness, and who was afterwards tried and convicted of perjury in the same testimony; whereupon the petitioner prayed that a writ of review might be granted him, because of the perjury by which the former verdict was obtained.

Bond, for the petitioner, argued that the writ ought to be granted, its object being the advancement of substantial justice, which had not yet been done between the parties; and this being the primary object and ruling principle on which Courts act in granting or refusing new trials. And he cited 1 *Dall.* 234. *Stat.* 1791. *ch.* 17. *Coffin v. Abbott*, 7 *Mass.* 252. *Rice v. Shute*, 5 *Burr.* 2611. 2 *H. Bl.* 695. *Frabrilius v. Cock* 3 *Burr.* 1771. *Loffi*, 160 1. *Bos. & Pul.* 427.

Orr and *Emmons e' contra*, contended that the petitioner ought not to be admitted thus to discredit his own witness and to avail himself of a conviction procured by himself;—*Rex v. Boston*, 4 *East* 572.—and that it was against the whole series of judicial decisions to set aside a verdict in order to give the party an opportunity of impeaching the credit of the witnesses sworn at a former trial. *Bunn v. Hoyt*, 3 *Johns.* 253. *Turner and al. v. Pearte*, 1 *D. & E.* 717. *Halsey v. Watson*, 1 *Johns.* 24. *Shumway v. Fowler*, 4 *Johns.* 425. *Duryee v. Dennison*, 5 *Johns.* 248. in which case *Fabrilius v. Cock* is doubted by *Kent J.* 2 *Salk.* 653. 12 *Mod.* 584. *Sayer* 27.

Weston J. afterwards delivered the opinion of the Court, as follows.

It has been made to appear in the present case highly probable that in the action originally tried between these parties the petitioner for a review would have prevailed, but for the testimony of *Daniel Philbrook*. It further appears that in giving this testimony *Philbrook* was guilty of wilful and corrupt perjury, of which he has been since convicted, and is now suffering the punishment awarded against him. Upon these facts the petitioner appeals to the legal discretion of this Court, praying that a writ of review may be granted him, that the cause may be again examined upon its merits, and that justice may be done between the parties.

Several objections have been urged against this application; first, that the petitioner was himself a witness against *Philbrook* upon his conviction; secondly, that it does not appear that the respondent was guilty of any improper conduct in regard to the testimony, or that he had any agency whatever in procuring him to swear falsely; and lastly that *Philbrook* was called and

examined by the petitioner, and that it is not competent for him to found his application upon an impeachment of the credit of his own witness. With regard to the first objection, it is intimated by the Judge who presided at the trial of *Philbrook* that in his opinion his conviction did not at all depend upon the testimony of the petitioner, who had no knowledge himself of the truth or falsity of the charge, but testified as to certain declarations of *Philbrook*, indicating an intention on his part to swear falsely, which the petitioner did not at that time believe.

If the judgment rendered against the petitioner was obtained by perjury, he is not the less injured because it was not committed in consequence of the procurement, subornation, or even privity of the adverse party. Though the latter may have been innocent of any charge of this nature at the time, it is more than questionable whether he can, *in foro conscientiæ*, continue to enjoy the fruits of the perjury, after it has been made apparent.

As to the last objection, it is clearly a rule of law that the party calling a witness shall not be permitted to attack his character by general evidence; yet he may, by other witnesses, disprove the facts to which he testifies. If therefore the facts thus testified to are directly proved to be false, there is no principle of law or of justice which prevents the party from availing himself of the truth of his case, although the credit of his own witness may thereby be impeached.

New trials have been frequently granted where there has been strong reason to suspect that perjury has been committed; much more ought they to be where the perjury has been clearly demonstrated.

It is further to be considered that this is an appeal to the discretion of the Court, in the exercise of which the utmost latitude is given by the statute. We are not therefore confined to the reasons which by settled rules are deemed to afford sufficient ground for granting new trials at common law, but are authorized to grant reviews upon petition, within the time limited, in all cases where we are satisfied that it would be for the furtherance of justice. As reviews no longer exist as a matter of right, it has become the more necessary that the Court should be governed by liberal principles in the exercise of their discretion, that there may be no occasion again to resort to the legislature

for the restoration of this process as a writ of right, which was formerly productive of much mischief in practice.

Upon a full consideration of this case, we are of opinion that the prayer of the petitioner ought to be granted, the costs to be subject to the future determination of the Court.

Note. The Chief Justice, having been of counsel with the petitioner at the trial of the action, gave no opinion in this cause.

SPRATT, PLAINTIFF IN ERROR *v.* WEBB.

The *Stat.* 1797. *ch.* 50. [*Revised Statutes ch.* 59. *sec* 7.] authorizing judgment in certain cases against an absent defendant at the *second* term, does not apply to a process of foreign attachment; but in such process, if the principal be absent, the cause *shall* be continued till the *third* term, by *Stat.* 1794. *ch.* 65. *sec.* 2. [*Revised Statutes ch.* 61. *sec.* 3.]

UPON a *writ of error* to the Circuit Court of Common pleas the case was thus:

Webb, the defendant in error, had sued out a writ of foreign attachment against *Spratt* the present plaintiff, who was an inhabitant of this State but then absent from it, and summoned one *N. S.* as trustee of his effects.

The supposed trustee appeared at the *first term*, and being examined on oath, was adjudged not trustee and discharged; and the principal being still out of the State, the action was continued as to him until the *second term*, at which time judgment was rendered against him upon default.

The error assigned was that the judgment was rendered against the principal without *two continuances* of the action, he being absent from the State at the time of service and until after the rendition of judgment. Plea, *in nullo est erratum.*

MELLEN C. J. after stating the facts, delivered the opinion of the Court as follows:—By comparing the statutes relating to this subject, we are to determine whether the Court could legally enter the default and judgment at the *second term.* If not, the judgment must be reversed.

In the second section of the *Stat.* 1794. *ch.* 65. it is provided "that if the principal shall be absent from the Commonwealth "when such writ shall be served, the Court *shall* continue the

"action *two terms*, that he may have notice, unless the principal "after the service of the writ, and before the sitting of the Court, "shall have come into the Commonwealth; in which case it "shall be in the discretion of the Court whether to continue the "action or not. And when the principal *does not appear* in his "own person nor by attorney, to answer to such suit, the trus- "tees or any of them, *having goods, effects or credits of the princi- "pal in his or their hands, or possession*, may appear in his behalf, "and in his name plead, pursue, and defend to final judgment "and execution." By the *Stat.* 1798. *ch.* 5. it is provided that when all the supposed trustees *shall be discharged*, &c. "the "plaintiff shall not proceed in his suit against the principal, un- "less there shall have been such a service of the original writ "upon the *principal*, as would have authorized the Court to pro- "ceed to render a judgment against him in an action brought "and commenced against him *in the common and ordinary mode of "process*." And by the *Stat.* 1797. *ch.* 50. which regulates the service in cases of *common and ordinary process*, it is provided that in case of the defendant's absence from the Commonwealth at the time of service and until the session of the Court, then the Court *shall* continue the action to the *next term*, on a suggestion of the fact being made on the record; "and if the defendant, "whose absence was noted on the record, shall not then appear "by himself or attorney, and be so remote that the notice of "such suit pending could not probably be conveyed to him or "her during the vacancy, the said Court *may* further continue "the action to the *next term*, and no longer." By the *first* section of the *Stat.* 1794, it will be seen that in certain cases a service on the *alleged trustee* is made and declared to be a sufficient service on the *principal*, though the trustee should be discharged. This being found to be an unwise provision, it was altered and modified as appears in the above cited passage of *Stat.* 1798. *ch.* 5.

On this comparison of the statutes relating to this subject, it has been contended by the counsel for the defendant that the second section of the act of 1794 should be considered as contemplating cases where the writ has not been *in any manner* served on the principal, and those cases where the trustee has disclosed goods effects and credits of the principal in his hands,

and has been adjudged trustee; but no other cases. And it is urged that the section seems to have no relation to the case where the trustee has appeared at the *first term* and been *discharged;* and that after the discharge of the trustee in the case at bar, the action should be considered as a common and ordinary process; and as a legal service for *such* process had been made on the principal, it was competent for the Court so to consider it, and render judgment at the *second* term, if they thought proper, as in cases of ordinary process. We have examined this argument, and the clauses of the statutes above cited, with a desire to find the construction which the counsel has given to be correct, so that we might leave the judgment undisturbed. But we have not been able to arrive at this conclusion.

The language of the *Stat.* 1794. *ch.* 65. *sec.* 2. is *unequivocal* and *imperative*, that a trustee process shall be continued *two terms*, unless the principal shall come into the State after the service and before the return term of the Court. The provision of the *Stat.* 1797. in cases where the supposed trustees are discharged, that the plaintiff shall not proceed in his suit against the principal unless there has been a good *common* service on him, only limits the rights granted to the plaintiff by the *first* section of the *Stat.* 1794, and authorizes him to *proceed in his suit* against the principal where there has been a good *common service;* but it does not authorize him or the Court to proceed till the *third term;* in other words, the *second* section of the *Stat.* 1794. *ch.* 65. remains in full force, still requiring two continuances. Thus the statutes are consistently explained. If no good reason could be assigned why the Legislature should have required the continuance of a trustee-action two terms in all cases, still we are bound by this positive provision. Perhaps, however, there is quite as much reason why such a cause should be continued two terms, when there is no trustee, he being discharged at the first or second term, as there is when he is not discharged. The principal is safer, when there is an honest trustee who may appear for him, than when he has neither any knowledge of the suit, nor a person who can legally answer for him. Perhaps also two continuances are required in these cases. to prevent fraud between the alleged trustee and the creditor, which might be perfected before the principal could have notice,

unless two continuances were always entered. But without looking for the precise *reasons* of the law in this case, it is enough that such *is* the law. As this is a trustee process, and as a default and judgment were entered at the *second* term, the proceeding is erroneous, and accordingly the

Judgment is reversed.

Bond and *Leach* for the plaintiff in error.

Buckminster for the defendant in error.

MORRELL *v.* ROGERS & TRUSTEE.

Practice. Upon an issue, in a foreign attachment, to try the validity or effect of an assignment, where the assignee has become a party to the record, pursuant to *Revised Stat. ch.* 61. *sec.* 7, the disclosure of the trustee may be read in evidence to the jury.

THIS was a *foreign attachment*, wherein the trustee having in his answers disclosed an assignment to *Arthur Gilman* of the goods, effects and credits of his principal, and *Gilman* being admitted a party to the suit pursuant to *Stat.* 1817. *ch.* 148. [*Revised Statutes ch.* 61. *sec.* 7.] it was objected by the plaintiff that the assignment thus disclosed was invalid, and ought not to have any effect to defeat his attachment; and an issue was thereupon formed to the country.

Allen and *H. W. Fuller*, for *Gilman*, offered in evidence to the jury the disclosure made in the case by the trustee; to which *Sprague*, for the plaintiff, objected, because, not being a deposition, nor the deed or writing of the adverse party, nor testimony *viva voce* in Court, it was not the "*usual evidence*" mentioned in the statute.

But it was replied that the assignment was known only by means of the disclosure, which was now matter of record, and must be seen by the Court, and consequently might be examined by the jury.

And to this opinion THE COURT inclined, and admitted the disclosure to be read in evidence to the jury.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

PENOBSCOT.

OCTOBER TERM,

1821.

THE INHABITANTS OF BANGOR *v.* THE INHABITANTS OF DEER-ISLE.

A notice under *Stat.* 1793. *ch* 59. [*Revised Statutes ch.* 122.] that persons have become chargeable as paupers, should state the names of such persons, or otherwise so describe them, as that the overseers may certainly know whom to remove.

Notice that "*S. and his family*"—or that "*S. and several of his children*" are chargeable, is insufficient.

THIS was an action of *assumpsit* for the expenses incurred by the plaintiffs in the support of a pauper, his wife, and seven minor children; and the only question reserved was, whether the notice given to the defendants was sufficient.

The notice was served *February* 16, 1818, and stated that "*Samuel Staple and family* had been chargeable to *Bangor* for several months next before the notice, occasioned by severe sickness of *himself, wife, and several children.*"

The jury, by direction of the Judge who presided at the trial of the cause, returned a verdict for the plaintiffs, assessing separately the expenses of supporting the husband and wife, and the expenses of supporting the children; which was to be amended or set aside, according to the opinion of the Court upon the question reserved.

W. D. Williamson, for the plaintiffs, contended that the notice was sufficiently explicit as to the whole family, for the de-

fendants were notified that they all were chargeable; and being thus cautioned against the expenses to which they were liable, it was their duty to have made provision for the support of those who stood in need of assistance. Under the *Stat.* 4 *W. & M. ch.* 13. it was settled that the warning of a husband *and his family* was sufficient to prevent the *family* from gaining a settlement, because they could not be separated from him. *Shirley v. Watertown*, 3 *Mass.* 323. So in the case of a complaint made to a Justice of the peace, for the removal of the husband, and judgment for the plaintiffs, the whole family being minors, must be removed with him; for on this topic it is the established principle of the settlement cases that the parent and child are not to be separated. *Somerset v. Dighton*, 12 *Mass.* 385. If therefore the present process had been a complaint for removal of the parents, the notice would have been sufficient to charge the defendants with the support of the children also, and therefore it ought to be considered sufficient here; for the notice needs not to be more specific than the warrant of removal; and the warrant to remove the parent is sufficient authority to remove the child with him.

Abbot, for the defendants.

It is admitted that the notice as to *Staple and his wife* is good. But it is contended that the notice as to the rest of the family is too general and uncertain. An order to remove *three men* and *their families* was quashed because too general. *Salk.* 482. So also to remove a *man, his wife and family* is bad. *Salk.* 485. 488. So to remove *Thomas Block and his family.* 1 *Strange* 114. Or *A. and his children. Com. Dig. tit. Justices of peace B.* 73.

The reasoning in the above cases applies with equal force to the notice required by our statute. A man's family may consist of his *wife*, *children* and *servants*. *He* may have a settlement in one town, and *some of his children* and his servants may have their settlement in *another*. The notice to be good ought to mention the names of all the persons who stand in need of relief, that the overseers of the poor may determine what course to pursue, and ascertain whether any or all the persons named have a settlement in their town; and if so, a knowledge of the members composing the family may be convenient to enable

the overseers of the poor to remove them with the least possible expense.

But this question does not rest solely upon general reasoning nor upon foreign authority. It has been settled in the case of *Embden v. Augusta*, which cannot be distinguished from the present. "You are notified that *the family of James Savage*," &c. is the language in that case. The Chief Justice says "the no- "tice is certainly defective, as it may put the overseers of the "town to great inconvenience to undertake the removal or sup- "port of a family without knowing of what number it may be "composed." 12 *Mass.* 307.

This doctrine is confirmed in *Andover v. Canton*, 13 *Mass.* 555. In the late case of *Shutesbury v. Oxford*, 16 *Mass.* 102. the notice was "that *David Rich and his family* were chargeable," &c. *Parker C. J.* states, "the notice given by the overseers of *Shutes-* "*bury was defective*, for want of *particularizing the family* of *Da-* "*vid Rich*; and had the overseers of *Oxford been silent*, that "town could not have been charged upon *such* notice." In this case the overseers of *Deer-Isle* were silent, and of course that town is not chargeable except for the support of *Staple* and his wife.

The cause being continued *nisi*, the judgment of the Court was delivered in the ensuing term at *Castine* in the county of *Hancock*, to the following effect, by

Mellen C. J. It is admitted that the notification in this case is sufficient as to *Samuel Staple* and *his wife*; and the only question is whether it is sufficient as to the children; who were, at the time of the notice, all minors, though not so described in the notification. Taking the whole notification together, it may fairly be considered as equivalent to a statement that "*Samuel Staple, his wife, and several of their children*" had become chargeable. Is such notice good?

The cases cited by the defendants' counsel from *Salkeld* and *Comyn* related to the sufficiency of orders of removal;—those cited from *Massachusetts* related to the sufficiency of the notice which had been given pursuant to the provisions of *Stat.* 1793. *ch.* 59. *sec.* 12. There is no such provision as this in any of the English statutes relating to the poor. The decisions in

Massachusetts seem to be founded upon the analogy between an order of removal in *England*, and a notification under our statute of 1793. It is contended by the plaintiffs' counsel that the case at bar differs from the cases of *Embden v. Augusta* and *Shutesbury v. Oxford;* because there the word *family* was used, and here the word *children*, which is supposed to be sufficiently descriptive and particular. But in the case of *Ware v. Stanhead-Mount-Fitchel*, 2 *Salk.* 488. it was decided that an order to remove *H.* with his wife *and children* was bad; and in *Comyn's Digest, Justices of the peace B.* 73. it is stated that an order of removal is bad if it does not state the *ages of the children;* that is, probably, so far as is necessary to shew them to be incapable of having any other than a derivative settlement.

By *Stat.* 1793. *ch.* 59. *sec.* 12. the overseers to whom the notification is sent are authorized to *remove* the persons chargeable. Hence the necessity that the notice should state the names of such persons, or otherwise so describe them, that the overseers may certainly know whom to remove. In 3 *D. & E.* 44. 637. it is settled that none of the family are *removable* except those who are *chargeable.*

As the decided cases make no distinction between the terms *family* and *children*, when used in an order of removal; and none seems to exist between them when used in the statute notification, if we duly consider the object in view in sending the notification, we do not feel at liberty to make any distinction in deciding this cause; more especially as by so doing we should extend the effects of an estoppel, perhaps to the exclusion of the truth.

According to this opinion the verdict is in part incorrect; and pursuant to the agreement of the parties it must be altered so as to stand for the expenses of supporting the husband and wife only.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE COUNTY OF

HANCOCK.

OCTOBER TERM,

1821.

MARTIN *v.* ABBOT, ADM'R and TRUSTEE.

A foreign attachment is dissolved upon the death of the debtor and the issuing of a commission of insolvency upon his estate.

AFTER the commencement of this suit, and after the examination of the trustee, the original defendant died, his estate was represented insolvent, and commissioners were appointed to receive and examine the claims of creditors; and the question was, whether the foreign attachment was thereby dissolved?

And THE COURT were all of opinion that it was. They observed that by law the *estate* of a deceased insolvent debtor is to be distributed *pro rata* among all his creditors. And by *Stat.* 1783. *ch.* 59. *sec.* 2. [*Revised Statutes ch.* 60. *sec.* 32.] the attachment of any *estate* is to have no force or efficacy after the death of the defendant and the issuing of a commission of insolvency upon his estate. The intent of the law plainly is, that whatever is liable to distribution shall be freed from attachment; and this applies as well to money due to the debtor, as to his visible goods. See *Patterson & al. v. Patten*, 15 *Mass.* 473.

Thayer, for the plaintiff.

Abbot, for the defendant.

HALE *v.* RUSS.

Where the principal in a bail-bond, after it was signed by the surety, and in his absence, but before delivery, erased the name of the Sheriff as obligee, and inserted that of the constable who served the precept, and this in the presence and at the suggestion of the constable; it was holden that this did not avoid the bond as to the surety.

Such an alteration, in a bail bond, seems to be immaterial.

The consent of the surety in such case may well be presumed, his intention of becoming bail not being affected, and the alteration being only in matter of form.

Scire facias against the defendant as bail for one *Wilson*. Plea that the defendant never became bail for said *Wilson*; and issue thereon.

The plaintiff produced the bail bond, bearing the names of the defendant and of *Wilson* as obligors, and that of *Robert Smith, junior* as subscribing witness; and proved by two witnesses, well acquainted with that vicinity, that they never knew such a person as *Smith* in the town where the bond was said to be taken, nor in that part of the country, and that no such person could be found after strict and diligent inquiry. The Judge who presided in the trial of the cause thereupon permitted the plaintiff to prove the hand-writing of *Wilson* and *Russ*, which being done, the bond was read to the jury.

The defendant then offered *Wilson* as a witness, to prove an alteration in the bond after its execution; and the Judge overruling the plaintiff's objection to his admission, he testified, that *David Brooks*, to whom the original writ of the plaintiff against him was delivered for service, called on him to procure bail in the action;—that he named *Russ* as his surety, whom *Brooks* agreed to accept; and directed him to procure a bond duly executed by himself and *Russ*, and bring it to *Brooks*, which he afterwards did;—that when *Brooks* saw the bond, he observed that it contained the name of the *Sheriff* as obligee, whereas *he* was not *then* a deputy of the Sheriff, though he recently had been, but was a constable of *Lincolnville*; and at his suggestion *Wilson*, in his presence, erased the name and office of the Sheriff, and inserted that of "*David Brooks, Constable of Lincolnville*," and delivered the bond to *Brooks* as the bail bond in the action.

Russ had no knowledge of this alteration till long after it was made; and it did not appear that he ever expressly assented to it.

The Judge, intending to reserve the questions of law, arising from these facts, for the consideration of the whole Court, directed a verdict for the plaintiff, which was accordingly returned; and which the defendant now moved the Court to set aside.

White, for the defendant, contended that the action could not be supported, not being between the contracting parties nor their privies in interest. The bond was between *Russ* and *Watson;* the action is between *Russ* and *Brooks;* the obligee was Sheriff of the county, the plaintiff is constable of a town. The alteration is not only material, but it was made without the defendant's consent or knowledge. *N. Hamp. Rep.* 95. 145. 1 *Esp. Rep.* 81. 5 *D. & E.* 325. 11 *Mass.* 309. 10 *East* 431.

Abbot, for the plaintiff. The obligor *Wilson*, being the person who made the alteration complained of ought not to have been admitted as a witness; it being against good policy to permit a party thus to impeach his own security. *Walton v. Shelly*, 1 *D. & E.* 300.

But a bail bond is a record, and cannot be denied nor varied by parol. It lays the foundation for a writ of *scire facias* against the bail. *Champion v. Noyes*, 2 *Mass.* 481. It is a part of the officer's return, and may not be contradicted. If false, the remedy is against the officer for a false return.

The alteration, however, is not material. It was evidently the intention of the defendant to become the bail of *Wilson*, and this intention is all which has been carried into effect. It may well be presumed that he consented that *Wilson* should make any alteration necessary for this purpose. The penal sum, and the conditions remain as at first; and the defendant is still bound to the officer who served the process, agreeably to his original intent. Neither was the alteration made by the obligee, or a stranger; but by one of the obligors, who therefore ought not to complain. 11 *Co.* 27. 5 *Mass.* 539. Nor was it made after delivery, but before; and therefore good, upon the authority of *Shep. Touchst.* 67.

White. Of the material parts of a deed, all the books agree that *parties* is one; and here was a change of *parties*, and there-

fore a material alteration. Nor was it made by the obligor. As to *Russ*, the bond was perfect when he executed it, and it was delivered as soon as it passed from his hands.

Mellen C. J. afterwards delivered the opinion of the Court as follows:

Two objections have been made to the verdict as grounds for the motion for a new trial.—1. That *secondary* evidence was improperly admitted to prove the execution of the bail bond.—2. That the jury were erroneously instructed that the alteration in the bond was of such a nature, and made under such circumstances as would not in law avoid it.

As to the *first* point, we cannot doubt the correctness of the decision admitting secondary evidence. The law requires that the subscribing witness shall be produced, if living, and within the reach of the process of the Court. But when due diligence has been used to find him, and without success, then the next best proof is admissible. In the case before us, it is stated that after inquiry made in the town where the bond was executed, it was found that no such person as the subscribing witness had ever lived there or in any of the neighboring towns; and nothing could be ascertained respecting him. After these facts were established, proof of the hand-writing of the defendant and of the subscribing witness was properly offered to the jury. *Cunliffe v. Sefton*, 2 *East* 183.

The *second* point deserves a more particular consideration. In *England*, *bail below* is given by bond to the Sheriff; *bail above* is given to the plaintiff by recognizance in Court, or before commissioners. The bail bond may by law be assigned to the plaintiff; and he may have an action of debt upon it in his own name, and may bring a *scire facias* upon the recognizance. By the laws of this State the bail given is made to answer the purpose both of bail below, and bail above, at common law. It is always taken by bond given to the officer; and such bond is not assignable, nor can an action of debt be maintained upon it by the plaintiff in his own name or the name of the Sheriff. With us, the plaintiff avails himself of such bond by a writ of *scire facias* in his own name, in the same manner as he does in *England* by the same kind of process on the recognizance; and

instead of the plea of *non est factum*, which would be proper in debt on a specialty, the bail may contest the execution or validity of the bail-bond on the plea that he did not become bail for the principal, as alleged in the *scire facias*. In fact this action proceeds on the principle that the officer to whom the bail-bond is given is the mere trustee of the plaintiff, and receives the security for his use. In the examination of this point of the cause, this distinction seems to be of some importance.

It is manifest that the alteration was made without any fraudulent intent or improper motive; by the consent and in the presence of *Brooks* the constable, and *Wilson* the principal in the bond; and for the express purpose of rendering the bond legal and sufficient. It is true that *Russ* was not privy to the alteration. The bond clearly is not avoided as to *Wilson;* the only question is, whether it is void as to *Russ* the defendant.

It does not seem to be necessary in this case to decide whether the alteration was an *immaterial* one, (though we are inclined to consider it as such,) nor whether it would avoid the bond, being made with the consent of the *obligee*. This latter question appears not yet settled either in this State, or in *Massachusetts*. In the case of *Barrett v. Thorndike* decided in *Lincoln* county *September* term 1820, (*ante* p. 73) we had occasion to review some of the principles relating to alterations and erasures in deeds, bonds, and other instruments, whether material or immaterial; but that case was determined upon other grounds. Nor is it necessary to determine how far the consent or act of the constable in making the alteration in the bond should be *imputed to the plaintiff*, even if the law were clear that an immaterial alteration, made by an obligee, would avoid a bond; inasmuch as the constable was a mere trustee, appointed by the law to receive a bond for the plaintiff's use, and over whose acts the plaintiff had no control. Waiving all these questions, we decide this cause upon other principles.

It is important to consider *at what time* the alteration was made. The bond was prepared and signed by *Wilson* at the request of *Brooks;* and then signed by *Russ*, who gave it back to *Wilson* to carry and deliver to *Brooks* as a good and sufficient bail-bond in the action. *Before* it was delivered to *Brooks*, he discovered the error in the *form* of the bond; and at his sug-

gestion and request *Wilson* made the alteration, and thereupon the bond, so corrected, was *delivered* to *Brooks*. The circumstances also, under which the alteration was made, deserve particular notice. In all cases relating to this subject it seems to be admitted that alterations, made by *consent of parties*, do not avoid the instrument. If therefore it should appear from the facts reported, that the bond was made payable to *Brooks* instead of the Sheriff by the *express* or *implied* consent of *Russ*, he must be bound by it. It is evident that he intended, when he signed the bond, to become the bail of *Wilson*, and to assume all the liabilities of bail. It does not appear that he ever knew who was the obligee named in the bond, and to him it was a matter of no consequence. His object was to assist his friend, and to obtain the continuance of his personal liberty. With this view all the arrangements had been made, and the bond was procured and signed. *Wilson* was the agent of *Russ* to carry and deliver the bond to *Brooks* the constable. *Brooks* told *Wilson* the agent that the bond was incorrect in form, and, unless corrected, could not avail as an effectual instrument. To render it correct and effectual this agent made the alteration, and then delivered the bond, which produced its intended effect to release *Wilson* from the arrest when made.

From this agency and confidence reposed, we may well presume the consent of *Russ* that any errors in the form of the bond, the correction of which would be consistent with his intentions and necessary to give them effect, might be corrected. We are of opinion that such consent ought to be inferred from the facts, to prevent the imputation upon the defendant of a fraudulent intent to the injury of the plaintiff. We also think ourselves fully justified in drawing this conclusion, from the reasoning of the Court in the case of *Smith v. Crocker*, 5 *Mass.* 538. and *Hunt v. Adams*, 6 *Mass.* 519. and the principles established by the decisions of those causes. In the case at bar the only alteration made in the bond was the honest substitution of *one nominal* obligee for *another;* the *real* obligee, that is *Hale* the creditor, being the same, for whose use the bond was taken, to whom alone it was intended as a legal security, and by whom it has been accepted as such, as appears by his prosecution of this suit. On the whole, we are satisfied that a new trial ought not to be granted. *Judgment on the verdict.*

ELWELL *v.* SHAW.

A deed executed by an attorney, to be valid, must be made in the name of his principal.

If land be sold for the non-payment of divers taxes, one of which is illegal, and the rest legal, the sale is void.

THIS cause was ordered to a new trial by the Supreme Judicial Court of *Massachusetts* immediately before the separation of *Maine* from that State, by a written order of the Court transmitted from *Boston* to the Clerk of this county. But the report of the case not being as yet printed, [since published in 16 *Mass.* 42.] and the principles of the decision not having been distinctly ascertained, it was opened *de novo* at *October* term 1820.

The tenant claimed title, as before, under *Jonathan Elwell*, the demandant, by virtue of a deed executed by *Joshua Elwell* his attorney, whose authority to make a deed of the premises in the name of his principal was admitted to be sufficient. This deed, after a recital of the substance of the letter of attorney, was in the following words; "Now know ye, that I the said *Joshua*, by "virtue of the power aforesaid, in consideration of two hun- "dred dollars paid me by *J. S.* and *T. P. S.* of, &c. the receipt "whereof I do hereby acknowledge, do hereby bargain, grant, "sell and convey unto the said *J.* and *T.* a certain tract of land, "&c.——To have and to hold the same to them the said *J.* and "*T.* their heirs and assigns forever. And I do covenant with "the said *J.* and *T.* that I am duly empowered to make the "grant and conveyance aforesaid; that the said *Jonathan*, at the "time of executing said power was, and now is, lawfully seized "of the premises, and that he will warrant and defend the same "to the said *J.* and *T.* forever, against the lawful claims and "demands of all persons. In testimony whereof I have here- "unto set *the name and seal of the said Jonathan*, this," &c. Signed *Joshua Elwell*, and a seal—and acknowledged by the said *Joshua* to be "his *and the said Jonathan's* deed," before a magistrate.

But the Judge who presided at the trial of the cause ruled that this was not the deed of the *demandant*, and therefore could not operate to pass the fee from him.

The tenant then shewed the deed of *Thomas Buckmar*, collector of taxes for the town of *Northport*, in which the land lies, conveying the premises to the tenant, as purchaser at a sale for non-payment of taxes. It appeared that there were five distinct taxes assessed and committed to the collector in separate bills, for the non-payment of *all which* the land was sold. The only objection made to the validity of the sale was, that in *one* of these assessments the overlayings exceeded, by ten dollars and thirteen cents, the amount authorized by the statute.

The Judge ruled that this objection was fatal to the tenant's title under the collector's deed; and a verdict was thereupon taken for the demandant, subject to the opinion of the Court upon the facts above stated.

Wilson and *Greenleaf*, for the defendant, argued, as to the first point, that the deed must be taken to be the deed of the demandant, unless it was plainly the deed of the attorney. The *seal is expressly declared to be the demandant's*, and the intent of the conveyance, as is manifest from inspection, was to convey the estate in execution of the power. The cases where the attorney has been held answerable personally on his covenants or other engagements are cases where he acted either *beyond his authority*;—as where administrators covenanted to warrant, *Sumner v. Williams*, 8 *Mass.* 162. 209.—to perform an award, *Barry v. Rush*, 1 *D. & E.* 691.—and where a guardian gave a promissory note; *Thatcher v. Dinsmore*, 5 *Mass.* 299.—Or *without any authority* whatever; *Appleton v. Binks*, 5 *East* 148. *Tippets v. Walker*, 4 *Mass.* 595. *Tucker v. Bass*, 5 *Mass* 164.—Or where he *does not name* his principal, or does not express in the instrument the authority under which he acts; *Stackpole v. Arnold*, 11 *Mass.* 27. *Mayhew v. Prince*, 11 *Mass.* 54. *Arfridson v. Ladd*, 12 *Mass.* 173. *White v. Cuyler*, 6 *D. & E.* 176.—Or where he *expressly* covenants in *his own* name; *Fowler v. Shearer*, 7 *Mass.* 14. If the instrument be executed in the name of the principal, or distinctly declare the person intended to be bound, it is enough. *Long v. Colburn*, 11 *Mass.* 97. *Wilkes v. Back*, 2 *East* 142. And as in this case the attorney had sufficient authority, which is recited in the deed, in which the party intended to be bound is plainly shewn to be the demandant, whose seal is affixed; and as the attorney has not exceeded his

authority, the deed cannot be considered as his, and is therefore the demandant's.

As to the second point, they contended that no injury could possibly result to the owner of land by supporting a collector's sale where one of the taxes was legally assessed. The valuation and copy of the assessments being lodged in the proper office would always enable him to ascertain what taxes were legally assessed, and *these* might be tendered at any time within two years and the land redeemed. The expenses would generally be the same on a sale for one tax, as for more than one; and if not, the owner might tender his proportion. *Colman v. Anderson*, 10 *Mass.* 105. 117.—119. *Pejepscot Prop'rs v. Ransom*, 14 *Mass.* 145. The decisions as to sales of personal chattels it is true are otherwise, and for other reasons. *There* the act is entire, and there is no method of separating the good from the bad. The sale is absolute. The owner has no time to redeem his goods; and thus the illegal tax *necessarily* affects the whole proceedings. *Libby v. Burnham*, 15 *Mass.* 147. *Stetson v. Kempton*, 13 *Mass.* 283. In this latter case the tax was illegal in its *object.*

Orr and *White*, for the plaintiff. The first point has already been settled, by a Court of competent jurisdiction, after long deliberation, and upon the weight of authority. But the deed *is* the deed of the attorney. Here are his covenants, in the words "*I grant, sell and convey,*" which import a covenant of quiet enjoyment. Here is also *his name*, and a seal, and he acknowledges it to be *his* deed before the magistrate. If this were an action of covenant against him, the Court would reject as surplusage all things contrary to his covenants. *Worthington v. Hylyer*, 4 *Mass.* 196.

As to the other point; it has been holden for many years that a title under the provisions of a statute must be made out *strictly;* and nothing is presumed but in favour of ancient conveyances, which this is not. The copies of the valuation and assessments being duly filed, purchasers may easily know what sort of titles they buy; and if they purchase those which are unsound, it is their own folly. If trespass will lie for selling personal chattels on a tax illegal by excessive overlayings, *a fortiori* a sale of lands in such case by a collector is void.

The cause being continued *nisi* for advisement, the opinion of the Court was delivered at the succeeding term in *Cumberland*, to the following effect, by

Weston J. As to the first question made in this action, it having been agitated before the Supreme Judicial Court of *Massachusetts*, and by them solemnly decided upon mature consideration, we do not feel ourselves at liberty to re-examine the grounds of that decision, and to sustain the objections which have been urged against it. Our predecessors felt strongly the equity of the case made by the tenant, and manifested a disposition to have supported his title, had not the pressure of legal authorities constrained them to a different course. If the principle, *stare decisis*, properly actuated them, we certainly have additional motives, arising from their decision, for yielding to its authority.

But the tenant now relies upon another title, arising from a collector's sale. This was made for the non-payment of five distinct taxes, committed to him for collection. The only objection urged at the trial against this title was, that in one of the taxes, namely, the school tax, the overlayings exceeded, by the sum of ten dollars and thirteen cents, the amount of five *per cent.* authorized by law. This objection was deemed, by the Judge who presided at the trial, fatal to the tenant's title; and whether it was so or not, is the question now presented.

The counsel for the tenant relies principally upon the authority of the case of *Colman v. Anderson*, 10 *Mass.* 115. but the assessment there objected to was made prior to the statute limiting the overlayings to five *per cent.* Anterior to this statute a practice had arisen, which had been universally acquiesced in, to exceed in the aggregate of the assessments, the entire amount authorized; partly to obviate the perplexity to which assessors were subjected in consequence of the fractions arising in the assessment of taxes upon the polls and estates of the inhabitants of the respective towns, and partly to meet abatements or mistakes, and to insure the collection of the whole sum ordered to be assessed. With a view to sanction and to limit this discretion, the legislature at length interposed; and gave to assessors a latitude fully adequate to enable them to discharge

with ease the duties imposed upon them. To suffer them to exceed this limit, would be to subject the citizens to the payment of taxes, to the imposition of which they had never assented, and to create uncertainty in their amount, in violation of the manifest provisions of the statute. And it has been expressly decided that "the assessing more than five *per cent.* above the sums voted by the town to be raised, makes the assessment illegal and void." *Libby v. Burnham et als.* 15 *Mass.* 144.

Upon the authority of this case also, the proceeding to make sale of the land in question, for the non-payment of all the taxes, renders the sale void, notwithstanding the assessment of a part of them is not liable to objection.

We are therefore of opinion that the jury were properly directed at the trial; and that there must be

Judgment upon the verdict.

Note. The Chief Justice, having formerly been of counsel with the defendant, did not sit in this cause.

MILLIKEN & ALS. *v.* COOMBS & ALS.

If the principal, in a letter of Attorney under seal, give it a false anterior date for the purpose of legalizing prior acts of the attorney, he is estopped to aver or prove that it was in fact executed at a subsequent period.

If an attorney, whose authority is by *parol*, execute a *bond* in the name of his principal, and *afterwards* he be regularly constituted by letter of Attorney bearing date *prior* to the bond, this is a subsequent ratification, and gives validity to the bond.

DEBT on an arbitration-bond, dated *March* 1, 1815. There were several issues in the case, among which was that of *non est factum.*

To prove this issue on their part the plaintiffs produced the bond declared on, which appeared to be executed by *James D. Wheaton* as the agent and attorney of the defendants, and to be made in virtue of a power given by the defendants to the attorney, dated *January* 9, 1815. To prove the attorney's authority, the plaintiffs gave in evidence a written power of attorney from the defendants to *Wheaton*, under seal, dated *Feb-*

ruary 1, 1815, but which, it appeared, was executed on or about *March* 16, 1815.

It further appeared that the arbitrators, after having given due notice, met and fully heard the parties *April* 19, 1815, on which day they made and published their award. Several of the defendants were present before the arbitrators at the trial, and they all appeared by their agent regularly constituted, who managed the cause on their part; but no objection was made by any person to the authority of *Wheaton* to enter into the submission in behalf of the defendants.

The counsel for the defendants objected to this evidence as insufficient to support the bond as their deed; and in support of this objection they gave in evidence a written power of attorney under seal, from eight of the defendants to *Wheaton* dated *January* 9, 1815, in which all the defendants' names were recited, but four of them never executed it. This power embraced the same subject matter as the power dated *February* 1.

The Judge overruled this objection, and thereupon a verdict was returned for the plaintiffs, subject to the opinion of the whole Court upon the facts above stated.

Orr and *Thayer*, for the defendants, contended that the attendance of the defendants before the arbitrators could not avail to give validity to the bond, however it might operate to confirm an authority *in pais*. Here the power must be proved by deed, because the agent assumed to bind his principals by deed, at the time of the execution of which he had no authority. His act was *completed* before he was legally made the attorney of the defendants; and no power existing *at that time* to bind them, it is not their deed.

Greenleaf and *Wheeler*, for the plaintiffs, argued that the execution of the power on the *sixteenth* of *March*, bearing date *February* 1, was to be considered as a ratification, under seal, of all acts done by the agent pursuant to the tenor of the power, since *February* 1, agreeably to the maxim *omnis ratihabitio*, &c. *Cady v. Eggleston*, 11 *Mass.* 232.

Weston J. delivered the opinion of the Court as follows:

The only question in this case arises from the objection made to the sufficiency of the power of attorney, under the

authority of which the arbitration bond was executed. It is urged that the power recited in the bond being described as bearing date *January* 9, 1815, that which was produced in evidence by the plaintiffs, bearing date *February* 1, 1815, can have no tendency to give effect to the bond; and this position is further attempted to be supported on the part of the defendants, by the production of a power of attorney, corresponding exactly in date with that recited in the bond, but which, though it purports to be the power of all the defendants, eight in number, was in fact executed by only four of them.

It may be convenient *first* to consider, whether if there had been no instrument of *January*, that of *February* could be received to support the bond, and *secondly*, if so, whether it is rendered inadmissible by the existence of the former power.

To give effect to the bond, as against the principals, it was only necessary that the attorney should have had in fact a sufficient power from them; its date was entirely unimportant, except that it should appear to be anterior to the execution of the bond. The production therefore of the power of *February*, being of a prior date, proved the material fact recited in the bond. This sufficiently supported the authority the attorney claimed to exercise; and justified the execution of the bond in behalf of his principals. That he possessed a power was all that it was necessary for him to set forth in the bond, and the insertion of its date was altogether gratuitous and unnecessary. A misrecital in this particular, accidental or designed, cannot be permitted to vitiate the proceedings, and to dissolve an obligation which the principals had undertaken through the agency of an attorney, who was in fact duly and legally authorized. Even in the conveyance of real estate, that the intent of the parties may prevail, some particulars in the description in the deed, not essential to ascertain the estate conveyed, inconsistent with others which are essential, may be rejected and will not be permitted to defeat the general intent of the parties. *Worthington et al. v. Hylyer et al.* 4 *Mass.* 196.

But shall the existence of the instrument of *January* render that of *February* inadmissible; the former and not the latter date being recited in the bond? Had that of *January* been executed by all the principals, according to its purport, there could be

no question that it must have been deemed to be the power intended in the recital in the bond. But although it corresponds to the recital in one particular, namely, as to its date, it varies from it in an another, altogether essential, it not being executed by *all* the principals, which is the power set forth and recited. The unexecuted power therefore of *January*, must be altogether rejected, varying both in form and substance from that recited; and that of *February*, which was the effectual and valid power, must be deemed to be that intended by the parties in the bond of arbitration. Indeed by the execution of the new power, the parties appear to have abandoned that of *January*, which had not been completed according to its terms.

It is further contended that the power relied upon, not having been executed until after the date and delivery of the bond, can give no validity to that instrument. The power was executed prior to the meeting of the arbitrators, and there can be no doubt that it was antedated, that it might appear as a subsisting power at the time of the execution of the bond; and that the principals might thereby be concluded from questioning the authority of their attorney. In this point of view the date becomes material, and must have been so considered by the parties. The defendants are therefore estopped by their deed to aver or to prove that it was in fact executed at a subsequent period. In the case of *Cady v. Eggleston et al.* 11 *Mass.* 282. cited by the counsel for the plaintiffs, which was debt upon a replevin-bond, which bore date at the time of the service of the writ, but was not in fact executed by *Eggleston*, the principal, until after the entry of the replevin suit, *Parker C. J.* in delivering the opinion of the Court observes, speaking of the bond executed by *Eggleston* the principal, " he is estopped to say that it was made on a day different from its date, and must be considered as having given force and effect to it on the day of the service of the writ of replevin." The analogy in this particular between the case cited and the case at bar, is very striking.

But if the defendants are not estopped from shewing the true time of the execution of their power, it may well be considered a confirmation of the authority assumed by their attorney; it being very apparent that the power was antedated that it might have that effect. That a subsequent assent is tantamount to a

precedent authority, is a familiar and well settled principle as to all acts done for another, in which a parol power only is necessary. There seems to be no good reason why the same principle should not be extended to cases in which an authority under seal is essential, provided the subsequent assent or recognition be proved by an instrument of equal solemnity, and provided, as in this case, it be dated back to a period anterior to the execution of the deed or obligation, it is intended to ratify.

The defendants having first authorized their attorney to submit the matters in controversy between the parties to arbitration, with a full knowledge that this had been done, were present, either in person or by their agent, at the hearing before the arbitrators, managing and conducting the business, and making no objection to their authority. Had the result been in their favour, the plaintiffs must have been bound by it; and we can discern no reason, either in law or equity, why the defendants should not be equally bound. Judgment must therefore be entered upon the verdict.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

LINCOLN.

OCTOBER TERM,

1821.

THE PROPRIETORS OF THE KENNEBEC PURCHASE
v.
KAVANAGH.

Where the possessor of a parcel of land entered into a written contract with the true proprietor, for the purchase of the land at a stipulated price, which he never paid; and afterwards conveyed all his right in the land to a third person, without notice of the contract with the proprietor; it was holden that the grantee, after six years, in an action by the proprietor, was entitled to the increased value of the premises by reason of the improvements made by *himself*, under *Stat.* 1807. *ch.* 75. [*Revised Statutes ch.* 47.] but not to the benefit of those made by his grantor.

AT the trial of this action, which was a *writ of entry*, the tenant shewed a deed of the premises from one *Grant* to *Richard Major* dated *April* 7, 1798, and a deed from *Major* conveying all his right in the premises to the tenant and *Mr. Cotterill* in mortgage, bearing date *September* 2, 1807, and failing to make out a title against the demandants whose original right to the land had been admitted, he requested that the increased value of the demanded premises by reason of the improvements thereon made, and the value of the same exclusive of such improvements, might be estimated by the jury, agreeably to *Stat.* 1807. *ch.* 75 commonly called the *betterment-law*. To this the demandants objected; and in support of the objection proved that *Major* on the 28th day of *April* 1803 made an agreement with them for the purchase of the premises at the price of 300 dollars, for which sum he gave them his note, and received from them an

obligation in writing, to convey the premises to him upon his payment of the note: but there was no proof that *Kavanagh* or *Cotterill* had any knowledge of this agreement of *Major* with the demandants.

Upon this evidence the Judge who presided at the trial of the cause, intending to reserve the question of law, directed a verdict for the demandants; and instructed the jury to estimate the value of the land and of the improvements as prayed by the tenant, the parties agreeing that the verdict should be amended agreeably to the opinion of the whole Court upon the case as reported by the Judge.

R. Williams, for the demandants, observed that *every* person holding land for six years, was not to be considered as holding by possession, within the meaning of the *Stat.* 1807. *ch.* 75. and instanced the cases of lessee, mortgagor, &c. and to this point cited *Knox v. Hook*, 12 *Mass.* 329. In the case at bar, which falls within the principle of *Knox v. Hook*, *Major* not holding by possession, and so having no right to the benefits of the statute, could convey no such right to *Kavanagh*, who purchased only the estate of his grantor. This estate or interest consisted in a seisin in fact, and a right of pre-emption of the land at a price agreed. The tenant, by virtue of his deed, became the assignee of *Major*, of the contract of 1803, and entitled to an action in the name of the assignor, for his own benefit. If the grantor falsely affirmed his estate in the land to be greater than in truth it was, the remedy of the tenant is by suit against him. If not, then the tenant suffers no damage. The contract of 1803 amounts, in effect, to a waiver of the rights which *Major* might otherwise have had under the statute, and brings this case within that of *Shaw v. Bradstreet*, 13 *Mass.* 241.

Bailey, for the tenant, contended that there was a material diversity between the facts in the cases cited, and those in the present case, as there the tenants in possession had made their own contracts with the demandants, or were conusant of agreements made by others their privies in estate. But here was no notice to the tenant of the existence of any contract. He could know of no title on record, for there was none; and of course he looked only to the possessory title of his grantor. For aught here appearing, he regarded the improvements made by

the tenant on the land as the principal security of his debt. He could not avail himself of the contract with *Major*, for it does not appear that he knew of it; and if he had, there is no process by which he could have obtained possession of the writing for the purpose of commencing his suit.

The equity of the case is also strongly with the tenant, who has expended his money in farther improvements, ignorant of any contract between his grantor and the demandants; rather than on the side of the same demandants, who, well knowing the nature and effect of the contract, have silently looked on for fourteen years, until the grantor being dead or insolvent, the remedy against him is become of no value.

MELLEN C. J. delivered the opinion of the Court as follows, at the succeeding term in *Cumberland*, the cause having been continued *nisi* for advisement.

From the report in this case it appears that the title of the premises demanded is in the plaintiffs; that *April* 7, 1798, *Abijah Grant* conveyed the same by deed to *Richard Major*, who on *September* 2, 1807 by deed of mortgage conveyed *all his right* in the premises to the tenant and *Matthew Cotterill;* and that possession has accompanied the deeds.—It does not appear who made the improvements on the land in question; but the value of them and of the land has been estimated by the jury in the manner prescribed by law. The question before us is, whether the tenant is entitled to the benefits of the law under which the estimate has been made, in as much as *Major*, on the 28th of *April* 1803 made an agreement with the demandants for the purchase of the premises, gave security for the purchase money, and received a written contract from them to convey to him the lands on payment of the price.—It does not appear that *Kavanagh* or *Cotterill* had any knowledge of this contract at the time of receiving the deed from *Major* or till the time of trial.

In the case of *Knox v. Hook*, 12 *Mass.* 329. it appeared that *Bagley* was the original settler, and contracted in writing with *Knox* for the purchase of the premises. *Hook* afterwards purchased of *Bagley* the improvements he had made.—Then *Knox* sold the land to *Thorndike* who contracted with *Hook* to convey the same to him on certain conditions which had not been per-

formed. The Court decided that *Hook* could not be considered as holding the premises " by virtue of a possession and improvement" within the meaning of the law; but under the contract he had made.

In the case of *Shaw v. Bradstreet*, 13 *Mass.* 241. *Cunningham* was the original settler. He made a contract with the demandant for the land at a certain price; and after this and about two years before the commencement of the action he conveyed the premises to *Bradstreet*, who was then informed by *Cunningham* of the contract he had made with *Shaw*. The Court decided that " *Cunningham*, by entering into the agreement waived " all claims by virtue of his possession and that *he* and *his* " *grantee* were bound by his agreement."—The case was considered as similar in principle to that of *Knox v. Hook*. The case at bar differs from *Shaw v. Bradstreet* in two particulars—*first*, in *that* case the tenant had *express notice* of the contract: in *this*, no such notice appears.—*Secondly*, in *that*, the tenant had been in possession only about two years after his purchase from *Cunningham:* in *this* the tenant has been in possession ever since *April* 1807.

We consider the two cases abovementioned as decided on correct principles and as having thus far settled the law upon this subject. *Major*, having *waived* all his rights under the statute, by the contract which he had made, could *convey* none to *Kavanagh* and *Cotterill;* but still, as *Kavanagh* was ignorant of that contract, and had been in the possession and improvement of the premises for *more than six years* prior to the commencement of this action, he stands like any other person in that situation, and is entitled to an estimate of the improvements *he* has made upon the land *himself* since the conveyance from *Major*. But as it does not appear by the verdict or the report, *who* made the improvements; or, if they were made partly by the *tenant*, and partly by *those under whom he claims*, in what proportion they were made; the verdict must be set aside and a new trial granted, that this fact may be ascertained and a verdict given in conformity to the principles above stated.

New trial granted.

LLOYD *v.* JEWELL & AL.

In an action upon a promissory note given for the purchase-money of land conveyed by deed with the usual covenants of seisin and warranty, the action being between the original parties, it is not competent for the defendant to set up, by way of defence, a partial or total failure of title, or a want of title in the grantor at the time of the conveyance.

And where the deed contained an express condition that upon the breach of any covenant therein, the damages might be payable by cash to the amount received in money, and the residue by delivering up such of the grantee's notes for the consideration as should remain unpaid; in an action upon one of such notes, some having been paid and others still due, the defendant was not permitted to shew a breach in the covenant of seisin as to parcel of the land, to the value of the note declared on.

THIS was *assumpsit* upon a promissory note dated *December* 23, 1814, for the sum of $166,67 made by the defendants and payable to the plaintiff or his order in four years from the date; to which the defendants pleaded the general issue.

At the trial of this issue the defendants offered in evidence a deed from the plaintiff to them, of even date with the note declared on, the consideration of which was six promissory notes, of which the note in suit was one, and which, being each for the same sum, amounted in the whole to a thousand dollars, of which three had been paid. The deed contained the following covenants, viz:—"And I do covenant with the said *Jewell* and *Manuel* their heirs and assigns that the premises aforesaid are free "of all incumbrances by me made, that I have good right to "sell and convey the same to the said *Jewell* and *Manuel* as "aforesaid, and that I will warrant and defend the same to "the said *Jewell* and *Manuel* their heirs and assigns forever, "against the lawful claims and demands of any person other "than the said *Jewell* and *Manuel* their heirs and assigns: Upon "condition that the said *Jewell* and *Manuel* their heirs and assigns shall not demand *or receive* of the said *James Lloyd* his "heirs, executors, or administrators by virtue of the grant or "covenant aforesaid either express or implied, and for the "breach or non-performance of the same, *any greater or further* "*sum* than the amount of *the consideration aforesaid* with interest "thereon after two years, payable in cash to the amount receiv-

"ed *on said notes and the residue by delivering up to be cancelled* "*such of the aforesaid notes as may remain unpaid*".

The defendants then proved that to a specific part of the premises described in the deed, the plaintiff, at the time of making the conveyance, had not any title; but the same was, and still continued to be, in the actual possession of a stranger who was the lawful owner; so that no title to this parcel passed by the deed to the defendants. They also proved that this specific parcel, being estimated by the price they gave for the whole premises, was of the just value of $191,10, being more than the amount of the note declared on.

To the admission of this evidence the plaintiff objected; but the Judge who presided at the trial of this cause, for the purpose of presenting the question to the whole Court, overruled the objection, and a verdict was returned for the defendants.

The plaintiff thereupon moved for a new trial, for the following reasons, viz:

1. Admitting there had been a failure of title to any part of the premises described in the plaintiff's deed, the defendants must resort to the covenants in the deed, and ought not to be permitted to go into the title by way of defence to this action.

2. If the defendants may set up the facts proved by way of defence to the notes, yet it appears that there are two notes, beside the one in suit, still remaining due and unpaid; which notes amount to a much larger sum than the deficiency proved, and by the true construction of the covenants in the deed the defendants must first pay for so much of the premises as they have good title, and then, for the sum remaining due, they may set up the deficiency in quantity by way of defence.

R. Williams, being about to argue for the plaintiff in support of his motion, was stopped by the Court.

Allen, for the defendants.

Public policy dictates that the defence should be made in *this* action, if it can be done consistent with the rules of law, as circuity of action will thereby be avoided. The rule that the consideration of a note of hand may be inquired into, as between the original parties, has been too long established to be brought now in question. But it is said that the covenants in

the plaintiff's deed form a consideration for the note, to which the defendants must resort for their remedy. The question, however, is not whether the defendants might not have a remedy on the covenants, but whether they are so confined to that remedy that they cannot offer the defence here. Courts have latterly been inclined to permit a defence to be set up in certain cases where there was another remedy, though the older opinions were otherwise. *Everett v. Gray*, 1 *Mass.* 101. *Taft v. Montague*, 14 *Mass.* 282. *Barton v. Butler*, 7 *East* 479. *Sill v. Rood*, 15 *Johns.* 230. 1 *Campb.* 190. *Winter v. Livingston*, 13 *Johns.* 54. In *Bliss v. Negus*, 8 *Mass.* 46. the Court strongly intimate their opinion against the objection to such a defence. But *Frisbee v. Hoffnagle*, 11 *Johns.* 50. is expressly in point. It was an action on a note, the consideration of which was a deed of a tract of land with a covenant of warranty; and the defendant was permitted to prove that there had been a failure of title. And though the defendant had never been evicted or disturbed, the Court held that the defence was good, observing that to allow a recovery in this case would lead to a circuity of action, for the defendant on this failure of title would be entitled immediately to recover back the money. So in debt for rent where there is a lease for a term of years, and the lessor covenants for quiet enjoyment, the defendant after being evicted by a paramount title may plead in bar that the plaintiff had no title to the premises leased, notwithstanding he might have a cross remedy by action on the covenant. *Haines v. Maltby*, 3 *D. & E.* 438.

The peculiar terms and stipulations contained in this deed are of a nature to remove the objection relied on. The notes are particularly described in the deed as forming the consideration, and the covenant is to pay for any defect of title *by cancelling notes if they should remain unpaid at the time of the breach.* By this reference in the deed, to the notes, they become as one instrument, and this renders it proper that when an action is founded on one part, the other should be received in evidence.

The inconvenience arising from trying the title to real estate in an action brought to recover the consideration-money, is imaginary;—it is no greater than arises from trying the title to personal estate in an action on a note given for its value, which

is a case of frequent occurrence. Special pleading may always be resorted to, whenever it is desirable to prove by the record the precise nature of the subject in controversy. The record in this case, with those averments which it would be competent for the plaintiff to make and prove, would be a bar to any action which the defendants might bring on the covenants, which would be virtually, in the terms of the deed, "giving up the notes to be cancelled."

Nor is the objection that the evidence does not apply to *this*, but to the *last* note, of any more validity. *That* would be altering the terms of the credit from six to five years, in consequence of a breach of the plaintiff's own covenant. We contend that it is at the defendants' election to apply this evidence to either note. But if the election was with the plaintiff, he has waived it by not exercising it, and thus has given the right to the defendants. The other notes may be transferred to *bona fide* indorsees, without notice, and thus the defendants be deprived of that equitable offset which justice obviously requires, and which the parties themselves intended, as is evident from the stipulations in the deed.

R. Williams, for the plaintiff.

Public policy does not seem to require that the defendants be admitted to this defence. On the contrary numerous mischiefs would result from it. It is true in general that mutual demands may be set off against each other; but this doctrine has never been extended beyond mutual *assumpsits*. Nor could a judgment for the defendants in this action be a bar to an action on the covenants in the deed. For how could the present plaintiff avail himself of it? It would not be an *accord*, for a judgment is rendered *in invitum*;—nor a *satisfaction*, because nothing would be *paid*;—neither would it be an *extinguishment* of the covenant, because no security would be given by the defendants to the plaintiff, of as high a nature as the deed. 3 *East* 252. Neither would the record shew to *which* covenant in the deed the matter of this defence was applied. And if the defendants should aliene the land, and their grantee be evicted from the parcel in question, the plaintiff would be liable a second time, to such grantee, as assignee of the covenants. This defence also goes to abridge the plaintiff's remedy against his

warrantor, by depriving him of the right of voucher; for even if he should *notify* his warrantor of the pendency of this suit, the record could be no evidence in a subsequent action against him.

As to the question to *which* note the covenant should apply, *this* is at the election of the plaintiff. If his covenant is broken, he is to pay the damages in notes or money, at his own election; and if he elect notes, it is with him to choose which of them he will deliver up.

Orr, in reply.

The case finds that the plaintiff's covenant was broken at the moment it was made, there being an actual adverse occupancy of part of the land. The plaintiff instantly became *debtor* to the defendants, to the amount of the incumbrance. The covenant being thus broken, of which the plaintiff was *bound to take notice*, he had an election in what manner to pay the damages; but he should have elected *immediately*, and notified the defendants, tendering the notes or money to the value of the breach. Such a tender might have been shewn in bar to an action on the covenant. But where the debtor has an election which he neglects to make, it results to the creditor, who may make it, even at the time of trial; and such election the defendants now make, by insisting on the right to set off the damage against the note in suit.

Mellen C. J. delivered the opinion of the Court at the succeeding term in *Cumberland*, as follows.

In the argument of this cause several questions were presented for consideration, which may be resolved into the three following.

1. In an action on a promissory note, payable at a given day, brought by the promissee or his representatives against the maker or his representatives, given for the price of real estate conveyed by the promissee to the promissor by deed containing the usual covenants of seisin and warranty, is it competent for the defendant to shew by way of defence a total or partial failure of title, or want of title in the grantor, at the time of his making the conveyance?

2. If not, then is it competent for the defendant in this case to

do it, in consequence of the special language of the plaintiff's covenants in his deed as to the limitation of his liability in damages, and the mode of paying them?

3. If so, is it competent for him to avail himself of any advantage from the special language of the covenants in an action on the *particular note sued in this case;* two *other notes*, given at the same time, and for part of the consideration of the land sold, still remaining due, and not yet demanded?

As to the *first point*, we would observe that for a long series of years the practice in *Massachusetts* has proceeded upon the principle that the covenants in the deed of conveyance, or, if no deed had been given, but only a bond or covenant *to give a deed*, then *such* bond or covenant constituted a good and valuable consideration for the note, and of course a want or failure of title would be no legal defence to an action on such note; and we had considered such to be the true principle of law in relation to this question; but the cases decided in *New-York* cited from *Johnson* by the counsel for the defendants, in which such a defence was considered substantial, have induced us to look carefully into those cases, and to examine the point with more attention, respecting, as we do, the high character and learning of the Court which pronounced those decisions.

It is a principle of law, universally acknowledged, that *assumpsit* will not lie where the debt is due by *specialty*, for in such case the specialty ought to be declared upon. *Bul. N. P.* 128. It is equally clear that if a debt due by simple contract be afterwards secured by specialty, the original cause of action is merged. Hence it is plain in the case before us, that whatever claim the defendants have upon the plaintiff is secured by the covenants in his deed; and if they can avail themselves, in *this action of assumpsit*, of the failure of title by way of defence, it is more than they could do in character of plaintiffs demanding damages. These propositions require no authorities to support them. It is also plain that the defence proposed cannot be made by way of set-off against the plaintiff's demand; because our statute upon this subject is not so broad as the *English* statute, and does not in any case authorize a defendant to set off a debt secured by a specialty or a promise in writing.

Where there are several covenants, promises, or agreements,

which are independent of each other, one party may bring an action against the other, without averring performance on his part, and it is no cause for the defendant to allege in his plea a breach of the covenant on the part of the plaintiff. 1 *Saund.* 320. *note* 4. *Yelv.* 134. *note* 1. *and cases there cited.* In those cases in the books in which the question was whether the promises or covenants were mutual and independent, or dependent, the contract or undertaking *on both sides* was of the same character and grade;—not *covenant* on one side, and *assumpsit* on the other, as in the case at bar. Another well established rule of construction is that the intent of the parties, and not the mere arrangement of the words, ought to govern. 1 *Saund.* 320. *note* 4. Thus, if a day be appointed for payment of money, and the day is to happen, or may happen *before* the thing which is the consideration of the money is to be performed, an action may be brought for the money when payable, and *before* performance; for it appears the party relied on his remedy, and did not intend to make the performance a condition precedent. *Same note* 4. In the case supposed in the point under consideration, the note is payable on a certain day; and yet the covenant to warrant and defend *might* not be broken for many years after. Another objection against allowing the defence proposed in an action on the note arises from the *amount* of damages which may become due in consequence of the failure of title to the lands conveyed. By our law, in case of eviction, the grantee or his assignee, as the case may be, is entitled to recover the value of the lands *at the time of eviction.* This *may be twice* the amount of the consideration secured by the note,—and it may be *not half* that amount. Hence also the propriety of considering each contract separately and independently of the other, so that each may have its proper operation and no more, and both parties be subjected to their respective legal liabilities, according to the principles laid down in *Boon v. Eyre*, 1 *H. Bl.* 273. *n.* 1. and *Duke of St. Alban's v. Shore*, *ib.* 270.

It has been urged that public policy requires that the proposed defence should be allowed, and several cases have been cited to support this argument. In the cases of *Everett v. Gray* and *Taft v. Montague* the defence grew out of the unfaithfulness

of the work for which the plaintiffs were seeking compensation; and so not like the present. In 3 *D. & E.* 438. the covenant of the plaintiff with the defendant amounted to nothing; it gave him no remedy against the plaintiff, and the permission to the defendant to use the patent frame, gave him no rights. It was not a new invention, and the whole was a fraud. The case of *Bliss v. Negus* was *assumpsit* on a promissory note, given for the assignment of *all the plaintiff's right* under a certain patent, with a covenant to warrant *the same* to the defendant; and it was proved that the plaintiff *had no right*, and that nothing passed by the assignment; and there being nothing on which the covenant could operate, it was a dead letter, and could not form a consideration for the note. The case of *Sill v. Rood*, 15 *Johns.* 230. only decides that in an action on a promissory note given for a chattel, the defendant may shew deceit in the sale, under the general issue. *Frisbie v. Hoffnagle*, 11 *Johns.* 50. was an action of trover for certain promissory notes given for lands purchased, the title to which had wholly failed; and the Court decided that the consideration for the notes had also failed, though the lands were conveyed with warranty. This case is admitted to be, in principle, directly in point for the defendants; but on examination of the cases of *Morgan v. Richardson*, 1 *Campb. N. P.* 40 *note*. *Tye v. Gwynne*, 2 *Campb.* 346. and *Barber v. Backus*, *Peake's Ca.* 61. all which are cited at the end of *Frisbie v. Hoffnagle*, it will be found that they are totally different from that case in principle and do not in any degree support it. They related merely to an alleged failure of the whole or a part of the consideration of bills of exchange given for articles which were defective. The other case cited for the defendant was *Winter v. Livingston*, 13 *Johns.* 54. That was *assumpsit* on three promissory notes signed by *Livingston* for the price of a tract of land. About a month after the date of the notes *Winter* covenanted with *Livingston* to convey the land in fee simple to him, on the *express condition that the covenant should be void* if several notes should not be *paid* at the times they should respectively become *due*. They were not paid. The Court, in delivering their opinion, say—"By this covenant, however, it was provided that the agreement was to be void, unless "*Livingston* paid his notes as they fell due. He did not pay

"them; and of course the agreement was void, if *Winter* elect-
"ed so to consider it; and the case shows that he availed him-
"self of this forfeiture, for he went on and sold the land for
"his exclusive benefit; and *Livingston* has therefore received
"nothing for his notes, and *Winter* has a complete and perfect
"title to his lands." It is clear that this case does not in any degree support the principle it was cited to establish. The only authority, then, opposed to the principle which has been so long recognized in *Massachusetts* is the case of *Frisbie v. Hoffnagle*, and that is an insulated case.

In the case of *Fowler v. Shearer*, 7 *Mass.* 14. the action was founded on a promissory note, and the defence was a want of consideration. The note was given in payment for land conveyed by a married woman alone, with covenants in the usual form. The only consideration pretended, was this deed by which nothing passed; and *Parsons C. J.* said—"the defendant "cannot derive any advantage from any *covenant* in the deed. "She is not answerable on any of her covenants; I do not "*therefore* see any consideration sufficient to support this prom-"ise." It is evident that if the covenants had been *good* and *binding* they would have been a good consideration for the note. The case of *Smith v. Sinclair*, 15 *Mass.* 171. recognizes and proceeds on the principle that the bond to convey the tract of land for which the note declared on was given, constituted a good consideration for the note, though there was a partial failure of title by a previous mortgage. And in addition to the authority of these decided cases it may not be improper to notice the argument *ab inconvenienti* urged by the counsel for the plaintiff. It is certainly unusual to try the title to real estate in actions of *assumpsit;* and in the present case, should the defence be allowed, and the sum now sued for not be recovered, but *in evidence* set off against the breach of one of the covenants in his deed; the record would disclose no facts on which the plaintiff could found his action against his warrantor for reimbursement. These, to say the least, are great inconveniences; which may all be avoided by a steady adherence to settled principles, in preference to consulting individual convenience, or merely preventing circuity of action.

With respect, therefore, to the *general question* which we have been considering, we all agree in deciding it in the negative.

As to the *second question*, whether the *general* principle is changed by the special language in the covenants on the part of the plaintiff, we are well satisfied that it is not. The clause relied on by the defendant was introduced for the benefit of the plaintiff, and the object was to limit his accountability, whatever might be the consequences as to the title, and reserve to himself the liberty of paying the damages which might be recovered against him, in the defendant's own notes in whole or in part, provided they should not have been paid at the time of such recovery of damages. Viewing the *special provision* in this manner, it is clear that the defendant has no rights reserved *to him* by it; and upon no fair construction can it be considered as dispensing with the rules of evidence, or altering the principles of law in the decision of the merits of the cause.

It has now become unnecessary to decide the *third question* before proposed; though we are inclined to believe that if the defence offered could be made in any form against *either* of the notes, the plaintiff might elect to have the damages paid by giving up one of the *other* notes: so as to avail himself of the costs of this action, which was properly commenced. But on this point we give no opinion.

We are all agreed that the evidence on which the defence prevailed was improperly admitted, and accordingly the verdict must be set aside and a new trial granted.

ADAMS *v.* THE PRESIDENT, &c. OF WISCASSET BANK.

In actions by or against *quasi* corporations, as towns, parishes, &c. which have no corporate funds, each inhabitant or corporator is a party to the suit, because his private property is liable to be taken to satisfy the judgment.

But in the case of corporations, properly so called, as incorporated banking companies, &c. it is otherwise, because no property is liable to be seized except the corporate property.

Hence in an action against a banking company in which a deputy sheriff is a stockholder, the writ may be served by another deputy of the same sheriff, within *Revised Stat. ch.* 92.

THE writ in this case having been served by a deputy sheriff who was at the same time a stockholder in the Bank, the de-

fendants pleaded that fact in abatement, alleging that the deputy sheriff being a stockholder and so a party to the suit, the writ should have been served by a coroner, within the provision of *Revised Stat. ch.* 93.

Bailey and *Allen*, for the plaintiff.

The writ does not run against the corporators, personally, but against the corporation. It is not like a process against a town, where the goods of each inhabitant may be taken and sold; for here nothing is liable but the corporate property. The reason, therefore, why the sheriff was disabled to serve process against towns where a deputy sheriff was a party, does not exist here, and the service is good. If it is not, the evils resulting will be incalculable. No one can know who are corporators, but themselves; and they may so change their stock as to defeat every attempt to serve process upon them. And if, pending the suit, the corporation should entirely change its members, still, it is the same *party* to the record. An individual, therefore, is not a party, merely by being a corporator; and yet it is only where the sheriff is a *party* that the coroner serves the writ. Even where the inhabitants of the sheriff's own town are party to the suit, his disability to serve the process is now removed by *Revised Stat. ch.* 92.; his interest in such case being too trivial to be regarded; much less ought it to be regarded in the present case.

R. Williams, *è contra.*

Corporations are but collections of many individuals into one body. *Kyd on Corporations* 13. They are liable to be assessed for poor rates, within 43 *Eliz. ch.* 2. and are deemed occupiers, and inhabitants. *Rex v. Gardiner*, *Cowp.* 79. 2 *Inst.* 697. 703. cited in 5 *Cranch.* 65. That *all the members* of the corporation are *parties* to the suit, results from the act of incorporation, by which certain *individuals* therein named, and their successors, are declared a corporation; and from the law that no member can be a witness in such suit. 7 *Mass.* 398. 10 *Johns.* 95. 10 *East* 293. *in note.* 5 *D. & E.* 174. 12 *Mass.* 360. 16 *Mass.* 118. And is more clearly laid down in *Bank of U. S. v. Deveaux*, 5 *Cranch* 61. *Hawkes v. the county of Kennebec*, 7 *Mass.* 461. *Inhabitants of Lincoln Co. v. Prince*, 2 *Mass.* 544. *First*

parish in Sutton v. Cole, 3 *Mass.* 96. *Society v. Wheeler*, 2 *Gall.* 105. Indeed a banking corporation is a mere partnership; and the sheriff in this case is disabled from serving the process, in the same manner, and for the same reasons, as if it were against a mercantile house in which he was a partner.

MELLEN C. J. at the succeeding term in *Cumberland* delivered the opinion of the Court, as follows.

The question presented by the plea in abatement in this case does not appear to have been decided in *Massachusetts;* nor is there any statute provision which in express terms embraces it. It depends on the construction of the statute which relates to the service of civil processes.

The first section of *Revised Stat. ch.* 93. provides "that every "coroner within the county for which he is appointed, shall "serve all writs and precepts when the *Sheriff* or either of his "*deputies* shall be *a party* to the same; and shall —— return ju- "rors *de talibus circumstantibus* in all causes where the sheriff "of the county shall be *interested* or *related* to either party." In all other cases the sheriff or either of his deputies may make legal service of processes within his county. In the case of *Brewer v. New-Gloucester*, 14 *Mass.* 216. it is decided that *each inhabitant of a town* is to be considered as *a party* to the suit, when such town sues or is sued, within the meaning of the last mentioned section, which is a transcript of a similar law now in force in *Massachusetts.* It is contended by the counsel for the defendants that a stockholder in a *banking institution* sustains the same character in respect to the corporation, as an inhabitant of a town does to the corporation of which he is a member; and that therefore each stockholder is as much a party in a suit against the bank, as each inhabitant of a town is in a suit against such town. If this position be correct, the plea in abatement is good, and the writ must be abated.

In the case of *Riddle v. The proprietors of locks, &c. on Merrimack river*, 7 *Mass.* 169. *Parsons C. J.* says, "We distinguish "between proper aggregate corporations, and the inhabitants of "any district, who are by statute incorporated with particular "powers by their consent. These, in the books, are sometimes "called *quasi* corporations. Of this description are counties

"and hundreds in *England*, and counties, towns, &c. in this "State." No private action, unless given by statute, lies against *quasi* corporations, for a breach of corporate duty. 2 *D. & E.* 667. Having no corporate fund, each inhabitant would be liable to satisfy the judgment. The common law does not impose this burthen; though a statute may. In regular corporations, having a corporate fund, this reason does not exist. But an action at common law lies against a turnpike corporation by any person specially injured by neglect to repair the road. 7 *Mass.* 188. and *Cowp.* 86. *there cited.* If an owner of land have sustained damage by the laying out of a turnpike road, the corporation, and not the corporators, are answerable for such damage. 5 *Mass.* 520. It is well known that all judgments against *quasi* corporations may be satisfied out of the property of any individual inhabitant; but an execution against a banking company incorporated, or any other proper aggregate corporation cannot be satisfied except out of the corporate fund; neither the person nor the private property of a stockholder or corporator can be taken. The question before us must therefore be settled upon this comparison of the powers, duties, and liabilities of corporations *properly so called*, with those of *quasi* corporations.

In the case of *Brewer v. New-Gloucester*, before cited, the Court assign as the reason of their opinion, that when judgment is recovered against a *town*, the execution *may be levied on the property of any inhabitant*, and so each inhabitant must be considered as *a party*. It would seem to follow from this very decision, that if a banking corporation had been defendant in that action, instead of *New-Gloucester*, and *Nevens* the deputy sheriff had been a stockholder, the writ would not have been abated; because, not being liable to have his property seized on execution, he was not *a party* within the meaning of the statute. Suppose the *Wiscasset* bank should sue one of the stockholders;—in such case the corporation would be one party, and the stockholder the other; and for the reasons before given, if he be a deputy sheriff, the writ must be served by a coroner. Such stockholder would be a party, in the fullest sense of the term; because the execution which would issue on the judgment against him, would run against his person and his property.

The argument arising from inconvenience is very strong against this plea. Shares are continually changing owners; and a corporation of this kind, if disposed to be evasive, might by frequent and secret transfers, abate every process commenced against them.

We do not consider the cases cited from *Cranch* and *Gallison* as applicable to the question under consideration. In the former case of *Bank of the U. S. v. Deveaux* the Supreme Court sustained the action by admitting the plaintiffs to aver that they, the President, Directors and Company, were citizens of *Pennsylvania*, and the defendants citizens of *Georgia*. It was a mere question of jurisdiction; and for the purpose of jurisdiction the *individual character* of the stockholders was averred, to give it. In the latter case, of *Society v. Wheeler*, *Story J.* in remarking upon the case of *Bank v. Deveaux*, says, "If the Court for this "purpose will ascertain who the corporators are, it seems to "follow that the character of the corporators may be averred, "not only to *sustain*, but to *bar* an action brought in the name "of a corporation. It might therefore have been pleaded in "this case, even if the corporation had been established in a "*neutral* country, that all the members were alien enemies." But neither of these cases has a tendency to shew who is *a party* to a suit within the meaning of our statute, and for the purpose of due service of legal process. And accordingly, notwithstanding the research and talent displayed in support of the plea, we are of opinion that it is bad and insufficient.

Respondeat ouster awarded.

Note. *Weston J.* being interested in the cause, gave no opinion.

DUNNING *v.* SAYWARD & AL.

If a promissory note not negotiable be assigned before it is due, and notice thereof be given to the maker, who afterwards pays the money to the promissee; in an action subsequently brought in the name of the promissee, for the benefit of the assignee, it is a good defence that the assignment was void, having been made without valuable consideration.

And this, though the defendant had previously been summoned as the trustee of the promissor in a foreign attachment, and disclosing the mere fact of the assignment had been discharged.

THIS cause, which was *assumpsit* upon a promissory note, came before the Court upon a point reserved by the Judge who presided at the trial, and who directed a verdict for the defendants, subject to the opinion of the Court upon the facts appearing in evidence, which were these.

The defendants, *July* 11, 1817, gave their note for $106,50, *payable in lime* on or before *October* 20, 1819, to the plaintiff or his order; which note the plaintiff, *November* 28, 1817, indorsed and assigned to one *Russ, for whose benefit this action is brought.* On and before *January* 1, 1818, the defendants had notice of this assignment, and were furnished with a copy of the note and of the assignment thereon; and being summoned as the trustees of *Dunning* in a foreign attachment, they disclosed the assignment, and were thereupon discharged. Afterwards, *October* 6, 1819, the defendants paid the note to *Dunning.* The note was not produced at the trial, there being proof of its loss; and the defence now made was, that the assignment to *Russ* was without consideration, fraudulent, and void; and that therefore payment was rightfully made to *Dunning.*

Longfellow and *Thayer, for the plaintiff*, contended that wherever upon the face of it an assignment appears to be fair, the law presumes it to be so, and the parties are bound by it; and here the only evidence of the assignment results from the disclosure of the defendants, in which they represented it as *bona fide* and were thereupon discharged, and ought not now to be admitted to say the contrary.

Orr, for the defendants.

The action is upon a note not negotiable, which, before the

day of payment, was paid to the promissee, and this is *in law* a bar. The suit then is an appeal to the equity-powers of the Court. But the *equity* which Courts of law will protect, is a *bona fide* assignment, for a *valuable consideration*, and without notice. Yet here the plaintiff demands payment a second time, to transfer it to his *cestui que trust*, and the jury have found the creation of this same trust to be fraudulent. There being therefore no good faith in the assignment, the defence is good upon the principles of law.

MELLEN C. J. delivered the opinion of the Court as follows:

From the necessity of the case the action is brought in the name of the original promissee, though for the benefit of the assignee. The payment which was made to the promissee after due notice of the assignment, is denied to be a good defence, because the law takes notice of the equitable interest of an assignee, and protects it. This is true, and the principle is established by numerous cases; but the law does not interpose and protect any but an *equitable interest*. In the present case it appears by the verdict of the jury that the assignee had no such interest, that the assignment to him was without any valuable consideration, and moreover was made with a fraudulent intent as to the creditors of *Dunning*. It is not necessary to inquire how far the promissors have an interest in this question of fraud, or a right to shew the assignment void by reason of the fraud; for this question is not presented by the report, and could not be; as it is understood that all the evidence on this subject was admitted to the jury and discussed without objection; but they certainly may shew the want of consideration.

It was urged for the plaintiff that as the defendants had once disclosed the assignment in the foreign attachment, and been discharged, they ought not now to be received to make the above objection. Still, the facts relating to the fraud and want of consideration are before us; and besides, it does not appear that the defendants knew of those facts at the time of their disclosure.

As it appears that no interest in the note was assigned, the assignee can lose nothing, and there is no interest in him requiring protection. The assignment being void, it is as if there had

been no assignment; and then upon what pretence can this action be maintained? The debt has been paid according to the promise, to the party who was entitled to receive it. If we should set aside the verdict and grant a new trial, the obvious tendency of the measure would be to give the plaintiff an opportunity to render a fraud successful, and thereby subject the defendant to a second payment of the note.

There must be judgment on the verdict.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

CUMBERLAND.

NOVEMBER TERM,

1821.

SOUTHGATE *v.* BURNHAM.

In a petition under the statute for partition, assuming in none of its stages an adversary form, the appointment of commissioners by the Court to make partition is virtually and substantially equivalent to the entry of judgment *quod partitio fiat.*

And in such cases if the report of the commissioners be accepted by the Court and recorded as the statute requires, the entry of the final judgment *quod partitio prædicta firma et stabilis*, &c. does not seem to be indispensably necessary.

The entries in the dockets, even if inconsistent with the judgment, are yet inadmissible for the purpose of impeaching it.

IN this action, which was brought to recover seisin and possession of a parcel of land in *Scarborough*, the demandant counted on his own seisin within thirty years, and alleged a disseisin by the tenant, who pleaded *nul disseisin.*

To prove the issue on his part the demandant offered in evidence an attested copy of a judgment of the Court of Common Pleas, held at *Portland*, *May* term, 1796, on the petition of the demandant for partition of certain lands, of which the demanded premises were a part. This judgment recited the substance of the petition, and an order of notice thereon,—stated that notice had been given pursuant to the order,—that no objection was made against the petition,—that thereupon a commission was issued to certain freeholders to make partition according to law,—that the process was thence continued to a subsequent term,—at which time the commissioners made report of their doings, setting off the demanded premises to the present

demandant,—" which report is accepted by the Court." And it appeared that the partition was recorded in the Registry of deeds.

The counsel for the tenant objected to the admission of this judgment in evidence, until the petition for partition, under which the proceedings in the Court of Common Pleas were had, was first produced;—and further objected the irregularity and deficiency of the proceedings, apparent on the face of the judgment itself;—and also that it varied from, and was even inconsistent with the several entries in the dockets, made from term to term under the case of said petition for partition while the same was pending in the Court of Common Pleas, and offered the several dockets referred to as evidence to support this last objection. But the Judge who presided at the trial of the cause, for the purpose of saving the questions of law for the consideration of the whole Court, overruled all these objections.

The tenant then proved by several witnesses that since the judgment and proceedings in partition, the tenant had held the exclusive, quiet and undisturbed possession of the demanded premises; and there was no evidence that the demandant had ever interfered during the whole of that period, until about the time of commencing this action; nor that he ever, before the judgment for partition, had the actual occupancy, either as tenant in common or otherwise, of any part of the lands of which partition was prayed.

The demandant, to rebut any presumption which might arise of any supposed waiver of his claim under the judgment for partition, and to repel any suggestions of fraud in its procurement, then proved that the tenant and one *Thomas Burnham* were, with several other children, joint heirs of a certain farm, of which the demanded premises are a part, and being the same lands of which partition was prayed; that the administratrix of *Thomas Burnham*, at public auction *April* 16, 1792, sold the share of said *Thomas* to the demandant and executed a deed of the same to him, which was duly acknowledged and recorded, at which sale the tenant was present, and was a bidder; that it was this share which was afterwards set off to the demandant upon his petition for partition; and that the tenant well knew all the facts respecting the partition, the commissioners having giv-

en him notice, met at, and proceeded from his house to discharge the duties of their commission.

Upon this evidence the Judge directed the jury to consider the proceedings and judgment for partition proved in the case as sufficient to maintain the demandant's right to recover; and they accordingly returned a verdict for the demandant; which was to be set aside if the evidence, offered by the demandant and objected to by the tenant, was improperly admitted, or if the dockets and entries referred to ought to have been admitted, or if the Judge's instructions to the jury were erroneous.

Emery, for the tenant, at the last term, took several exceptions to the evidence offered by the demandant.—1. The petition itself is uncertain, neither naming the co-tenants, nor alleging that they were unknown, nor describing the estate with sufficient certainty.—2. It does not appear *how*, or *what* notice was given. The Court, in this particular, perform a duty purely ministerial; and by the rules applicable to the acts of ministerial officers they should have stated specially the kind of notice and the manner in which it was given, that it might appear that the statute was complied with.—3. There is no record of any judgment *quod partitio fiat*, and without such judgment the Court had no authority to appoint commissioners to make partition; nor is there any final judgment *quod partitio prædicta, stabilis*, &c.—4. It does not appear, in any part of the proceedings, that the commissioners were freeholders; and none but such were qualified, by the statute, to make partition.—The statute was enacted, not to introduce new principles, but to make partition more easy;—to provide a remedy for the inconveniences of a tenancy in common with infants, or with persons unknown. It furnishes new facilities, by providing a mode of notice conclusive on all parties in interest; but it in no wise authorizes any departure from the spirit of the common law, the rules of which are applicable in all their force, as well to the remedy by petition as to that by writ. 5 *Com. Dig. Parceners C.* 9. *Co. Lit.* 168. *b.* 171. *note. Stat.* 8. *&* 9. *W.* 3. *c.* 31. 2 *W. Bl.* 1159. 5 *Vin. Abr. suppt.* 337. 338. *Ramsdell v. Creasey*, 10 *Mass.* 170.

He further adverted to the docket of the Court of Common Pleas for *May* term 1796 where the entry under the demandant's petition was, "demurred, defendant's plea good"; and this

he contended, must have carried the cause out of the power of that Court, else this evil arises, that it cannot be determined which parcel of the land was ordered to be partitioned.

Longfellow, for the demandant.

The docket is merely a private minute kept by the clerk, of an inferior grade of evidence, and utterly inadmissible to control the record of a judgment, which is the highest evidence, and against which no averment can be received. This solemnity has been accorded even to the judgments of foreign tribunals, so far as regards the facts found in them; *a fortiori* it ought to be given to those of our own. *Phillips' Evid.* 219. *note. Cogswell v. Burns*, 9 *Johns.* 287.

As to the objections taken to the judgment in partition as being apparent on the face of it, he denied that the duty of the Court in the matter of *notice* was purely ministerial. Notice was ordered to be given according to the directions of the law. Afterwards, it appearing that such notice had been given, commissioners were appointed. Here was a declaration that legal notice had been given, and this by the only tribunal competent to judge of its sufficiency, and one to which was specially committed the exposition and administration of the law. The objection of the want of a judgment *quod partitio fiat* is founded on the common law, where the interlocutory judgment is necessary only when there is an adverse appearance. If there is no such appearance to oppose the partition, it is taken *pro confesso*, and the special entry of such judgment is unnecessary. By the *Stat.* 1783. *ch.* 41. there was no provision made for any interlocutory judgment; and if there was an adverse appearance the proceedings were necessarily suspended. This inconvenience was remedied by the subsequent *Stat.* 1786. *ch.* 53. which provided that if any person was aggrieved by such judgment, he might appeal to the Supreme Judicial Court. But what possible benefit could result from a judgment, when no person appeared to demand it, to contest its regularity, or to appeal from it? *Cook v. Allen*, 2 *Mass.* 462. *Simmons v. Kimball*, 3 *Mass.* 299. In the case of *Ramsdell v. Creasey*, there had been notice ordered by the Court, which had never in fact come to the knowledge of the party contesting; and the question was whether he should come in *after* the judgment *quod partitio*, &c. which

the Court admitted him to do, *de bene esse*, but not vacating the judgment for partition.

But even admitting that this judgment is defective in form; yet such has been the form in use in this country very many years, under which many estates are held; and if these defects are held incurable, very extensive mischiefs will ensue. Courts have often sanctioned proceedings in some respects defective, and growing out of the infancy of the country, where the consequence of repudiating them would be the extensive subversion of titles to real estates. And such was recently the case in this county in relation to the proceedings in the Courts of Probate where there had been no judgment of the probate of wills.

Neither is the objection well founded that the commissioners do not appear to have been *freeholders*. They are so described in the *commission*, which is part of the record. Had they not been so described, the fact might be proved or disproved by testimony; but being so styled, it is conclusive.

Nor does the statute require any final judgment *quod stabilis*, &c. It merely enacts that partition being so made, accepted by the Court, and recorded there, and in the Registry of deeds, it shall be sufficient. It substitutes certain proceedings, *instead* of the process and judgment at common law. Those proceedings being had, are conclusive on all parties and privies, and on all who could have come in while the process was pending.

E. Whitman, in reply.

Both the statutes of *Massachusetts* on the subject of partition are made with reference to the existing state of the remedy at common law. And in this remedy a judgment *quod partitio*, &c. and a final judgment were essential. The inconvenience of this mode of relief was felt where minors were co-tenants, or where some of the part owners were unknown. In *England* this evil was provided against by Chancery. But having no Courts of equity here, the legislature provided the remedy by petition, leaving it to be governed by the rules of the Courts of equity. It is an enabling statute, intended to extend the benefits of these tribunals to the case of partition of lands, but not to dispense with any known principles of law, much less to authorize partition without judgment of law. It obliges the Courts to render judgment as the law requires," and admits the respondent to ap-

peal from a judgment *quod partio fiat.* Now what law could the legislature mean, but the common law? And why provide for an appeal from such judgment, unless it was necessarily incident to the course of proceeding by petition?

If, as is contended, the Court had power to judge of the sufficiency of the proceedings, it was necessary they should exercise that power. If their duty was not ministerial but judicial, then it is indispensable that there should be a *judgment.* The mere *acceptance* of the report is of no greater dignity than the acceptance of a bill of exchange.

Nor is it to be *presumed* that the commissioners were freeholders. The legal presumptions in such cases are always against the party who lies by, as the demandant has done, and are always in favor of the party in possession. It is only to *support* the possession that Courts have gone thus far; the possession being the great *indicium* of ownership.

The cause having been continued to this term for advisement, the opinion of the Court was delivered as follows, by

Weston J. From the evidence in this case it clearly appears, that at the time the demandant preferred his petition for partition of the lands, of which the demanded premises constituted a part, he was actually seized, as tenant in common, of the share which was afterwards set off to him in severalty, by a title emanating from the same source with that under which the tenant held; and that the latter had a full knowledge of the origin of the right of the demandant, and of the proceedings under the process for partition. If, therefore, these proceedings can be supported in point of form, the claim of the demandant appears to be well founded upon the merits.

It is objected, on the part of the tenant, that the attested copy of the judgment of the Court of Common Pleas, upon which the demandant relies, is not of itself sufficient evidence, without the production of a copy of the original petition for partition. But we know of no rule or principle of law which requires the exhibition of this paper, as additional evidence of the facts recited in the judgment, any more than a copy of the original writ, in support of a judgment in ordinary cases. The regularity of the antecedent proceedings is presumed; and can be impeached

only upon error brought to reverse the judgment. And for this reason the entries in the several dockets were properly rejected; the judgment deriving from them no additional verity, and they being entirely inadmissible for the purpose of impeaching it. If indeed, by the misprision of the clerk, a judgment has been erroneously entered up, the Court may in a summary manner, in their discretion, order its correction. But in a case within its jurisdiction, full faith and credit is to be given to the judgment of a court of record; and, except upon a writ of error, it is not to be controverted by any plea or evidence whatever.

It is further objected, that there was in this case no formal entry of the interlocutory judgment, *quod partitio fiat.* It is certainly proper and suitable that this judgment should be entered; although we understand that, in many of the counties, it was generally omitted in the Courts of Common Pleas. How far this exception might be sustained, if the proceedings were before us upon a writ of error, it is not necessary now to determine; but we are of opinion that the process in question, not having in any of its stages assumed an adversary form, the appointment of commissioners by the Court to make partition, was virtually aud substantially equivalent to the entry of the interlocutory judgment.

It is also insisted that it does not appear that the commissioners appointed were freeholders; but their commission describes them as such, and such they must be presumed to be, at least until the contrary is shewn, if indeed this could be permitted to be done in the trial of the present action.

The counsel for the tenant lastly contend, that the final and principal judgment, *quod partitio prædicta firma et stabilis*, &c. was not rendered by the Court. The statute however provides, that the division or partition made by the commissioners, "being accepted by the said Court, which ordered the division to be made, and there recorded, and also recorded in the Registry of deeds, in the county where such estate lies, shall be valid and effectual to all intents and purposes." *Stat.* 1783. *ch.* 41. *sec.* 1. This having been done in the case objected to, we do not feel warranted in deciding that the power and authority, given by the statute to the Court, was not sufficiently executed; especially when it is considered that the same form of proceed-

ing was formerly very extensively adopted in the Common Pleas.

There being however a strong analogy between the process for partition by petition, and that by a writ of partition at common law, the former being a substitute for the latter, it is in the highest degree proper that, in the proceedings under each of these remedies, both the interlocutory and final judgments should be entered, according to the forms prescribed by the common law.

We must not lose sight of the consideration, that the demandant in this action relies upon a subsisting judgment, of a Court having jurisdiction of the subject matter. Had the irregularities in the antecedent proceedings been pointed out and assigned upon a writ of error, we do not take it upon us to declare that they might not have been deemed fatal to the judgment; but it is upon that process only, as has been before remarked, that it can by law be suffered to be impeached.

Upon the whole we are satisfied that none of the objections, made by the counsel for the tenant, to the opinions and direction of the Judge, who presided at the trial, can be sustained, and that

Judgment must be entered upon the verdict.

CROSS & AL. *v.* PETERS.

If the vendor would rescind a contract for the sale of goods, and reclaim them, on account of fraud in the vendee, it must appear that deceptive *assertions* and false *representations* were fraudulently made, to induce him to part with the goods.

The mere insolvency of the vendee, and the liability of the goods to immediate attachment by his creditors, though well known to himself and not revealed to the vendor, will not be sufficient to avoid the sale.

Replevin for a pipe of brandy, and divers other goods. The defendant pleaded that the property of the goods was in one *William Parker*, traversing the property of the plaintiff, on which traverse issue was taken. It was admitted at the trial

of this issue that the property of the goods was originally in the plaintiff, and so continued unless altered by a sale to *Parker;* they having been attached as his property by the defendant, who was a deputy sheriff, by virtue of writs in his hands at the suit of *Gustavus Holm* and of *Benjamin T. Chase.*

To prove the debt of *Holm & Chase* the defendant called *Parker* as a witness, who was objected to by the plaintiffs' counsel as being interested, and also as having committed a fraud in obtaining the goods improperly from the plaintiffs for the express purpose of having them attached at the suit of *Holm* and *Chase.* But the Judge who presided at the trial of the cause admitted him to testify, it appearing that he had not paid the plaintiffs for the property.

Parker testified that on the tenth or eleventh day of *March* last he called at the plaintiffs' store, and purchased the goods replevied on a credit of four months, which he took away on the eleventh of *March*, giving no note, and receiving no bill of them at that time, though one of the plaintiffs was present at the delivery, but too busy to write one, or to receive a note. He said that the plaintiffs and two other merchants offered him other goods on credit, which he declined purchasing; and that he stopped payment on the same eleventh day of *March.*

On his cross examination he testified that he had given sundry notes to the *Cumberland Bank* and to the *Bank of Portland*, amounting to $1904, 05, a note to *John Williams* for $900, and another to *Benjamin T. Chase* for $315, all which were indorsed by *Holm*, but none of them were payable on the 11*th March.* He further testified, and it was proved by other witnesses, that on the day and two days preceding his failure he went to eight different stores in the same town and purchased sundry articles of merchandize, all on credit, and for which he was still indebted; but which he said he purchased with no other view than to trade upon as usual, and that he did not know that *Holm* knew of these purchases. It was proved that *Parker* had all said goods carried to his shop on the 10*th* and 11*th* days of *March;* that on the afternoon of the 11*th* which was Saturday, at the urgent request of *Holm*, to which he made some objections, he gave a note to said *Holm* for $2815 70, this being the amount,

as ascertained by a hasty estimation, which *Holm* had indorsed for him on the notes aforesaid, none of which were then payable;—that at the same time he took up the note he had given to *B. T. Chase* for $315, which was indorsed by *Holm*, and was not payable, giving instead of it his own note, without an indorser, and payable on demand;—that he took no discharge, or bond of indemnity from *Holm*;—that *Holm & Chase*, the same afternoon, on obtaining said notes payable on demand, immediately sued out writs against *Parker*, and attached the whole property in his possession, of which the goods replevied were a part;—that after *Chase* had given up the note indorsed by *Holm*, and taken *Parker's* own note in its stead, he said to *Holm* that his own attachment ought to be laid on the goods first, because he had thus exonerated him from his liability as indorser, to which *Holm* assented;—and that *Parker* had been transacting business at a loss before this time, and on one occasion appeared disturbed when a person entered his shop after the goods were removed thither, and found him offering tea under its value.

The counsel for the plaintiffs hereupon contended, 1st that here was sufficient evidence of a conspiracy between *Holm and Parker* to procure the goods for the express purpose of their attachment by *Holm*, for which cause the contract of sale was void, as being a fraud on the creditors, and they might well reclaim the goods:—2d that if the jury were not satisfied of the conspiracy, yet if they believed from the evidence that *Parker*, when he bargained for and received the goods, well knew that he was insolvent, and meant not honestly to pay according to the terms of the contract, and thereby imposed on the plaintiffs, the contract was void for that imposition.

But the Judge instructed the jury that though at the time of making the purchases from the plaintiffs and others it appeared that *Parker* was insolvent, yet his insolvency, unattended by any misrepresentations or falsehood in obtaining the credit, would not render the sale void; and that unless they believed that he obtained such credit with a fraudulent intent and secret agreement or understanding with *Holm* that the goods should be attached by him to secure his debt, the plaintiffs could not maintain the action; but that if they believed that the goods were purchased with such intention and understanding, their verdict

ought to be for the plaintiffs. The jury thereupon returned a verdict for the plaintiffs, which was to be set aside and a new trial granted if the Judge's instructions were erroneous, or if *Parker* was improperly admitted as a witness.

Todd, for the Plaintiffs.

The evidence reported by the Judge shews that the plaintiffs had the proprietary right to the chattels replevied, and that *Parker* had but a mere possession, unaccompanied with any equity. So jealous is the common law to protect property in the rightful proprietor, that it will not permit it to be divested, but for a valuable consideration, and by the consent of the owner fairly and honestly obtained. 1 *Bl. Com.* 136. 2 *Bl. Com.* 389. 450. Law and equity are the same in all questions relating to the sale of merchandize, which arise between vender and vendee, or promissor and promissee. *Snee v. Prescott* 1 *Atk.* 245. *Wright v. Campbell* 4 *Burr.* 2046.

The law will not permit the stock of one merchant to be pillaged or dissipated by paying the debts of other men. Every stock in trade may be considered as hypothecated to pay its own debts. 1 *Atk.* 233. *Exparte Dumas.* 1 *Cook's Bankr. law* 404. 405. *Fisk v. Herrick* 6 *Mass.* 271.

When goods are sold in this country, since the repeal of the national statute of bankruptcy, in case the vendee, contrary to the just expectations of the seller, should be insolvent and unable to pay for them, equity protects the proprietary interest in the vender for the purpose of reclaiming them, until they are sold by the insolvent vendee to an innocent purchaser without notice, for a valuable consideration, 2 *Bl. Com.* 247. 248—250. *Snee v. Prescott*, 1 *Atk.* 245. *Newson v. Thornton*, 6 *East* 17. and note of *Buller J.* and cases there referred to. *Young v. Adams*, 6 *Mass.* 185. and cases there cited, *Abbot on Shipping* 402. 407. *Hussey & al. v. Thornton & al.* 4 *Mass.* 405. *Buffinton v. Gerrish & al.* 15 *Mass.* 156. *Rogers v. Phinney*, 15 *Mass.* 359. *Cummings v. Brown*, 9 *East* 513. The plaintiffs in the present case might reclaim their goods by any means but by breach of the peace, within the principles of the cases cited.

Parker being insolvent, his offering to give a note for the price was a nullity, and the plaintiffs had a right so to regard it. Nothing but payment could divest their title. *Hogan v. Shee*,

2 *Esp.* 522. *Puckford v. Maxwell*, 6 *D. & E.* 52. *Owenson v. Morse*, 7 *D. & E.* 54. *Hodgson v. Loy*, 7 *D. & E.* 446. *Ferse v. Wray*, 3 *East* 100. *Abbot on Shipping* 402. *Nerot v. Wallace*, 3 *D. & E.* 17. *Havelock v. Geddes*, 10 *East* 555.

In England, by the statute of bankruptcy, 21 *Jac.* 1. *cap.* 19. *sec.* 11. when goods unpaid for come to the actual possession of the bankrupt vendee, or to his possession constructively, as in the case of a bill of lading sold in market, the commissioners take a legal title to them by virtue of the statute; it being an execution against all the property in possession of which he was the legal owner, or which he could dispose of. It vests in the commissioners a lawful title to the property not paid for, in which the bankrupt equitably had no interest whatever, and which the unfortunate vender might have reclaimed as well out of the actual possession of the insolvent, as on the road to his hands, but for this statute, which is in derogation of the common law. Here, as we have no such statute, the plaintiffs are entitled to their common law rights, by which they may reclaim out of the actual possession of the insolvent, unless an innocent purchaser should intervene; in which case such purchaser is entitled to hold a fair possession and an equitable title. As the goods, being in possession of the insolvent, drew the money from the pocket of the purchaser, the laws of property say he shall hold the goods; and equity follows the law in this case, in conformity to the rule that when one of two innocent persons must suffer by the acts of a third, he who enabled such third person to occasion the injury must sustain the loss. *Lempriere v. Pasley*, 2 *D. & E.* 490. *Brown v. Heathcote.* 1 *Atk.* 163. *Mace v. Cadel*, *Cowp.* 232. *Gordon v. East, Ind. Co.* 7 *D. & E.* 231. *Livermore v. Bagley*, 3 *Mass.* 498. 4 *Burr.* 2481.

The evidence discloses a manifest *fraud* in *Parker*, which avoids the agreement.

Legal frauds vary in shade, from the unjust delay of payment when a debt is due, to the crime of larceny. The law forbids them all, and commands the exercise of good faith.—Frauds not indictable are as destructive of all contracts with which they intermingle, as if they were thus punishable. *Parker*, in keeping up his sign in view of the plaintiffs, occupying a shop, and offering to them his credit for their goods, affirmed

that his credit, so offered, was solid. These acts were tacit assertions, and symbolical warranties to the plaintiffs that his credit was good, but were stronger and more likely to deceive than any mere verbal assertions, *without* such acts, could possibly have been. *Rex v. Wheatly*, 2 *Burr.* 1127. *Park's Insur.* 178. *Twine's case*, 3 *Rep.* 80. *Cadogan v. Kennett & al. Cowp.* 432. *Martin v. Pewtress*, 4 *Burr.* 2478. *Harman v. Fisher*, *Cowp.* 122. *Trueman v. Fenton*, *Cowp.* 544. *Parley v. Freeman*, 3 *D. & E.* 51. and the cases cited by *Buller J. Lyon v. Mills*, 5 *East* 437. *Emerson v. Brigham*, 10 *Mass.* 196. *Bradley v. Manley*, 13 *Mass.* 144. *Parkinson v. Lee*, 2 *East* 323. Covin is always matter of law arising on the facts in each particular case. *Powell on Mortg.* 63. 69. 70. *Co. Lit.* 35. *Foxcroft v. Devonshire*, 4 *Burr.* 2480. *Cockshot v. Bennett*, 2 *D. & E.* 765. *Robson v. Calze*, *Doug.* 228. *Devan v. Watts*, *Doug.* 91. 92. 2 *Bl. Com.* 478.

Parker, the witness objected to, was improperly admitted. Having perpetrated the fraudulent acts apparent on the record, he ought not to be called by a *particeps fraudis* to testify against the legal inferences which fairly result from those acts. As the law in some cases departs from its general rules, and admits interested witnesses, for the purposes of justice, and to discover frauds, and this from necessity; so for the same reasons, and within the rule of a moral necessity to prevent injustice, *Parker* is incompetent in the present case. *Abrahams v. Bunn*, 4 *Burr.* 2258. *Warren v. Merry*, 3 *Mass.* 28. and cases there cited. *Churchill v. Suter*, 4 *Mass.* 161. *Bean v. Bean*, 12 *Mass.* 20. *Peake's Evid.* 138. *McNally's Evid.* 256.

E. Whitman, for the defendant.

As far as the argument on the other side proceeds on the ground of fraud and collusion between *Parker* and *Holm*, the verdict itself is a sufficient answer, for it negatives the existence of such fraud.

The law of this case is settled in *Hussey v. Thornton*, 4 *Mass.* 405. where the true principle is the ***voluntary and unconditional delivery*** of the goods by the vender, and such was the delivery in the present case. Had this been a sale of land, instead of goods, and the deed acknowledged and recorded, the circumstances being precisely like those in the case at bar, will it be

pretended that the grantor could reclaim the land? Yet this is the conclusion to which the principles advanced on the other side would directly lead. The single fact of insolvency is no mark of fraud. If it were so, then every merchant whose concerns are extensive and intricate, and whose ships at sea are all lost, he not knowing the fact, would nevertheless be bound at his peril to be conusant each moment of the condition of his property; and if insolvent, though rendered so by events just happened in another quarter of the world, goods sold to him under apparently the most fortunate circumstances might be reclaimed.

As to the admission of *Parker*,—the policy of the law does not exclude him; for it excludes no person but the indorser of a promissory note or bill of exchange. Nor was he disqualified by his interest, for this was equal. At all events he must either pay the plaintiffs for the goods, or *Holm* for the value of them. Neither was he guilty of any fraud. He stated nothing falsely; he concealed nothing; and his circumstances were not worse than those of many merchants who continue to transact business and at last retrieve their affairs.

Longfellow, in reply.

The jury were only instructed to consider the question of fraudulent conspiracy between *Parker & Holm*, and *this* fraud is all which is negatived by the verdict. The fact of a purchase by *Parker alone*, with a secret intent to defraud the plaintiffs, was never presented to them, and of course the verdict finds nothing respecting it. The case of *Buffinton v. Gerrish & al.* 15 *Mass.* 156. fully establishes the position that fraud in the vendee vitiates the contract; and it is clear that the fraudulent *suppressio veri* is as fatal as the *allegatio falsi*.

The witness, *Parker*, though his interest were equal, ought to have been rejected on the ground of public policy, as *particeps fraudis*. He was insolvent, and knew himself to be so. He bought goods at several places, and, as soon as they were in his possession, made a note payable on demand,—to a friend to whom he was not indebted,—who was his indorser, indeed, but had never been called upon,—and this friend instantly attached them;—a transaction carrying, in all its stages, the strongest indications of fraud. The only cases where a *particeps criminis*

is admitted to testify, are those in which his testimony is indispensably necessary for the furtherance of public justice; but he is never considered admissible to *disprove the existence* of the fraud. Yet for this purpose alone he was in the present case erroneously admitted.

MELLEN C. J. afterwards delivered the opinion of the Court, as follows.

Two questions are presented for consideration; one, as to the admission of *Parker* as a witness;—the other as to the opinion delivered by the presiding Justice to the jury.

As to the first question, the objection seems unfounded.—The case finds that the goods the witness purchased have not been paid for:—He therefore stands entirely indifferent. He is liable to the plaintiffs for the price of the goods, if they *do not* succeed in this action: and will *remain* liable to *Holm* if they *do* succeed. Let this cause be decided *either* way, one of the witnesses debts must be cancelled and the other will remain due and unpaid. To this point may be cited the case of *Bean v. Bean*, 12 *Mass.* 20. The objection as to *interest*, therefore fails. But it is urged that he is inadmissible on the ground of his connection with the alledged fraud. In the case in 4 *Mass.* 492. cited by the plaintiffs' counsel, such an objection is considered as of no importance.

As to the other point reserved, the presiding Justice instructed the jury that unless they should be satisfied that the goods replevied were purchased by *Parker pursuant to some secret agreement or understanding between him and Holm*, so that they might be attached by *Holm* for his indemnity, they ought to find in favour of the defendant. It is now necessary to examine and determine whether that instruction was correct. If not, the verdict must be set aside and a new trial granted. As it appears by the report of the case that no arts or devices were practiced, nor any false representations or pretences whatever were made by *Parker* at the time of purchasing the goods on credit, or at any other time by means of which he obtained the credit; and as the jury have found that there was no such concert or secret agreement or understanding between *Parker* and *Holm;* and as it does not appear that *Parker knew*, at the time.

that he was insolvent, though in fact he *was* so; the simple inquiry is this: "If a man doing business as a trader and in *good credit* "(though insolvent at the time, but not aware of that fact) obtains "goods on credit in the town where he lives and is known, without "practising any artifice or making any false representations or "pretences, or in fact any representations or pretences at all;— "and removes these goods to his own store openly: Can such "vender, upon learning the insolvency and circumstances of the "purchaser, *reclaim* the goods in the possession of the purchas- "er or maintain replevin for them against the attaching officer, "on the principle of his legal right to rescind the bargain?"— This seems a clear and fair statement of the question.

If in the present case the plaintiffs had a right to rescind the contract of sale, it must be on the ground of *fraud* on the part of *Parker* the purchaser; and though in many instances contracts may be avoided by reason of the fraudulent conduct of one of the parties: and the party attempted to be charged may for that cause be excused from the performance of his contract;— yet in cases of the kind under consideration, where a vender claims the right of *rescinding a contract of sale* which has been carried into effect and executed on his part by a *delivery of the articles sold*, it would seem that his right to rescind must be founded on such a fraud on the part of the vendee as would render him liable to an *indictment;* or if not, would at least subject him to *an action of deceit:* or in other words, that a vender has not a legal right to *rescind* a contract of sale and reclaim the goods sold, unless such fraud was practised in making the contract, that if the vender *did not rescind it*, he would recover damages against the vendee for the injury sustained by that fraud. —But without advancing any direct opinion as to the correctness of this principle, it appears to us to be clear that it would require as much proof of fraud and false representation to maintain an action against a *vendee* in the above circumstances, as an action against a *third person*, by whose fraudulent and false representations the *vender* was induced to give credit to the *vendee*.—Artifice, misrepresentation, falsehood and fraud constitute the foundation of all such prosecutions.

It may not be useless to examine the subject in both points of view.

In the case we have stated, would an indictment lie against the purchaser?

1. Cheating, at *common law* was an indictable offence; but to constitute the offence two things were necessary. *First*, the act must be of such a nature as to *affect the public*. *Secondly*, it must be such against which common prudence could not have guarded. 1 *Hawk. Ch.* 71. 2 *Burr.* 1125.

2. The statute of 33 *Hen.* 8. *ch.* 1. made it an offence to obtain money, goods, &c. by *a false token*. Though this statute in some respects altered the common law, it did not affect those cases against which *common prudence* would be a sufficient security.

3. The statute of 30 *Geo.* 2. *ch.* 1. goes still further and makes it an indictable offence to obtain money, goods, &c. upon a *false pretence*. Before this last statute was enacted, it was not an offence to obtain money, goods, &c. by a *false pretence*, unless *false tokens* were used. *See* 6 *Mod.* 105. 301. 42. 61. 5 *Mod.* 11. 11 *Mod.* 222. *Ld. Raym.* 1013.

This statute was never in force in *Massachusetts*, as we are informed by *Parsons C. J.* in the case of *Commonwealth v. Warren*, 6 *Mass.* 72. But the *Stat.* 1815. *ch.* 136. contains similar provisions, and therefore those decisions which we meet with in the English books upon the *Stat. Geo.* 2. are applicable to the statute of 1815.

In the case of *Young in error v. Rex*, 3 *D. & E.* 98. it is decided that to bring a case within the act of *Geo.* 2. there must be false pretences or stories, and misrepresentations, deceiving and intended to deceive the person with whom the offender is dealing, and fraudulently contrived for that purpose.—*Buller J.* says, "Barely asking another for a sum of money, is not sufficient: but *some pretence* must be used, and this pretence must "be *false*, and the *intent* is necessary to constitute the crime."—The case of *Rex v. Lara*, 6 *D. & E.* 565. shews the nature of those *false tokens* and *pretences* which are necessary to support an indictment.—*Lara* pretended that he wished to purchase certain lottery tickets to a large amount. He did so, and paid for them by a draft on a certain banker with whom he *said* he had funds, *though at the time he* KNEW *he had not*.—The Court decided that the indictment could not be maintained. *Ld. Ken-*

yon observed that *Lara* used nothing but his own *assertion* to gain credit,—"that he sat down and drew a check on a Bank-"er; but it would be ridiculous to call that a false token:—that "it left his credit just where it was before. What the defend-"ant did was highly reprehensible and immoral; but as he "used no false tokens to accomplish his designs, judgment must "be arrested."

Hawk. B. 1. *ch.* 71. *sect.* 2. says that "the deceitful receiving "money from one man to another's use upon a false pretence "of having a message and order to that purpose, is not punish-"able by criminal prosecution, because it is accompanied by "no manner of artful contrivance; but wholly depends on a "bare, naked lie."

The above-cited case of *Commonwealth v. Warren* was decided before the act of *Massachusetts* for the punishment of Cheats was passed. Had it been in force at the time of the trial, *Warren* would probably have been convicted, as he used several false pretences to obtain credit by means of which his fraud was successful. The case further shews *that if another person had been connected with him in the fraud*, the offence would have amounted to a conspiracy *without any false pretences;* and might have been charged and punished as such.—This distinction it is of importance to notice, as it may have a bearing on the main question reserved in this cause; and for that reason it may under this head be also remarked that where two or more *conspire* to do an unlawful act, or a lawful act for an unlawful purpose, it is a crime; and the *gist* of the conspiracy is the *unlawful confederacy. Commonwealth v. Judd & al.* 2 *Mass.* 329. *Commonwealth v. Tibbetts & al.* 2 *Mass.* 536.

Our next inquiry is whether, in the case stated, an action of deceit, or an action on the case in nature of deceit, would lie for damages occasioned by the fraud.—Our Law books must answer the question.

Some of the cases relating to this point are founded upon an alledged fraud and deceit on the part of the *vender:* others on the part of the *vendee.*—Those which are grounded upon an *express warranty* do not come within the range of our present view. In *Ld. Raym.* 519. it is settled that *possession* is a warranty of the *implied* kind, that the goods belong to the seller; for possession

is a colour of title, and an action lies upon a *bare affirmation* of the possessor that the goods are his own. *Roberts on frauds* 523.—"An action upon the case lies for a deceit when a man does any deceit to the damage of another. *Com. Dig. Action on the case for deceit A.* 1." "*Fraud* without *damage* or *damage* without *fraud* gives no cause of action—both must concur." 3 *Bulst.* 95. *Roberts* 523. "No action lies against a man for his declaring that a certain person would have given him a *certain sum* for his farm; though no such offer was ever made.—It is a mere ground of estimation with which no prudent man should be satisfied;"—but a declaration of *the fact* that the *rent* was so much, when it was not, whereby a purchaser is deceived, will support an action. See *Roberts* 523. and the cases there cited. Many other cases of false or fraudulent representations on the part of the *vender* might be stated, shewing the principles on which actions for deceit may be maintained against them:—but these are sufficient. It is much more to our present purpose to examine those cases in which actions have been supported against *vendees* or *receivers of money*, for fraud and deceit on *their part*, and the facts necessary to support such actions. In the case of *Buffinton & al. v. Gerrish & al.* 15 *Mass.* 156. *Walker* was guilty of gross fraud, and stated a series of falsehoods well calculated to gain him credit, by inspiring confidence in his responsibility;—and by means of this fraud and false pretence he succeeded in obtaining credit to a large amount. In *Badger v. Phinney*, 15 *Mass.* 359. *Rand*, the minor, obtained credit by falsely affirming that he was of full age: and this affirmation was pointedly made, too, in reply to the inquiries of *Badger*. *Putnam J.* in giving the opinion of the Court says, "the goods were delivered to the plaintiff *Rand be-* "*cause* he undertook to pay for them *and declared he was of full* "*age*. The basis of this contract has failed from the fault if "not the *fraud* of the infant: and —— the *fraud* which *induced* "the contract, furnishes the ground for the impeachment of it. "Thus in the case of *Buffinton & al. v. Gerrish & al.* where "one purchased goods on credit by *means of false representa-* "*tions*, it was holden the vender had not parted with his proper- "ty, but might maintain replevin against the attaching officer."

In the case before mentioned of *Commonwealth v. Warren*, the

Court observe that the man defrauded should seek his remedy by action. In that instance false and fraudulent representations had been made. In the important case of *Pasley v. Freeman*, 3 *D. & E.* 51. *Buller J.* observes, "The fraud is that the defendant "procured the plaintiff to sell goods on credit to one whom "they would not otherwise have trusted, *by asserting that which* "*they knew to be false.* Here then is the fraud and the means "by which it was committed:—the *assertion* alone is not suffi- "cient: but the plaintiff must go on and prove that it was *false* "and that the defendant *knew it to be so.*" The action of *Pasley v. Freeman* was maintained upon the principle that the defendant had been guilty of that fraud and misrepresentation to induce the plaintiff to sell goods on credit to *Falch*, which would have maintained the action against *Falch* if he had himself been guilty of the fraud and falsehood.—*Buller J.* concludes with observing that "if a man will *wickedly assert* that which he knows "to be *false* and thereby draw his neighbour into a heavy loss "he is liable in damages." *Ashurst J.* in delivering his opinion says "In order to make it actionable it must be averred that "the defendant intending to deceive and defraud the plaintiffs, "did *deceitfully encourage and persuade* them to do the act and "for that purpose made the *false affirmation*, in consequence of "which they did act." "If *A.* send his servant to buy a "horse, who buys it and pays for it, and the seller *affirms* to *A.* "that he was not paid, *whereby A.* pays him; an action lies. So "if a man affirm himself to be of full age, when he is an infant, "and *thereby* procure money to be lent on mortgage." See *Com. Dig. action on the case for deceit A.* 10. and the authorities there cited; also *Bean v. Bean*, 12 *Mass.* 20. Numerous other instances of similar imposition and falsehood might be collected and stated; but it is not necessary, as they are all founded on the same principle, viz. that the money, goods or credit had been obtained by means of false and fraudulent assertions of the defendant. We have not been able to find a *single instance* in which an action of this kind has been supported, except where the party charged had succeeded in his plan by *false assertions* and *fraudulent misrepresentations.* In 3 *Chitty on pleading* are a number of forms of declarations in actions of deceit—one for selling goods as and for a larger quantity than there was;—one

for selling a piece of land as containing more acres than it did contain;—one for misrepresenting the value or profits of a certain trade;—one for representing himself as authorized by a third person to do a certain act or receive a certain sum of money; and one for personating the plaintiff. In each of these forms there is a strong averment that the defendant made a direct, false and fraudulent representation of facts, with an intent to accomplish his object and defraud the plaintiff; and that by means thereof he had succeeded.

We have thus taken a brief review of some of the general principles of law applicable to *indictments* for frauds and deceits, and to *actions on the case* brought by the party injured against him who commits the fraud; whether he is the *vendee* of the goods or his *artful* and *fraudulent* friend. It appears by the precedents to which we have alluded, that in case for a fraudulent purchase or obtainment of money, the declaration must contain an allegation that the plaintiff was imposed upon by artifice and false declarations—calculated and intended to deceive; and in all the cases which we have cited, the prosecution on civil action was maintained or defeated, according as the proof appeared on trial touching the *false and fraudulent representations* alledged to have been made by the party charged; he knowing them to be false and deceptive.—Judging, then, from legal forms and decided cases, it seems to be settled that *deceptive assurances* and *false representations fraudulently* made are essential to the support of an indictment or civil action for a fraud committed in the manner above supposed; and of course, that such proof is equally necessary to the support of an action of replevin by the vender who claims the right of rescinding the sale he has made on the ground of fraud in the vendee. Let us for a moment look at the facts in the case at bar.—*Parker*, it turns out, was insolvent when he purchased the goods, but there is no proof that he was apprized of the fact;—he bought the goods on credit in usual form, refusing the offer of further credit from the plaintiffs:—he made no professions or promises;—no representations or assertions; practised no other art than obtaining the credit without *disclosing his insolvency;* a fact, which it does not appear that he himself knew. These facts are essentially different from those appearing in the cases we

have collected and stated; in which it is declared not only that there must have been *assertions* and *representations* made—but they must also have been *false:* and to complete the proof the defendant must have *known* them to be *false.* Under these circumstances we are not aware of any legal principles on which an indictment could be sustained or an action for deceit against *Parker;* and we do not perceive how it is competent for the plaintiffs to rescind the contract they have made and reclaim the goods in this action, unless upon the *ground of concealment,* which has been also urged by the counsel for the plaintiffs, and which we will presently consider.—As the jury have decided that no secret understanding existed between *Parker* and *Holm* of a fraudulent nature relating to this property, we do not see why the rule of law is not applicable in this instance, *melior est conditio defendentis.* The plaintiffs may have been guilty of negligence or want of due care; but as it regards the question before the Court the defendant and he whom he represents seem not liable even to that imputation.

But it is contended by the counsel for the plaintiffs that a vender may rescind a contract of sale on account of fraud in the *vendee* by *concealment of the truth* as well as by *false assertions and misrepresentations;* that the consequences are the same and of course the law is the same. Before answering this argument, it is natural to inquire wherein this *concealment* consisted.—It is stated by the counsel for the plaintiff that it was the duty of *Parker,* as an honest man, to have disclosed his insolvency to the plaintiffs at the time he applied to purchase the property. The first reply to be given, is, that it does not appear in the case that he knew he was insolvent.—He might be suspicious of it, and he might not be; on that point we have no information. It does not appear, then, that he concealed any facts which he was bound to disclose.—If the principles of law respecting this part of the cause were to be carried to the same extent by the Court as they have been in the argument of the counsel, all confidence in dealing would be destroyed, and perfect confusion, as to the title of personal property, would be the consequence.—The vendee would never feel safe in purchasing, nor any other person safe in purchasing of him, lest the *creditor* should afterwards discover that the vendee, when he purchased,

was actually insolvent, and that those who afterwards bought of him knew of the insolvency; and then should come forward, with a sweeping claim of the property he had sold, on the principle of rescinding the sale for a fraudulent concealment.—But supposing that *Parker did* know of his own insolvency at the time of his contract: we are perfectly satisfied that the sale is not void on the ground of fraud because he did not disclose the fact.

It is true, the fraudulent concealment by the *vender* of a secret defect in an article sold by him, wholly unknown to the *vendee*, may be the foundation of an action for damages by him against the vender, and perhaps authorize the *vendee* to rescind the contract on discovery of the fraud; because the law implies a *warranty* that the goods or articles sold are of a merchantable quality. *Gilb. Evid.* 187. *Roberts* 523. But we apprehend no case can be found by which it has been settled that the law *implies* any thing like a warranty on the part of a purchaser that he is a man of property, and *sound* as to his pecuniary concerns.—In the commerce and intercourse of mankind, such an implication was never understood to exist.

It is also true that in the case of policies of assurance the *concealment of the truth* is nearly allied to *misrepresentation*. If the fact be material, it avoids the policy. But it is not on the *ground of fraud* in the concealment that the contract is void; because if the concealment be the effect of accident or mistake, negligence or inadvertence, it is equally fatal to the policy as if it were intentional and fraudulent.—See *Marshal* 347. and cases there cited. But it will be difficult to find a case where a policy was declared void, because the *assured*, when the policy was effected, was insolvent and yet concealed *that* fact:—still the reasoning of the plaintiffs' counsel seems to lead to the conclusion that the policy would in such a case be void because the assured was insolvent and unable to pay the note he had given for the premium.—We apprehend no conclusion can be drawn from these principles of the law of Insurance unfavourable to those on which we place the decision of this cause.

We have before stated that there might be a conspiracy between two or more to obtain goods or money from another *without any false pretences*, &c. and which would be punishable as

a crime. In reference to this principle of law the jury were instructed that if they believed such conspiracy or secret arrangement existed between *Parker* and *Holm*, though there were no false pretences or representations, they ought to find a verdict for the plaintiffs, but not otherwise.

It is to be lamented, if the plaintiffs have lost their property by reposing confidence where it was not deserved; but this is not a circumstance for our consideration in the decision of the cause.

On the whole, after much thought and the most careful examination, we are satisfied with the correctness of the instructions which were given to the Jury; that the motion for a new trial must be overruled, and that there be an entry of

Judgment according to the verdict.

MARTIN, APPELLANT *v.* MARTIN.

A husband cannot convey land by deed *directly* to his wife.

THE appellee filed his petition in the Probate Court, for partition of the real estate of which his father died seized, and the Judge thereupon decreed that partition be made. From this decree the mother of the petitioner appealed to this Court, and filed the following as the cause of her appeal:

"Because *Ezekiel Martin* her husband, on the 20th day of "*June* 1808, being then in full life but since deceased, by his "deed of bargain and sale, with general warranty, duly ac- "knowledged *July* 28, 1818, and recorded, for the considera- "tion of four hundred dollars therein acknowledged to have "been received of said *Mary*, did give, grant, bargain, sell and "convey to said *Mary* and her heirs and assigns forever in fee, "the land described in the petition aforesaid, by force of which "deed she became and still is sole seized and possessed of said "land in her own demesne as of fee," &c.

And the question was upon the effect of this deed.

Greenleaf, for the appellant.

No other reason is given against the validity of a deed of conveyance from the husband *directly* to the wife, but this, that they cannot contract with each other, *being in law but one person.*

But this maxim is not universally true, and the reasons on which it is founded do not apply to cases like the present. The incapacity of a *feme covert* arises not from her want of skill and judgment, as in the case of an infant; but, 1st, from the husband's right to her person and society, which would be violated if a creditor could arrest and take her away;—and 2d, from his right to her property.

1. She may sue and be sued as a *feme sole* where the husband is banished; *Co. Lit.* 432. *b.*—or has abjured the realm for felony;—*Case of the wife of Weyland*, cited in *Co. Lit.* 133. *a.*—or is an alien enemy;—*Duchess of Mazarine's case*, 1 *Salk.* 116. 1 *Ld. Raym.* 147. 2 *Salk.* 646. She may contract with her husband to live separately, and he cannot compel her to live with him again. *Mrs. Lester's case*, 3 *Mod.* 22. *Rex. v. Lister*, 1 *Stra.* 478. *Rex v. Mead*, 1 *Burr.* 542. For in these cases he is understood to have renounced his marital right to her person.

2. Where the husband covenanted that she might enjoy, to her own use, her estates real and personal, and that he would join her in the surrender of her copyholds, her surrender *without him* was holden good. *Compton v. Collinson*, 1 *H. Bl.* 334. 2 *Atk.* 511. Husband gave his wife a note of 3000*l.* to be paid if he should ever again treat her ill; and he did so, and the note was decreed in Chancery to be paid. *Reeve Dom. Rel.* 94 cites. 2 *Ventr.* 217. 2 *Vern.* 67. But even his right to her property has its limits. She may take separate property by devise; and if no trustees be appointed by the will, the husband shall be trustee for her use. *Bennet v. Davis*, 2 *P. Wms.* 316. So of a legacy of stock;—*Rich v. Cockell*, 9 *Ves. jr.* 369;—So of a gift from the husband to the wife. *Moore v. Freeman*, *Bunb.* 205. And she may even have a decree against him in respect of such estate. *Cecil v. Juxon*, 1 *Atk.* 278. She may accept a gift of personal ornaments from her husband. She may lend money to him, which his executors shall be bound to repay. *Slanning v. Style*, 3. *P. Wms.* 334. *ib.* 337. And she may bequeath her

own personal property, of which she was endowed *ad ostium ecclesiæ*. *Reeve* 145–150. and authorities there cited. The reason of all these cases applies with as much force at law as in equity, viz. that the husband's right to her property is not thereby affected.

The wife may also act *in auter droit* as a *feme sole*. She may be an attorney;—*Co. Lit.* 52. *a.*—or a guardian; and her receipt separate from her husband is good. *Reeve* 121. cites 13. *Ves.* 517. So if she have power to dispose of lands to whom she pleases, she may convey without her husband,—*Daniel v. Upley*, *W. Jon.* 137. cited in *note* 6 to *Co. Lit.* 112. *a.*—because, as *Mr. Hargrave* observes, "he can receive no prejudice from her acts." She may in such case convey *to* her husband, *Reeve* 120. She may be an executor—and if a *feme sole* be appointed sole administrator, and take husband, he becomes joint administrator; but she alone may perform any acts which a joint administrator may perform. 1 *Com. Dig. Administration* (*D.*)—She may also release her dower by her separate deed, subsequent to the husband's sale of the estate. *Fowler v. Shearer*, 7 *Mass.* 14.

From these authorities this general principle is deducible,—that the wife is to be considered capable to act as a *feme sole*, *wherever the marital right to her person is not infringed*,—and *wherever the estate of the husband can receive no prejudice from her acts*.

Now what prejudice can his estate receive, or what right of his can possibly be infringed, by considering her as capable to take directly from him by deed? He may convey to trustees for her use. He may convey to a third person, and this person, *at the same time*, in pursuance of a previous agreement, may convey to the wife, with the husband's assent, and it will be good *at law* against him and his heirs. And yet divers deeds thus executed, are to be taken as *parts of one entire transaction*. *Holbrook v. Finney*, 4 *Mass.* 566. *Hubbard v. Cummings*, *ante*. p. 11. He may covenant to stand seized to her use; and the statute of uses 27. *Hen.* 8. vests the possession in her. *Co. Lit.* 112. *a.* And in all these cases the estate descends, not to his heirs, but to her own. The coverture may well operate to suspend any remedy on the covenants in a deed from the husband

to his wife, during the life of the husband; and this for the preservation of domestic peace, and of his right to her person, which would be infringed if she could imprison him; but this would not affect her capacity to take.

E. Whitman for the appellee.

It is a sufficient answer to the argument on the other side to say that the law of the land is otherwise. It has ever been considered as law here, from the first settlement of the country, that the wife was incapable to take by direct conveyance from her husband; and conveyances have been regulated accordingly. Indeed the intervention of trustees on all occasions proves that estates cannot be thus conveyed without them. No instance can be found of any attempt to support a deed like this. The same has been the common law of *England* from time immemorial. *Lit. sec.* 168. *Co. Lit.* 112. *a.*

And it is founded in good reason. It frees the husband from the constant importunity of the wife while he is in health, and from the effect of her influence over his mind when it becomes enfeebled by disease. If it were otherwise, this barrier which the presence of trustees interposes would be broken down, and every artful woman might disinherit the children of a former wife at her pleasure.

Greenleaf, in reply.

The argument arising from the presence of trustees, as the protectors of a weak husband against the arts of an ambitious or an avaricious wife, is of little weight in the cause. Pliant trustees are as easily found as imbecile husbands; and a wife, artful or eloquent enough to obtain her husband's consent to convey, will always be able to introduce some convenient relative or friend of her own as a trustee.

As to the course of decisions, no adjudged case directly to this point is to be found in the books. *Dicta*, indeed, to this effect, are not infrequent; but if the *reason* of the law does not support them, why should they be treated as law? If the principle now contended for could operate to unsettle the titles to any estates, or to disturb vested rights, there might be good reason to reject it, and to adhere even to harmless errors, rather than do mischief by correcting them. But it does not go to disturb titles, it shakes no established principles or decisions, it abridges no

rights;—on the contrary it vindicates the consistency of the law on this subject, and takes from it the reproach to which it is otherwise exposed.

Mellen C. J. afterwards delivered the opinion of the Court as follows.

The only question presented in this case is whether the deed from *Ezekiel Martin*, the late husband of the appellant, directly to *her* is a legal conveyance by which the estate passed from *him* to *her*. If any principle of *Common Law* is settled and perfectly at rest, it seems to be this, that a husband cannot convey an estate by deed to his wife. The appellant's counsel has not attempted to shew any authority shaking this principle: and even the learned author of the Treatise on Domestic Relations—though an able advocate for the rights of married women in regard to the control or disposition of property belonging to them,—does not contend that such a deed would be an operative conveyance: on the contrary he admits it would not. See pages 89. 90.—The numerous cases cited by the counsel in support of the deed, are principally *Chancery decisions;* and those which are *not such*, have reference to questions totally different from that now under consideration: Neither class of cases, then, can be relied upon as authorities, in the determination of this cause. It can be of no use for the Court to disturb or attempt to disturb a legal principle, which has never before been agitated in our Courts or till very latelybeen even doubted. It is not necessary for us to answer the inquiry which has been made, "why a deed from a husband to his wife should "not be a valid conveyance?" in any *other* manner than by observing that the law of the land declares such a deed to be a mere nullity. Accordingly, without a particular examination of the authorities cited on either side, we *affirm* the decree of the Judge of Probate and direct the record and proceedings to be remitted to the Probate Court, that such further proceedings may be had therein as the law requires.

HOBART, PLAINTIFF IN REVIEW *v.* TILTON.

When a review is granted, pursuant to *Stat.* 1791. *ch.* 17. [*Revised Stat. ch.* 57.] the writ must be entered at the next following term, unless otherwise specially provided in the order of Court by which the review is granted.

The plaintiff in review, who resided in *Boston*, and was defendant in the original suit, filed his petition for review in the Supreme Judicial Court there, at *November* term 1819, and notice was ordered upon the defendant in review to shew cause at the next term in the same county, which commenced on the first Tuesday of *March* 1820. The act of Separation of *Maine* from *Massachusetts* took effect *March* 15, 1820, and provided that "the rights and liabilities of all persons, shall, after said sepa- "ration, continue the same as if the said District was still a part "of this Commonwealth, in *all suits pending*, or judgments re- "maining unsatisfied, on the fifteenth day of *March* next," &c. It appeared that the writ of review was granted at *March term* in *Suffolk* county, on the twenty-ninth day of the term, which happened on the 15th day of *April* 1820, and that it was sued out returnable at the Supreme Judicial Court in *this* county, *May* term 1821; one term having intervened between the granting and the suing out of the writ.

The writ was granted upon condition that the petitioner should file in the Clerk's office a bond conditioned to prosecute the action of review, and to respond and satisfy such judgment as the original plaintiff should finally recover against him. No bond, however, was filed *after* the grant of the writ; but it appeared that a bond, *had been* filed *February* 4, 1820, containing a *prospective* condition to the same effect.

The writ was endorsed thus,—"*Wm. F. Hobart, by his Attorney Wm. Willis.*"

Longfellow, for the defendant in review, hereupon moved the Court to abate the writ for the following reasons:

1. It is not indorsed as the Statute requires. The plaintiff resides without the State, and in such case the *Stat.* 1784. *ch.* 28. requires that it be indorsed by some responsible person resident within the State, who shall be liable for the costs. But here the party originally liable is not the attorney, but the principal, so that the indorsement is as none.

2. It is sued out without authority. This is a writ granted not *ex debito justitiæ*, but *ex gratia* only; and the terms on which it is granted ought therefore to be strictly complied with. One of these conditions is express, that the plaintiff in review *do* give bond; yet here no bond was ever given *in pursuance* of the order of Court. Another condition is implied from the state of things then approaching. The writ ought to have been sued out before the Court awarding it lost its jurisdiction over the person of the defendant in review, by the separation of the State. If the action were to be tried here, and judgment be rendered against the plaintiff in review, it could not be executed in *Massachusetts*, not having been "pending" at the time of the Separation.

3. If regularly granted and sued out, it was not returnable at the proper term. Writs of this description ought to be sued out returnable at the first term after they are granted. Otherwise this mischief ensues; that the plaintiff in review, having obtained a *supersedeas* of the execution against him, may choose his own time, when the witnesses against him are dead, or absent, or accommodated to his views, to obtain a reversal of any judgment however justly rendered.

Whitman and *Willis* for the plaintiff in review.

As to the first objection, the statute applies to the indorsement of *original writs only*, which this is not. It is a judicial writ, authorizing a revision of the former suit, upon the same pleadings;—in which no amendment can be made, nor any new issue be joined. 7 *Mass.* 346. 10 *Mass.* 221. The cause is one and the same; and the *original* writ, for there can be but one in a cause, is that which was entered in the Court below, and which alone is to be inspected to ascertain the nature and extent of the plaintiff's demand. It was doubtless so regarded by the Court who granted the present writ, as is evident from their requiring a *bond* for payment of costs.

But if this is an original writ, the indorsement is sufficient; for the plaintiff living without the State, the attorney is originally liable, upon a reasonable construction of the Statute of 1784. *ch.* 28. which is a revision of the provincial *Stat.* 1 *Geo.* 1. *ch.* 1. in which this principle is clearly expressed. Indeed an

indorsement precisely in form like this was adjudged good in *Middlesex Turnpike Corporation v. Townsend*, 8 *Mass.* 266.

As to the want of authority;—the condition of filing a bond was substantially complied with, the plaintiff in review having previously filed one with a condition prospective to the granting of the writ, and which furnishes a remedy sufficient to meet any state of facts which this case can present.

And the writ was sued out in due time. The statute imposes no limit of time in this particular; and the Court have imposed none. Reasonable time is all which can be contended for; and if the plaintiff should unnecessarily delay, and thus abuse the privilege granted him, the Court would punish him by revoking the *supersedeas*, and issuing the execution. Now at the time of granting the writ, our civil institutions were unsettled by a great political revolution, the new Court was soon after created, and its terms fixed at periods to which the people were not accustomed. The delay of one term, therefore, seems not unreasonable for a party resident without the State, to become acquainted with our new regulations.

Emery in reply.

The question arises upon the *eighth* of the terms and conditions in the act of Separation. The object of the first part of this condition was to protect the non-resident owners of lands or rights of property, from laws which might be passed making a difference between them and residents. It then provides that "the rights and liabilities of all persons shall, after the separa- "tion, continue the same as if the said District was still a part "of the Commonwealth." And if the sentence had stopped here, we should have derived but little benefit from the separation. It was necessary to make a qualification of this very general introduction, and limit it to "all suits pending, or judg- "ments remaining unsatisfied on the fifteenth of *March* next, "where the suits have been commenced in *Massachusetts* Proper, "and process served within the District of *Maine*," or *è converso*, "either by taking bail, making attachments, arresting and de- "taining persons, or otherwise, where execution remains to be "done; and in such suits *the Courts within Massachusetts Proper* "*and within the proposed State, shall continue to have the same juris-* "*diction as if the said District had still remained a part of the*

"*Commonwealth.*" The most unexceptionable and safe construction of this section is, that the Courts in *Maine* shall have exclusive jurisdiction over suits pending in any county in *Maine*, though the writ was served in *Massachusetts*, and the Courts in *Massachusetts* shall have the like exclusive jurisdiction over suits pending in any county in that Commonwealth, where the service was made in *Maine*. It could not have been the design of the law that *Massachusetts* should draw a cause from the State of *Maine*, pending there, though served in *Massachusetts*. If this had been attempted, the right would have ceased on the fifteenth of *March*; because, if the act had not taken place, this Court could not have had jurisdiction under the former laws, and therefore the grant of a review before *this* Court is not within the terms of the act. The Supreme Judicial Court of *Massachusetts* have not granted it to be heard before that tribunal; and *this* Court cannot have jurisdiction of the suit, because, if the State, formerly District, of *Maine* had still remained a part of *Massachusetts*, this Court would have had no existence.

Nor is there any necessity for proceeding on this writ of review. On the contrary this is the only Court to which an *original* application for review of this cause should be presented.

The *Middlesex* case, cited on the other side, is not applicable to the present, that being the case of a corporation, which could act only by attorney, who must necessarily be personally liable.

MELLEN C. J.—delivered the opinion of the Court as follows.

The question submitted is whether this action shall be sustained or the writ abated for the reasons which have been urged by the defendant's counsel.

We have no doubt that the Supreme Judicial Court of *Massachusetts*, had a right to grant the review, though after the fifteenth of *March*, 1820; inasmuch as the *petition* for the review was pending in that Court on that day.—The act of Separation provides that "all suits" thus pending, were to be heard and determined by the Courts, in which they were then pending. This petition was "*a suit*," within the meaning of that provision. The Court having a right to grant the review, the petitioner, *Hobart*, had a right to the benefits of the grant by suing out

his writ of review in this county, where the judgment in the original action was rendered. But on consideration of the subject, we are of opinion that it was not sued out in due season, and therefore that the action is not regularly before us, and the writ must be abated.---The review was granted in *April*, 1820.---The first term of the Supreme Judicial Court in this county under the government of this State was holden on the fourth Tuesday of *August* following. Here was ample time for suing the writ, returnable at that term, instead of which it sued returnable at *May* term, 1821. A motion was then made and entered on the record for the dismissal of the action for the reasons which have been urged in argument: The defendant has therefore all advantages which he then had of the objections made.---By law a person has *three years* allowed him, within which he may petition for a review of an action in which judgment has been rendered against him.---He ought to be satisfied with this indulgence; and having obtained permission to review the cause, many reasons exist why he should not delay the service of the writ.—In the first place the opposite party cannot take depositions in the cause till *after* the service;—delay may operate essentially to his injury;---his witnesses may die or remove out of the county; the memory of facts may be gone, and unnecessary embarrassment and suspense be the consequence.---All these ought to be avoided.---Besides, if the service of the writ may be delayed to a *second* term, why not to a *third or fourth*, or as long as the party may incline to delay it? There is as much reason that the writ should be made returnable at the *first* term after the review is granted, as that a creditor of an insolvent estate whose claim has been rejected by commissioners, should commence his action at the next following term.—Such has always been the practice, and the law has been considered as requiring it.—The settlement of the estate ought not to be delayed.

A review *after* judgment is to supply the place of a *new trial before* judgment. When a new trial is granted at common law, the party obtaining it is always expected to be ready at the *next* term to proceed to trial: the same reason exists in case of review; and in neither case should further delay be granted unless obtained on motion in open Court in the usual man-

ner.—There may be circumstances at the time of granting a review, which would render it *impossible, or extremely inconvenient,* to sue out the writ of review at the *next term*; as where the review is granted in a county at a distance from that where the writ must issue and be served: though such cases would very rarely occur. When they do occur, the Court, when granting the review, would authorise it to be sued out at the *second* term, by way of exception from the general rule.

It is therefore to be understood that when a review is granted, pursuant to our statute, the writ must be entered at the next following term; unless otherwise specially provided in the order of Court by which the review is granted.

This opinion renders it unnecessary to decide upon the objection which has been made to the indorsement of the writ.

Writ abated.

THE INHABITANTS OF BOSTON

v.

THE INHABITANTS OF YORK.

If an action of *assumpsit,* in which the *ad damnum* exceeds seventy dollars, be brought into the Supreme Judicial Court by a fictitious demurrer, and upon trial the plaintiff recover less than twenty dollars; the plaintiff shall have judgment for his costs to the amount of *one quarter* of the damage recovered, under *Stat.* 1807. *ch.* 123. And the defendant shall have a separate judgment for his costs on the appeal, under *Stat.* 1817. *ch.* 185. And in such case of fictitious demurrer the Court will not certify "*that there was reasonable cause for such appeal.*"

Assumpsit. The *ad damnum* in the plaintiffs' writ was laid at more than *seventy* dollars; and the action was brought from the Common Pleas into this Court by appeal from a judgment rendered *pro forma* upon a fictitious demurrer, the plaintiffs being appellants. On trial here, the plaintiffs had a verdict of *thirteen* dollars.

Emery, for the defendants, now moved for judgment for their costs on the appeal, pursuant to *Stat.* 1817. *ch.* 185. *sec.* 2. which provides that "in any personal action where the demands for "debt or damage shall exceed the sum of seventy dollars, if the "plaintiff in such action shall appeal to the Supreme Judicial

"Court, and, upon the trial of such appeal, shall not recover "more than seventy dollars, he shall not be entitled to his costs "on the appeal, but the defendant shall be entitled to his costs, "and shall have a separate judgment and execution therefor," &c. "*provided however*, that if the Supreme Judicial Court shall "certify that there was reasonable cause for such appeal, the "plaintiff may thereupon recover his costs of the appeal."

Longfellow, for the plaintiffs, opposed the motion, and applied for a certificate that there was reasonable cause for the appeal, under the *proviso* in the same section.

MELLEN, C. J. delivered the opinion of the Court, as follows.

It was the design of the Legislature to prevent unnecessary appeals, where substantial justice had been done in the Court below. The statute seems to contemplate those cases only where there might have been a fair and full trial on the merits in *that Court*; but in which the plaintiff might be dissatisfied with the judgment. In the cases of *Turner v. Carsley*, [*ante.* p. 15.] and *Lunt v. Knight*, [*ante* p. 17.] we have decided that if, after such *fair* and *full trial*, the *defendant* obtains a verdict in the Common Pleas, and on appeal to this Court the *plaintiff* obtains one in his favour, this is proof of reasonable cause of appeal.—He could not obtain justice without appealing. But the plaintiff cannot lay the foundation of a reasonable cause of appeal merely by witholding proof, and suffering a verdict to be returned against him in the Court below. Nor can he, for the same reason, create this reasonable cause by his own act in demurring to a good plea and then appealing from the judgment; though with the consent of the defendant that the demurrer should be waived and issue joined in this Court. If we should give this construction to the statute, it would not only be expressly against its language, but would defeat its intended effect, by allowing parties to bring all actions to trial in this Court without the peril of costs which the statute has provided. It is our duty to aid the legislature by giving that construction which must have been intended by those who framed the law. The principle, on which the Court proceeded in the case of *Weightman v. Hastings*, 4 *Mass.* 244. is very similar to that on which we decide this point; although the questions have arisen upon different statutes. The Court observed that it was "absurd to say

" that the parties may, by their agreement, evade a positive and " very wholesome provision of a statute. It would be to *make* " law, and not to *explain* or *administer* it."

We are unanimously of opinion that the plaintiffs are not entitled to a certificate as prayed for. There must be judgment for the plaintiffs for their costs to the amount of one quarter part of the sum they have recovered in damages, it being less than twenty dollars, pursuant to *Stat.* 1807 *ch.* 123. and the defendants must have a special judgment for their costs on the appeal.

Note. The *Stat.* 1817. *ch.* 185. is now repealed so far as it respects this State; but the Statute passed *Feb.* 4. 1822, establishing a Court of Common Pleas, contains a provision that when an appeal shall be made by the plaintiff " in any personal action, (except actions of tresspass *quare cl. fregit*, and ac- " tions of replevin wherein the value of the property replevied shall by the " finding of the jury exceed one hundred dollars,) and he shall not recover " more than one hundred dollars debt or damage, he shall not recover any " costs after such appeal, but the defendant shall recover his cost on such " appeal against the plaintiff, and shall have a separate judgment therefor; " and in case such appeal was made by the defendant, and the debt or dam- " ages recovered in the Court of Common Pleas shall not be reduced, the " plaintiff shall be entitled to recover double costs on the appeal." But it does not provide for the case where the plaintiff, *having reasonable cause to appeal*, recovers less than a hundred dollars.

TRIBOU, PLAINTIFF IN ERROR, *v.* REYNOLDS.

Excuses for non-appearance at a military inspection must be offered to the commanding officer of the company within eight days after the inspection, unless the party be prevented from offering such excuse by severe sickness.

UPON a writ of error to reverse the judgment of a Justice of the peace, rendered in an action of debt, brought by the plaintiff in error, who was clerk of a company of militia, against the defendant who was a soldier therein, to recover a fine for his neglect to appear at the annual inspection of arms, the case was thus:—

The defendant was unfit to do military duty by reason of extreme deafness, and therefore did not attend at the inspection;

nor did he offer any excuse for this neglect within eight days, to the captain, agreeably to the "Rules and Articles for governing the militia when not in actual service," *Art.* 32. [*Revised Stat. ch.* 164. *sec.* 44.] part of which is in these words;—"And "any such non-commissioned officer or private, who shall ne- "glect to give or cause to be given to his commanding officer, "such satisfactory evidence of his inability to appear (*provided* "he is not prevented *therefrom* by severe sickness) within the said "eight days, shall forfeit and pay the penalty by law provided "for such non-appearance." And it appeared that the defendant was not prevented, by any bodily indisposition, from offering his excuse within the eight days. Upon the trial before the Justice the defendant offered to shew his said inability in evidence; to which the plaintiff objected, on the ground that no proof ought to be received of inability to do duty, unless it either had been communicated to the commanding officer within the eight days, or was a case of severe sickness, not only disabling the party from doing duty, but also disabling him from offering his excuse within the limited time. The Justice, however, overruled the objection, and admitted the evidence, and thereupon rendered judgment for the defendant; to reverse which this writ was sued out.—

And THE COURT were of opinion that by the "severe sickness" mentioned in the *proviso*, was intended such sickness as prevented the party from giving to his commanding officer, *within the eight days*, satisfactory evidence of his inability to appear; —and that such not appearing to have been the case here, the Justice erred in admitting the evidence, and therefore the judgment ought to be reversed.

There being some material defects in the original declaration, the judgment of the Court extended no farther than the reversal, the parties immediately adjusting the suit by compromise.

REGULÆ GENERALES.

AT YORK, AUGUST TERM, 1820.

ORDERED, That the rules and regulations of the Supreme Judicial Court of Massachusetts, in force on the fifteenth day of March, 1820, relating to the admission of Counsellors and Attornies and to practice, shall be considered as in force in this Court until further order.

AT YORK, APRIL TERM, 1822.

ORDERED, That the rules of this Court heretofore provisionally adopted, excepting the rules for the regulation of the practice in Chancery, be, and they hereby are repealed, and the following RULES and ORDERS are ordained and established as the rules for regulating and conducting business in this Court, viz.

I.

Of Attornies and Counsellors admitted prior to March 15, 1820.

All Attornies and Counsellors at law, who had been admitted as Attornies or Counsellors at the bar of the Supreme Judicial Court of Massachusetts, prior to the fifteenth day of March, A. D. 1820, and were resident within this State on the tenth day of February, A. D. 1821, are Attornies or Counsellors of this Court.

II.

Of the admission of Attornies graduated at some public College.

Any person, being a citizen of the United States, may be admitted an Attorney of this Court, who shall have had a liberal education and regular degree at some public College, and shall afterwards have commenced and faithfully pursued the study of the law, in the office and under the instruction of some Counsellor of this Court within this State for three years, and shall afterwards, being first recommended by the bar of that county, within which he pursued his studies during the last of said three years, to the Court of Common Pleas, for said county, as having a good moral character, and as having completed the full term of study required by this rule, and being suitably qualified for admission as an Attorney of said Court, have been thereupon admitted as an Attorney by said Court, and shall afterwards have practised law with fidelity and ability in said Court for the term of two years, and be thereupon recommended by the bar of the county in which he shall dwell, for admission as an Attorney of this Court.

III.

Of studies commenced in another State.

The commencing and diligently pursuing the study of the law in the office of an Attorney of the highest Judicial Court in any other State for the full term of one year, and afterwards pursuing the study of the law in the office of some Counsellor of this Court within this State for the full term of two years at least, shall in all cases be considered as equivalent to commencing and pursuing the study of the law for three years in the office, and under the instruction of some Counsellor of this Court.

IV.

Of the admission of Attornies not graduated at some public College.

Any person not having a liberal education and regular degree from some public College, who shall have attained such a knowledge of the English and Latin languages as is usually required for admission to public Colleges, and shall in addition thereto, after having arrived at the age of fourteen years, have faithfully "devoted seven years at least, to the acquisition of scientific and legal attainments," five years at least of which period shall have been spent in professional studies with some

Counsellor at law, and the last two of said five years in the office, and under the instruction of some Counsellor of this Court within this State, shall be considered as possessing a qualification for admission equivalent to that of having a liberal education and a regular degree, together with that of having commenced and pursued the study of the law for three years in the office and under the instruction of some Counsellor of this Court within this State.

V.

Admission in another State not equivalent to study in this.

The bar shall not recommend for admission as an Attorney, any person either to the Court of Common Pleas, or to this Court, unless he be qualified for such admission agreeably to the provisions of these rules. Nor shall the admission of any person to practice in the Courts of any other State be deemed or construed by the bar equivalent to the course of study required by the statute regulating the admission of Attornies, or as relieving the candidate for admission from the necessity of complying with the provision requiring that he should pursue the study of the law two years in the office, and under the instruction, of some Counsellor of this Court within this State. But any person who, prior to the passing of said statute, had been regularly admitted to practice at the bar of any Court of Common Pleas in any county in the State agreeably to the rules then in force, and who shall after such admission have practised law in the Court of Common Pleas with fidelity and ability for the term of two years, may be admitted an Attorney of this Court, being first recommended for admission by the bar of the county, in which such person shall dwell.

VI.

Of the admission of Attornies without the recommendation of the bar.

If the bar of any county shall unreasonably refuse to recommend, either to this Court or the Court of Common Pleas, for admission as an Attorney, any person suitably qualified for such admission, or if, after the recommendation of the bar, the Court of Common Pleas shall unreasonably refuse to admit, as an Attorney, the person so recommended, such person, submitting to an examination by one of the Justices of this Court, and producing to him sufficient evidence of his good moral charac-

ter, may be admitted an Attorney of this Court on the certificate of such Justice, that he is duly qualified therefor, and has pursued the study of the law agreeably to the provisions of these rules.

VII.

Of the admission of Attornies of the Courts of another State.

Any person, who shall have been admitted an Attorney of the highest Judicial Court of any other State, in which he shall dwell, and afterwards shall become an inhabitant of this State, may be admitted an Attorney or Counsellor of this Court, at the discretion of the Justices thereof, after due inquiry and information concerning his moral character and professional qualifications; such person having first conformed to the requisition of the statute regulating the admission of Attornies, by pursuing the study of the law two years in the office of some Counsellor of this Court.

VIII.

Of the admission of Counsellors.

Any person, who now is, or who shall be an Attorney of this Court, having practised law therein with fidelity and ability as an Attorney thereof, for two years, may be admitted a Counsellor of this Court on the recommendation of the bar of the county in which such Attorney shall dwell, or without such recommendation, if it be unreasonably refused; unless such person was admitted an Attorney of this Court, because he had been unreasonably refused admission as an Attorney of the Court of Common Pleas, in which case he shall not be recommended nor admitted as a Counsellor of this Court, until he has practised law as an Attorney thereof for the term of four years.

IX.

Attornies and Counsellors may be admitted in any county, &c.

Any person, who is duly qualified for admission as an Attorney or Counsellor of this Court, may be admitted in any county within the State, where the Court shall be holden by two or more Justices thereof, on producing a certificate of recommendation according to the rules now established of his qualifications, professional studies, and good moral character, from the bar of the county in which he may have dwelt and practised. And where the candidate proposed for admission as an Attor

ney of this Court, was admitted an Attorney of the Court of Common Pleas of this State, prior to the passing of the statute regulating the admission of Attornies, such certificate of recommendation shall so state the fact; but if such admission were not prior but subsequent to the time aforesaid, such certificate of recommendation shall state whether such candidate had, prior to his admission to practice at the bar of the Court of Common Pleas, pursued the study of the law two years at least in the office and under the instruction of some Counsellor of this Court within this State.

X.

What Attornies may do.

Attornies of this Court may prepare and sign the pleas and pleadings and statements of facts in cases stated, may draw and file interrogatories, give and receive notice on rules obtained to plead, or produce papers, and generally may do whatever is necessary and proper in preparing a cause for trial.—They may also read depositions and other papers to the Jury, and assist Counsellors in the examination of witnesses, but are not permitted to open a cause to the Jury, nor to argue to the Court or jury any issue of law or fact.

XI.

What Counsellors must do.

All issues in law and in fact, and all questions of law arising on writs of error, *certiorari* and *mandamus*, on special verdicts and cases stated, on motions for new trials and in arrest of judgment, shall be argued only by the Counsellors of this Court.—And the Counsellors of this Court may also practice as Attornies.

XII.

Of the time of entry of actions.

No civil action shall be entered after the first day of the term, unless by consent of the adverse party, and by leave of the Court; or unless the Court shall allow the same upon proof that the entry was prevented by inevitable accident, or other sufficient causes.

XIII.

Of the entry of the Attorney's name on the Clerk's docket, and of a party's changing his Attorney.

Upon the entry of every action or appeal, the name of the plaintiff's or appellant's Attorney shall be entered at the same

time on the Clerk's docket, and in default thereof, a non suit may be entered; and within two days after the entry of the action or appeal, the Attorney of the defendant or respondent shall cause his name to be entered on the same docket as such Attorney, and if it be not so entered, the defendant or respondent may be defaulted. And if either party shall change his Attorney, pending the suit, the name of the new Attorney shall be substituted on the docket for that of the former Attorney, and notice thereof given to the adverse party. And until such notice of the change of an Attorney, all notices given to or by the Attorney first appointed, shall be considered in all respects as notice to, or from his client, excepting only such cases, in which by law the notice is required to be given to the party personally: *Provided however*, that nothing in this rule contained, shall be construed to prevent either party in a suit, from appearing for himself, in the manner provided by law; and in such case the party so appearing shall be subject to all the same rules that are or may be provided for Attornies in like cases, so far as the same are applicable.

XIV.

Of amendments in matters of form.

Amendments in matters of form will be allowed as of course, on motion; but if the defect or want of form be shewn as cause of demurrer, the Court will impose terms on the party amending.

XV.

Of amendments in matters of substance.

Amendments in matters of substance may be made, in the discretion of the Court, on payment of costs, or on such other terms as the Court shall impose; but if applied for after joinder of an issue of fact or law, the Court will in their discretion, refuse the application, or grant it upon special terms; and when either party amends, the other party shall be entitled also to amend, if his case requires it. But no new count or amendment of a declaration will be allowed, unless it be consistent with the original declaration, and for the same cause of action.

XVI.

Of pleading double.

In all actions originally brought in this Court, leave to plead double will be granted of course, on application to the Clerk,

and entered on his docket at any time within two days after the action is entered, the day of the entry to be reckoned as one day: and if any one or more of the pleas so filed shall appear to the Court unnecessary or improper, the same will be struck out, at the motion of the plaintiff or demandant: and no leave to plead double will be granted after the expiration of the said two days, unless by consent of the plaintiff or demandant, or unless the Court shall allow the same upon proof that the party was prevented from making the motion by inevitable accident, or other sufficient cause.

XVII.

Of leave reserved to plead anew.

In all actions of replevin, trespass *quare clausum fregit*, ejectment or real actions, brought by appeal from the Court of Common Pleas, wherein the defendant or tenant may have reserved leave to plead anew, he shall file such new plea within two days after the action is entered, the day of the entry to be reckoned as one, unless it shall appear to the Court that the matter of the plea, or the circumstances of the case are such, as to require a longer time; in which case the Court will, on motion, assign a time for the filing of the plea: and if such plea be not filed within the time prescribed by this rule or to be assigned by the Court as aforesaid, the defendant or tenant will be considered as electing to abide by his plea, pleaded in the Court of Common Pleas.

XVIII.

Of pleas in abatement.

Pleas in abatement, or to the jurisdiction in actions originally brought in this Court, must be filed within two days after the entry of the action, the day of the entry to be reckoned as one, and if consisting of matter of fact, not apparent on the face of the record, shall be verified by affidavit.

XIX.

Of writs of error and *certiorari*.

In every writ of error, the plaintiff may file the assignment of errors in the Clerk's office before taking out the *scire facias*, in which case the same shall be inserted in the *scire facias*, and the defendant shall be held to plead thereto within the first two days of the return term, unless the Court shall by special order

enlarge the time. And writs of error and *certiorari* to correct proceedings in the Court of Common Pleas, may be directed to, and returned by either of the Justices of said Court.

XX.

Of obtaining a rule to plead.

Either party may obtain a rule on the other to plead, reply, rejoin, &c. within a given time, to be prescribed by the Court; and if the party so required, neglect to file his pleadings at the time, all his prior pleadings shall be struck out, and judgment entered of non suit or default, as the case may require, unless the Court, for good cause shewn, shall enlarge the rule.

XXI.

Of the time of filing amendments or pleadings.

When an action shall be continued, with leave to amend the declaration or pleadings, or for the purpose of making a special plea, replication, &c. if no time be expressly assigned for filing such amendment or pleadings, the same shall be filed in the Clerk's office, by the middle of the vacation, after the term when the order is made; and in such case the adverse party shall file his plea to the amended declaration, or his answer to the plea, replication, &c. as the case may be, by the first day of the term to which the action is continued as aforesaid. And if either party neglect to comply with this rule, all his prior pleadings shall be struck out, and judgment entered of non suit or default, as the case may require; unless the Court, for good cause shewn, shall allow further time for filing such amendment or other pleadings.

XXII.

Of continuances.

Causes standing for trial will not be allowed to be continued, even by consent of parties, unless for good cause shewn; and a continuance granted at the motion of either party shall be allowed upon such terms as to the Court shall seem just and equitable, when the Court think it reasonable to impose terms.

XXIII.

Of the time of making motions for continuances.

All motions for the continuance of any civil action shall be made at the opening of the Court in the morning of the second day of the term unless the cause shall come in course to be

disposed of in the order of the docket on the first day, and in case the entry of the action were not made by the time aforesaid, such motion shall be made on the day of the entry. *Provided however*, where the cause or ground of the motion shall first exist or become known to the party after the time prescribed by this rule, the motion shall be made as soon afterwards, as it can be made, according to the course of the Court; and whenever an action is continued on such motion, after the time above prescribed, the party making the motion shall not be allowed any costs for his travel and attendance for that term, unless the continuance is ordered on account of some fault or misconduct in the adverse party.

XXIV.

Of affidavits to support a motion for continuance.

No motion for a continuance, grounded on the want of material testimony, will be sustained, unless supported by an affidavit, which shall state the name of the witness, if known, whose testimony is wanted, the particular facts he is expected to prove, with the grounds of such expectation; and the endeavors and means, that have been used to procure his attendance or deposition, to the end that the Court may judge whether due diligence has been used for that purpose. And no counter affidavit shall be admitted to contradict the statement of what the absent witness is expected to prove; but any of the other facts stated in such affidavit may be disproved by the party objecting to the continuance. And no action shall be continued on such motion, if the adverse party will admit that the absent witness would, if present, testify to the facts stated in the affidavit, and will agree that the same shall be received and considered as evidence, on the trial, in like manner as if the witness were present and had testified thereto; and such agreement shall be made in writing at the foot of the affidavit, and signed by the party, or his Counsel or Attorney. And the same rule shall apply, *mutatis mutandis*, when the motion is grounded on the want of any material document, paper, or other evidence that might be used on the trial.

XXV.

Of the evidence to support any motion grounded on facts.

The Court will not hear any motion grounded on facts, unless the facts are verified by affidavit or are apparent from the

record, or from the papers on file in the case, or are agreed and stated in writing signed by the parties or their Attornies, and the same rule will be applied as to all facts relied on, in opposing any motion.

XXVI.

Of motions in arrest of judgment and for new trials.

Motions in arrest of judgment and for new trials must be made in writing, and assign the reasons thereof, and must be filed within two days after the verdict, unless the Court shall for good cause by special order enlarge the time: *Provided nevertheless*, motions for new trials founded on any supposed misdirection to the jury in any point of law, or the admission or rejection of testimony by the Judge who presided at the trial, may be made at any time before judgment is rendered on the verdict.

XXVII.

Of the time of making motions, and presenting petitions, &c.

All motions, petitions, reports of referees, applications for commissions to take depositions, surveys, or for views by the jury in causes touching the realty, and such like applications, shall be made and presented at the opening of the Court on the morning of the second day of the term: *Provided*, that when the cause or ground of such motion or other application shall first exist or become known to the party, after the time in this rule appointed for making the same, it may be made, (if the cause require it,) at any subsequent time. But motions or applications, such as from their nature require no notice to any adverse party previous to granting the same, may be made at the opening of the Court on the morning of each day.

XXVIII.

Of notice previous to motions.

When any motion is made in relation to any civil action at the times specifically assigned for such motions by the rules of this Court, no previous notice of such motion need be given to the adverse party. But the Court, if notice have not been given, will allow time to oppose the motion if the case shall require it. Where however for any special cause, such motion may by the proviso of any rule be made at a subsequent time, it will not be heard, unless seasonable notice thereof shall have been given to the adverse party.

XXIX.

Of depositions taken in term time.

Depositions may be taken for the causes, and in the manner by law prescribed in term time, as well as in vacation: *Provided*, they be taken in the town in which the Court is holden, and at an hour when the Court is not actually in session. But neither party shall be required during term time to attend the taking of a deposition, at any other time or place than is above provided, unless the Court, upon good cause shewn, shall specially order the deposition to be taken.

XXX.

Of commissions to take depositions.

The Court will grant commissions to take the depositions of witnesses, and will appoint the commissioners; and in vacation a commission may be issued upon application to either of the Judges of the Court, in the same manner as may be granted in term time; or either party upon application to the Clerk, may obtain a like commission; but in the latter case, unless the parties shall agree on the person to whom the commission shall issue, the commission shall be directed "to any Judge of any Court of Record." And in each case the evidence by the testimony of witnesses shall be taken upon interrogatories to be filed in the Clerk's office by the party applying for the commission, and upon such cross interrogatories as shall be filed by the adverse party, a copy of the whole of which interrogatories shall be annexed to the commission. And no such commission shall issue but upon interrogatories to be filed as aforesaid by the party applying, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross interrogatories within fourteen days from the service of such notice. And no deposition taken out of the State without such commission shall be admitted in evidence unless the same were taken by some Justice of the Peace, Notary Public or other officer, legally empowered to take depositions or affidavits in the State or County in which the deposition is taken, nor unless the adverse party was present, or was duly and seasonably notified but unreasonably neglected to attend. And in all cases of depositions taken out of the State without such commission, it shall be incumbent on the party producing such deposition to prove that it was taken and certified by a person legally empowered as aforesaid.

XXXI.

Of the filing of depositions.

All depositions shall be opened and filed with the Clerk, at the term for which they are taken; and if the action in which they are to be used shall be continued, such deposition shall remain on the files, and be open to all objections when offered on the trial, as at the term at which they were opened; and if not so left on the files they shall not be used by the party who originally produced them: but the party producing a deposition may, if he see fit, withdraw it, during the same term in which it is originally filed, in which case it shall not be used by either party.

And all depositions taken to be used in any action in the Court of Common Pleas, and there opened and filed, in case such action be appealed, shall at the same term, when the action shall be entered in this Court, be filed with the Clerk and remain on the files, subject to the same regulations which are above mentioned in relation to depositions taken for and to be used in this Court.

XXXII.

Of bringing money into Court.

In all actions wherein the defendant on leave first obtained for that purpose, shall bring money into Court, unless the plaintiff will accept the same with costs in discharge of the suit, the sum thus paid into Court on account of the debt or damage claimed by the plaintiff shall be considered as paid before action brought, *and thereupon as struck out of the declaration.* And the action shall proceed for the residue of the demand in the same manner as if it had been originally commenced for such residue only. But if upon the trial the verdict shall be for the defendant, the plaintiff shall not be liable for any costs incurred before the bringing of the money into Court, but only for the costs incurred subsequent to that time

XXXIII.

Of the denial of signatures.

In actions on promissory notes, orders, or bills of exchange, the counsel of the defendant will not be permitted to deny at the trial the genuineness of the defendant's signature, unless he shall have been specially instructed by his client that the signa-

ture is not genuine, or unless the defendant, being present in Court, shall deny the signature to be his, or to have been placed there by his authority.

XXXIV.

Of the use of copies of deeds.

In all actions touching the realty, office copies of deeds pertinent to the issue from the registry of deeds, may be read in evidence without proof of their execution, where the party offering such office copy in evidence is not a party to the deed, nor claims as heir, nor justifies as servant of the grantee or his heirs.

XXXV.

Of notice to produce written evidence.

Where written evidence is in the hands of the adverse party, no evidence of its contents will be admitted unless *previous notice* to produce it on trial shall have been given to such adverse party or his attorney, nor will counsel be permitted to comment upon a refusal to produce such evidence, without first proving such notice.

XXXVI.

Of the order in which civil actions are to be tried.

All civil actions shall be heard and tried in the order in which they stand on the docket, unless the Court shall, upon good cause shewn, postpone any trial to a time later than that in which it would come in course: *Provided however*, that any one action may with the consent of all parties concerned and with the leave of the Court, be substituted for another action standing earlier on the docket; but in such case the said action which stood earliest, shall take the place of the one which is substituted for it, and shall be tried when the latter would have come on in course, if no such change had taken place. And *provided also*, this rule shall not be construed to extend to questions and issues of law.

XXXVII.

Of copies in causes for argument on questions of law.

No cause standing for argument on a question or issue in law will be heard by the Court, until the parties shall have furnished each of the Judges with a copy or abstract of the case, fairly and legibly written, containing the substance of all the mate-

rial pleadings, facts and documents, on which the parties rely, and each party shall also note on the copies or abstracts, the points of law intended to be presented at the argument.

XXXVIII.

By whom copies are to be furnished.

In all cases of writs of error or *certiorari*, issues of law on pleadings, facts agreed and stated by the parties, and trustee processes, it shall be the duty of the plaintiff or complainant to furnish the papers or abstracts for the Court; and in all other cases the same shall be done by the party who moves for a new trial, or who holds the affirmative upon the question to be argued; but this shall not prevent the adverse party from furnishing the papers if neglected by him whose duty it is to furnish them; and where the party whose duty it is shall neglect to furnish the papers as by the rules of this Court is required, he shall not have any costs that term, and shall further be liable to be nonsuited, defaulted or to have judgment against him as upon a *nol. pros.* or discontinuance, or such other judgment as the case may require.

XXXIX.

Of the payment of jury and Clerk's fees.

No cause shall be open for trial by the jury, until the fees due in that behalf are paid to the Clerk; all other fees due to the Clerk shall be paid as soon as they are by law payable, and if the Clerk shall fail to demand and receive any such fees when payable as aforesaid, he shall be chargeable with all those, for which he is by law required to account to others, in like manner, as if he had actually received the same.

XL.

Of costs in actions under reference.

When an action is continued by the Court for advisement, or under reference by a rule of Court, costs shall be allowed to the party prevailing, for only one day's attendance and his travel, at every intermediate term.

XLI.

Of the taxation of costs.

Bills of costs shall be taxed by the Clerk, upon a bill to be made out by the party entitled to them, if he shall present such

bill, and otherwise upon a view of the proceedings and files appearing in the Clerk's office; and no costs shall be taxed without notice to the adverse party to be present, provided he shall have given notice to the Clerk in writing, or by causing it to be entered on the Clerk's docket, of his desire to be present at the taxation thereof; and either party dissatisfied with the taxation by the Clerk, may appeal to the Court, or to a Judge in vacation.

XLII.

Of the day of rendition of judgment.

The Clerk shall make a memorandum on his docket, of the day on which any judgment is awarded; and if no special award of judgment is made, it shall be entered as of the last day of the term.

XLIII.

Of the custody of papers by the Clerk.

The Clerk shall be answerable for all records and papers filed in Court, or in his office; and they shall not be lent by him, or taken from his custody, unless by special order of Court; but the parties may at all times have copies. Provided only that depositions may be withdrawn by the party producing them, at the same term at which they are opened; and whilst remaining on the files, they shall be open to the inspection of either party, at all seasonable hours.

XLIV.

Of the filing of papers, and recording of judgments.

In order to enable the Clerks to make up and complete their records within the time prescribed by law, it shall be the duty of the prevailing party in every suit forthwith to file with the Clerk, all papers and documents necessary to enable him to make up and enter the judgment, and to complete the record of the case; and if the same are not so filed within three months after judgment shall have been ordered, the Clerk shall make a memorandum of the fact on the record; and the judgment shall not be afterwards recorded, unless upon a petition to the Court at a subsequent term, and after notice to the adverse party, the Court shall order it to be recorded. And no execution shall issue until the papers are filed as aforesaid. And when a judgment shall be recorded upon such petition, the Clerk shall

enter the same, together with the order of the Court for recording it among the records of the term in which the order is passed, with apt references in the index and book of records of the term in which the judgment was awarded, so that the same may be readily found; and the judgment when so recorded, shall be, and be considered in all respects as a judgment of the term in which it was originally awarded. And the party delinquent in such case shall pay to the Clerk the costs of the recording judgment anew, and also the costs on the petition, and the costs of the adverse party, if he shall attend to answer thereto.

XLV.

Of writs of *venire facias*.

Every *venire facias* shall be made returnable into the Clerk's office by ten of the clock in the forenoon of the *first day of the term*, and the jurors shall be required to attend at that time; excepting only when in case of a deficiency of jurors, the Court shall order an additional *venire facias* in term time, in which case the same shall be made returnable forthwith, or at such time as the Court shall order.

XLVI.

Of writs of *capias* upon indictments, and *scire facias* upon recognizances.

On indictments found by the Grand Jury, the Clerk shall *ex officio*, issue a *capias* without delay; and when default is made by any party bound by recognizance in any criminal proceeding, the Clerk shall in like manner issue a *scire facias* thereon, returnable to the next term, unless the Court shall make a special order to the contrary.

A TABLE

OF THE PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.

SURETY.
See BAIL 1, 3.

TAXES.
1. If land be sold for the non-payment of divers taxes, one of which is illegal, and the rest legal, the sale is void. *Elwell v. Shaw.* 339

TENANTS IN COMMON.
1. A tenant in common who has ousted his co-tenant, is intitled, in a writ of entry against him, to have a moiety of the increased value of the premises by reason of his improvements ascertained by the jury, under the Statutes of *Massachusetts* of 1807, *chap.* 75. and 1819. *chap.* 269. [*Revised Stat. ch.* 47.] *Bracket v. Norcross,* 88
2. Of the evidence of such ouster. *ib.*

TENDER.
1. If there be a promise to deliver specific articles at a day certain, and no place be mentioned in the note, the creditor has the right of appointing the place. *Aldrich v. Albee.* 120
2. A plea of tender of specific articles must state that they were kept ready until the uttermost convenient time of the day of payment. *ib.*
3. If a promise be in the alternative, to deliver one article at one place, *or* another at another place, at the election of the debtor, it seems he ought to give the creditor seasonable notice of his election. *ib.*

TOWN OFFICERS.
See COLLECTORS OF TAXES 1, 2, 3.
WAYS 1.

TRESPASS.
1. The owner of land, having, for valuable consideration, given license to another by parol to build a bridge on his land, an action of trespass *de bonis asportatis* will lie against him for taking away the bridge without the consent of him who erected it. *Ricker v. Kelly.* 117

USURY.
1. If money be loaned on a usurious contract, and on maturity of the note it be partially paid, and a new note, similar to the former, be given for the balance, such new note is void for the usury. *Warren v. Crabtree.* 167
2. And if the borrower be not a party to the usurious note, being neither maker nor indorser, but the security is such, both as to parties and time of payment, as had been previously agreed between the borrower and lender; the indorser, in an action against him, may shew the usury in bar of the action. *ib.*

VERDICT.
After a verdict every promise alleged in the declaration, is taken to have been an express promise. *Stimpson v. Gilchrist.* 202

WAYS.
1. The Selectmen of a town have no authority by law to lay out a public landing, or place for the deposit of lumber. *Bethum v. Turner.* 109
2. The Court of Sessions may lawfully order the location of a county road, to be made at the expense of the petitioners.—SEMBLE. *Jewett v. Somerset.* 125

WILL.
See DOWER 5.

WITNESS.
1. A Shipmaster having received a trunk of goods on board his vessel, to be carried to another port which on the passage he broke open and rifled of its contents; the owner of the goods, proving the delivery of the trunk and its violation, was admitted a witness, in an action for the goods against the shipmaster, to testify to the particular contents of the trunk, there being no other evidence of the fact to be obtained. *Herman v. Drinkwater.* 27