REPORTS

OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE.

BY SIMON GREENLEAF,
COUNSELLOR AT LAW.

VOL. II.

CONTAINING THE CASES OF THE YEARS 1822 AND 1823.

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1824.

DISTRICT OF MAINE—ss.

BE IT REMEMBERED, That on this twenty-eighth day of September, in the year of our Lord one thousand eight hundred and twenty-four, and [L. S.] the forty-ninth year of the Independence of the United States of America, SIMON GREENLEAF, Esquire, 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:

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J. MUSSEY, *Clerk of the District Court of Maine.*

A true copy as of record. Attest: J. MUSSEY, *Clerk D. C. Maine.*

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, ESQUIRE.

ADVERTISEMENT.

In this Volume the Revised Statutes, published in two volumes in the summer of 1821 by order of the Legislature, are cited as the Statutes of that year, by the chapter as numbered in the bound volumes, though some of them were enacted in *June* 1820, and are differently numbered in the pamphlet first published.

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CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

YORK.

APRIL TERM,

1822.

Note. WESTON J. was not present during this term.

THE INHABITANTS OF YORK *v.* THE INHABITANTS OF PENOBSCOT.

If a notice to a town chargeable with the support of paupers, be defective in not being signed by the overseers in their official capacity, or in not describing the paupers with sufficient precision; yet if it be understood and answered without any objections on account of its insufficiency, such objections are thereby waived.

ASSUMPSIT to recover the expenses incurred by the plaintiffs in the support of *Betsey Thomas*, and her two children.

It appeared that the overseers of the poor of *York* addressed a letter *June* 24, 1816, signed by *Edward Simpson* as one of the overseers and by order of the board, to the defendants, in which they stated that *Betsey Thomas*, an inhabitant of *Penobscot*, was supported as a pauper in *York*, and requested the defendants to pay her past expenses and remove her. In this letter they say they had previously written to the defendants on the same subject, but had received no answer.

A second letter addressed to the overseers of the poor of *Penobscot*, *December* 30, 1816, was written in the language of the overseers of *York*, and contained the following passage;— "We have written you twice that *Betsey Thomas and her two* "*children*, inhabitants of your town, is chargeable in this town, "and have not received any answer from you. We hereby "notify you that the said *Betsey Thomas* is still in this town,

"and is chargeable." But this letter was signed only with the name of *Edward Simpson*, without any addition of office, or indication of the character in which he signed it. To this the overseers of the poor of *Penobscot* replied by letter addressed to the overseers of the poor of *York*, *January* 8, 1817, acknowledging the receipt of their letter of *December* 30,—denying the receipt of any information relative to "*Betsey Thomas* and *two children*,"—and referring to a letter which mentioned the *mother alone*, as the only one they had received from the plaintiffs;—the letter thus alluded to being that of *June* 24, as appeared by a subsequent reference to some part of its contents. They also suggest a method of removing the mother *and children* to *Penobscot*, the latter of whom they express their intention to bind out to some good master, and request information of the amount of expenses for the support of the mother and children.

At the trial of the cause, the counsel for the defendants objected that here was no evidence of notice that the *children* were chargeable, but the Judge who presided at the trial overruled the objection; and a verdict was taken for the plaintiffs, subject to the opinion of the whole Court upon that question, and to stand or be amended accordingly.

Wallingford, for the defendants.

The only letter written in an official character, is that of *June* 24. The other is merely the letter of a private individual, not assuming to act in his public capacity, and therefore not to be regarded in the cause.

The official letter mentioning *Betsey Thomas* only, there has been no notice as to the children, and the verdict therefore is erroneous to the amount furnished for *their* support.

Lyman, for the plaintiffs.

1. The notice of *June* 24, is substantially sufficient to include the children, they being young, and dependent for nurture upon the mother. It cannot be necessary ever to name the children in these cases, where they are of too tender an age to be removed from her immediate care.

2. The letter of *December* 30, is manifestly official, for it is couched in the language of the overseers, and is signed by one

of them; and it is not material in what part of the letter his character or authority is expressed. Here it is apparent from its whole tenor.

3. But the answer of the defendants, in which they do not contest their liability to support the children, and propose arrangements for their removal and the payment of their expenses, is a waiver of any objection which might otherwise legally exist, either to the form of the notice, or to its subject matter. *Westminster v. Barnardston*, 8 *Mass.* 104. *Bridgewater v. Dartmouth*, 4 *Mass.* 273.

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

Two objections are urged against the instructions of the Judge to the jury.

1. The letter of *December* 30, 1816, is not signed by *Simpson* as one of the overseers of the poor of the town of *York*, nor in their behalf by their order.

2. No legal notice was given to the overseers of *Penobscot* that the *children* of *Betsey Thomas* were chargeable to *York*.

As to the *first* point.—It appears that prior to *June* 1816, a correspondence had existed between the overseers of the two towns relating to *Betsey Thomas* and one *Hannah Bridges*.—On the part of *York*, *Simpson* was the correspondent, expressly acting for the board of overseers.—He so signed the letter of *June* 4th, 1816.—It is true his letter of *December* 30th, appears, by what is *said to be* a copy of that letter, to have been signed merely with his name, without the addition of his office, and he not stating himself as signing by order in behalf of the board. Still he speaks in the *plural* number, in the language of overseers in regard to their official duties, and upon the subject of his former letter, which was signed expressly by order of the overseers. The overseers of *Penobscot*, well knowing the character in which *Simpson* was acting, considered it as an *official* letter, and on the 8th of *January* following answered it *as such*: commencing with the address "Gentlemen" and directing their answer to the overseers of *York*.—These facts afford strong reason to suppose, that the original letter in the possession of the defendants and which they have not thought prop-

er to produce, may have been, signed by *Simpson* as suggested by the plaintiffs. But however this may be, after proceeding in this manner, it is too late for the defendants to make this objection with success.—The intention of the law seems in this particular to have been complied with.

As to the *second* point. It is clear that the notice given in the letter of *June* 4, 1816, is insufficient as it regards the *children* of *Betsey Thomas*:—no allusion being made to them in that letter.—See the case of *Bangor v. Deer-Isle*, 1 *Greenl.* 329.—It appears that no notice was ever received by the overseers of *Penobscot* respecting the children, except what is contained in the letter of *December* 30; and this is rather loose and uncertain in its language; sometimes speaking of *Betsey Thomas* as chargeable,—then requesting the removal of *Betsey Thomas and her children*, then again speaking of expense incurred in supporting *her*,—not mentioning the children.

Notwithstanding all this, the overseers of *Penobscot* seem to have perfectly comprehended the meaning of the letter and to have governed themselves accordingly in their answer of *January* 8th.—In this letter they deny having received any notice respecting the children, except what is contained in the one of *December* 30; and then they request the removal of *Betsey Thomas and children* to *Penobscot* by some convenient conveyance; and conclude by further requesting the amount of expense incurred by *York* in the support of *Betsey Thomas and children*, and express an opinion as to the best mode of disposing of the children in the service of some good master. Here we find an *acceptance* of the notice, instead of an *objection* against it on account of any informality or want of precision; and on *this ground*, we think the instructions of the presiding Judge to the jury were correct.—It is perfectly clear that *of itself*, and unconnected with the answer of *January* 8th, the notice must be considered as insufficient; and if no reply had been made by the overseers of *Penobscot*, or if such insufficiency had been objected to, the defect in this particular would be fatal to the action. But according to the cases of *Emden v. Augusta*, 12 *Mass.* 307. and *Shutesbury v. Oxford*, 16 *Mass.* 102, the conduct of the defendants' officers, has cured the defect in the notice.—We must consider them by their answer of *Janu-*

ary 8th, as waiving all objections to form and placing the claim of the plaintiffs on its merits; or else of practising duplicity on purpose to deceive and injure; which we are not disposed to do.

We cannot suppose that the jury allowed any of the charges for expenses incurred more than two years before the commencement of the action, because they were barred by law—and as more than two years had elapsed after the notice of the 30th of *December* 1816, and prior to the commencement of this suit, we must presume the jury returned their verdict for the amount which they thought proper to allow for expenses incurred during the *two years* next before the action was commenced. —In this view of the subject, we perceive no ground for a new trial; and accordingly there must be

Judgment on the verdict.

THE INHABITANTS OF SANFORD *v.* EMERY.

In an action upon *Stat.* 1793. *ch.* 59, *sec.* 15. [*Revised Stat. ch.* 122. *sec.* 22.] for bringing into and leaving a pauper in a town where he has not a legal settlement, the *intent* of the defendant is a fact to be found by the jury.

And it is the *unlawfulness of the intention* which constitutes the offence against the statute.

Where, upon trial of a cause, there is no proof except what is offered by the plaintiff, and this is insufficient to warrant a verdict for him, the course is to direct a nonsuit.

THIS was an action of *debt*, brought to recover the penalty given by *Stat.* 1793, *ch.* 59, for bringing and leaving a pauper in the town of *Sanford*, in which she had not a legal settlement, the defendant well knowing her to be poor and indigent.

At the trial the plaintiffs proved by a letter of the defendant that he knew the pauper to be such, and that under the belief that she had a legal settlement in *Sanford*, he had brought and left her at the dwelling house of one *Allen* in that town. They also proved that she had resided in the family of *Allen* for several weeks previous to her departure from *Sanford*;—that she had been wandering about the country for about two weeks when

the defendant returned her;—and that when he brought her back he was told that she was not supported there by the town of *Sanford*, but that he might leave her with the family of *Allen*, who was willing to take charge of her. She remained in his family a few days only; and the plaintiffs offered to prove that she immediately afterwards became chargeable to them, and so continued to the time of trial. *Allen* had made no charge to *Sanford* for her support, and having known her many years, was willing to have kept her at his own expense.

Upon these facts being proved by the plaintiffs, the Judge directed a nonsuit, on the ground that the defendant having been informed that *Allen's* house was her home, and having left her there with his consent, the penalty was not incurred; and the question came before the whole Court on the plaintiffs' motion to set the nonsuit aside.

Burleigh, for the plaintiffs.

1. The language of the Statute is explicit, that if any person shall *bring in* a pauper, &c. he shall incur the forfeiture. Its origin is found in the provision of the statute of *Elizabeth*, that each parish shall provide for the paupers *found in it.*

2. But if the *intent* of the defendant is to govern the case, that should have been left to the jury, it being a fact of which they are the sole judges. *Aylwyn v. Ulmer*, 12 *Mass.* 24. 6 *Bac. Abr. Trial, D.* Or, if the Judge was correct in assuming the determination of this fact, yet the evidence shews that the defendant well knew the pauper to be such, and brought her to *Allen's* with the avowed expectation that she would there be supported at the charge of *Sanford.*

C. Green, for the defendant.

The mischief intended to be remedied by the statute is the transferring of paupers from one town with the deliberate and improper *intention* to make them chargeable to another;—not to punish those who might act from motives of humanity, or a sense of justice and duty however mistaken,—but those who, from interested views, might attempt to impose on other towns burdens which the law had not created. *Greenfield v. Cushman*, 16 *Mass.* 393.

Now here the intent was manifestly to return the woman to her own home,—not to impose her as a pauper on a town to which she did not belong. It was an act of kindness and mercy, and not of relentless avarice and corruption. And this intention was proved by the plaintiffs themselves.

Whether the intent is a fact for the jury to find or not, it is not material in this case to inquire. The plaintiffs were nonsuited, not because upon weighing the evidence the case was with the defendant; but because they utterly failed to make out, even *primâ facia*, a case for themselves.

MELLEN C. J. delivered the opinion of the Court as follows, at the succeeding term in *Cumberland*.

The question is whether, upon the facts reported in this case, the defendant is to be considered as having incurred the penalty demanded.

In cases of this nature, where there is contradictory testimony as to the motives by which a defendant is actuated, it is proper that the whole should be submitted to the consideration of the jury. But where there is no proof, except what is offered by the plaintiffs, and *that* is insufficient to justify a verdict in his favor, and in fact furnishes a legal defence, it is always proper to direct a nonsuit.

On examining the facts before us, we think the action cannot be maintained. For although the 22d section of the act of 1821, *ch.* 122, (being a revision of the statute of *Massachusetts*, on which this action is founded,) is silent as to the *motive* with which a person may carry a pauper into a town in which he has not a legal settlement and there leave him; still the *unlawfulness of the intention* is the essence of the *act* and gives it the character of an offence against the statute.—On this principle it has often been decided in actions brought to recover a penalty for sawing or disposing of mill logs belonging to the plaintiff; that the penalty was not incurred, if the defendant took and carried away the logs, *really believing them to be his own*. Such belief negatived the idea of fraud, or any criminality of intention.—This principle is in accordance with the decision in the case of *Greenfield v. Cushman*, 16 *Mass.* 393.—In that case the Court sanctioned the instructions which the presiding Judge had giv-

en to the jury.—These instructions were "that it was incum-"bent on the plaintiffs to prove that the defendant knew that "*Rowland* was poor and indigent; and that he carried or caus-"ed him to be carried to *Greenfield with intent to impose a* "*charge upon that town.*"—In the case before us it appears from the plaintiffs' own testimony (and there was no other,) that the defendant, under a belief that the pauper had a legal settlement in *Sanford*, carried her to and left her at the house of one *Allen* in that town by his express permission.—It is true he was told by *Allen*, before he left the pauper at his house, that he had been misinformed as to her having been boarded *at his house* by the town of *Sanford;* still it further appears that *Allen* never made any charge against *Sanford*, or any other town, for her support in his family, prior to that time; and he declared he never intended to make any charge on that account.—This proof negatives the idea of an intention to impose a charge upon *Sanford*; and it also shews the irrelevancy of the proof offered, and rejected by the Court, to shew that she *afterwards* became chargeable.

For these reasons we are satisfied that the nonsuit was proper and ought to be confirmed.

Motion to set aside the nonsuit overruled—and judgment entered for the defendant.

MAXWELL *v.* PIKE.

Where a town clerk inadvertently gave a defendant a false certificate, attested as a copy of record, in order to support his plea of infancy; by reason of which the plaintiff was obliged to obtain a continuance of his cause to the next term, prior to which the debtor died;—it was holden that the town clerk was liable to pay the plaintiff the damages occasioned by the delay and continuance of the action.

Proof of the issuing of a commission of insolvency is the only competent evidence of the insolvency of a deceased defendant, so as to dissolve an attachment of his estate.

THIS was an action of *trespass on the case*, in which the plaintiff declared that on the 30th day of *June* 1818, one *Humphrey Scammon* was indebted to him for goods sold;—that the debt

being unpaid, he sued out a writ of attachment *October* 26, 1818, and caused sufficient personal estate to be attached to satisfy his demand;—that at *April* term 1819, the cause came on to be tried in the Circuit Court of Common Pleas, and the plaintiff proved the sale and delivery of the goods to *Scammon*, and his promise to pay;—that it became important to shew the time of the birth of *Scammon*;—and that the defendant being town clerk of the town of *Saco*, falsely and fraudulently gave to said *Scammon* a false certificate under his hand official, stating that said *Scammon* was born *October* 30, 1797, and purporting to be a true copy of the records of the town of *Saco*; whereas in truth said *Scammon* was born *October* 20, 1797, and so was the town record, then in custody of the defendant;—that *Scammon's* counsel offered said false certificate in evidence to the jury, whereupon the plaintiff was obliged to move for and did obtain a continuance of his action to the next term of said Court in *September* following;—but that in the vacation, viz. *August* 25, 1819, *Scammon* died totally insolvent, whereby the plaintiff's attachment was dissolved and his debt lost.

At the trial of this action, upon the general issue, the plaintiff proved his debt against *Scammon*, and his suit, attachment, trial upon the plea of infancy pleaded by *Scammon*, the production of the false certificate to support that plea, its falsehood, and its materiality to the issue, the true record being such as would have proved him of full age at the period in question;—and he further proved the continuance of the action from *April* to *September* term; that in the interim the debtor went on a voyage to the West Indies, where he died sometime in *August*;—and that the action was still pending in the same Court, for the purpose of summoning in an administrator to defend it, but that no administration had yet been granted upon his estate.

It further appeared that *Scammon* applied to the defendant for the certificate, while he was engaged in his ordinary employment at his shop; which not being willing to leave to go to his house and examine the record, he certified hastily, according as *Scammon* affirmed the truth to be.

The plaintiff then offered parol testimony that *Scammon*, when he died, was poor and left no property; which was objected to as incompetent, but was admitted by the Judge for the purposes

of this trial, subject to the opinion of the whole Court; and a verdict was thereupon returned, by consent of parties, for the plaintiff, for the entire amount of his debt and costs against *Scammon*, and to be amended or set aside by the whole Court, according to their opinion upon the facts reported as above by the Judge who presided at the trial.

Shepley, for the defendant.

1. Parol testimony was incompetent to prove the fact of *Scammon's* insolvency, the law having plain reference to evidence of an higher nature. The attachment of his goods is not dissolved but upon his death, administration granted on his estate, a representation made to the Judge of Probate that the estate was insolvent, and a *commission* of insolvency *duly issued*. This last is an indispensable requisite, and is matter of which *the record is the only evidence*.

2. No commission of insolvency having issued, the plaintiff's attachment is yet in full force on the goods of the debtor, and the debt is abundantly secure. Of course the plaintiff has sustained no damage. The *gravamen* is the death of *Scammon*, not the misconduct of the defendant. It is as if the legislature, pending the action, had passed a law dissolving all attachments, and directing a distribution *pro ratâ* among creditors. There the plaintiff would have lost his debt by the operation of a public law;—here, by the act of God.

3. But if the loss were the result of any act of the defendant in combination with other causes, yet it is a result too remote to bind him. He is answerable only for the natural and necessary, the probable and direct consequences of his act, which the death of *Scammon* surely was not. *Thurston v. Hancock*, 12 *Mass.* 229.

Emery, for the plaintiff.

[He was about to argue upon the general questions presented in the case, but was directed by the Court to confine his remarks to the question of damages alone.]

If the plaintiff shews that he is *exposed* to damage in consequence of the defendant's misconduct, the defendant must be answerable for its amount, unless he can shew that the danger

or liability has since been removed. *Sheriffs of Norwich v. Bradshaw*, *Cro. El.* 53. *Bird v. Randall*, 3 *Burr.* 1345.

And it is sufficient if the loss proceed from the act of the defendant. His penitence, his explanation, and his upright intent, cannot avail him, unless they can be beneficial to the party injured, which in this case they cannot. He gave *Scammon* a false certificate, which enabled him to do mischief; when his duty as town clerk required him to certify the truth at his peril.—3 *East.* 599. *Ogle v. Barnes*, 8 *D. & E.* 188. *Stat.* 1795, *ch.* 41, *sec.* 1. *Lincoln v. Hapgood*, 11 *Mass.* 350.

The case of *Thurston v. Hancock*, shews that full damages are recoverable whenever the plaintiff is not equally in fault, as was the case there. *Thurston* did not recover full damages, because he placed his house too near the verge of his land, thus exposing it by his own act to the subsequent danger from excavation.

The cause being continued *nisi*, the opinion of the Court was delivered as follows, at the succeeding term in *Cumberland.*

MELLEN C. J. It is admitted that the certificate which the defendant signed as town clerk was false; though it appears he was not aware of it at the time; and that a fraud was practised upon him by *Scammon.* Still, as a certifying officer,he must be answerable to the party injured by such false certificate; whether he signed it fraudulently, or through negligence in not examining the records and ascertaining the *fact* which he ought to certify.—The plaintiff is therefore entitled to maintain the present action; and the only question is, what is the measure of damages.

The plaintiff contends that as he secured by attachment on the mesne process against *Scammon*, property sufficient to satisfy the demand against him; and as *Scammon* died several years since, and, according to the parol evidence in the case, *insolvent*, he is entitled in this action to judgment against the defendant for the amount of the full demand, which, it is alleged, is now lost to him. As no administration has ever been granted on *Scammon's* estate, we have no legal means of knowing whether his estate is insolvent.—Such insolvency cannot be proved by parol;—nor can any thing short of a commission of insolvency be competent proof of the dissolution of an attach-

ment on the mesne process against the deceased, according to the provision of the 32d *Sect.* of the act of 1821, *ch.* 60, and to the case of *Rockwood v. Allen, Exr.* 7 *Mass.* 254.

This principle being applied to the present case, it stands on the same ground as it would if *Scammon* were now living; and how could it then be contended that the plaintiff has lost the benefit of his attachment and the amount of his demand?—If the cause had been finally decided at the *April* term, and in consequence of the defendant's false certificate judgment had been rendered in favour of *Scammon*, the plaintiff in this action would be entitled to *full damages*—nothing less would amount to an indemnity.—But the only damage appearing is this, that in consequence of the *false certificate* produced at the trial in *April* 1818, the cause was continued to *September* term following, to obtain proof of its falsity.—This was a *delay* and a *damage* to the plaintiff; for which he is entitled to the damages incident to such delay.—If *Scammon* had not died *before September* term the cause would probably have been finally disposed of *at* that term.—But it has ever since been continued for want of an administrator on the estate to answer to the suit and defend it.—The defendant is not answerable for the death of *Scammon:* nor for the delay occasioned by *that* or any *other* cause, since existing.—On these principles the verdict is incorrect and must be altered so as to stand for the damages occasioned by the delay and one continuance of the action.—These damages are composed of counsel fees paid at the *April* term by the plaintiff; the travel and attendance of himself and his witnesses at that term, and the expense of obtaining them.—As soon as the counsel have ascertained the amount of these sums, let the verdict be reduced to that amount and judgment be entered thereon.

COOK *v.* BENNETT & L.

Practice.—Where the defendants in an action of trespass plead severally, and have several judgments in the Court below, from which the plaintiff appeals, but neglects to enter and prosecute his appeal in the Court above; each defendant is entitled, upon his separate complaint, to affirmation of his own judgment, independent of his co-defendant.

THIS was a complaint, for the affirmation of a judgment rendered in the Court of Common Pleas, in an action of trespass, in which *Cook*, and another defendant had pleaded severally, and had obtained several verdicts and judgments, from which the original plaintiffs *Bennett & al.* entered a general appeal to this Court; but now failing to enter and prosecute their appeal, the original defendants filed each his separate complaint, praying for the affirmation of his own judgment.

Goodenow, for the respondents, objected that the original defendants ought to have joined in one complaint:—

But THE COURT said that having pleaded severally, and obtained separate judgments for their respective costs in the Court below, each is entitled to the affirmation of his own judgment here, independent of his co-defendant.

GOWEN *v.* NOWELL.

Practice.—In a hearing in chancery upon a penal bond, it is the *plaintiff's* duty to shew how much is due in equity and good conscience.

IN debt on a bond with condition, and judgment rendered for the whole penalty, the defendant prayed to be heard in chancery, and that execution might not issue for more than was due in equity and good conscience, pursuant to the Statute. And a question being made, *whose* duty it was to prove what was the amount equitably due,—THE COURT, after some conversation, held the *onus probandi* to be on the plaintiff.

Emery, for the plaintiff.
Burleigh, for the defendant.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

CUMBERLAND.

MAY TERM,

1822.

HARPER & AL. *v.* LITTLE.

Where one, residing in a foreign country, authorized an agent here to sell lands and give deeds in his name, such power became *de facto* extinct at the decease of the principal;—and a deed made in his name by the attorney, after the death of the principal, but before intelligence of it arrived here, was holden to be merely void; and an action lies against the attorney to recover back the money paid.

Nor is the attorney estopped by such deed from claiming the land as heir, the deed being not his own, for want of apt words to bind him.

If one assume to act as attorney without authority and make a deed in another's name, which is void, the deed is not *therefore* the deed of the attorney, but the remedy against him is by a special action of the case.

THIS was a writ of entry upon the demandants' own seisin, and a disseisin by the tenant, and came before the Court upon a case stated by the parties as follows.

William Jackson late of *Balize* in the province of *Yucatan*, and father of all the demandants except *Harper*, who sued in right of his wife, being seised of the demanded premises, *March* 25, 1811, made a general letter of attorney under seal to *Harper*, authorizing him, among other things, to sell, transfer and convey any real estate of his constituent in *Portland*, and in his name to give deeds of the same.

Jackson afterwards died at *Balize*, *August* 18, 1813, during the war between the United States and Great Britain.

Harper, not having heard of the decease of *Jackson*, the intercourse with *Balize* being interrupted by the war, made a

deed *January* 8, 1814, in his capacity of attorney to *Jackson*, purporting to be a regular execution of the power, and to convey the demanded premises to the tenant, for the consideration of fifteen hundred dollars, which was paid by the tenant, but never paid over by *Harper* to the executors of *Jackson's* will.

Upon these facts the questions presented to the Court were—1st. Whether the deed from *Harper* to the tenant was effectual to pass the estate?—2d. If not, whether *Harper* was estopped by the deed from claiming any part of the demanded premises? If these questions should be resolved against the tenant, it was agreed that the cause should stand for trial, the tenant claiming the land under a sale for non-payment of direct taxes assessed by the United States.

Greenleaf, for the demandants.

As to the *first* question;—the ancient and general rule of law is, that a power of attorney expires with the life of the constituent. *Lit. sec.* 66. *Co. Lit.* 52. *b.* 181. *b.* 1 *Bac. Abr. Authority, E.* And the only exception is where the power is coupled with an interest, or where the instrument conveying the power, conveys also to the attorney a present or future interest in the land. *Bergen v. Bennett*, 1 *Caines' Cas.* 3. But the present case not being within the exception, must be governed by the general rule.

As to the *estoppel;*—if one act *merely as the attorney* of another, he does not prejudice himself. 1 *Com. Dig. Attorney, C.* 6. Here the power was apparently sufficient, and the deed regularly made in pursuance of it, and within its terms, and *purporting* to be the deed of the *constituent;*—but he being dead, the deed is merely *void.* It is not like the case of an attorney assuming to act, but not using apt words to bind his constituent; for there, not being the deed of the principal, it might be the deed of the attorney.

Further, estoppels must be *reciprocal*, and bind both parties. 4 *Com. Dig. Estoppel, B. Brereton v. Evans, Cro. El.* 700. 1 *D. & E.* 86. But here the deed being merely void, the tenant has a right of action against *Harper*, to recover back the whole purchase-money, and one is now pending for that purpose. If,

therefore, *Harper* is estopped, he loses both the land and the money.

Todd and *Longfellow*, for the tenant.

When an agent is once vested with competent authority to act for his principal, all such acts must be binding on the principal and his heirs, until notice of a revocation actually given to the agent. Unless the law, from an honest policy, does thus support agencies, there can be no faith in them. The inconveniencies to the commercial world would be extreme; and this too, in cases where they are most necessary. But the law is not open to this reproach. When a power is revoked by the death of the constituent who resided in a foreign country, the law will support all *bona fide* acts of the agent, until notice of such revocation by the act of God, as in cases of revocation by act of the party, or operation of law. *Co. Lit.* 55 *b.* 2 *Bl. Com.* 122. *Salt v. Field.* 5 *D. & E.* 215. *Chitty on bills* 27.

But all the heirs of the constituent ought to be estopped by the power authorizing the deed, where the death of the constituent intervenes between the execution of the power and the making of the deed, in the same manner and for the same reason that the principal would have been estopped if living. And this seems to be within the text law of estoppels. *Co. Lit.* 352. *a. Butler's note*, 342. *b.* They are also rebutted, either by the implied warranty arising from the act of their father in giving the power, or by an express warranty arising from the words in the power—"ratifying and confirming," &c. *Co. Lit.* 365. *b.*

The power and the deed may, for the purposes of justice, be considered as one conveyance, transferring the land from *Jackson* to *Harper* for the purpose of being conveyed to the tenant; and the deed from *Harper* may be considered as delivered by *Jackson* at the time he delivered the power. For the law will adopt and maintain a fiction to support justice, though not to overthrow it. *Co. Lit.* 342. *b. Butler's note*, 298. *Sullivan v. Montague*, *Doug.* 112.

Here also the tenant was induced by the act of *Jackson* to part with a full consideration for the premises demanded. The power, *quoad hoc*, is as irrevocable by the heirs of *Jackson*, as

his act in making the power would have been;—and the law will do the same justice by estopping the heirs, as the Chancellor would do by compelling releases, the rule both at law and in equity being the same. *Rex v. Bulkeley*, *Doug.* 293. *Jackson v. Veeder*, 11 *Johns.* 169.

But whether the *heirs* are estopped, or not, another principle applies to *Harper*;—for if the deed he assumed to execute is not the deed of his principal, the law treats it as his own, against which he can neither claim nor aver. *Banorgee v. Hovey*, 5 *Mass.* 11. *Hatch v. Smith*, *ib.* 52. *Sumner v. Williams*, 8 *Mass.* 199.

Greenleaf, in reply.

There is a difference between a revocation by the death of the constituent and by his own act while living. In the former case the land descends immediately to his heirs;—in the latter, not. Moreover, the case of this tenant is not different from that of every other party contracting; since the uncertainty of human life is the paramount law of every human contract.

The agent acting at a distance from his constituent, by virtue of a written power, has no greater authority than if, being present, he was requested to guide the hand of the principal in the act of signing the deed. In both cases it is the deed of the *principal*, if *he be living*;—otherwise not. In both cases he would have intended to convey, but died *re infectâ*.

Nor ought the heirs to be estopped. Admitting that they are bound whenever their ancestor is bound;—yet here they aver nothing against his deed, but a fact independent of it. They do not deny that he made the power,—but they affirm that he died before any act was done under it.

The cause, after this argument, which was had at *November* term last, being continued for advisement, the opinion of the Court was now delivered by

Mellen C. J. The principal question, if not the only one, in this cause, is whether the deed made by *Harper* under the power of attorney from *Jackson*, operated to pass the estate to the tenant according to the intention of all concerned: or, in other words, whether the *death* of *Jackson* before the execution

of the deed though unknown to *Harper* and *Little* at *that* time, was such a determination of the power of attorney as to render the deed void and ineffectual as a conveyance of the estate.

It is admitted that a revocation of a power not coupled with an interest, will not defeat and render void those acts which are done in pursuance of it, and prior to notice of such revocation being given to the attorney.—Authorities are clear and direct on this point. The tenant contends that the same principle is applicable and ought to prevail in case of the determination of a power of attorney by the death of the constituent; such death not being known at the time of the execution of the conveyance made pursuant to such power;—though he frankly admits that no case can be found which establishes that principle.—This very circumstance goes far towards shewing the legal distinction existing between the two cases.—In the case of a *revocation*, the power continues good *against the constituent*, till notice is given to the attorney; but the instant the constituent dies, the estate belongs to his heirs, or devisees, or creditors; and their rights cannot be divested or impaired by any act performed by the attorney after the death has happened; the attorney *then* being a stranger to them and having no control over their property. In *Watson v. King*, 4 *Campb.* 272. it was decided by lord *Ellenborough* that a power of attorney, though coupled with an interest, is instantly revoked by the death of the grantor: and an act afterwards *bona fide* done under it by the grantee before notice of the death of the grantor is a nullity.

The counsel for the tenant has contended that the *power* and the *deed* made in pursuance of it, constitute but *one act*. Still, this *one act* was not completed till months after *Jackson's* death, and is equally ineffectual on this hypothesis. The deed is therefore ineffectual to pass the estate.

But it is further urged that as *Harper*, the attorney, who made the deed in that capacity, is a demandant in this action in right of his wife, who is one of the children and heirs at law of *Jackson*, he is estopped by the deed he has made to deny his own authority at the time of making it, and thereby destroy the effect of the conveyance; and that so the deed is good by estoppel against *Harper*, one of the demandants, and bars this action.

This argument deserves examination. It may be observed as a correct principle of law, that *Harper* is not *estopped* by this deed, unless it be *his deed;* and, of course, unless *he* is bound by it.—In order, therefore, to shew that *Harper* is estopped by the deed made by him *as attorney* to *Jackson*, it must be established as law that it *is* his deed.—It has been stated by the counsel for the tenant as a settled principle of law, that if A. make a bond, for instance, as the attorney of B., when, in fact, he is *not* his attorney, it shall be considered the bond of A. and bind *him*.—Some cases have been cited in support of the position.—We apprehend this proposition is to be considered as subject to several limitations; and that it is not correct in the latitude in which it is advanced.—Before investigating this point, it is proper to remark that the deed in question is made in the most correct and proper form.—From beginning to end it is in the name of *Jackson* the principal.—He speaks in the *first person* throughout.—*He* grants—*he* covenants—and *his* name is subscribed and *his* seal affixed to the deed. All this is done by *Harper* as the attorney of *Jackson*.—In what part of the deed does *Harper* undertake to grant or covenant for himself? Can the Court grant or covenant for him? Or subject him to the consequences of having so granted or covenanted, when an inspection of the deed at once negatives these questions?—No man can aver against a deed or explain or contradict it.—And can a Court, in construing a deed proceed on a different principle?

To establish the doctrine contended for, the counsel for the tenant has cited the case of *Banorgee v. Hovey & al.* 5 *Mass.* 11. —In that case *Smith* was part-owner of a vessel with the defendants and was also supercargo.—He borrowed money of the plaintiff and gave a *bond* to secure the payment, and signed and sealed it for himself and the other owners, naming them.—And by the bond he undertook to *bind himself* and *them* for the payment.—The Court decided that *Smith* had no authority to give the bond; it did not bind the *other* part-owners, but it bound *him*.—And why should it not?—He made the bond *in his own name* and actually *bound himself*.—*So far* the bond was valid, but no farther. In the case of *Hatch v. Smith and trustee*, 5 *Mass.* 42. it does not appear how the release was execut-

ed, whether in the name of the principals, or in his own name.—Besides, no definite opinion is given. *Sedgwick J.* says, "if the "attorney was not duly authorized, it must be *his* deed: and if "not directly a release to *Smith*, it must be construed as a cove-"nant for his security.—But we are all of opinion, that as this "case is before us, we ought *to presume* that when one undertakes "to act as attorney and did so act, *he was duly authorised.*"—The principle of law is much more clearly stated by *Parsons C. J.* in the case of *Tippets v. Walker & al.* 4 *Mass.* 595.—That was an action of covenant broken founded on an agreement entered into by the defendants as a committee of the Directors of the Middlesex turnpike corporation. In witness of the contract and its terms the *defendants set their hands and seals.*—The *Chief Justice* says, "the decision of this cause must therefore "depend on the construction of the deed.—If the defendants "have *by their deed personally undertaken to pay*, they must be "holden.—In the agreement, the defendants have not (if they "had legal authority) put the seals of the directors or the seal "of the corporation, but have put *their own seals;* it is therefore "*their deed.*—And if it is not *their* covenant, it is not the cove-"nant of any person or corporation."—Again he says, "The "corporation are therefore not bound by this contract. The "contract before us is a contract of *some* individuals for *others:* "if they have bound themselves they must look to their prin-"cipals for indemnity—but they have *expressly bound them-"selves.*"

In the case of *Long v. Colburn*, 11 *Mass.* 97. the defendant signed the note declared on in the following manner, viz. "*Pro Wm. Gill, J. Colburn*"--And the Court decided, that unless *Colburn* had authority from *Gill* to make the note, *Gill* could not be bound by it: and if he had *no* such authority, still it would not bind *Colburn;* because *he* did not promise; and that the only remedy against *Colburn* was by a special action on the case for the deception and injury. In the case of *Ballou v. Talbot*, 16 *Mass.* 461. the defendant signed his name to the note declared on, adding thereto the words "agent for *David Perry.*"—The *Chief Justice* in giving the opinion of the Court says, "It is obvious "from the signature that it was neither given or received as the "defendant's note," and the Court observed that the remedy

against *Talbot* must be a special action on the case for the injury occasioned by his assuming the character of attorney. *Justice* as well as *strict law* seem to require that such should be the decision with respect to the deed under consideration. Suppose that in this case *Harper* had paid the price of the land, which he had received of *Little*, over to *Jackson*, by remitting it to him before knowledge of his death, and his legal representatives had received it;—or suppose he had accepted *Jackson's* draft for the amount:—and suppose that *Harper's* wife were the only child and sole heiress of *Jackson:* now, would it not, in such case, be unjust that the deed in question, executed with good faith and in full confidence that the authority which had been given was not determined, should operate as an estoppel against *Harper*—deprive him of all *his* interest in the land—and leave him liable to pay the draft according to his acceptance, or recover back the money, if paid, from the representatives in the best manner he could?—In the present case, the deed being void, an action lies for *Little* against *Harper* to recover the same back again.—The law is *just* in giving a *remedy* where there is a *right*.—It gives an action against a debtor or a wrong doer and subjects him to a judgment for competent damages: though it never insures his solvency or the eventual payment of the damages.—Our decision may operate severely on the tenant, and he may unfortunately lose all he has paid for the estate as well as the estate itself: if so, we can only *lament* his misfortune, but cannot change legal principles in order to *avert* it.

In the case of *Stinchfield v. Little*, 1 *Greenl.* 231. there was a full and regular power delegated to *Little*, to make the deed; but he made it in *his own name:* and not in the name of the *Pejepscot proprietors*.—It was therefore not *their* deed; but *his own*.—In the present case, the deed made by *Harper* is good in *point of form*, but void for want of *power* in him to make it: and as in no part of the deed he has *bound himself*, the remedy against him must be by another form of action.

Upon the facts stated in the agreement of the parties, we are of opinion that the action is in law maintainable:—but as it is suggested that the tenant has another defence on which he relies, grounded on a sale of the demanded premises under the

law of the United States by one of their collectors of direct taxes, the cause must stand for trial that the merits of that defence may be investigated.

PORTER *v.* NOYES.

If there be a contract for the sale of lands, and the bargainor agree to "*make a warranty-deed, free and clear of all incumbrances*," this agreement is not satisfied by the making of a deed with *covenants* of general warranty and freedom from incumbrances, unless the grantor had the absolute, entire and unincumbered estate in the land at the time of the conveyance.

And if the bargainee consent to accept a deed not knowing that the land is incumbered, he is not bound by such consent, but may afterwards refuse on discovering the incumbrance.

An inchoate right of dower is an existing incumbrance on land; and not a mere possibility or contingency.

THIS was an action of *assumpsit* for the non-performance of an agreement to purchase a farm of the plaintiff, lying in *Boxford* in the Commonwealth of *Massachusetts*.

At the trial, which was upon the general issue, the plaintiff relied for proof of the agreement, upon certain letters written to him by the defendant. From these it appeared that the treaty for the purchase commenced as early as *November* 1818, —that the defendant had offered 2200 dollars for the farm,— to pay 800 dollars on the first of *April* following, to clear off a mortgage outstanding, and to pay the residue in *May*,—that he should not want possession till the first of *April* following, about which time he supposed the deed would be ready for delivery, —that he wished the plaintiff to bring the deed in person, or send it to *Joseph Hovey's* or to another place,—and wished the house to be cleared by the first of *April*;—adding, in his last letter, "If you accept of that offer, you shall make to me a warranty deed, free and clear of all incumbrances."

Hovey testified that the deed was sent to him *in April* bearing date *March* 29, 1819, and that the defendant, when notified of this fact, agreed to accept it, and made no objection on account of the lateness of the time.

The counsel for the defendant hereupon objected that it was incumbent on the plaintiff to have tendered or sent a deed to

one of the places designated, on or before the first of *April*. But the Judge who presided at the trial overruled this objection.

The counsel then urged,—1st. that the title was not in the plaintiff, but in *N. Coffin*, at the time when the conveyance was to be executed;—2. that if *Mr. Coffin* had conveyed his estate to the plaintiff, yet that *Mrs. Coffin* had an inchoate right of dower which was not released;—3. that one acre of the farm was sold *February* 13, 1818, to *Moses Bass* for non-payment of the United States' tax for 1816.

It appeared that *Coffin* originally bought the farm at a sale made by the administrator of the estate of *Moses Porter* deceased, *April* 26, 1815, and conveyed it to the plaintiff by his own deed dated *May* 3, 1815, and recorded *April* 15, 1819:—and that he exercised no acts of ownership over it after the date of his deed to the plaintiff, it being in the possession of the plaintiff's brother and tenant, who also was the administrator.

It also appeared that an acre of the land was sold for the direct tax, as alleged, and that the plaintiff redeemed it *October* 28, 1819.

Intending to reserve, for the consideration of the whole Court, the question whether these facts amounted to a sufficient defence, the Judge instructed the jury to return a verdict for the plaintiff; which was to be set aside, or stand, according to the opinion of the Court upon the whole case, reported by the Judge.

Longfellow, for the defendant.

1. The time fixed for performance, so far as it can be collected from the defendant's letters, was the first of *April*, at which time it was the duty of the plaintiff to have tendered the deed;—but failing to do this precedent duty on his part, the defendant is not liable. *Sugden's law of Vendors*, 205, 210, 265. 2 *Comyn on Contr.* 52, 53. 1 *Selw. N. P.* 160.

2. But before the defendant was compellable to take a deed, the plaintiff was bound to exhibit a good and indefeasable title to the land. It was of the essence of the contract that the plaintiff should *convey* such a title,—not that the defendant should receive a deed and resort to the remedy on his covenants, for this remedy might be fruitless. Yet here the only title

on record at the time of tender was the conveyance from *Moses Porter* to *Mr. Coffin*. *Long after this* the plaintiff registered his deed from *Coffin*, the existence of which the defendant had no means of proving, and did not even know.

3. Yet if the title on record had been in the plaintiff, the defendant would not have been bound to receive the deed, the land being under incumbrances. The right of dower in *Mrs. Coffin*, though not perfect, was yet an existing incumbrance, sufficient to justify the defendant in refusing to part with his money. And the same may be remarked of the sale of a part for non-payment of the direct tax. It constituted indeed but a small incumbrance, but the rule applies equally to all, the reason, in every case, being the same.

Whitman, for the plaintiff.

The defendant's first position is sufficiently refuted by the evidence; for when the deed was offered to him in the latter part of *April*, he did not object that it was out of time;—on the contrary he agreed to accept it.

Nor was here any want of title in the plaintiff, since the deed from *Coffin* to him must have been on record at the time when the defendant saw and perused the deed offered by the plaintiff.

As to the right of dower in *Mrs. Coffin*, if the doctrine contended for by the defendant were good law, yet it is not applicable to this case;—1st. because when the deed was offered to the defendant he did not make this objection, but consented to accept it;—2d. because the plaintiff's brother and agent, who also was administrator, was constantly in actual possession of the land.

But the inchoate right of dower is a possibility of incumbrance too remote and uncertain to be regarded by the law;—because, 1st. the wife may not survive the husband,—2d. if she survive, she may never claim the land,—3d. the husband may make other provision for her by his will, which she may accept in lieu of dower.

As to the direct tax and the sale under it, this was not an *adverse title*, but only a *lien*; and whatever may be the law respecting an adverse title to lands intended to be conveyed, yet no *lien* was ever considered as an obstacle to the conveyance,

or as forming any valid excuse to the party refusing to purchase. It was enough that the plaintiff offered to convey with warranty, since this was all he was bound to do. The defendant was bound to accept such conveyance, and take his remedy, if he was injured, on the covenants in his deed.

The cause being continued after this argument, which was had at *November* term last, the opinion of the Court was now delivered as follows, by

Weston J. The terms of the agreement, for the non-performance of which this action is brought, are principally to be found in the letter of the defendant, bearing date the *twenty-seventh* of *January* 1819, which is referred to, and makes a part of this case. In that letter, the defendant proposes to pay eight hundred dollars by the *first* of *April* following, to pay off a mortgage, with which the premises were incumbered, and the residue of the purchase money, the amount of which is to be ascertained by a reference to other written evidence in the case, was to be paid in the succeeding month of *May*. And he adds, " if you accept of the offer, you shall make me a warranty " deed, free and clear of all incumbrances." In another part of the letter he states, " I shall want to move there by the *first* " of *April*, and if I have the farm, I shall expect you to clear " the house at that time; if you do accept the offer which I " make you now."

The terms proposed in this letter were accepted by the plaintiff.

It cannot be understood to have been the true intent and meaning of the parties, that on the one hand, the defendant was to pay the eight hundred dollars, and to extinguish the mortgage, without receiving his deed, relying upon the agreement only of the plaintiff to execute it; or that, on the other, the plaintiff could be holden to make and deliver the deed and to part with the land, upon the personal security of the defendant for the payment of the eight hundred dollars, and the extinguishment of the mortgage. The respective stipulations of the parties, except the payment of the residue of the purchase money in *May*, must then be deemed to have been dependant or concurrent. *Thorpe v. Thorpe*, 1 *Salk.* 171. *Goodison v. Nunn*, 4 *D. & E.* 761. *Glazebrook v. Woodrow*,

8 *D. & E.* 366. *Johnson v. Reed*, 9 *Mass.* 78. In order to entitle himself to this action, it was therefore incumbent upon the plaintiff to aver and to prove a performance, or an offer to perform the conditions on his part. This it is insisted he has not done; and various objections are, upon this ground, urged against his recovery in this action. From the view we have taken of the case, it has become unnecessary to notice them all.

One of the conditions imposed is, that the plaintiff should convey by deed of warranty, free of incumbrances. It may be urged that this condition is satisfied by a covenant in the deed, that the premises were so; but we are of opinion that, upon a fair construction of the terms used, the defendant prescribed it as a condition, that they should be in fact free from incumbrances. At the time that the plaintiff tendered his deed, it appears in the case, that the wife of *Nathaniel Coffin* had an inchoate right of dower in the premises. If this was to be deemed an existing incumbrance, the plaintiff is not entitled to claim damages of the defendant, for the non-performance of the agreement on his part. And we are of opinion that it must be so considered.

In the case of *Jones v. Gardner*, 10 *Johns.* 266. which was upon an agreement for the sale of real estate, the plaintiff, upon certain specified conditions, was to give to the defendant "a good and sufficient deed in law to vest him with the title of "the said farm of land, with the appurtenances." The defendant, not having fulfilled the stipulations on his part, was called upon to answer in damages for the non-performance. The plaintiff had executed and tendered a deed to the defendant, but his wife had not therein released her dower; and this was deemed a sufficient objection to his recovery in that action. The *title*, say the Court in their opinion, which the plaintiff had stipulated should *vest* by his deed in the defendant, "meant the "legal estate in fee, free and clear of all valid claims, liens, "and incumbrances whatsoever. It is the ownership of land, "the *dominium directum et absolutum*, without any rightful par- "ticipation by any other person in any part of it. If the plain- "tiff's wife had a contingent life estate in one third part of the "farm, the defendant had not a clear and absolute title. If "this claim of dower was not inconsistent with the title to be

"vested in the defendant, it would be difficult to maintain that "any other life estate in the same in reversion or remainder, or "any judgment or other lien thereon would be incompatible "with it; and the title might thus be embarrassed and weak- "ened, until it had lost all its value and strength."

This respectable authority goes the full length to establish the position, that an inchoate right of dower is an existing incumbrance; and not a mere possibility or contingency, which is to be deemed an incumbrance only when it becomes consummate.

It is however insisted by the plaintiff's counsel, that as it appears from the deposition of *Joseph Hovey*, which is referred to in the case reserved, that the defendant in the month of *April* 1819, agreed to accept the deed made by the plaintiff, and made no objection on the ground of incumbrances, he must be considered as having waived all objections of this sort. But it does not appear that he then had any knowledge of the existence of an inchoate right of dower on the part of *Mrs. Coffin*. He might not know that *Coffin* had a wife living; and if he did he might believe that *Mrs. Coffin* had released her right of dower in the deed from her husband to the plaintiff; it not appearing that he had any means of ascertaining the contents of this deed until after the fifteenth of the same month of *April*, when it was first received for registry. Certainly nothing short of the most express waiver, with a full knowledge of the existence of the incumbrance, could remove this objection; and it may be doubted whether even this, if done by parol, could have that effect; inasmuch as by the statute of frauds, the agreement for the sale of real estate, by the party to be charged, must be in writing. To suffer therefore the terms and legal effect, of a written agreement of this sort, to be changed or modified by any subsequent parol agreement between the parties, might be deemed a violation of the salutary provisions of that statute.

Being satisfied that the plaintiff stipulated to convey, *free of incumbrances*, and this stipulation not having been complied with, by reason of the inchoate right of dower on the part of *Mrs. Coffin*, the non-performance of the agreement on the part of the defendant, in the opinion of the Court, was thereby ex-

cused. It results therefore, that the verdict, which has been returned in favour of the plaintiff, must be set aside, and a new trial granted.

THE INHABITANTS OF BRUNSWICK
v.
THE INHABITANTS OF LITCHFIELD.

Where the marriage of a female pauper was rendered valid by the operation of the *Resolve* of *March* 19, 1821, it was holden that her derivative settlement, thus gained, could not operate to oblige the town, thus newly charged with her support, to pay for supplies furnished prior to the passage of the Resolve.

Assumpsit to recover monies expended by the plaintiffs for the relief and support of *Mehitabel Potter* and her children, whose lawful settlement was alleged to be in *Litchfield.*

In a case stated by the parties, it was admitted that the paupers had no other settlement in *Litchfield* than was derived from *Robert Potter*, the supposed husband of said *Mehitabel* and father of her children, who, it was conceded by the defendants, was settled in *Litchfield.*

It also appeared that *Robert* and *Mehitabel* both resided in *Brunswick* in 1810, where their intentions of marriage were duly entered and published;—that they were competent to contract marriage;—that in *April* 1810, their marriage was solemnized by one *Adam Elliot*, the minister of an unincorporated church or society of *free-will-baptists* in that town, licensed and ordained according to the rules of that communion, and claiming and exercising the right to join persons in marriage; of whose society the parties were then members.

And the question was, whether this marriage was valid, either by the general laws regulating marriages, or by force of a Resolve passed *March* 19, 1821, while this action was pending.

This Resolve, among other things, provides—"that all mar-
"riages which have been solemnized within this State by min-
"isters of the gospel, who were not stated and ordained minis-
"ters of the gospel, between parties competent by law to con-
"tract marriage, and whose intentions of marriage were legally

"published, shall be deemed and taken, and are hereby de-
"clared to be good and valid in law, to all intents and purpos-
"es; and the children of parties thus joined in marriage, shall
"and are hereby declared to be entitled to all the privileges
"and immunities, to which children of parents who have been
"joined in marriage by stated and ordained ministers of the
"gospel, or Justices of the peace, are or may by law be en-
"titled: *Provided however*, that this resolve shall not be deem-
"ed to extend to those, who, having been joined in marriage by
"any minister of the gospel not legally authorized, have since
"separated, and one of the parties has been legally joined in
"marriage with another person; but the children of the first
"marriage shall be considered, to all intents and purposes, le-
"gitimate."

The argument was had at *November* term 1821, after which the cause was continued to this term for advisement.

Everett, for the plaintiffs.

1. The marriage was valid by the laws in force at the time it was solemnized. Under the impression that marriage was a divine institution, persons entering into that relation formerly regarded the ecclesiastical character of the person officiating at the solemnity, rather than his civil powers;—and hence it has been deemed sufficient if he was ordained after the usages of his own sect. The *Statute* 1786, *ch.* 3. does not require that he should be *settled over* the town; but it enables "every stated "and ordained minister of the gospel *in* the town, district, par-"ish or *plantation* where he *resides*," to solemnize marriages. The use of the term *plantation*, in which it is believed no corporate parish existed at the time of the passage of the statute, shews that the legislature did not look to the powers of the society to which the minister might officiate, but to the clerical character of the man himself.

2. But if not valid by the existing laws, yet it is rendered so by the Resolve of *March* 19, 1821. The case is clearly both within the terms of the Resolve, and within the mischief it was designed to remedy. The number of such marriages was very great, and rapidly increasing. And it was in the power of a vast number of men to abandon their wives and cast their

offspring on the world exposed to the evils of illegitimacy. For this alarming danger it was the duty of the legislature to provide a remedy, and such was the purpose of the resolve.

If the intent of the legislature, thus manifest and clear, cannot be carried into effect in the present case, it must be either 1st. because, on principles of natural and common right, retrospective laws cannot be obligatory;—or 2d. because they are unconstitutional.

As to the *first* objection. The law, deducible from various sources, is, that the legislature may, in doubtful cases, for equitable purposes, or to correct mistakes, pass remedial statutes, general and reciprocal in their import, but having, upon public corporations, a retrospective effect. 1 *Bl. Com. b.* 1. *ch.* 2. *Bac. Abr. Statute, E. Rex v. Northfield, Doug.* 661. There is high authority on this point in the amendment to the Constitution of the United States proposed by *Massachusetts* in 1793, which had a retrospective effect on suits then pending against a State. *Tucker's Blackst. Vol.* 1. *p.* 153. *note. Hollingsworth & al. v. Virginia,* 3 *Dall.* 378.

As to the *second* objection. The legislature is, in the first instance, the proper judge of its own powers. It is only in extreme cases that the Courts will refuse to execute its acts. *Adams v. Howe,* 14 *Mass.* 345. And the legislatures of this State and of *Massachusetts* have uniformly acted on the right to pass remedial laws however retrospective in their effect. *Statute* 1808, *ch.* 92. *Resolve, February* 12, 1819, &c. [Here the counsel cited a large number of acts and resolves of both States of the kind in question.] *Milford v. Worcester,* 7 *Mass.* 56. *Kendall v. Kingston,* 5 *Mass.* 534. *Blanchard v. Russel,* 13 *Mass.* 1.

The constitutional objection derives its force from the clause prohibiting the passage of *ex post facto* laws, and those impairing the obligation of contracts. But this Resolve is not *ex post facto,* but retrospective. *Calder & ux. v. Bull & ux.* 3 *Dall.* 386. 1 *Bl. Com.* 46, 91. And the latter branch of the objection was never held to apply to general laws remedial and confirmatory in their nature. *Lock, adm'r. v. Dame & al.* 9 *Mass.* 363. *Dartmouth College v. Woodward,* 9 *Cranch* 43. *Call v. Haggar,* 8 *Mass.* 430. *Walter v. Bacon, id.* 468. *Patterson v. Philbrook,* 9 *Mass.*

151. *Holbrook v. Finney*, 4 *Mass.* 566. *Bacon v. Callender*, 6 *Mass.* 309. *Foster & al. v. The Essex Bank*, 16 *Mass.* 270, 273.

Moreover it should be observed that the Resolve in question rather affects the *evidence* of the contract of marriage, than the contract itself; which was already a contract made between the parties, and binding *in foro conscientiæ.*

Orr, for the defendants.

A single reply is sufficient to the authorities cited for the plaintiffs. They do not apply to the case;—for in none of them is it found that the responsibility of one corporation was transferred to another.

The supplies were all furnished prior to the passage of the Resolve; at which time *Brunswick*, by the existing laws, was bound to pay for them;—and the defendants were not. The true question therefore is, whether the legislature have authority to change a legal obligation from one party to another, without the consent of the party thus charged?

1. As to the legality of the marriage by virtue of the laws then in force. It was necessary by *Statute* 1783, and such has been the construction, that the person officiating should be regularly ordained over some corporate parish in the town where he resided and where the marriage was solemnized. And similar to this is the law in *England*, where the cases of settlement derived by marriage will all be found to turn upon the authority of the person solemnizing. There he must be in orders, and the marriage be had in strict compliance with all the forms of law. *Salk.* 119. *Rex v. Inhabitants of Luffington*, 1 *Wils.* 74. *Rex v. Inhabitants of Northfield*, *Doug.* 658. *Rex v. Inhabitants of Hodnett*, 1 *D. & E.* 96. And these cases shew that where the marriage is not legal, no settlement is derived from it.

2. The case is not within the provisions of the Resolve. It does not legalize marriages solemnized by persons not authorized by law. Nor is there any necessity that this novel exercise of power should be enlarged by construction. It speaks of marriages which have been solemnized *within this State*, by which may be intended such as have occurred since the organization of the State as a separate sovereignty; and nothing more.

3. But if the Resolve by its terms should be understood to reach the case, yet it contravenes the provisions of the Constitution, and is therefore void as to the present question. It impairs the obligation of contracts. The duty of one town to support its poor, has its corresponding right in other towns, who may advance them supplies, to remuneration. And this is founded in tacit contract, declared by law. The contract is with the State, as trustee of all parties beneficially concerned. The law is the same respecting the obligation to support schools, and to repair highways, &c. And these cannot be transferred. Here was an obligation imposed by existing laws on the inhabitants of *Brunswick;* and the ground taken by them is, that the legislature, by a single act of arbitrary power, have removed this obligation from them, and imposed it upon the defendants. Such a construction, it can hardly be supposed, the Court will be ready to admit.

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

According to the case of *Milford v. Worcester*, 7 *Mass.* 56. the supposed marriage in this case was void: and for the purpose of confirming *that* and many *other* supposed marriages solemnized under similar circumstances, the *Resolve* of *March* 19, 1821, was passed.—Without question, it was dictated by the best intentions and will be productive of very salutary consequences. Neither is it liable to the objection of unconstitutionality, as it respects all those legitimate objects of legislation which were in view and to which its application was contemplated.—But we cannot, without disrespect to the legislature, presume they intended thereby to destroy, impair or disturb vested rights, or *ipso facto* to create a debt from one man or corporation to another; because it is well known that this would transcend their constitutional powers. There is ample room for the operation of the Resolve in the most beneficial manner, without any interference with established principles, or in any degree invading private rights.—But to give to it the construction for which the plaintiffs' counsel has contended, would be to sanction an interference of one department of the government with another and expose the citizens to dangers

which neither they, nor the legislature ever contemplated.—Without going into any argument to shew that the Resolve would be directly unconstitutional, if it could receive such construction, we shall content ourselves with subjoining the following cases in support of the position. *King v. Dedham Bank*, 15 *Mass.* 447. *Medford v. Learned*, 16 *Mass.* 215. *Dash v. Van Kleeck*, 7 *Johns.* 477. *Calder v. Bull*, 3 *Dall.* 336. *Call v. Hagger*, 8 *Mass.* 422. Many others might be added.

It appears by the statement of facts that the expenses, the amount of which is demanded in this action, were incurred by *Brunswick before* the abovementioned Resolve was passed: and *until* it was passed, it is not pretended that the town of *Litchfield* was under any obligation whatever to pay the above sum to *Brunswick*. Now it is very clear that no act or resolve of the legislature can *of itself create* this debt on the part of *Litchfield* and subject them to instant liability to pay it to *Brunswick*.—Such a power as this would be destructive of those rights, which are guaranteed to the people by the Constitution.

There is no ground on which this action can be maintained, and the plaintiffs must be called.

HAMMOND'S CASE.

A witness may testify to his belief of the genuineness of handwriting from his *acquaintance* with the handwriting of the party; whether this acquaintance were gained by having seen the person write,—or having received letters from him,—or having at any time seen writing either *acknowledged or proved to be his.*

And there is no distinction between civil and criminal cases, in the application of this rule.

The prisoner was indicted for the forgery of a check on the bank of *Portland*, in the name of *Attwood & Quincy.*

The *Attorney General* proved that a sheet of paper was found in the prisoner's chest on which were written six or seven blank checks, each signed with the name of "*Attwood & Quincy*";—and that the prisoner acknowledged these checks to have been

written by himself; but said that it was done after the officers of the bank had accused him of the forgery, and after he had written another check of the same tenor at their request and for their inspection; and that it was only an unmeaning scrawl. This paper, it appeared, was since lost, or unintentionally destroyed.

He then offered one of the directors of the bank as a witness, to prove that he had seen and critically examined that sheet, and to testify to the similitude of the signatures, and his belief that the check described in the indictment was signed by the prisoner with the names of *Attwood & Quincy*.

To the admission of this evidence the counsel for the prisoner objected, but the Judge who presided at the trial overruled the objection;—and the prisoner, being thereupon convicted, now moved that the verdict be set aside, because of the admission of that evidence.

Daveis, for the prisoner, contended that the only mode of making proof by handwriting was by actual knowledge of it; derived,—1st. from having seen the party write,—2d. from correspondence not denied to be genuine:—and that the mode resorted to in this case was novel, and not recognized in principle by any judicial decision. And he relied on *The King v. Cator*, 4 *Esp.* 117, and *Mr. Day's* note to that case. *Gilb. Evid.* 54.

The Attorney General agreed with the prisoner's counsel, that testimony to handwriting must be founded in actual acquaintance with the autography of the party; but he contended that this acquaintance might be gained as well from the inspection of writings confessedly genuine, as from either of the two methods mentioned; and that in the present case the testimony of the witness ought, upon legal principles, to be received, it approaching at least as near to positive proof as if derived from correspondence with the party.

Mellen C. J. now delivered the judgment of the Court, as follows.

In the course of the trial of this cause it was proved that a sheet of paper was found in the prisoner's chest, upon which were written several bank checks, signed with the names "*Att-*

wood & Quincy." It was also proved by the confession of the prisoner, that the body and signature of each of those checks was in his handwriting, and that they were all lost or destroyed, so that they could not be produced on the trial;—and *Charles Fox*, who had carefully examined those checks and their signatures, was permitted to testify to the *similitude* between those signatures and that of the forged check, and to *his belief* that the signature of *that* check was in the handwriting of the prisoner. Was this proof admissible? If not, the verdict must be set aside;—otherwise, sentence must follow.

Whatever doubts were formerly entertained, it is now perfectly settled that the same rule of evidence upon this subject is equally applicable to civil and criminal cases. 1 *Phillips' Evid.* 371. *The King v. Cator*, 4 *Esp. Rep.* 117. 2 *McNally's Evid.* 394, 417. Note to *The King v. Cator*, 4 *Esp. Rep.* 273. *a. Phillips*, page 372, says—"It is an established rule "of evidence that handwriting cannot be proved by com- "paring the paper *in dispute* with any other paper acknowl- "edged to be *genuine.*" This rule is not in force in this State, or in *Massachusetts*, with the same strictness and to the same extent as in *England. Homer v. Wallis*, 11 *Mass.* 312. But it appears by many cases that a witness may testify that the signature in question is the handwriting of the person attempted to be charged, from his acquaintance with such person's hand; which acquaintance may have been gained by having seen such person write,—having received letters from him, —or having *seen writing acknowledged or proved* to be such person's handwriting.—The case at bar falls within this last rule.

Proof of this kind was admitted in *Sidney's* case, 3 *St. Tr.* 802—and in *Ld. Preston's* case, 4 *St. Tr.* 446—7. The same principle was admitted and established in the case of *Ld. Ferrer's v. Shirley, Fitzgibbon's Rep.* 195. There, in order to prove the handwriting of *Cottington*, a subscribing witness to a pretended deed of the Earl, a person was produced and was ready to testify that he had seen letters which his master *told him* had been written by *Cottington.* This witness, so offered, was rejected by the Court, because he could not testify, nor was it proved, that such letters were *in fact written by Cottington.* It appears that he would have been admitted, if *this fact* had been

established,—and even *without producing the letters*, or shewing that they could not be produced. *Phillips*, page 369, commenting on this case, says, "The rule to be deduced is—that a "witness may be admitted to speak to a person's handwriting, "*if he has seen letters which can be proved to have been written by* "*him.*" He intimates that it would be reasonable that the opposite party should be allowed to call for the production of the letters for examination;—but this principle, if well founded, cannot apply to papers which have been lost or destroyed without fraud or fault.

The same principle is recognized and the same kind of proof was admitted in *Layer's* case 6 *St. Tr.* 275. In the trial of *the Seven Bishops* the same kind of proof was admitted as to several of them; and though the Court were divided in opinion, yet it was considered legal and proper in *civil causes;* but as the distinction between civil and criminal causes touching this point no longer exists, the case is an authority in support of the admission of *Fox's* testimony. The case of *The King v. Cator*, is different from the case at bar. But even there, Baron *Hotham* in giving his opinion says, "I do not know how that gen- "tleman [the inspector of franks,] could speak to the handwrit- "ing, unless he could say he had seen the party write, *or unless* "*he had been in the habit of correspondence with him*, excepting "that he is called to speak as a man of science to an abstract "question." This knowledge of the party's handwriting, gained by *correspondence*, seems not to be more certain than that gained from seeing papers or letters *expressly acknowledged* to be his writing. If the case of *The King v. Cator* be considered as variant from those above cited, and tending to shew the inadmissibility of the testimony of *Fox*, it may be remarked that Baron *Hotham* considered it directly and completely a "com- "parison of hand,"—and in that sense in which the rule in *England* in some respects differs from the rule in *Massachusetts* and in this State. In the case of *Smith v. Fenner*, 1 *Gal.* 170, Mr. Justice *Story* admitted a witness who swore to the *handwriting* of the scribe who wrote the will then in question, and produced certain deeds in his possession, and was permitted to swear to certain peculiarities of resemblance in the writing;—the Court observing that such was "not a mere comparison of "hands."

On these authorities, and for these reasons, we are all of opinion that according to the principles of law as now settled, understood, and reduced to practice, the proof objected to was properly admitted; and of course the motion to set aside the verdict is overruled.

LITTLE *v.* LARRABEE.

Where the finding of the jury, or the record of it, is defective or erroneous in a matter of form, having no connexion with the merits of the case, nor affecting the rights of the parties, the Court will amend it, and render the verdict and record pursuant to the issue.

But where the jury themselves have erred in matter of substance, as by returning a verdict for the wrong party, or for a larger or smaller sum than they intended, and thereupon have separated, the Court will not amend the verdict, but will set it aside.

To *such* mistakes the affidavit of the jurors is admissible.

THIS was a writ of entry in which the demandant counted upon his own seisin within thirty years and a disseisin by the tenant. At the trial, which was upon the issue of *nul disseisin*, the finding of the jury was, that the tenant did disseise the demandant in manner and form as alleged in the declaration; which verdict was received and recorded by the Court, and the jurors separated.

After this the jurors discovered that they had misunderstood the legal terms in which they had drawn up their verdict, and that they had returned a verdict for the demandant, instead of one for the tenant, which last was their sole intention; and they all made a joint affidavit stating these facts.

And now *Orr* and *Fessenden* for the tenant moved that this affidavit of the jurors be received and placed on file, which the Court, *de bene esse*, permitted: and thereupon they moved that the verdict and record be amended by the affidavit, by changing the finding to a verdict in favour of the tenant. They insisted on the right of the Court to amend the finding even without affidavit; and cited *Edwards v. Hopkins*, *Doug.* 376. *Williams v. Bredon*, 1 *Bos. & Pul.* 329. *Jackson v. Dickinson*,

15 *Johns.* 309. But they relied chiefly upon *Cogan v. Ebden*, 1 *Burr.* 383.

Whitman and *Little*, for the demandant, did not deny the existence of a remedy; but they contended that it was by setting aside the verdict, and not by amending it. 2 *D. & E.* 281. *Apthorp v. Backus*, *Kirb.* 407. *Blackley v. Sheldon*, 7 *Johns.* 32. *Root v. Sherwood*, 6 *Johns.* 68. *Dana v. Tucker*, 4 *Johns.* 487.

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

It appears by the defendant's motion and the affidavits of the jury, taken *de bene esse* in support of it, that they intended to return their verdict in favour of the tenant; although as written and *signed by the foreman* and *affirmed by the Court*, it is a plain and unequivocal verdict in favour of the demandants:—or, in other words, that they used language which did not convey their meaning.—This was not discovered till after the jury had separated and had an opportunity of conversing with the parties; by means of which the mistake was ascertained.

The questions are, whether the Court can permit the verdict so to be amended or altered as that it may stand a verdict in favour of the tenant; and, if not,—then what is the proper course to be pursued?

The decision of these questions depending on precedents, we have examined the authorities relating to the subject and will now state the result.

There are two classes of cases to be found in the books respecting erroneous or defective verdicts.

The *first* class contains those cases in which the incorrectness or defectiveness of the verdict or error in the record of the judgment consists in something merely *formal* and which has no connection with *the merits of the cause;* where the amendment, when made, in no respect impairs or changes *the rights of the parties;* but may only prevent the disturbance of the proceedings by writ of error; or, by correcting clerical mistakes, render the record consistent and the verdict pursuant to the issue.—Of this description are the following cases: 1 *Salk.* 47, 53. *Cro. Car.* 144, 338. *Cro. Eliz.* 677. *Cro. Jac.* 239. *Cro. Eliz.* 112. *Lord Raym.* 335. 2 *Str.* 1197. 4 *Co.* 52. 3 *Bulstr.* 181. *Hett.* 52. and numerous others which it is unnecessary to cite.

The *second* class contains those cases where the error has been committed by *the jury;* either by returning a verdict against the *wrong party;* or, if not so—for a *larger* or *smaller* sum than they intended: and those where, if the amendment or alteration should be made and the *damage should be increased* or *diminished,* or the *verdict reversed,* the rights of the parties would be immediately affected and changed: and this, too, after the jury had, by their separation, become accessible to the parties and subject to their influence.—Of this class are the following cases, viz.—

"A motion for a new trial upon affidavits of eleven of the "jury that they had agreed on a verdict for the plaintiff and "five shillings damage: but the foreman, by mistake, gave a "verdict for the defendant. A new trial was granted." 21 *Vin. Abr.* 483.

In *Woodfall's* case, 5 *Burr.* 2667, a doubt arose as to the meaning of the jury in the verdict they had given. Lord *Mansfield* says, "It is impossible to say with certainty what "the jury really did mean:—probably they had different "meanings. If they could possibly mean *that,* which, *if ex-* "*pressed,* would acquit the defendant, he ought not to be con- "cluded by this verdict. If a doubt arises from an ambiguous "and unusual word in the verdict, the Court ought to lean in "favour of a *venire de novo*"—and it was awarded accordingly. In that case the doubt rose on the face of the verdict; no affidavit having been given.

In *Spencer v. Goter,* 1 *H. Bl.* 78, the Court decided that they could not *alter* a verdict, unless it clearly appeared on the face of it, that the alteration would be agreeable to the intention of the jury; and that the proper remedy in that case was a *new trial.*

In the case of *Rex v. Simmons,* 1 *Wils.* 329, a *new trial* was granted; the jury having stated on affidavit that they did not mean to give such a verdict as was in fact recorded by the Court.—*Simmons* was charged with putting into the pocket of one *Ashley* three ducats with a malicious intent to charge him with felony.—The jury did not intend to find the defendant guilty of the *criminal intent*—but only of the *fact* of putting the ducats in *Ashley's* pocket. But, as the Judge reported, by

some mistake or misapprehension of the Court or the jury or both, a *general verdict* of guilty was entered—*Lee*, C. J. observed that the verdict was taken by mistake; and therefore that it was not granting a new trial upon any *after-thought* of the jury.

"The Court will not set aside a verdict upon the affidavit of a juryman that it was decided by lot." 1 *New Reports*, 329.

"But the affidavits of jurors will be admitted to shew that a "mistake had been made in taking their verdict and that it was "entered differently from what they intended."—The Court observed, "What the jurors have deposed must be noticed by "the Court, because their affidavits are not to what transpired "while deliberating on their verdict, but as to what took place "in open Court in returning their verdict." 15 *Johns.* 309.

"The Court will, under circumstances, grant new trials on "the affidavit of jurors that their verdict was taken contrary "to their meaning; but they are very cautious how they do this, "as it may be of dangerous tendency." 1 *Sellon's Practice*, 488.

We have examined the case in 1 *Burr.* 385, which is relied upon by the counsel for the tenant.—It does not appear to have ever received any final determination, so as to assume the authority of a decided case; and it appears also that the cases cited by *Burrow* in support of it, are either irrelevant or else are those falling within the *first* class abovenamed. We therefore cannot consider it as shaking the authority of those we have stated as composing the *second* class. —In all those cases, the Court, instead of attempting to *correct* and amend the verdict and make it conformable to the intentions of the jury, as explained by them after it was affirmed, granted relief and corrected the mistake by *setting aside the verdict* and granting a *new trial.*—It is to be regretted that such a mistake should have been made in the present cause and that its consequences should be so serious and embarrassing to the parties. But the law is such that we *cannot* do any thing *more* for the tenant than set aside the verdict and grant a new trial: and, in the circumstances before us, we *ought not* to do *less.*

Verdict set aside and new trial granted.

NOTE. Respecting the admissibility of the affidavits of jurors to prove misbehaviour in the jury themselves the cases are contradictory.

The course formerly was to admit them. *Metcalf v. Deane*, *Cro. El.* 189. adjudged in 32 *Eliz.* recognized as good law in *Vicarey v. Farthing*, *Cro. El.* 411. *Moor*, 452. *S. C.* 38 *Eliz.* *Heylor v. Hall*, *Palm.* 325. 2 *Rol. Rep.* 61. *S. C.* 20 *Jac.* 1. *Mellish v. Arnold*, *Bunb.* 51. 1719. *Par v. Seames & al.* 1 *Barnes*, 320. 4to. ed. 8 *Geo.* 2. *Phillips v. Fowler*, 2 *Com. Rep.* 525. *Prac. Reg.* 409. *Barnes*, 441. *S. C.* 9 *Geo.* 2. Said *per Willes C. J.* to be the settled rule in *C. B. Norman v. Beaumont*, *Willes*, 487. 18 *Geo.* 2. So in *Aylett v. Jewell*, 2 *Bl. Rep.* 1299. 19 *Geo.* 3. In these cases the propriety of admitting such testimony does not seem to have been much questioned.

During this period there are only two decisions known to the contrary. *Prior v. Powers*, 1 *Keb.* 811. 16 *Car.* 2. and *Palmer v. Croule*, *Ander.* 382. 12 *Geo.* 2.

The old practice was first broken in upon by *Ld. Mansfield* in *Vaise v. Delaval*, 1 *D. & E.* 11. *A. D.* 1785. and it is now settled in *England* that the testimony of jurors to the *misbehaviour* of the jury in the finding of their verdict is not to be received. *Jackson v. Williamson*, 2 *D. & E.* 281. *Owen v. Warburton & al.* 4 *B. & P.* 326. *Rex v. Wooler*, 2 *Starkie*, 111. And the usage in the American Courts accords with the later English decisions. *Cochran v. Street*, 1 *Wash.* 81. *Price v. Warren*, 1 *Hen. & Munf.* 385. *Dana v. Tucker*, 4 *Johns.* 487. *Bridge v. Eggleston*, 14 *Mass.* 248. *Cluggage v. Swan*, 4 *Bin.* 155. *per Yeates J.* The earlier American cases of *Grinnell v. Phillips*, 1 *Mass.* 541. and *Smith v. Cheetham*, 3 *Caines*, 57. so far as they relate to this point seem to be overruled by subsequent decisions.

In *Connecticut*, the jurors, and the deputy marshal who had charge of them, being called to testify that they separated before agreeing on a verdict, were told by the Court, *Livingston* and *Edwards J. Circuit Court U. S.* that they could not be compelled to answer, as it was a misdemeanor; but they might answer if they pleased. *Howard v. Cobb*, 3 *Day*, 310.

In some of each class of these cases the misbehaviour complained of was in the jurors setting down each man a sum, and dividing the aggregate by twelve. If this be taken as the rule to fix the damages *absolutely*, it is a misdemeanor, and the verdict will be set aside. *Smith v. Cheetham*, 3 *Caines*, 57. But if it be only adopted as the mode to ascertain a reasonable mean, or measure of damages, without binding themselves at all events to abide the result, the verdict is good. *Dana v. Tucker*, 4 *Johns.* 487.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

LINCOLN.

MAY TERM,

1822.

THE PRESIDENT, DIRECTORS AND COMPANY OF THE KENNEBEC BANK *v.* TURNER AND CHASE.

Where a lease was made to two, one of whom was sole occupant of the premises, which he held over the term, and debt for the rent of the whole period of actual occupancy was brought against both;—it was holden that the other lessee was not estopped to shew that he signed the lease only in the character of *surety*, for the term specified, without having in fact occupied the premises at any time; and that *he* was not liable for rent after the time mentioned in the writing, the holding over being, *as to him*, no continuance of the lease.

DEBT for two years' rent of a house in *Wiscasset*. In a case stated by the parties it appeared that the evidence of the contract was a paper not under seal, by which the plaintiffs by their agent had let the house to the defendants for three months:—and it was agreed that the defendant, *Chase*, could prove by parol testimony, if it was competent for him so to do, that he dwelt in *Newcastle*,—that he never actually occupied the premises, though he appeared in the written memorandum as a joint lessee,—but that he signed merely as the surety of *Turner*, who, it was agreed, had held the premises over the term mentioned in the writing, and during the time specified in the declaration. It was also agreed that *Turner* had previously occupied the premises under other lessors; and that on the day of making the writing he notified the plaintiffs that after the expiration of his term he should not pay so high a rent as he had agreed to pay for the preceding year. The rent due for the term specified in the memorandum was brought into Court upon the common rule.

Upon these facts the question was, whether the parol evidence was admissible,—and whether the occupancy of *Chase* could be extended, by construction, beyond the three months mentioned in the memorandum which he had signed?

Sheppard, for the plaintiffs.

1. As to the constructive possession of *Chase*. The defendants were jointenants, by the terms of the demise; and the entry and occupation of one, was the entry and occupation of both. If either of them had died during the first quarter, the residue of the term would have gone to the survivor. 2 *Cruise's Dig.* 498, 516, 551. *Co. Lit.* 181, *b.* and *note* 60. *id.* 46, *b.* Nor does the want of a seal vary the construction. Any words shewing that one will divest himself of the possession, and the other come to it for a certain time, in whatever form expressed, will amount in law to a lease. 2 *Cruise's Dig.* 111.

If the lessees were thus jointenants, during the first quarter, their character as such did not change during the time mentioned in the declaration, because neither party *gave notice* to the other, during the quarter, of any intended termination of the lease. The continued possession of the tenants holding over is characterized by the previous lease, and is, in law, an implied renewal; and thus the relation of landlord and tenant continuing to exist, the liability to pay rent is not changed. It continues until the tenant gives up complete possession, or the landlord accepts another tenant. *Harding v. Crethorn*, 1 *Esp. Rep.* 57. *Osgood v. Dewy*, 13 *Johns.* 240. *Woodfall's landlord and tenant*, 164. 2 *Com. on Contr.* 218. *Roe ex dem. Jordan v. Ward*, 1 *H. Bl.* 97.

This construction operates no unreasonable hardship on *Chase;* for he might at any time have avoided farther liability, by delivering up the premises at the end of the term, or by notifying the plaintiffs that he would no longer be holden.

2. As to the admissibility of parol evidence. This is an attempt on the part of one of the defendants to control and entirely to change a written contract;—to shew that he was never lessee, though expressly so styled in the writing, but only a surety, responsible collaterally for a quarter's rent. Such testimony is not legally admissible. *Lewis v. Gray*, 1 *Mass.* 297. *Hunt v. Adams*, 6 *Mass.* 519. 7 *Mass.* 518.

And the action is well brought. Debt lies in this case, as well as *assumpsit*. And where there is a written lease, and also a claim for use and occupation, debt is advised as the better remedy. 2 *Chitty's Plead.* 172, *note z.* 174, *note c.* 8 *note c.* 2 *Selw. N. P.* 536. But if not well brought, yet the case stated is a waiver of any objection to the form of action.

Bailey, for the defendants.

The admission of the parol evidence violates no principle of law, because it does not go to control or vary a written contract, but it is offered to prove other and collateral parts of the contract, the whole of which was never reduced to writing. *Lewis v. Gray*, 1 *Mass.* 297. *Barker v. Prentiss*, 6 *Mass.* 434. *Peake's Ev.* 121.

As to the liability of *Chase*;—he ought not to be bound beyond the plain intention and understanding of the parties. He entered into the contract merely as a surety for the payment of one quarter's rent. The case finds that he never occupied beyond the term mentioned in the lease. Yet rent becomes due only in consideration of occupancy, which must be expressly averred. *Woodf. Landl. & Ten.* 164, 181, 183, 345. The case is as if both had occupied in fact as lessees, until the end of the term, at which time *Chase* had departed, yielding up possession according to the contract, the other lessee tortiously holding over. Upon what principle of law or justice could the tenant who fulfilled his contract be made responsible for the conduct of him who did not? And if the landlord should be driven to his action to regain possession, could it be sustained against *both?* Yet this absurdity certainly follows, if the possession is in both by intendment of law.

But the case finds that the rent, after the first quarter, was not fixed, but left to future adjustment by the parties; notice to this effect having been given by *Turner* at the time of signing the paper. The remedy of the plaintiffs therefore is an action for reasonable *damages* for the use and occupation; and the present action is misconceived, because debt lies only in those cases where certainty of the sum *appears in the contract*, and the plaintiff recovers *in numero*, and not in damages. *Woodf. Landl. & Ten.* 323.

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

It is not necessary to inquire whether the defendant *Chase* is estopped to deny that he was a lessee jointly with *Turner*, during the term of three months for which the written lease was given, and to prove that he was merely a *surety* for *Turner* during that time; because he claims no exemption from liability to pay the rent mentioned in the lease; and the amount of it has been brought into Court on the common rule for the plaintiffs' use.—Is he then estopped by the lease to shew the facts on which he relies for his defence *after the expiration of it?* We know of no principle by which he can be thus estopped. Manifest injustice would be the consequence, if he were. If a man take a lease of his own land *under seal* for one year, he shall not be estopped to claim the land and assert his title to it *after the termination of the lease. Co. Lit.* 47. *b.* We are, then, in forming our opinion, to consider the facts which the defendant offered to prove, *as proved:* and if *Chase* be not liable, the present action against the defendants *jointly*, cannot be maintained.—Now it appears that *Chase* has never for a moment occupied the premises jointly or severally; not even during the term of the written lease. On what principle, then, should he be holden as the surety of *Turner*, when he never consented to be such, except for the above named three months?—It is not necessary to consider the authorities particularly, which have been cited by the plaintiffs' counsel; because they are deemed by us not to apply to the present case. The principle relied on, to charge *Chase* with the rent after the expiration of the three months, may be effectual to charge *Turner;* because *he* actually *held over* the original term and continued his possession for the term mentioned in the writ; but it cannot charge *Chase.* It is applicable only to a lessee or lessees having a *beneficial interest* in the premises leased, continuing to hold over after the end of the term. The proof of *assent* arising from a continued possession and claim of interest, does not exist in the present case in respect to *Chase;* and therefore the action cannot on this principle be supported. It is true there is an agreement on the part of *Chase* and *Turner* in the written lease, that the premises shall be delivered up to the lessors at the end of the term,—and it appears that instead of being so delivered

up they were continued in possession of *Turner*. Still in this action of *debt*, no damages could be recovered for this breach of the contract, if any have been sustained, even if there were any count in the writ for this purpose. In every view of the subject we are satisfied the action cannot be maintained, except for *nominal* damages and *costs as the parties have agreed.*

Defendants defaulted.
Judgment for one cent damage.

EATON *v.* OGIER.

In an action of the case against a sheriff for returning bail to the action, when no bail was taken, the sheriff may be admitted to shew the insolvency of the debtor; and this fact being proved, the creditor is entitled to none but nominal damages.

In such case the Court refused to permit the plaintiff to amend his writ, by inserting a count for not delivering up the bail bond mentioned in the officer's return.

THIS was an action of the case against the defendant, who was a deputy sheriff of this county, for making a false return upon a writ; and it came before the Court upon a case stated by the parties.

It appeared that the writ was delivered to the defendant with directions to attach sufficient property, and in want thereof to arrest the debtor and commit him to prison, unless he should offer good bail;—and the fees for such commitment were at the same time tendered to the defendant. The debtor at that time, and ever since, was destitute of any attachable property, and could lawfully have obtained his discharge from prison by taking the poor debtor's oath. The defendant was in company with the debtor on the same day, and might have arrested him, but did not;—but falsely returned upon the writ that he *had* arrested him, and had taken bail. The action was thereupon entered, and proceeded to final judgment and execution.

The writ of execution was delivered to the defendant six days before the return day, with special instructions to collect the amount or commit the debtor to prison. The debtor had

been at home ever since the rendition of judgment, residing in the same town and neighbourhood with the plaintiff and defendant, until two or three days before this time; when he sailed, with the plaintiff's knowledge, as a seaman on a coasting trip, from which he did not return till after the return day of the execution.

The defendant duly made return upon the writ of execution, that after diligent search he could not find either the property or the body of the debtor. Soon after this the plaintiff demanded the bail bond of the defendant, who replied that he had no bond, but was bail himself, and was ready to surrender the debtor at any time. The defendant also requested the plaintiff to deliver him an *alias* writ of execution which he would execute, but the plaintiff refused.

The parties further agreed that the plaintiff might make any amendments in his writ, consistent with the rules of law, upon such terms as the Court might impose.

And now, the defendant having suffered judgment to go by default, and being admitted to a hearing in damages, the question was upon the amount for which judgment should be entered.

Wheeler, for the defendant, insisted that the plaintiff was entitled to no greater damages than he had in fact sustained; and that these could be but nominal, the body of the debtor being a pledge of no value; since he might and would have liberated himself by taking the poor debtor's oath. For all purposes of substantial benefit, the plaintiff is now in as good a situation as he would have been by an arrest of his debtor. *Colby v. Sampson*, 5 *Mass.* 312. *Nye v. Smith*, 11 *Mass.* 188. *Weld v. Bartlett*, 10 *Mass.* 470.

Thayer, for the plaintiff, contended that the officer was bound by his return, and ought not to be admitted to contradict it, or to avail himself of its falsity. Had the return been true, the bail might have enabled or induced the debtor to pay the debt; and it is not for the officer to calculate the probable results of his duty had it been done;—it was his business to have performed it. *Gardiner v. Hosmer*, 6 *Mass.* 325. *Purington v. Loring*, 7 *Mass.* 392. *Cesar v. Bradford*, 13 *Mass.* 169. *Simmons v. Bradford*, 15 *Mass.* 82.

If the Court should not think this ground maintainable, he asked leave to amend his writ, by inserting a count for not delivering the bail bond;—and cited *Staten v. Chelsea*, 4 *Mass.* 470. *Long v. Billings*, 9 *Mass.* 479.

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

This is an action for a *false return* made by the defendant; in which return he stated that he had taken bail, when in fact he *had not taken* any. The defendant is defaulted; and the question is, what damages the plaintiff is entitled to recover.

The facts in *Weld v. Bartlett*, 10 *Mass.* 470, cited by the defendant's counsel are precisely similar to those in the case at bar. There, nominal damages only were given, in consequence of proof admitted by the Judge who tried the cause, shewing the poverty of the debtor, and that he had not concealed himself. This opinion was sanctioned by the Court, and judgment was entered on the verdict. This case then is a decisive authority in favour of the defendant, as the plaintiff's declaration now stands; and it is not overruled, or in any degree shaken by the case of *Simmons v. Bradford*, 15 *Mass.* 82. That case is different from *this* and *Weld v. Bartlett.*

Simmons demanded damages of *Bradford* on account of the default of one of his deputies in not delivering to him a bail bond, which in *his return* he stated he had taken. The action proceeded on the principle that the *return was true;* the declaration affirmed its truth, and the plaintiff claimed those advantages to which he would have been entitled, had such bail bond been delivered up to him for his use. In *that* case the Court would not permit the defendant to *deny the truth of the return;* but subjected him to the payment of the plaintiff's demand; because the bail which he returned that he had taken, would have been liable to the same amount. But in *Weld v. Bartlett*, and in the present case, the plaintiff proceeds on the *disaffirmance* of the officer's doings, and expressly *denies* the *truth* of the return, and demands damages for its *falsehood.*

The plaintiff's counsel, in order to bring this case within the principle of *Simmons v. Bradford*, has moved for leave to add a new count; charging the defendant with neglect in not delivering to him, on demand the bail bond which he has alleged

in his return that he had taken; and this motion he makes in virtue of the agreement of the parties. This amendment is opposed by the defendant's counsel on the ground that it is not within the *rules of amendment*; and the agreement extends to no other. On consideration of this motion, we are all satisfied that it cannot be sustained. The proposed count would be founded on *a new cause of action;* and *such* can never be admitted by way of amendment, unless by consent. If the motion stood on doubtful ground, we should not feel any disposition to extend the doctrine of amendments in favour of a plaintiff, who, from the facts before us, seems to have discovered a disposition to avail himself of undue advantage. The amendment is not permitted; and the plaintiff is entitled to none but *nominal damages.*

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

KENNEBEC.

MAY TERM,

1822.

PATRIDGE *v.* BALLARD & AL.

Under *Stat.* 1786, *ch.* 67, it was competent for the Court of Sessions, in the exercise of a sound discretion, to impose as a condition on granting the prayer of a petition for a new highway, that the expense of its location should be borne by the petitioners.

The petitioners in such case are not bound to cause the road to be laid out; but if they do, they assent to the condition imposed, which they are therefore bound to perform.

If, pending such petition, it be altered in a part not affecting the general object sought by the petitioners, such alteration will not discharge their liability.

The effect of such alteration upon the road prayed for being a question of fact, and not of construction, is to be determined by the jury.

ASSUMPSIT for services performed by the plaintiff, as one of a Committee appointed by the Court of Sessions of this county, to lay out a certain highway, upon the petition of the defendants.

From the report of the Judge who presided at the trial it appeared that in the year 1799 the Court of Sessions of this county established a standing rule, that all county roads laid out under the authority of that Court on the application of petitioners, should be *laid out at the expense of such petitioners*, unless otherwise specially directed; and that the practice ever since had been uniformly according to the rule.

It further appeared that upon a petition of the defendants, the Court of Sessions, after due proceedings had, appointed a committee of whom the plantiff was one, to lay out the highway herein prayed for, at the expense of the petitioners; the com-

mittee proceeded under their commission to examine the ground over which the road was to pass; and being of opinion that a variation from the precise course described in the petition and thence copied into their commission, and for which one of the petitioners was also particularly solicitous, would better accommodate the public, they recommended such alteration to the Court;—whereupon the Court being satisfied on due examination that the alteration would be a public benefit, and that it did not materially affect the general objects and views of the petitioners, and no person appearing to object, the Court amended the petition accordingly, and reappointed the same committee to lay out the highway agreeably to the petition as thus amended, at the expense of the petitioners; and the committee proceeded thereupon to lay out the highway, some of the petitioners being present at the location and made due return of their doings.

It did not appear that the petitioners ever specially employed any person as agent or attorney to present the petition; but it was handed by a third person, (together with another petition signed by others for the same highway but which was never prosecuted,) to the attorney who did in fact present it, and who attended to the business while it was pending. Nor did it appear that the committee were ever instructed or requested by either of the petitioners to lay out the highway, or that they were notified by either of the petitioners not to enter upon that service. But it did appear that they intended that the petition should be presented; that they well knew the general course of proceedings relating to its presentment and prosecution, from time to time while it was pending; and that none of them, during that time, ever disclaimed or disavowed the authority of the attorney who had charge of the business in their behalf. There was also some evidence exhibited touching the effect of the alteration made in the petition, upon the general object sought by the petitioners.

Upon this evidence the Judge instructed the jury that it was competent for the Court of Sessions, in the exercise of a sound discretion, to impose as a condition on granting the prayer of a petition for a new highway, that the expense of its location should be paid by the petitioners;—that the petitioners in such

case were not bound to cause the road to be laid out; but if they did proceed and cause it to be laid out under such order, they thereby assented to the condition imposed;—that if the alteration in the road prayed for was one which would better accommodate the public, and at the same time was not material as it respected the objects sought by the petitioners, of which the jury would judge, such alteration would not discharge the petitioners, if otherwise responsible to the plantiff; but that if the alteration made was inconsistent or at variance with the general objects and views of any one of the petitioners, unless such alteration had been assented to by the petitioners, it would discharge them;—that the rule of Court having been established for twenty years or more, and having been uniformly practised upon, except in special cases; and the attorney continuing to proceed in obtaining the location of the road, and the petitioners not objecting, but some of them taking an active part in forwarding the proceedings, were facts constituting sufficient evidence of assent to the conditions imposed respecting the expense;—and that it could not avail the defendants that all the committee had not joined in the action, nor that there was another petition for the same object, signed by other persons who were not defendants in this action.

The jury thereupon returned a verdict for the plaintiff, which was to be set aside if this direction was wrong; otherwise, to stand.

Emmons, for the defendants.

1. The Court of Sessions had no authority by law to impose on petitioners the expense of locating roads, without their consent.

Their powers are given by statutes, in which this authority is not enumerated, and therefore does not exist. There is no reason why it should exist:—it is repugnant to natural justice, as it compels private citizens to pay for public works:—it is an unequal distribution of public burdens:—and against the policy of the law in other cases similar in principle to this, as where a private citizen prosecutes a criminal offender. The public ought to defray the expense as well in the one case as in the other.

2. Here has been no assent of the petitioners.

As the Court of Sessions had no authority to create an obligation on them, they may well be presumed to have relied on that fact; in which case their suffering the process to go on is no evidence of assent. And they may well be supposed to have believed that all the petitioners on *both* petitions were alike liable. Had there been an express promise, it would not have bound them, if the law would not otherwise charge them:—much less where, as in this case, there was no sufficient consideration.

3. The petition was materially altered, without the petitioners' consent.

Greenleaf and *Fuller*, for the plaintiff.

As to the *first* point, they contended that the roads denominated public highways were often of greater private than public advantage;—that the Court of Sessions was a committee of the prudential affairs of the county;—that they were not bound to establish roads whenever prayed for;—but might well take all circumstances into their consideration, and establish them upon such terms as they might think reasonable;—and that if the expenses of a viewing committee were legally chargeable on petitioners, as in *Commonwealth v. Cambridge*, 7 *Mass.* 158, so, for the like reason, the expense of location.

As to the *second* point, they insisted that the petitioners, well knowing that the petition was advocated by a gentleman of the bar in their behalf, and not having denied his authority, they were bound by all orders of the Court, of which he was conusant. If he did not choose to accept an adjudication upon the terms of the order of 1799, he might have withdrawn the petition.

The immateriality of the alteration was settled by the verdict.

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

Several objections have been made to the instructions given to the jury by the Judge who presided at the trial.

As to the competency of the Court of Sessions to annex a condition to the grant of the prayer of the petition for the location of the highway in question:—by the *Stat.* 1786, *ch.* 67,

sec. 2. the Court of General Sessions of the peace may, in certain cases lay out *private ways* at the costs *of the persons applying.* A similar power is given to the Court of Sessions in this State, by *Stat.* 1821, *ch.* 118. *sec.* 10. By this provision it must be intended that the Courts may subject the persons applying for the way to the payment of such costs, whether they consent thereto or not. In the case of county roads or highways no such provision exists by law. In the case before us it was not contended by the plaintiff nor intimated by the Judge that the Court had power to compel the petitioners to defray the expense of laying out the road *without their consent.* The decision of the Court as to the location of the road, expressed in the judgment and warrant, could not *of itself* create any liability on the part of the petitioners;—it is the *assent* of the petitioners, in every such case, which must create their liability. Hence, in the case at bar, the question of assent was left to the jury for their consideration and decision, upon the evidence relied on by both parties. On this point we perceive nothing incorrect in the Judge's instructions to the jury.

The next objection to the opinion of the Judge relates to the *alteration* made in the course of the road, and the submission of the question of its *materiality* to the determination of the jury, as well as the petitioners' *assent* to such alteration. We think both these points were properly left to the jury. This is not like the common case of an alteration of a written contract, where the question of materiality is always a question of law,—being a question of construction;—but in the case before us the materiality or immateriality must depend on facts which are not open to the inspection of the Court, but must be proved by witnesses in the usual form, whose character and testimony must be the subject of their peculiar consideration.

Neither was the Judge incorrect in stating to the jury that certain facts, by him enumerated, constituted sufficient evidence of the assent of the petitioners to the conditions above mentioned respecting the expense of laying out the road. By this instruction of the Judge he must have intended that the jury would decide whether the facts to which he referred were satisfactorily proved; and that, if they believed those facts, they proved the assent to those conditions. We perceive nothing improper

in this instruction. When certain facts are proved, with a view to take a case out of the statute of limitations,—to prove a new promise by a person after his arrival at full age,—to shew probable cause for a prosecution,—or to charge or discharge an indorser in a suit against him; in all such cases, and many others which might be named, it is a question of law whether the facts so proved are sufficient to establish the point intended.

Another objection is, that it is against public policy to give legal effect to the promise of the defendants, if such promise has been proved. No authorities have been read to support this objection; and inasmuch as the petitioners must have felt an interest in procuring the establishment of the road, we do not perceive why public policy should discountenance the performance of the promise they made to gain the object they had in view. See the case *Gowen v. Nowell*, 1 *Greenl.* 292.

The last objection which has been noticed by the counsel in the argument is, that the promise of the defendants is without any legal consideration. In reply to this objection we need not add any thing to the answer last given.

Judgment on the verdict.

TODD *v.* THE INHABITANTS OF ROME.

A town is not liable in any form, for the deficiency of a road, unless, by regular legal proceedings, or by *user* and acquiescence for a sufficient term of time, they have acquired the right to enter upon the land, and make and repair the road.

Such use and acquiescence for twenty years, and perhaps for a shorter period, may be considered sufficient to give the town a *right*, and subject them to *liability* to repair, and to its legal consequences.

No *certiorari* lies to set aside the doings of a town respecting the location and acceptance of a *town* way. If they are not legal, they are *merely void*.

THIS was an action on the statute, [*Stat.* 1821, *ch.* 118. *sec.* 17.] for an injury to the plaintiff's horse, occasioned by a defect in a causeway on a supposed town road in *Rome;* and came before the Court upon a motion to set aside a nonsuit.

The plaintiff, at the trial of the issue, proved from the town records of *Rome*, that at a town meeting on the 16th day of *Jan-*

uary 1815, the inhabitants voted "to accept a piece of a "road, beginning at a stake and stone north of *Ivory Blasdell's* "cut-down, and running *southwesterly* to *Solomon Tracy's* dwelling "house in *Rome;* said road to be four rods wide, and to be on "each side of said course." He also proved, by one of the selectmen for the years 1814 and 1815, that he, with the other selectmen, in the autumn of 1814, laid out a road from *Blasdell's* to *Richard Furbish's*, in *Rome*, and made minutes thereof, which were presented at the town meeting on the 16th of *January* 1815, but he did not recollect whether those minutes were signed or not;—that the road as laid out by them passed the dwelling house of *Solomon Tracy, junior*, but the town accepted only the part extending from this latter house to *Blasdell's;*—and that the witness, who was also town-clerk, in recording the acceptance of the road, omitted the addition of *junior* to the name of *Tracy*, by mistake. He also proved that the surveyor of highways, for the year 1815, caused the road from *Blasdell's* to *Solomon Tracy, junior's*, to be cut out, built a small bridge, and made a causeway of logs, on the same road, on which causeway the plaintiff's horse received the injury complained of;—that a surveyor of highways, living on the road between *Furbish's* and *Blasdell's*, had been chosen by the town every year since the acceptance of said piece of road, and had expended thereon more or less of the highway taxes of the inhabitants living thereon;—but it did not appear that the assessors had made out any warrants to the surveyors of highways, nor any assignments of their limits. It was also proved, that in the years 1819 and 1820, the surveyor living on said road had the names of the men living on the same, with the amount of each man's tax, given him by the assessors, and that he caused the same to be expended in labour on that road; but still had no warrant or assignment of his limits, under the hands of the assessors;—and that after the injury to the plaintiff's horse, the surveyor living on the road repaired the causeway, at the expense of the town. It also appeared that due but ineffectual search had been made for the minutes or report of the selectmen who laid out said road, it being supposed to be lost.

On the part of the defendants it was proved that there was a town road leading from *Blasdell's* to *Solomon Tracy, senior's*,

which had been opened and used before the 16th of *January* 1815, the course of which is south 30 degrees west, and that the course of the road contended for by the plaintiff is south 80 degrees west;—that during the spring and summer three sets of bars have usually been kept up across the road between *Furbush's* and *S. Tracy junior's*, and one set between the latter place and *Blasdell's*;—that at *Furbush's* it terminates in a town road leading to *New-Sharon*, and is there closed by bars;—that at *Blasdell's* it terminates in another town road leading to *Mercer*, where it is open;—that the road on which the injury happened is not fenced at the sides;—that the line fence of one of the owners of the land crosses the road at one of the barred places;—that the old road from *Blasdell's* to *Tracy's* was fenced up in 1815 and that no labour had since been expended upon it;—and that the causeway is ten rods northerly of a course south 80 degrees west from *Blasdell's* to *S. Tracy junior's*, but yet is built in the travelled path. They also proved that the person riding the plaintiff's horse was notified that it was obstructed by bars, which, however, he removed.

It further appeared that the defect in the causeway was occasioned about sixteen days before, by a freshet, of which the surveyor living on the road had due notice;—and that it was repaired by a surveyor of highways in the summer of 1821.

Upon this evidence, by advice of the Judge who presided at the trial, the plaintiff became nonsuit, subject to the opinion of the whole Court upon the general question whether, upon the facts stated, the action could be sustained.

Boutelle and *Clark*, for the plaintiff.

The statute which gives the action being remedial, is to be liberally expounded, in favour of the party injured; imposing on towns the duty to repair all highways, in whatever manner established.

1. The road in question was well located according to the statute; for there was a laying out by the selectmen, and an acceptance by the town. The location by the selectmen was sufficiently recorded, upon the paper laid before the town; which it was not necessary they should *sign*. But if the proceedings of the town or its officers were not in all respects

formal, yet the record of the acceptance of the road by the town ought to have at least the effect of an adjudication of the sessions that a way prayed for is of public convenience; behind which record, parties are not permitted to go, where there has been an acquiescence in the road as located. *Ex parte Miller*, 4 *Mass.* 565. *Commonwealth v. Justices of Norfolk*, 5 *Mass.* 435. *Hardin's Rep.* 258.

Nor is it competent for the town to deny their own record. And here they have recorded a way established from *Blasdell's* to *Tracy's*.

The original record made by the selectmen being lost, we may presume that the record of the town contains only the general description of the way; and that the lost paper contained the particular courses. *Makepeace v. Bancroft*, 12 *Mass.* 469. If the existing record discovers any uncertainty in the description either of persons or courses, it is made certain by reference to the actual location. As to the course described as *southwesterly*, it must be taken to mean any course between south and west, which will lead to the *terminus* mentioned; and the actual location shews which of the *Tracys* was intended. The omission of *junior* from the name of one of them reduces the case to the common occurrence of a latent ambiguity, which may always be explained by matter *ab extra*. *Peake's Ev.* 112. 10 *Johns.* 133.

2. But if it is not a way of record, yet it is a way *de jure*, or *de facto*; and however the town may have acquired the easement, they are bound, from the moment of acceptance, to maintain it, at least until it is as publicly abandoned. The modes in which such easement may be acquired are various, but the authorities all go to prove the correctness of this position. *Alden v. Murdock*, 13 *Mass.* 258. 8 *D. & E.* 608. 1 *Campb.* 260, 262. 8 *East*, 6. 11 *East*, 265. *Phillips' Evid.* 126. *Shaw v. Crawford*, 10 *Johns.* 236. *Hathorne v. Haines*, 1 *Greenl.* 245. 2 *Str.* 909. If the town, by any act of their own, as by erecting guide-boards, or by open assumption of the obligation of maintaining a way as a public road, induce the unwary traveller to pass over it to the injury of his limbs or property, it is most reasonable that the town should respond in damages; and that this liability should continue until the public are informed,

by some act of equal notoriety, that the obligation is no longer recognized by the town.

The bars erected across the road are no evidence of any denial of this duty, because towns being authorized by the statute to permit such erections, they must be presumed to be kept up by leave of the town, rather than to have been nuisances, unless the contrary appear. And such license would be in itself sufficient evidence, against the town, of the existence of the road.

Bond, for the defendants.

1. Here is no legal way. It should not only have been laid out by the selectmen, but they should have made a report of their doings under their hands, to the town, and this report should have been recorded. *Commonwealth v. Merrick*, 2 *Mass.* 529. But here was no report, and so the subject was never legally before the town.

Besides, the forms of law not having been observed in the location of the road, the town have acquired no right to enter on the land to make or repair it. Every person thus entering would be liable in trespass. And if the town have not the right to make repairs, they are not responsible for damages arising from defects in the road; for the right and the obligation are inseparable.

2. If it were a way of record, yet the record is the only evidence; and if *this* be regarded, the injury did not happen upon the way laid out, but on private property far distant from it. And this record is not to be contradicted by the parol evidence offered. *Peake* 112. *Hunt v. Adams*, 7 *Mass.* 518. *King v. King*, *ib.* 496. *Townsend v. Weld*, 8 *Mass.* 146. *Stackpole v. Arnold*, 11 *Mass.* 27. But if it were competent for the plaintiff to introduce the parol evidence offered at the trial, yet the case shews that the causeway on which the injury happened is several rods north of the course contended for, and so not within any possible liability of the defendants.

3. But if the injury happened upon a road regularly laid out, yet it was merely a *private* and not a public way; and such ways towns are not obliged to support. The only obligation on them is imposed by statute, and this speaks of highways and town ways only. Private ways are reparable by *private*

persons, and their liability for not repairing seems recognized by the same section on which this action is founded.

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

In this case a nonsuit was entered by consent of parties, and all the evidence has been reported; and we are to decide upon it in the same manner as though the whole had been presented upon a statement of facts.

In the argument several questions have been discussed which it is not necessary for us now to decide. The only points demanding attention are—whether a town way was legally laid out and established at the time and in the place contended for by the plaintiff;—and if not,—whether a road or highway has been *in fact* opened and used in such a manner and for such a length of time as to render the town liable for the damages done to the plaintiff's horse by means of the defect in the bridge situate on such alleged road or highway.

As to the *first* of these points, there seems to be no doubt upon the facts before us. In the case of the *Commonwealth v. Merrick*, 2 *Mass.* 529, it was decided that the doings of the selectmen relating to the laying out a town way must be recorded; otherwise the way is not legally established. In the present case that was not done. What those doings were is but imperfectly known; nor does it appear that they made and signed any location of the way. The way then clearly was not a legal *town* way, or *private* way; and cannot be considered as such, unless in an action or prosecution against such town. It is urged by the plaintiff's counsel that the town cannot object to their own proceedings on account of their irregularity; and that as *against them* the location and acceptance of the way are to be considered legal and binding. To this it may be replied that any of the owners of the land through which the supposed way is laid could have maintained an action against the surveyor for opening and making it;—because such owner certainly might object to the irregularity of the proceedings, even if the town could not. How then could the town be liable, in any form, for the deficiency of such supposed road, if they had no legal right to open and make it without the consent of such owner? Their *duty* cannot be broader than their *right*. It is true if the owners of the lands over which the supposed road

has been laid, had *assented to it*, even though it was not located exactly in the course described in the return and acceptance of it, and the public had been permitted to use it according to its practical location, without molestation or objection, and such consent, acquiescence and *user* had been continued for twenty years, or perhaps for a shorter time;—these circumstances might essentially change the ground, and be considered sufficient to give the town a *right* to repair the way, and subject them to *liability* to repair, and to the legal consequences of neglecting their duty. But such is not the proof in the present instance.

It has, however, been urged that the way must be considered as a legal one, until it shall be declared void by some legal process; in the same manner as county roads which have been laid out are to be deemed, and all the proceedings relating to their location valid, however erroneous and imperfect they may be, until quashed on a writ of *certiorari*. The cases are in no wise parallel. No *certiorari* lies to set aside the doings respecting the location and acceptance of a *town* way. Hence if they are not legal, they are *void*, and not merely *voidable*.

As to the *second* point;—to prove that a way *de facto* existed as above mentioned, the plaintiff relies on the circumstance that the road was opened and made in the year 1815 by the surveyor of the town of *Rome*,—and that he had at different times expended the money of the town in repairing it, by permitting the persons living on the road to work out upon it the amount of their highway taxes,—and that this was done by the consent of the assessors, verbally given. But, opposed to this is the fact that ever since the year 1815 this supposed road has remained, in all parts of it, without any fence on either side, and several of the owners of the adjoining lands have extended their *line fences across the road*; so that no persons could pass or repass without removing bars in three or four places. We consider this as clearly shewing a controling power, exercised by the owners of the lands, over all the supposed claims of the public, utterly inconsistent with the nature of a highway or town way *de facto*; and are satisfied that the nonsuit ought to be confirmed. *Motion to set aside the nonsuit overruled—*

And judgment for defendant.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

SOMERSET.

JUNE TERM,

1822.

Memorandum. WESTON J. was not present at this term.

THE STATE *v.* SMITH.

A recognizance for the appearance of the party in a criminal prosecution should state in substance all the proceedings which shew the authority of the magistrate or Court to take it.

In a *scire facias* upon a recognizance taken by a Justice of the peace in a criminal case, it must appear that the recognizance has been returned to the Court having jurisdiction of the matter.

SCIRE FACIAS upon a recognizance entered into before a Justice of the peace. The writ recited that the defendant acknowledged himself indebted in a certain sum, to be levied to the use of the Commonwealth of *Massachusetts*, if one T. P. should fail personally to appear at the next Circuit Court of Common Pleas to answer to the complaint of one J. A. against him for assault and battery; and alleged that T. P. did not appear at said Court "but made default as appears of record." To which the defendant demurred.

Boutelle, in support of the demurrer, objected that it did not appear from the recognizance that the Justice had jurisdiction of the matter. It speaks of a complaint for an assault, but it does not appear where it was pending, nor that there was *any* process before the magistrate. The cause of caption should appear in the recognizance itself. *Commonwealth v. Downing.*

9 *Mass.* 520. *Commonwealth v. Ward*, 4 *Mass.* 497, *ib.* 641.— Moreover, it does not appear that the recognizance was made matter of record in the Court to which it was returnable. *Bridge v. Ford*, 7 *Mass.* 209. 4 *Mass.* 497. *Commonwealth v. Downing*, 9 *Mass.* 520.

Kidder, for the State, replied that the writ sufficiently shewed that there was a complaint pending for assault and battery; and in all such cases the statute gave jurisdiction to Justices of the peace, either to bind over, or to punish by fine. Here he bound over by recognizance, which is apparent enough from the writ. *Commonwealth v. Loveridge*, 11 *Mass.* 337.

As to the other objection, he adverted to the recital in the writ "as appears of record," which might well be taken to relate to all the proceedings previously set forth.

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

It is settled law that a recognizance should state the ground on which it is taken, so that it may appear that the magistrate taking it had jurisdiction and authority to demand and receive it. 4 *Mass.* 641. 7 *Mass.* 209. 9 *Mass.* 520. These cases shew that the Court issuing the *scire facias* must be in possession of the record of the recognizance. In all cases such *scire facias* must contain an averment of those facts which shew the recognizance to have been legally taken and returned to the Court where the party recognizing is bound to appear, and such proceedings of that Court as form the basis of the suit. In the present case, the writ does not state that any complaint was made to the Justice taking the recognizance, nor that any process was pending before him. Neither does the recognizance. Nor have we any facts by which we can ascertain by what authority he demanded and received it. It does not appear that he had rendered any judgment or passed any order against the party accused, or that any appeal had been claimed by him to the Circuit Court of Common Pleas, nor on what account the recognizance was entered into by the defendant. Nor is there any averment that the same had ever been returned to that Court, so as to become the legal foundation of the present action. In every view the process is defective, and we accordingly adjudge the writ insufficient.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

HANCOCK.

JUNE TERM,

1822.

WINSLOW *v.* GRINDAL.

The grantee of land is not bound by a judgment in a suit commenced *after* such grant, by his own grantor, against *his* immediate grantor, upon the covenants in his deed.

ENTRY SUR DISSEISIN. The demandant proved that as early as the year 1770, his son *David Winslow* entered into the demanded premises claiming them as his own; but that at the commencement of the war of the Revolution he left this part of the country, and was supposed soon after to have died, unmarried, never having been heard from. Upon his leaving the premises, the demandant entered and made improvements, claiming the land as his own, till *July* 16, 1788, when he sold and conveyed the premises, with warranty, to *Samuel Fairfield*. *Fairfield* afterward sued the demandant upon his covenants of seisin, right to sell, and freedom from incumbrances, as contained in the deed of conveyance; in which action the demandant's seisin at the time of the conveyance being put in issue, the jury found that the demandant was not seised of the premises as he had covenanted in his deed; and judgment was thereupon rendered against him for $177,75 damages, at *June* term, 1801.

The tenant derived his title, by several mesne conveyances under which the respective grantees entered, from the same

Samuel Fairfield, who sold the land to one *Andrew Herrick*, *July* 27, 1789.

A verdict was taken for the demandant, subject to the opinion of the Court upon the foregoing facts.

Abbot, for the demandant.

The title of the demandant is admitted to be good, unless it was conveyed by his deed to *Fairfield*. But the judgment recovered by *Fairfield* against him on the covenant of seisin, shews that *Winslow* was not seised when he undertook to convey, and of course nothing passed by the deed. *Porter v. Hill*, 9 *Mass.* 34. The tenant, being privy in estate, is estopped to deny the fact found by that judgment. The deed, therefore, of *Winslow* to *Fairfield* may be laid out of the case; and then the title of the tenant wholly fails, and that of the demandant is unimpeached.

Orr and Wilson, for the tenant.

If *Winslow* was not seised of the land at the time of the conveyance to *Fairfield*, then there was no *privity* between them; and the judgment produced in evidence is nothing to *Fairfield's* grantees. It only proves that *Winslow* was not the owner of the land.

Whoever the true owner may be, he was disseised by the deed from *Fairfield* to *Herrick* in 1789.

But the judgment against *Winslow* is not conclusive on the tenant on another ground;—it was obtained long *after* the deed was made by *Fairfield* to *Herrick*, and without *notice* to the tenant. It could not have bound any but those who were parties to the record.

The cause having been continued under advisement from *June* term, 1821, when the argument was had, the opinion of the Court was now delivered as follows, by

PREBLE J. If *Fairfield* had continued in possession of the demanded premises, and were tenant in this action, there would be no doubt of *Winslow's* right to recover. In such a case the demandant would no longer be estopped to deny that any thing passed by his deed to *Fairfield*, whereas *Fairfield* having al-

ready recovered a full indemnity in his action for covenant broken would be estopped by the record from claiming any thing under his deed. *Porter v. Hill*, 9 *Mass.* 34. And the same rule would apply to all persons claiming title in the demanded premises under *Fairfield*, whether mediately or immediately *derived from him subsequently* to such recovery. But in the case at bar, the demandant having been in quiet possession for more than twelve years, claiming and improving them as his own, conveyed the demanded premises by deed to *Fairfield*. *Fairfield* thereupon entered under his deed, and continued to hold and occupy for about a year, and without having been evicted, ousted or disturbed in his possession, conveyed the premises to *Andrew Herrick*. *Herrick* accordingly entered and continued to occupy and improve, unmolested and undisturbed, until he conveyed the premises in 1811 to *Alexander*. Now whatever right *Winslow* had, passed to *Fairfield;* and whatever he had, passed to *Herrick*. It is one of the first principles of the law, founded in the plainest common sense, that where a man has granted an unconditional estate to another, it is not in his power, without the concurrence of his grantee, to resume or defeat the estate thus granted. It was not competent for *Fairfield*, ten or more years after he had conveyed away an estate, merely by his own act to defeat that conveyance. *Herrick's* right cannot be affected by the proceedings in the action brought by *Fairfield* against *Winslow*, to which *Herrick* was not a party or privy, and by which of course he is not bound. Whatever estate *Herrick* therefore derived from *Fairfield*, passed to *Alexander*, and from him to the tenant. The verdict must be set aside; and according to the agreement of parties the demandant must be called.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

YORK.

AUGUST TERM,

1822.

LORD *v.* CHAMBERLAIN.

By the law as it stood prior to *Stat.* 1821, *ch.* 135, every person resident within the limits of a territorial parish, if otherwise qualified, was *ipso facto* a member of the same, unless he was regularly united as a member to some poll-parish. And on ceasing to be a member of such poll-parish, he became forthwith a member of the territorial parish within which he resided, unless such secession was colorable and fraudulent.

But by *Stat.* 1821, *ch.* 135, it seems that no person can become a member of any religious society without first obtaining its consent.

THIS was an action of trespass on the case against the defendant, as clerk of the first or congregational *parish* in *Lebanon*, for refusing to receive the plaintiff's vote for a moderator, at a parish meeting held *May* 8, 1820; and it came before the Court upon exceptions filed to the opinion of the Circuit Court of Common Pleas, and an appeal therefrom pursuant to the statute.

It was proved, at the trial in the Court below, that the town of *Lebanon* formed one parish, the bounds of which were the same with the bounds of the town: and that within the town there were two voluntary religious associations formed under the *Stat.* 1811, *ch.* 6, to one of which, called the first baptist society in *Lebanon*, the plaintiff united himself as a member in *August*, 1811, having previously for many years been a member of the congregational parish. He continued thus a member of the baptist society till *April* 24, 1820, when he obtained duplicate certificates that he had *withdrawn* from that society, their

articles of association permitting him so to do; one of which certificates he lodged with the town clerk, and thereupon, claiming to have again become a member of the congregational parish, he attended a meeting thereof on the 8th of *May* following, producing the other certificate to the clerk who presided at the choice of moderator, and offering his vote, which the clerk refused to receive, and for which refusal this action was brought.

During the time in which the plaintiff professed to belong to the baptist society he had occasionally, and some of his family had always, attended the religious meetings of the congregational parish; but he had never been taxed there after his secession in 1811.

It was also proved that about the time of the plaintiff's withdrawing from the baptist society he declared that *his object was to destroy the first parish*, and to obtain their lands for the town of *Lebanon;* and that many others had agreed with him to obtain similar certificates for the same purpose. These lands were certain lands given by the original proprietors of *Lebanon* for the use of the ministry, and were partly in possession of the town, and partly in possession of the parish, claimed by both.

The Court below were of opinion that the plaintiff, on withdrawing from the baptist society in 1820, again became by operation of law a member of the congregational parish, and entitled, as such, to vote in the election of its officers;—to which opinion the defendant excepted.

Emery and *Hayes*, in support of the exceptions, argued that however the law may have been, prior to *Stat.* 1811, *ch.* 6, it was the object of that statute to put all religious societies on a footing of perfect equality of rights and privileges, and to designate the *certificate* as the only legal evidence of parish membership. It undoubtedly designed this evidence to apply as well to the returning to a parish once left, as to the original departure from it by joining another. In both cases the membership is to be proved by certificate from the clerk of the society *to* which the party has united himself. A different construction involves great mischief. If every town composes one parish, of which all persons are members *de facto* who do not belong to any other religious society, then such parish must lie at the

mercy of all other denominations, and be obliged to submit its property and its affairs to the control of its foes, since it would have no power to prevent them from becoming members of the corporation.

The right of admitting or excluding members ought to be permitted to every corporation, as essential to its preservation and safety;—at least the right to exclude persons attempting to thrust themselves in, as in the present case, with the avowed purpose of effecting its destruction.

Shepley and *Burleigh*, for the plaintiff, contended that by the laws of *Massachusetts*, by which this question was to be determined, every citizen was considered as a member of the territorial parish where he lived, unless he was united, in the mode provided by statute, to some particular society commonly called a poll-parish, for the time being. Such temporary membership was only in the nature of an exception to a general rule; and the plaintiff, by leaving the baptist society, and thus ceasing to be under the exception, again became subject to the general rule as a member of the territorial parish.

Nor is this any other than the fair and legitimate operation of a principle adopted at an early period in the history of this country. Every man, of whatever communion, was compellable by law to pay taxes as a member of the parish within whose territorial limits he might happen to reside; and it was but just that he should be allowed to vote in imposing them. The evil, if it be such, of being exposed to the addition of unwelcome corporators, has always existed, and is common to towns as well as parishes. The case shews nothing more nor less than a regular application of the great principle that the right to vote and the obligation to pay taxes are reciprocal, and that in all cases the will of the majority must govern.

After this argument, which was had at the last *April* term, the cause was continued for advisement; and now the opinion of the Court was delivered as follows, by

Mellen C. J. When a man moves into a town from some *other* town, or being resident in a town arrives at full age, he at once becomes a member of the corporation without its consent, or any other act on his part; and is subject to all the *liabilities*

and entitled to all the *privileges* of a member. The same consequence follows when a man removes from another place into a *territorial parish*, or, while resident therein, arrives at full age.

If a *poll-parish* be formed within the limits of a territorial parish, a man living within those limits, or removing within them from another place, does not thereby become connected with such *poll-parish*, without being included in the act of incorporation by name, or *doing some act* expressive of his intention to become a member of the poll-parish, and not belong to the territorial parish. The nature of this act, and the *proof of membership*, are designated by law. Both were formerly prescribed in the acts incorporating such poll-parishes, and until the general provision on this head was made in the second section of the act of 1811, which rendered special provisions in each case unnecessary.

All such provisions, whether *general* or *special*, seem founded on the idea that unless a man belongs to a poll-parish, by its charter, or by his own election, and act afterwards, he continues to be, of course, a member of the territorial parish within the limits of which he resides.

From an examination of the act of 1811 it appears that the second section of it was intended to apply to poll-parishes or societies, corporate or unincorporate, not distinguished by territorial bounds or limits: and to provide the mode of joining any such societies and proving membership. Because, as we have before observed, no declaration or certificate can be necessary to create or prove membership of a territorial parish. These can be necessary only where members of a territorial parish *withdraw* from it. Hence the section provides how persons may change their relation, and become members of any such *poll*-parish. But it will be observed that the act neither makes provision for a person's *returning to*, or *becoming a member* of the *territorial* parish *again*;—nor prescribes any mode by which his connexion with a poll-parish is to be dissolved, or the dissolution proved. This was not thought necessary. An exemption of the seceder from taxation during the time of his membership in the poll-parish was all that the legislature contemplated.

When a man leaves a poll-parish, and ceases to be a member of it, the general principle of law at once places him under the jurisdiction of the territorial parish, by making him a member of it, without any other act on his part, and as effectually as if he had removed into such parish from another town;—that is to say, he is divested of his character of member of the territorial parish no longer than while he continues a member of the poll-parish. When this latter membership ceases, he instantly assumes his former character.

Let us now apply these principles to the case before us. *Lord*, until *August* 28, 1811, continued a member of the first or congregational parish in *Lebanon*, being a *territorial* parish. He then joined the first baptist society—a poll-parish—of which he continued a member till *April* 1820. He then by his own act, and by the consent of said society, as appears by the certificate of the society's committee, dissolved his connexion with it, and left such certificate with the town clerk. This was notice that he claimed the *rights*, and submitted himself to the *liabilities* of a member of the first or congregational parish, and by operation of law he then was a member of it, and had a legal right to give the vote which the defendant refused to receive;—*provided* the dissolution of the plaintiff's connection with the baptist society was in reality what it appeared to be,—that is, sincere, *bona fide*, and complete;—not fraudulent, colourable and pretended;—because fraud poisons every thing, and renders that void and ineffectual which would otherwise have its intended operation. Now on the exceptions it appears that "about "the time the plaintiff, *Lord*, obtained his certificate from the "said committee with a view of seceding from said baptist so- "ciety, he declared that his object was to *destroy said first par-* "*ish*, and obtain the *parish lands* for the benefit of the town of "*Lebanon*, and that *many others* had agreed with him to obtain "similar certificates for the *same purpose*." This is the plaintiff's own language;—it is proved that he made this declaration of his own motives, and those of many others of the first baptist society, in obtaining the certificates of secession from that society. This declaration we are bound to believe. It can have no operation as to any other member of the society; but as to the plaintiff it is an avowal of motives which prove

his conduct in the above transaction to have been colourable,—his secession *pretended* only,—and designed as a *fraudulent* mode of obtaining the control of the ministerial lands. This renders the whole proceeding ineffectual on his part; and an attempt of this kind can never be sanctioned by a court of justice. The exception therefore of the defendant to the direction of the Court below must prevail, and a new trial be had at the bar of this Court.

It will be observed that our statute of 1821, *ch.* 135, contains some new provisions on the subject of parishes; one of which is—" that any person may become a member of any parish or " religious society now existing, or hereafter to be created, by " *being accepted by the society of which he wishes to become a mem-* " *ber*, at a legal meeting of the same, and giving notice thereof " in writing to the clerk of the society which he is about to " leave." But as the facts of the case at bar took place before the passing of this statute, we must be governed in our decision by the statute of 1811. And the general principles laid down are to be considered as having reference to the laws as existing prior to the statute of 1821.

New trial granted.

HEATH *v.* RICKER & AL.

Parol proof of usage in the maintenance and repair of separate portions of a partition fence, is admissible evidence to shew a prescription.

THIS was an action of trespass for taking and carrying away the plaintiff's sheep, and came before this Court at the last *April* term upon a summary bill of exceptions to the opinion of the late Circuit Court of Common Pleas, pursuant to the statute.

The defendant *Ricker* pleaded in justification that he found the sheep in his close, *damage feasant*, and impounded them as he lawfully might, and that his proceedings respecting them were conformable to the provisions of the statute respecting cattle taken *damage feasant*. To this the plaintiff replied that the sheep escaped from his, which was an adjoining close, into the close of the defendant, through the defective fence of said

Ricker. The defendant rejoined that the sheep did not escape through the deficiency of his fence, and hereupon issue was joined.

To maintain the issue on his part, the plaintiff offered a witness to prove that *Ricker* shewed the witness which part of the fence dividing the close of the plaintiff from his own was the fence of the defendant, and which part was the plaintiff's fence; and to prove that the fence shewed by the defendant as his own was in a decayed and ruinous condition, and wholly insufficient. The Court below ruled this evidence to be inadmissible, until it should first be shewn that the partition fence had been divided in the mode prescribed by statute, or by an agreement in writing; to which opinion the plaintiff excepted.

Wallingford, being about to argue in support of the exceptions, was stopped by the Court.

Burleigh and *Goodenow* for the defendant, argued that every man is bound by the common law to keep his cattle on his own close at his peril; and the moment they escape into another's field he is liable, unless it was through the other's fence, which was deficient. *Rust v. Low*, 6 *Mass.* 90. *Stackpole v. Healey*, 16 *Mass.* 23. The division of a partition fence between the owners of adjoining closes may be proved—1st by written agreement between them;—2d by an assignment made by fence-viewers and recorded, pursuant to the statute;—or 3d by prescription. Now it is not pretended that the fence in question was ever divided by either of the first two methods; and if the plaintiff would rely on the last, it should have been specially pleaded. But this he has not done, and of course the parol evidence was very properly rejected, as it went to establish a method of division not known to the law.

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

The Circuit Court of Common Pleas, to whose decision the exceptions in this case were filed, seem to have rejected the parol proof which was offered by the plaintiff arising from the confession of *Ricker*, on the ground that the *division* of the fence could not have been made, unless by an assignment to each of his proportion according to the provision of the Act of 1821, *ch.*

44 :—or by an agreement in writing. It is not stated that any *such* assignment or agreement had ever been made, and the question is whether any *other kind* of division may have been made, which was existing at the time of impounding, and which might have been legally proved by parol evidence. If so, then the decision of the Court was incorrect and a new trial must be granted. The case of *Rust v. Low & al.* 6 *Mass.* 90, on which the defendant's counsel relies, is full of learning on this subject, and contains principles by which this cause may be satisfactorily decided. In that case *Parsons C. J.* observes that "the owner of cattle may aver that the party complaining "ought by law to make and maintain the fence; in which case "he may produce the *assignment by fence viewers;* or shew that "he is bound *by agreement* to make and repair the fence, which "agreement he ought to set out in pleading; or that he was "bound by *prescription*, when he should regularly plead the pre-"scription. Every person then may distrain cattle doing dam-"age on his close, or maintain trespass against the owner of the "cattle, unless he can protect himself by the *provisions of the* "*statute*, or by a *written agreement* to which the parties to the "suit are parties or privies, or by *prescription*." According to the foregoing principles, an obligation by *prescription* on the defendant, to make and maintain the defective part of the fence on the dividing line ought to have been set out in the plaintiff's replication: and if the question now before us, were a question of *special pleading*, we might admit the reasoning of the defendant's counsel on this point. But we are now deciding on a *question of Evidence.* The issue before the jury was, whether the defective fence was the part belonging to the defendant *Ricker.* To prove this fact by *prescription*, proof of *usage* is correct and pertinent The Chief Justice in the case before mentioned, goes still further and observes that "the country has "now been settled long enough to allow of the time necessary "to prove a prescription: and *antient assignments* by fence-"viewers, made under the provincial laws, and also *antient* "*agreements* made by the parties, may have once existed and "be now lost by lapse of time." Perhaps this kind of evidence might have been produced by the plaintiff in the case at bar, to prove a prescription; and we do not perceive why all such

proof would not have been admissible and pertinent. Whether it be *probable* that such proof can be produced, is not for us to inquire; but as the Court excluded all parol testimony, we think the exception must be allowed, and a new trial be had at the bar of this Court.

SARAH NOWELL, ADMINISTRATRIX, APPELLANT FROM A DECREE OF THE JUDGE OF PROBATE *v.* JOHN NOWELL, ADMINISTRATOR *de bonis non.*

Upon the death of an administrator without having settled his administration-account, it belongs to *his* representative, and not to the administrator *de bonis non*, to present such account to the Judge of Probate for allowance and settlement.

JAMES NOWELL, the husband of the appellant, was administrator on the estate of his *father*, and died without having settled his account at the Probate office. The appellant then took administration of the estate of her husband, and the respondent took administration *de bonis non* of the estate of the father. The *appellant* having presented to the Judge of Probate, in her character of administratrix, an administration-account of her late husband as administrator of the goods and estate of *his father*, the Judge decreed that no further cognizance be taken of it, it being, in his opinion, not regularly before him; from which decree the administratrix appealed to this Court.

Shepley for the appellant.

The statutes regulating the settlement of estates and the jurisdiction of the Courts of Probate having authorized the Judge of Probate to examine and allow the accounts of executors and administrators, the subject matter of this case was once within his exclusive jurisdiction. It was made his duty to inspect, with his own eye, the settlement of all estates in his county. Has the death of the party taken this jurisdiction away? For such, in fact, is the question, which the Judge of Probate seems to have decided in the affirmative, he having referred her to the common law Courts, to claim the value of the services of her late husband as administrator. But that

the administration-account is to be settled at the Probate office, the statute has explicitly declared. Who is to present it? Not the administrator *de bonis non*, for he is interested against its allowance. It is his duty to resist all claims for the services of *James*. On the contrary the *administratrix* is interested to obtain a settlement of all the accounts of her intestate, and an allowance for his services.

Such seems to have been the uniform course in the ecclesiastical courts in *England;* for it is said that the payment of sums under forty shillings by the executor may be proved by his own oath, but that *after his death*, the oath of *his representative* shall not be received as sufficient. *Burn. Eccl. Law* 427. *Ought.* 347. *Toller* 492.

And the same course of proceeding passed *sub silentio* before the Supreme Judicial Court of *Massachusetts* in the time of *Parsons C. J.* whose vigilance was particularly directed to correct the errors of inferior tribunals, especially of Courts of Probate. *Storer v. Storer*, 6 *Mass.* 390. If the Judge of Probate had *no* jurisdiction in that case, then his decree was merely void, and debt would not lie upon it;—and yet the action of debt was sustained.

Indeed it is not material by whom the account is presented, since it is the duty of an administrator to give notice to all persons interested to appear and shew cause against its allowance. And being once before the Judge, and all persons duly summoned, it only remains for him to examine the account, and allow or reject it.

J. Holmes, for the respondent.

The appellant represents the estate of *James Nowell*,—the respondent that of *John*;—between whom the Judge of Probate could not adjudicate. His decree therefore is right, though the reasons given may be erroneous. He has no jurisdiction in these cases except over accounts rendered by the immediate representative of one deceased.

The necessity of appointing *any* administrator *de bonis non* shews that the appellant's account ought not to be sustained. *He* represents the estate of his own intestate, and therefore he alone is the proper person to present all unsettled accounts re-

lating to it. The appellant's account is merely a private demand of her late husband against the estate of his father, in which he is made chargeable for the monies he has received, and claims allowance for services done. And her demand is to be adjusted by the legal representative of the father. If he refuses to do her justice, and any money is due, her remedy is open at law. Or, if not at law, yet the administrator *de bonis non* ought to exhibit the accounts of his predecessor, and obtain and pay over the balance to his legal representative.

The Judge of Probate was correct, on another ground, in refusing to take cognizance of the account presented. It shews payments made by *James* in his life time, and more than four years since, of a large sum beyond the assets by him received. Now by making such advances beyond the assets, he made himself a *creditor* of the estate;—and to all claims of *creditors* the lapse of four years is, by the statute, a peremptory bar. If the administrator pays beyond the funds in his hands, it is at his own peril. If he neglect for four years to reimburse himself, by obtaining a settlement of his account at the Probate office, the loss is his own. He can pay no outlawed debts without being guilty of mal-administration;—and by the same reason he cannot retain for his own debt. *Parsons v. Mills*, 2 *Mass.* 80. *Williams v. Lawrence*, 15 *Mass.* 326. *Storer v. Storer*, 9 *Mass.* 37. *Scot v. Hancock*, 13 *Mass.* 162. *Ex parte Allen*, 15 *Mass.* 59. *Thompson v. Brown*, 16 *Mass.* 172. *Brown v. Anderson*, 13 *Mass.* 201. *Dawes, Judge, &c. v. Shed*, 15 *Mass.* 6. *Johnson v. Libby*, 15 *Mass.* 140.

Shepley, in reply.

Suppose the administrator *de bonis non* should not *choose* to present the account;—what is the remedy against him? Yet if *he* is required to do this, it is a requisition not contained in his bond;—and is unreasonable, because it obliges him to look into the doings of his predecessor, without giving him any legal right to obtain the vouchers to support them.

Weston J. delivered the opinion of the Court as follows.

James Nowell, administrator of the goods and estate of *John Nowell*, deceased, having made a certain progress in the duties

assigned him, died without having perfected the administration, and before his administration-account, as far as he had gone, had been examined and allowed by the Judge of Probate. After the death of the said *James*, *Sally Nowell*, who had been duly appointed administratrix of his goods and estate, presented the administration-account of the said *James*, to the Judge of Probate for examination and allowance. This account, thus presented, the Judge of Probate by his decree refused to receive and examine; it not appearing to him to be a matter regularly brought within his jurisdiction.

From this decree, the said *Sally Nowell* interposed an appeal to this Court. And whether the Court of Probate should have taken cognizance of this account or not, is the question presented for our consideration.

Upon the death of an administrator, without having completed the administration, his administrator does not represent him in the relation in which he, the first administrator, stood to his intestate. No privity arises between the estate of the first intestate and the last administrator; but the administration of that estate is to be completed in virtue of a new authority, to be delegated by the Probate jurisdiction, to an administrator *de bonis non*.

It becomes important however to distinguish between the authority which an administrator has to represent his intestate, and the responsibility he is under to the tribunal from which he derives his power, to render a true and faithful account of whatever he may have done in pursuance of the trust reposed in him. In the exercise of his delegated authority, he acts *en autre droit;* but in the account he renders of his proceedings, he discharges a duty, for which he is personally bound; the due performance of which is secured by his administration bond. In his transactions with other persons, debtors or creditors of his intestate he acts in his representative capacity; but when he appears before the Judge of Probate to account for his doings, it is for the purpose of making an adjustment between himself and the estate he represents. It is true that in his accounts he describes himself as administrator; but the items made on the debit side are charges, which he claims to have allowed in favour of himself personally against the estate of his

intestate. Thus the estate and interest of the administrator becomes directly affected by the allowance of every item in his administration-account; and the Court of Probate interposes its superintending power to protect the estate represented from any improper claims, which the administrator might be tempted to make, for his own benefit. For the due performance of all the duties and responsibilities of such administrator, he, in his life time, is personally bound, and his representative is answerable upon his decease; it therefore becomes necessarily incident to the power, duty, and authority of the representative to be permitted to shew that these duties and responsibilities have been faithfully discharged. To refuse him this privilege, would be to hold him accountable for the doings of the party he represents and, at the same time, to withhold from him the means of shewing that such party had conducted with the most perfect fidelity.

It could not be seriously contended that, in a suit brought upon the administration bond, against the representative of the first administrator upon his decease, the former could not be received to shew that there had been no breach of the conditions of the bond. How is this to be done where the administrator, having conducted with diligence and fidelity, dies without having settled his administration-account? That account must be adjusted, before it can be ascertained whether he has done his duty or not. Nothing is more clear than that the examination and allowance of accounts of this description, appertains to the Probate jurisdiction. It seems therefore necessarily to result that the last administrator, who is answerable in his representative capacity, upon the first administration bond, should be permitted to resort to that tribunal to examine and to allow, or to reject the accounts of the first administrator; by which alone the extent of his responsibility, and how far he may have fulfilled, or fallen short of the duties incumbent upon him, can be ascertained.

But it is contended that the representative of the first administrator, should procure the adjustment of the accounts of the latter, through the intervention of the administrator *de bonis non* of the first intestate.

The duties of the administrator *de bonis non*, are confined and limited to the goods and estate, not administered upon. So far as they have been rightfully administered, they are placed beyond his agency and control. It is not made a part of his duty to procure an allowance of the accounts of the first administrator. So far as he may interpose, his interest, in his representative capacity, is adverse to such allowance. At common law, there was no privity whatever between the first administrator, and the administrator *de bonis non*. The latter could not enforce a judgment, recovered by the former. *Grout v. Chamberlain*, 4 *Mass.* 611. And there can be no propriety in requiring the representatives of the former to resort to the latter, to present the accounts of the first administrator for examination and allowance.

But we are not without authority to guide us in the determination of the question before us. By the practice of the ecclesiastical courts in *England*, to whose jurisdiction this subject belongs, the oath of the administrator himself is received to verify all items in his account of administration under forty shillings; but, upon his decease, his representatives are required to substantiate such items by other proof. *Burns' ecclesiastical law* 427. *Toller's law of executors* 492. This practice proves that the representatives of the first administrator, are there received to present and verify the administration accounts of the latter.

In the case of *Storer v. Storer*, 6 *Mass.* 390, cited in the argument, *Joseph Storer*, administrator of *John Storer*, deceased, died before he had closed his administration. His administrators settled an administration-account of their intestate, as he was administrator of the estate of the said *John Storer*, deceased. A balance was found due from the estate of *Joseph* to the estate of *John*; and a decree was passed directing the administrators of *Joseph* to pay that balance to the administrators *de bonis non* of *John Storer's* estate. Upon this decree the administrators *de bonis non* brought an action of debt against the administrators of *Joseph*, and prevailed. The action was sharply contested upon other points; but neither the opposing counsel, nor *Parsons C. J.* in delivering the opinion of the Court, suggested any objection to the regularity of the proceedings before the Judge of Probate. The decree, which was the basis of that action,

was predicated upon the settlement of an administration-account of the first administrator, by his administrators; and if the Probate Court did not in fact possess the jurisdiction it assumed to exercise in that case thus presented, it is extremely improbable that such an exception, which would have been fatal to the action, should have escaped the attention of the learned counsel, or of the bench.

The administratrix of the deceased administrator does not, in the case before us, assume to proceed further in the administration of the estate of the first intestate; but she claims to be permitted to shew, before the proper tribunal, for the benefit of the estate of her intestate, what he had in fact done in his life time, in pursuance of the trust reposed in him, by the competent authority. Unless this course of proceeding be allowed to her, it might be difficult to determine in what manner the administration-account of her intestate, can be legally examined and adjusted.

As to the expediency of allowing or rejecting the whole, or a portion of the account exhibited, upon the merits, that is a question not regularly before us on this appeal; and it becomes therefore unnecessary, at this time, to notice many of the authorities, having a bearing upon this point, cited by the counsel opposed to the appellant.

Upon full consideration, we are of opinion, upon principle and authority, that the account, of which the Judge of Probate declined to take cognizance in this case, was rightfully presented to him by the appellant, for examination and allowance; and it is therefore ordered and decreed here, that the decree of the said Judge of Probate, refusing such cognizance, be reversed; and that this case be remitted to him for further proceedings, in conformity to this opinion.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

OXFORD.

SEPTEMBER TERM,

1822.

READ, ADM'R *v.* CUMMINGS & AL.

Where one seised of an equity of redemption in land, gave a bond to a stranger, conditioned to convey to him a part of the land in fee with general warranty, on the payment of certain notes given by him for the purchase money, and then died insolvent, the original mortgage being still unpaid ;—it was holden that the legal representative of the obligor might recover the amount of the notes, the remedies being mutual and independent.

THIS was *assumpsit* upon a note of hand made by the defendants to the plaintiff's intestate, and came before the Court upon a case stated, containing the following facts.

The plaintiff's intestate, on the 25th of *March* 1806, purchased of the trustees of *Phillips' Academy* about 9000 acres of land in township *No.* 4, now *Greenwood*, for the consideration of 5500 dollars; for which sum he gave his own note of hand payable in six years with interest; to secure the payment of which he at the same time mortgaged the same land to the trustees in fee.

On the 2d of *January* 1813 the plaintiff's intestate bargained to the defendants a lot being part of the mortgaged tract, giving them his bond conditioned for the giving of a good and lawful warranty-deed of the lot to them, upon the payment to him of their three several notes of hand of the same date, given for the purchase-money.

The defendants thereupon entered upon the lot, and paid a small part of one of the notes. The intestate afterwards died;

this action was then commenced;—and then the trustees entered into the *whole tract* for breach of the condition of their mortgage, the amount due thereon being upwards of ten thousand dollars.

After this, the estate of the intestate was represented insolvent, and commissioners were duly appointed to receive and examine claims, pursuant to the statute. And the question was, whether, upon these facts, the plaintiff could recover.

Greenleaf and *L. Whitman* argued for the defendants.

1. The bond and notes, being of the same date, are to be taken together as one entire contract. *Thorpe v. Thorpe*, 1 *Salk.* 171. *Johnson v. Read*, 9 *Mass.* 81. *Holbrook v. Finney*, 4 *Mass.* 569. *Hubbard v. Cummings*, 1 *Greenl.* 12. Being thus taken, they shew a contract *executory* on both sides,—the obligor to give a deed, and the obligees to pay money. The *land*, and not the *remedy*, is the only subject matter of the contract; and the defendants accordingly went into immediate possession. They intended, and reasonably expected to acquire, for their money, the *absolute and unincumbered estate* in fee-simple. The plaintiff's intestate had engaged to give them "*a good and lawful warranty-deed of the lot.*" And this, in common parlance, means a deed with the covenants usually inserted in warranty-deeds;—and covenants too, not broken as soon as made. *Jones v. Gardiner*, 10 *Johns.* 266. *Porter v. Noyes*, *ante p.* 22. The defendants had a right to rescind the contract on discovery of the intestate's incapacity to convey a clear and unincumbered title;—and this incapacity being now rendered permanent by his death and insolvency, payment of the notes ought not to be enforced.

2. But if the bond and notes are, on general principles, to be taken as independent and absolute stipulations, on which mutual remedies may exist; yet such mutual remedies exist only where there is a perfect reciprocity between the parties in respect of the remedy;—which *here* is not;—the common law as to the matter being altered by the statute of insolvency. *Lyman v. Estes*, 1 *Greenl.* 182. *Stat.* 1821, *ch.* 51.

Longfellow and *S. Emery*, for the plaintiff.

The facts stated furnish no defence to the action, unless they disclose either fraud, want of consideration, or an equitable offset.

The *first* of these is not pretended.

As to the *second*, the bond alone is a sufficient consideration for the notes. It is an absolute and independent stipulation on the part of the obligor, to execute a deed upon payment of the money. The payment is a condition precedent, and it is by the performance of it that the obligor was to be enabled to obtain the indefeasible title the defendants would wish to receive. This point has been settled by authority. *Smith v. Sinclair*, 15 *Mass.* 171.

Nor is here any equitable claim; for none can exist until the defendants have paid money to relieve the land, which it appears they have never done. In *Lyman v. Estes* the deed had been given and the incumbrance actually paid off by the defendant, and therefore the equitable claim was well founded. The present is merely the common though unfortunate case of a remedy, legal in form, but fruitless in effect, against the estate of a bankrupt.

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

The note declared on, and two others of the same date, were given for the price of a parcel of land; for the purchase of which the defendants contracted with *Jonathan Cummings*, the intestate, who gave them a bond with conditions to execute and deliver to them a good and lawful deed of warranty of the land, upon payment of said three several notes. *Cummings* the obligor died insolvent, and his estate is under a commission of insolvency. The notes not having been paid, *Reed*, the administrator, sues this action, to enforce the payment of one of them. The defendants' counsel contends that as they cannot by law maintain any cross action against the administrator on the beforementioned bond of the intestate, in consequence of the commission of insolvency on his estate; and as they would not be indemnified by a dividend of an insolvent estate, even if such action could be maintained; and as they cannot obtain a

deed of the land according to the condition of the bond, they ought to be permitted, in this action, to shew the foregoing facts in their defence; as they all relate to the same contract and transaction, according to the principles of the case of *Lyman, adm'r v. Estes*, 1 *Greenl.* 182. In that case *Lyman* the intestate had conveyed a piece of land to *Estes* with the usual covenants of seisin and freedom from incumbrances; and *Estes* gave his promissory note for the price. *Lyman* died insolvent, and in an action by his administratrix, founded on the note, it appeared that before the conveyance to *Estes*, *Lyman* had mortgaged the land; and *Estes*, after *Lyman's* death, had paid off the mortgage; and this Court allowed and directed such payment to be deducted from the amount due upon the note declared on; considering the payment as in effect made to the administratrix, because it had gone to the benefit of the estate. But the two cases essentially differ. In the first place *Estes* had a perfect right of action against *Lyman* his grantor, in his life time, for the breach of the covenant in his deed that the land was free from incumbrance. This covenant was broken the moment it was made, and damages might have been recovered against *Lyman*, when living or claimed before the commissioners on his estate. In the second place *Estes* had removed the incumbrance, by paying the sum to the mortgagee. In the present case the defendants have not as yet acquired a right of action against any one, or laid the foundation for a claim before commissioners; and they cannot present a legal claim of any kind till the notes abovementioned have been paid. If *Cummings*, the obligor, were now living, no action could be maintained against him; for the obvious reason that the condition of his bond has not been broken. *Thorpe v. Thorpe*, 1 *Salk.* 171, 3 *Leon.* 219. Even if our statute had permitted a bond, to be set off against a note in an action upon the note, still, in this action, such set off could not be made; because a set off always presupposes, and is in fact founded upon, an existing right of action upon the demand so set off; and it is a substitute for a cross action in certain cases, where a defendant inclines to adopt that course of proceeding.

As well might we in this action permit the defendants to defeat it by shewing that they hold a promissory note against the es-

tate for a larger sum, although not payable, by the terms of it, till some future day. We therefore cannot, according to the spirit of our decision in *Lyman v. Estes*, admit this defence on the ground of insolvency, and for the reasons assigned for our opinion in that case. According to the case of *Smith v. Sinclair*, 15 *Mass.* 171, and *Lloyd v. Jewell & al.* 1 *Greenl.* 352, the bond constituted a good and legal consideration for the note; of course there is no defence on this ground.

But still it is contended that though the bond did constitute a good and legal consideration for the notes, yet as the intestate had disabled himself to perform the condition of the bond, the defendants are discharged from their liability on the notes; because of the manifest injustice which would be the consequence of their being obliged to part with their money without the possibility of an equivalent; and the case of *Jones v. Gardiner*, 10 *Johns.* 266, has been cited in support of the argument.—That case has little resemblance to this.—It was an action on an agreement by which the defendant agreed to pay a certain sum to the plaintiff whenever he should receive from him " a good and sufficient deed in law to vest him" (the defendant) " with the title of the farm of land with the appurte- " nances" which was the subject of the contract.—The deed tendered by the plaintiff was incorrect in the description of the boundaries,—and not containing all the farm. Besides, the wife of the plaintiff had not legally extinguished her contingent right of dower in the farm. The Court decided against the action for the above reasons.

In short, whatever inclination we may feel to sustain the defence which has been urged, we cannot find any legal principles on which it can be supported.

The defendants will probably be sufferers, and lose the sum, or a large part of it, which they are thus compelled to pay. But the law is liable to no imputation on this account. They should have guarded against loss, occasioned by the insolvency of the intestate, by insisting on his giving bond with sufficient sureties. Not having done this, they must submit to the inconveniences resulting from their own inattention.—The defendants must be called.

GORHAM *v.* HERRICK.

The *liability* of the vendee to damage as the surety of the vendor, is not of itself a sufficient consideration to support an *absolute* conveyance of property, against creditors.

And where the vendee, at the time of such absolute conveyance, executed a bond of defeasance to the vendor, it was holden to be incumbent on the vendee, in an action brought by him against an officer attaching the goods so conveyed, at the suit of a creditor of the vendor, to produce such bond, or to shew that upon due diligence its production was out of his power.

TROVER for a shearing machine, which the defendant, in the discharge of his duty as a deputy sheriff, had attached as the property of one *William Gorham* at the suit of *Leonard Richmond.* From the exceptions filed in the Court below, it appeared that the plaintiff was one of the sureties for his brother *William* at the Probate office, in a bond given by him as administrator on the estate of his father;—that several years after this they went together to a scrivener, for the avowed purpose of executing certain instruments of conveyance for the security of the plaintiff against his liability on the Probate bond;—that accordingly *William* executed to the plaintiff an absolute deed of conveyance of certain real estates, and assigned certain personal chattels, among which was the shearing machine in question;—and at the same time the plaintiff gave a bond to said *William*, conditioned to reconvey or account for the property so conveyed to him, upon his being saved harmless from the Probate bond. It further appeared from the testimony of said *William*'s attorney, who made out and assisted to settle his administration-account, that a large sum appeared to be in his hands, to be divided among the heirs; but there was no evidence that the plaintiff had ever paid money or suffered damage by reason of his suretyship.

It further appeared that said *William* and *Richmond*, the attaching creditor, had been partners in trade,—that a few days before the conveyances to the plaintiff, they had dissolved their copartnership, and entered into articles, by which *William* assumed the payment of the partnership debts, which were considerable, and the payment of a farther sum to said *Richmond;*—and that soon after these transactions *William* absconded.

It was objected on the part of the defendant, that the bond for reconveyance, being executed at the same time with the

deeds and transfers, was part of the entire contract between the plaintiff and *William Gorham ;* and that the whole contract having thus been reduced to writing, it was not competent for the plaintiff to prove any part of it by parol, without first accounting for the absence of better evidence. But this objection the Court below overruled.

It was further objected by the defendant that parol testimony as to the amount of monies in the hands of said *William* due to the heirs of the intestate, was inadmissible, because better evidence could be had from the Probate office. But this objection also was overruled ;—and a verdict by direction of the Court being returned for the plaintiff, the defendant filed exceptions and brought the cause here by appeal, pursuant to the statute.

Fessenden, for the plaintiff, now contended that it was enough for him to have shewn his title to the property by the deed of assignment ;—the bond being no part of his title, he was not bound to produce it. It was as much in the power of the other party, as of the plaintiff, and the *liability* of the plaintiff on the Probate bond, he insisted was sufficient consideration for the conveyance.

Greenleaf and *W. K. Porter*, for the defendant.

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

This case comes before us upon exceptions taken to the order and direction of the Circuit Court of Common Pleas, upon the trial there, in receiving certain testimony, objected to by the counsel for the defendant, as by law incompetent.

It was incumbent upon the plaintiff to prove that the article, for the conversion of which this action is brought, was in fact his property. And it became necessary for him to establish his title, not only as between himself and the party of whom he purchased, but also as against the creditors of that party. The article in question did belong to *William Gorham*, as whose property it was taken by the defendant, in his official capacity of deputy sheriff, by virtue of a precept legally sued out by a creditor of the said *William*. The plaintiff claims under a sale and transfer from *William* to himself. The defendant, representing a creditor, has a right to require that such sale and transfer should appear to have been made *bona fide*, and for a

good and sufficient consideration. The case finds that the consideration for the transfer of this and other property, was the liability which the plaintiff had assumed, as the surety of the said *William*, in an administration bond to the Judge of Probate. There was no evidence that the plaintiff had paid any money or sustained any damage, by reason of his liability. That alone could give him a right of action against his principal. But a surety may lawfully take security for his indemnity; or he may take a pledge of property real or personal, for the same purpose. An absolute conveyance of property, founded upon this consideration, may be defeated by subsequent purchasers, or by the creditors of the principal; for it may be that no damage will arise to the surety. We are therefore well satisfied that the plaintiff, as against the creditors of *William Gorham*, could only receive the property in pledge, to be returned in case he should finally sustain no damage in consequence of his liability; or should be otherwise indemnified.

It is insisted by the counsel for the plaintiff, that when he exhibited the instrument under which he claims, which purports to be an absolute transfer of the article in question, he furnished all the evidence which could lawfully be required of him, or which was necessary on his part;—that the counter instrument which he had given, is as much within the control of the defendant as of himself;—and that if that paper affords any matter of defence, the defendant should have taken measures for its production. But if, as has been before stated, the plaintiff could, as against the creditors of *William Gorham*, whom the defendant here represents, hold the property only as a pledge upon the consideration before mentioned, of which we entertain no doubt, it became incumbent upon him to shew that as such he did receive and now claims it. When therefore the plaintiff produced the instrument of sale to him, that, being in its terms an absolute transfer, was insufficient, upon the consideration proved, to entitle him to a verdict and judgment in his favour. He then offered and was received to shew by parol that the property passed to him as a pledge; and that the terms of the pledge were set forth in the condition of a bond, by him given to *William Gorham*. This testimony was objected to; and its admission by the Court below constitutes one of the exceptions,

the validity of which we are now called upon to decide. And we are of opinion that this testimony was illegally admitted.

It is one of the most familiar principles of the law of evidence, that inferior testimony is not to be received while higher exists in the power of the party, who relies upon it. Where therefore a contract has been reduced to writing, the written evidence must be produced, and parol testimony cannot be substituted, unless that which is written has been lost or destroyed; or being in the possession of the adverse party, has not been produced upon notice. Considering this property as having passed to the plaintiff as a pledge, which is the only title which can avail him in the present action, the instrument which he received and that by him executed are parts of the same contract. It was incumbent upon the plaintiff in proving the whole contract, which he was bound to do, to procure the production of that part of it which went into the hands of *William Gorham*, who was himself a competent witness; or to shew that upon due diligence used, neither that nor the said *William* could be found. The plaintiff offered no proof of any steps taken or inquiry made by him, with a view to procure this paper; and for aught we know such inquiry, if made, would have resulted in its production.

We are of opinion therefore that by reason of the illegal admission of the parol testimony before referred to, the verdict must be set aside, and a new trial granted at the bar of this Court.

From the view we have taken of this part of the case, it becomes unnecessary at this time to consider the effect of the other exceptions taken by the counsel for the defendant.

VARRILL v. HEALD.

In an action against an officer for not serving and returning a writ of execution, he may shew the insolvency of the debtor in mitigation of damages, notwithstanding he does not return the precept, nor allege that it is lost.

In such action it is incumbent on the plaintiff to shew that the precept has never been returned.

This was an action of the case against the defendant for neglect of his office of deputy sheriff in not serving and returning an *alias* writ of execution in favour of the plaintiff against one *James Coffin*. At the trial in the Court below, which was upon the general issue, the plaintiff proved the delivery of the execution to the defendant, but offered no proof respecting the ability of the defendant to have collected it; nor did he shew that it had never been returned to the Justice who issued it, the Court ruling that he was not bound so to do. The defendant denied that he ever had the execution in his hands, but offered to shew the insolvency of the debtor, in mitigation of the damages;—to the admission of which evidence the plaintiff objected, until the defendant should first shew that he had *returned* the execution;—but the Court overruled the objection, and admitted the evidence, and thereupon instructed the jury that if they were satisfied that the poverty of the debtor was the cause why the money had not been collected, and that the defendant had used due diligence in this particular, they might find for the plaintiff, assessing only nominal damages; but if they were not satisfied of these points, they might assess such damages as would fully indemnify the plaintiff for the amount of his execution, with additional damages;—and they found for the plaintiff, assessing nominal damages only. To this direction the plaintiff filed a summary bill of exceptions, and brought the cause to this Court by appeal, pursuant to the statute.

Fessenden and *Hill*, for the plaintiff.

The object of the action is to restore the plaintiff to what he has lost by the misdoing of the defendant. *Prima facie* he appears to have lost his debt, since he is deprived of the original means of enforcing its collection;—and in such cases the

amount of the judgment and interest is the general rule of damages against the officer. The cases in which the officer is permitted to reduce the amount of damages recoverable by the general rule, are not where the neglect has been either wilful or criminally gross;—for if it appears that his conduct has either destroyed or essentially abridged the rights of the creditor, the jury are permitted to go even beyond the amount of the former judgment, for the purpose of giving him a full and complete indemnity. *Weld v. Bartlett*, 10 *Mass.* 470. And no case has been found, where an officer who has *never returned* the precept, but still holds it in his hands, has been admitted to offer evidence in mitigation of the damages.

If the precept is in existence, its return is material to the creditor. It may be that the judgment is satisfied, or that some collusion has been practiced between the officer and the debtor, which the execution, if produced, would discover,—or that a return by the officer would give the creditor additional rights, by its truth or its falsity, against the debtor or the officer. *Simmons v. Bradford*, 15 *Mass.* 82. But here the officer does not pretend that he has lost the precept. His defence rested on the simple denial that he ever had it in his hands. This fact the jury found against him;—and he ought not, while wilfully withholding the execution, to be allowed to say in excuse that it was against a very poor man.

Chase, for the defendant.

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

The question before us is whether the direction of the Court to the jury was incorrect, as to the assessment of nominal damages, in case they should believe that the defendant had used due diligence, and that the judgment debtor was poor and destitute. On this subject we entertain no doubt. The jury were instructed to do justice to the plaintiff by giving him damages equal to the injury he had sustained. He certainly was entitled to no more. It is urged that this case differs from those where nominal damages have been allowed, because *here* the execution has not been returned; and that so the plaintiff has lost the benefit of his judgment and cannot collect the amount of the debt-

or. It does not appear that the execution has not been returned. The objection therefore has no foundation in fact. It was the plaintiff's duty to shew that it had not been returned, in order to prove his declaration. And it is not so much a matter of surprise that the plaintiff recovered only nominal damages, as that he recovered any. But this point is not before us.

If it should appear hereafter that the officer had actually collected the amount of the execution, it may be recovered in an action for money had and received. There is no pretence for disturbing the verdict. The exception is overruled and the judgment below affirmed.

EMERY, PETITIONER, *v.* SHERMAN, ADM'R.

A petition to the Court to enable an administrator to execute a deed, is not an adversary proceeding, nor is the power, thus obtained, imperative on the administrator.

THE respondent's intestate had contracted with the petitioner to convey to him a parcel of land, and died without having executed the conveyance; and the petitioner thereupon prayed the Circuit Court of Common Pleas that the administrator might be authorised to make the deed. The administrator appeared, and pleaded the insolvency of the estate, to which the petitioner demurred; and the Court overruled the plea, and granted the license prayed for. Whereupon the administrator claimed an appeal to this Court, which the Court below refused to grant;—and on application now to this Court, they refused to sustain the appeal;—observing that this was not an adversary proceeding, in which an appeal would lie; but was merely a petition to *empower*, not to *compel*, the administrator to execute a deed, which he might or might not execute, as he should be advised his duty as a faithful administrator would require.

Lincoln, for the petitioner.

Bradley, for the respondent.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

KENNEBEC.

SEPTEMBER TERM,

1822.

THE PEJEPSCOT PROPRIETORS *v.* CUSHMAN.

Construction of the Indian deed of the "*Pejepscot claim*," and its boundary on the east side of the great falls at *Lewiston*.

THIS was a writ of entry on the seisin of the demandants within thirty years, to which the general issue was pleaded.

The demanded premises are situated on the east side of *Androscoggin* river, above the great falls at *Lewiston*. At the trial of the issue, it was admitted that the demandants held the title of *Richard Wharton* and others, under a deed from *Warrumbee* and others, Indian chiefs, bearing date *July* 9, 1684, and purporting to convey—"all the aforesaid lands from the "*uppermost part of Androscoggin falls* four miles westward, and "so down to *Maquoit*, and by said river of *Pejepscot*, and from "the other side of *Androscoggin* falls, all the land from the falls "to *Pejepscot* and *Merrymeeting* bay to *Kennebec*, and towards "the wilderness, *to be bounded by a south-west and north-east line*, "to extend from the *upper part* of the said *Androscoggin upper-*"*most falls* to the said river of *Kennebec*, and all the lands from "*Maquoit* to *Pejepscot*," &c.—Also—"all the land lying five "miles above *the uppermost* of the said *Androscoggin* falls, in "breadth and length holding the same breadth from *Androscog-*"*gin* falls to *Kennebec* river, and to be bounded by *the aforesaid* "*south-west and north-east line*, and a parcel of land at five miles

"distance to run from *Androscoggin* to *Kennebec* river as afore-"said," &c.

The falls referred to lie in a bend of the river, which contains several islands; and the commencement of the fall, or broken water, on the west side, is many rods higher up the river than any similar appearances on the east side;—so that running a northeast course from the commencement of the fall on the *west side* of the river, would include the demanded premises within the tract described in the deed; while commencing at the beginning of the fall on the *east bank* would as clearly exclude them.

The demandants read a resolve passed *June* 21, 1803, authorizing the committee for the sale of eastern lands to appoint a surveyor to ascertain and run the lines of the *Pejepscot* claim, agreeably to the report of *Levi Lincoln*, *Samuel Dexter* and *Thomas Dwight*, Esquires, so far as the lands of the Commonwealth adjoin the same;—and they also shewed the appointment of *Lothrop Lewis*, Esq. as surveyor, under this resolve, and his return dated *September* 1805, certifying that he began at a red oak tree on the *west* bank of the river, at the uppermost part of the falls on *that side*, and ran a line north-west five miles, and *from the end of said five miles* north-east to *Androscoggin* river, and continuing across the river the same course to the line of the *Plymouth* claim;—also from the same red oak tree, west, about four miles to the curve-line, and marked a beech tree for the head-line of the Pejepscot claim on the west side of *Androscoggin* river.

The tenant in support of his title read a resolve passed *March* 26, 1788, adding *John Read* and *Daniel Cony*, Esquires to the committee on unappropriated lands in the counties of *Cumberland* and *Lincoln*, extending their powers to the county of *York*, and directing them to cause a survey and plans to be made of the located lands in those counties, and to mark out the unlocated lands into townships, &c.—also a survey and return of *Ephraim Ballard*, dated *October* 31, 1794;—also a deed from *Nathaniel Wells*, *Leonard Jarvis* and *John Read*, Esquires, in behalf of the Commonwealth, to *David Cobb*, Esquire, dated *January* 20, 1795, conveying to him the demanded premises in fee;—and a deed conveying the same land from said *Cobb* to the tenant in fee, bearing date *January* 21, 1815.

To shew that the persons who undertook to convey to said *Cobb* had no power so to do, and that the functions of the committee were suspended, the demandants relied on the resolve of *March* 8, 1787, directing the committee on unappropriated lands not to locate or dispose of any lands lying upon *Androscoggin* river, and between said river and lands claimed by the *Plymouth* company, to the southward of the south line of *Bakerstown*, bounded at the great fall in *Androscoggin* river, on the west and south line of Port-Royal, on the east side of the river.

In reply to this the tenant relied on the resolve passed *March* 26, 1783 above cited, in which the committee or the major part of them were instructed generally to sell the unappropriated lands in any of said counties;—and also read a resolve of *June* 20, 1783 directing the same committee to sell all the lands in either of said counties which had become the property of the Commonwealth by confiscation. He also proved by the Hon. *Daniel Cony*, one of the committee, that *Nathan Dane*, *John Brooks*, and *Rufus Putnam*, who had been appointed members of the committee for the sale of eastern lands, by previous Resolves, had never acted on that committee after *March* 1783, and that he understood they had resigned.

It was contended by the counsel for the demandants that the line run by Col. *Lewis* in 1805 as the northern boundary of the upper tract conveyed by *Warrumbee* and others, was final and conclusive; and as by that line the premises demanded were within the limits of the *Pejepscot* claim, the tenant was bound by it. But the Judge who presided at the trial instructed the jury that as Col. *Lewis* was only appointed to run and establish the line of the *Pejepscot* claim so far as the lands of the Commonwealth adjoined the same, and as it appeared that the adjoining tract on this side had been conveyed to Mr. *Cobb* several years before the survey, he and those claiming under him were not bound by the running of that line, unles it was established in the proper place. He further instructed them that *Messrs. Wells*, *Jarvis* and *Read* were sufficiently authorized to convey the premises by deed, according to the resolves of *March* 26, and *June* 20, 1783, and the testimony offered; and that as *Warrumbee* and others by their deed conveyed one tract of land on the *west side* of the river by a certain boundary and head line run-

ning from the uppermost part of the falls; and another tract on the *east side* of the river, running another and different, viz. a northeast course from the uppermost part of the falls on the *east bank* of the river as the boundary of the tract on *that side;* and that measuring from *this point*, according to the plan taken in this case and exhibited to the jury, these principles would lead to a verdict for the tenant.

A verdict was accordingly taken for the tenant, subject to the opinion of the Court upon the foregoing facts as stated in the report of the Judge.

Longfellow, *Greenleaf* and *Fessenden* were of counsel for the demandants.—*Orr* and *R. Williams* for the tenant.

For the demandants it was argued—1. That the lands on both sides of the *Androscoggin* formed one entire tract, and had a common boundary—viz.—the uppermost part of the uppermost falls; and was described by *one line*, and this a continued line, extending across the river.—2. That this boundary was fixed and established by Col. *Lewis* under the resolve of *June* 21, 1803, and that this survey concluded the Commonwealth and all persons claiming under them. *Lunt v. Holland*, 14 *Mass.* 149.—3. That if this survey was not final and conclusive as to the land on the *east side* of the river, and the land was to be considered as two tracts, divided by the river, then they were bounded by the thread or channel of the river, and the admeasurement is to begin at the point where the water first breaks at the centre of the stream, agreeably to *Lunt v. Holland.*—4. That the deed from *Wells* and others to *Cobb* was without authority. The resolve of *March* 26, 1788, relates to *unappropriated* lands;—but these were already *appropriated* by the resolve of *March* 8, 1787, to the use of the Commonwealth, with special reference to the unsettled state of the title. This resolve is a sufficient *caveat* to any purchaser, who must be considered as taking the land subject to the prior claim of the demandants. And it is not repealed by the resolve of *March* 26, 1788, there being no express words of repeal, nor any *necessary* implication. *Pease v. Whitney*, 5 *Mass.* 580.—5. Nor was the same deed to *Cobb* made by a *majority of the committee* for the sale of eastern lands. By the resolve last cited, two

were added to the committee, increasing the number to seven,—*four* of whom constituted the *majority* mentioned in the resolve;—a majority of the committee *then existing*;—not of such number as might chance to remain after the resignation or death of the rest. But if not, yet the evidence of the resignation of some of the committee was not legal, being only *parol*; nor was it sufficient, being only what the witness understood from others.

For the tenant, it was contended that the land described in the Indian deed consisted of two distinct tracts, each having for its northern limit the upper part of the water-fall at the bank of the river it adjoined;—that the survey of Col. *Lewis*, so far as it respected the east side of the river, was without authority, his commission extending no farther than where the Commonwealth's land adjoined, which applied only to the west side;—that the appropriation of lands by the resolve of *March* 8, 1787, was only a temporary suspension of the powers of the committee, and was repealed by that of *March* 26, 1788, which is a revision of the whole subject matter;—and they referred to various resolves shewing that the persons acting as the committee were duly authorized; especially to that of *March* 10, 1791, in which *Messrs. Phillips*, *Wells*, *Jarvis*, *Read* and *Cony* are styled "*the committee* for the sale of eastern lands."

After the argument, which was had at the last term, the cause was continued for advisement; and the opinion of the Court was now delivered as follows, by

WESTON J. In the argument of this cause, it has been urged on the part of the counsel for the demandants, that the lands on the east side, and the lands on the west side of the *Androscoggin* conveyed by *Warrumbee* and others, by their deed of *July ninth*, 1684, constituted one entire tract, through which the river flowed; and that the monument ascertained and fixed on the western side, or at least a point in the thread of the river, at the uppermost part of the falls, would form the common starting place, from which the head line of the land on the west side of the river, running a west course, and the head line of that lying on the east side, running a northeast course, would be ascertained.

The lands on each side would constructively run to the channel or thread of the river; and being conveyed by the same deed to the same grantees, would form one entire tract, if the grantees thought proper thus to regard them. But as the land conveyed, as it presented itself to the eye, was in fact separated by the intervention of the river, it was natural and obvious to consider it as forming two prominent divisions. And with a view to this division, or for some other reason, the lands on the west, and those on the east side of the river, are conveyed with a reference to that natural boundary. But in the view we have taken of the cause, we have not considered the determination of this point decisive of the controversy, raised on this occasion.

Two principal questions present themselves for our consideration First, is the monument, as ascertained and fixed by *Lothrop Lewis*, conclusive between these parties? Secondly, if it be not so, were the jury properly instructed as to the principles by which they were to ascertain and fix the uppermost part of the falls, referred to in the deed of *Warrumbee* and others, from which to run a northeast course?

The determination of the first question involves another, namely, the validity and effect of the deed of *January twentieth*, 1795, from *Nathaniel Wells*, *Leonard Jarvis*, and *John Reed*, assuming to act as a committee in behalf of the Commonwealth of *Massachusetts* to *David Cobb*, under whom the tenant claims. The objections urged against this last deed are twofold; that it is not the deed of a majority of the committee, and that if it be so, they were not authorized to sell the premises in question.

By a resolve of *November eleventh*, 1784, *Samuel Phillips, Jr. Nathaniel Wells*, and *Nathan Dane*, were appointed a committee in relation to unappropriated lands in the county of Lincoln; and the powers of the committee were subsequently enlarged, so as to extend to all the counties in Maine. In *November*, 1785, *John Brooks* was, by a legislative resolve, substituted in the place of *Nathan Dane*, then absent at Congress. By a resolve of *March twenty-fourth*, 1786, *Samuel Phillips, Jr. Nathaniel Wells*, and *John Brooks* are described as the committee on the subject of unappropriated lands. On the *sixteenth* of *November*, 1786, *Leonard Jarvis* and *Rufus Putnam* were, by a resolve of

that date, added to the committee; any two of whom by consent of the majority were empowered to transact and complete any business, that might be assigned to the committee. By a legislative resolve of *November seventeenth*, 1786, the accounts of *Nathan Dane*, who is described as having been one of the committee on the subject of unappropriated lands were, upon his memorial, referred to the same committee for examination and allowance. And by the resolve of *November fourteenth*, 1788, the balance found due by that committee to Mr. *Dane*, was directed to be paid. In the resolve of *March tenth*, 1791, *Samuel Phillips*, *Nathaniel Wells*, *Leonard Jarvis*, *John Reed*, and *Daniel Cony* are described as the committee for the sale of eastern lands. This last resolve fully corroborates the testimony of *Daniel Cony*, one of that committee, which forms a part of this case, that prior to that time, *Nathan Dane*, *John Brooks*, and *Rufus Putnam* had ceased to be members of the committee. And upon a full consideration of the foregoing resolves, and of the testimony of the said *Cony*, we are satisfied that at the time of the making of the before mentioned deed to *David Cobb*, *Nanthaniel Wells*, *Leonard Jarvis*, and *John Reed*, who united in the execution of that deed, did constitute a majority of the committee for the sale of eastern lands.

As to the objection that the committee were directed not to sell a certain tract of land, embracing the premises in question, for certain reasons recited in the resolve of the legislature of *March eighth*, 1787, we are of opinion that this inhibition was completely removed by the resolve of *March twenty-sixth*, 1788, by which the committee, or a majority of them, were authorized to sell the unappropriated lands in any of the counties, "any resolve to the contrary notwithstanding."

It results therefore, that by the deed of a majority of the committee of the *twentieth* of *January*, 1795, to *David Cobb*, all the right, title, and interest of the Commonwealth of *Massachusetts* to the premises in question, passed to the said *Cobb*, under whom the tenant claims.

After thus parting with their interest, it is not to be presumed that the Commonwealth would do any thing to affect or impair that interest, in the hands of their grantee. If in fact there were no constitutional objection to their so doing, nothing short

of language the most express and unequivocal, indicating such an intention, could be deemed or construed to have that effect. So far is the resolve, under which *Lothrop Lewis* was appointed, from justifying such an implication, that the agents of the Commonwealth for the sale of eastern lands, are there authorized and directed to appoint some suitable person, to run and ascertain the line of the *Pejepscot* claim only "so far as the lands of the Commonwealth adjoin thereto."

And we are of opinion that neither the resolve of *June twenty-first*, 1803, under which *Lothrop Lewis* was appointed, nor what he did in virtue of that appointment was intended to have, or could legally have, the effect to impair the title or interest, which had passed to *David Cobb* in *January*, 1795, and which has since vested in the tenant. As to the tenant this proceeding was *res inter alios acta*. He was neither party or privy to, or legally connected with, or concluded by it.

It remains to determine whether the jury were properly instructed as to the principles by which they were to ascertain and fix the uppermost part of the falls, from which a northeast line was to be run, referred to in the deed under which the demandants claim.

When fixing the uppermost part of these falls, as the monument from which the tract on the eastern side of the river was to begin, we cannot doubt that the parties had reference to that monument as it existed and was to be found, on the same side of the river. And even if we consider the lands on both sides of the river as forming one entire tract, we are not aware that a different result would be produced. The line from the river on the west side was to run a west course, and on the east side, a northeast course. No course is given across the river. And we know of no more obvious or satisfactory construction that can be given to the language of the deed, or one which seems better calculated to effectuate the intention of the parties than to take the uppermost part of the falls, as it is to be found on the western side of the river, as the starting point from which the west course is to be run; and the uppermost part of the falls, as it is to be found on the eastern side of the river, as the point from which the northeast course is to be run. Thus the uppermost part of the falls, as they lie from side to

side, whether they pass directly or obliquely, will be the course across the river.

Being all of us fully satisfied with the opinion and direction given upon the trial of this cause, judgment is to be entered upon the verdict.

LIGONIA *v.* BUXTON.

A minister ordained over an unincorporated religious society, composed of members belonging to different towns, is not a *stated and ordained minister of the gospel*, within the meaning of *Stat.* 1786, *ch.* 3.

A marriage solemnized by a minister at his own house, neither of the parties residing in that town, is void under *Stat.* 1786, *ch.* 3.—and this statute is not altered in this respect by *Stat.* 1811, *ch.* 6.

The resolve of *March* 19, 1821, does not render valid a marriage solemnized *against* the laws then in force. It only confirms those which, through misapprehension of the law, were defectively solemnized, the minister being not a *stated and ordained minister*, though erroneously supposed to be such.

Assumpsit for the support of a pauper named *Mary Brazier*, the supplies furnished commencing *March* 28, 1821.

In a case stated to the Court, it was agreed that her settlement was in *Buxton*, unless she had gained another by her supposed marriage with one *Joseph Brazier* in the year 1814, the validity of which was the only question in the case. At the time of this supposed marriage he resided in *Palermo* and she in *Montville*, in the county of *Lincoln;* and the marriage was solemnized by *Isaac Hall*, an elder of the Baptist church, at his dwelling house in the plantation of *Knox* in the county of *Hancock*, adjoining *Montville*, there being then no settled ordained minister resident either in *Knox* or *Montville*. *Mr. Hall* was ordained in 1806, after the usages of the sect to which he belonged, over an unincorporated religious society composed of individuals resident in the towns of *Unity*, *Montville*, and the plantation of *Knox*, in the respective counties of *Kennebec*, *Lincoln*, and *Hancock*. *Brazier* left his wife in 1820, and had not cohabited with her since.

Allen, for the plaintiffs.

The objections to the validity of the marriage are twofold;—viz.—

That the person by whom the marriage ceremony was performed was not authorized to solemnize marriages in *any case*;—

And that if he was generally authorized, yet he was not so as it respected these parties.

Neither is the marriage rendered valid by the resolve of *March* 19, 1821, legalizing certain marriages.

1. The statute respecting marriages, 1786, *ch.* 3, provides that every *stated* and ordained minister in the town, district, parish or plantation where he may reside, shall be authorized to solemnize marriages, when one or both of the parties to be joined in marriage are inhabitants of, or resident in, the town, district, &c. where such minister shall reside. But the nature of *Mr. Hall's* ordination, and of his various duties and obligations, preclude all supposition of his being a *stated* minister within the meaning of the statute. The church over which he was ordained extended into three distinct towns or plantations, and as many counties. In what place, then, could he be said to be a stated minister? His case is very similar to that of *Comfort Smith*, who was convicted in this county at the S. J. Court *October* term, 1818, for pretending to join persons in marriage, he not having the requisite qualifications, but was afterwards pardoned by the executive. A minister thus ordained could not recover taxes paid by his parishioners into the treasury of the town, for the support of public worship. *Kendall v. Kingston*, 5 *Mass.* 524.

2. *Mr. Hall*, if generally qualified, had no authority to join these persons in marriage. On this point the statute is explicit. Where there is no minister in the town where either of the parties reside, the minister of the next town may perform the ceremony, "provided it be done in the town where one of the parties reside." But this marriage, having been solemnized in *Knox* where neither of them resided, is clearly out of the protection of the law.

3. The resolve of *March* 19, 1821, for making valid marriages, and for other purposes, is, to say the least of it, an ex-

traordinary act of legislation. How far it might be effectual as between parties themselves applying for its passage, is not now the question; for the case finds that *Brazier* had ceased to cohabit with the pauper long before the date of the resolve. Between these persons it has no operation, because they never applied to the legislature for this provision,—*Ellis v. Marshall*, 2 *Mass.* 269—and their dissent is clearly implied from their living apart.

But whatever may be its effect upon these persons, it cannot be construed to affect the rights of other persons or corporations. If the settlement of the pauper was in *Buxton* before the passage of the resolve, by what rule can it, without any act of her own, or of the plaintiffs, and without her knowledge or consent, be transferred to *Ligonia?* To give it this effect would present the singular case of a marriage made between parties actually resident at the time in different towns, and without any assent of either, or any knowledge or suspicion that they were thus to be united:—a construction as little in advancement of public policy, as of domestic happiness. The resolve is void as interfering with vested rights. Before its passage the pauper had her settlement in *Buxton*, on which town the plaintiffs had a right to call for the reimbursement of any sums they might be obliged to advance for her relief. This right the resolve takes away. *Wales v. Stetson*, 2 *Mass.* 143. It impairs the obligation of contracts. *Sturgis v. Crowninshield*, 4 *Wheat.* 208. *Dartmouth College v. Woodward*, *ib.* 518. Nor can it have the effect of rendering the marriage valid from the time the ceremony was performed; for this operation is retrospective, and therefore void. *Dash v. Van Kleick*, 7 *Johns.* 477. *Society v. Wheeler*, 2 *Gall.* 134.

Greenleaf, for the defendants.

1. *Mr. Hall* was ordained, after the usages of his own sect, over a church and society not incorporated by law, but voluntarily associated and gathered out of the town of *Unity*, and the adjoining plantations of *Montville* and *Knox*.

By *Stat.* 1811, *ch.* 6, unincorporated religious societies are expressly recognized, and thenceforth must be known in law: and they thus give a character to a minister *set over them.*

And hence, since the passage of that statute, a minister regularly ordained over a church and society not incorporated, must be taken to be a "stated and ordained minister of the gospel." It is not such ministers that the resolve of 1821 considers as not stated and ordained;—but the ministers of the methodist and other communions, who are ordained as travelling evangelists, without any local charge. The term *parish*, occurring in our statutes since the year 1811, can hardly be considered as any longer limited to territorial bounds, but is become, in one sense, synonymous with *society*. These principles are supposed to be supported by *Baldwin v. McClinch*, 1 *Greenl.* 102.

The word *parish* in *Stat.* 1817, *ch.* 141, is believed to have the force abovementioned, and to mean "the limits of the minister's parochial or spiritual charge;"—and this whether lying in one town or in several. The marriage therefore, being within the "parish" where one of the parties, *viz.* the woman, resided, and solemnized by a stated and ordained minister of the gospel, was valid.

2. If not, it was made valid by the resolve of *March* 19, 1821. Marriages are to be supported and encouraged by the civil magistrate, on the ground of public policy, to prevent wanton and lewd cohabitation, and the consequent dissoluteness of public morals. *Milford v. Worcester*, 7 *Mass.* 52. *Medway v. Needham*, 16 *Mass.* 160. On these principles the resolve was passed. A large number of marriages were supposed to be illegal, and parties were tempted to avail themselves of the legal advantages thus presented, to forsake each other and bastardise their issue. It was accordingly resolved, by way of public remedy, that "all marriages between parties competent by law to contract "marriage, and whose intentions of marriage were legally pub- "lished, shall be deemed and taken to be good and valid in "law, to all intents and purposes." Now this being *such* a marriage, it is legalized by the express language of the resolve.

To the objection that these persons did not assent to the resolve, they continuing to live apart,—it is answered—1. They assented to a legal marriage, doing all in their power to contract and consummate it; and the resolve does no more than confirm what the parties supposed valid, and probably still deem so.—2. The resolve, as it specially excepts the case of all who, hav-

ing been thus married, "have since separated, and one of the "parties has been legally joined in marriage with another "person," does, by necessary implication, include all who live apart, not having contracted a second marriage.—3. If the want of express assent is a valid objection, yet third persons have no right to make it. It lies in the mouth of none but the parties to the marriage or their heirs at law. And so is the doctrine of *Ellis v. Marshall*, 2 *Mass.* 269.—4. All persons are to be presumed to assent, who had not subsequently contracted another marriage. The resolve was dictated by high considerations of public policy, and for the conservation of public and domestic peace. And the legislature had a right to declare that contracts thus solemnly made should be binding. They were valid *in foro conscientiæ*. So are verbal contracts for the sale of real estate. Yet even *these* contracts are held binding when part executed. And ought not a marriage to be held valid, when consummated by cohabitation? Who is wronged by giving the resolve the effect originally intended by the parties?

To say that the resolve operates only to render a marriage legal from the time of its passage, and not from the time of the marriage, is in effect to make a *new marriage*, commencing on that day. This construction at once excludes from the benefit of the resolve all those marriages where one of the parties was then *dead*, or *non compos*—together with the children, in both cases, as well as all children then born, whose parents were still living. And these classes of persons probably compose more than half the number of cases on which the resolve was intended to operate. What then becomes of the claim of dower,—or of estates already descended to children, and perhaps to grandchildren,—or hereafter to be claimed by those born before the passage of the resolve? Such a construction, inviting endless litigation among lineals, and collaterals, and working so much injustice to those whose rights it was doubtless the great object of the legislature to secure, it is believed the Court will not willingly adopt.

The resolve affects no vested rights, and impairs no contracts, for none existed in this case till the supplies were furnished, which was not till after the date of the resolve. And as to the objection that legal settlements are thus arbitrarily

changed, it lies equally against many other general laws, of long standing, whose binding force was never questioned, because of their *general* application.

Allen, in reply.

The preamble to *Stat.* 1811, *ch.* 6, together with its enactments, sufficiently explain the objects of the legislature, and the objects apparent on the face of it are of sufficient importance to account for its passage and extend its operations, without enlarging its provisions by construction. There is nothing in it which dispenses with the qualifications required in a minister who is authorized to solemnize marriages by *Stat.* 1786, *ch.* 3. Its object is rather to enlarge the privileges of members, than to extend the authority of the teachers, of unincorporated societies. But such rights as are conferred by the statute of 1811, are so particularly defined as to preclude any implication. It was principally designed to enable such teachers to recover the money paid by their hearers into the treasury of the town, and to exempt them from taxation. It enacts that "all (such) ministers shall have the same exemptions from taxation as are "given to stated and ordained ministers of the gospel;"—clearly recognizing a distinction between *such* ministers, and those who are stated and ordained,—investing them, *thus far*, with the same privileges, and limiting it to the same extent. The term *stated* has obviously a reference to place, and cannot properly be applied to one who is ambulatory, whether in a smaller or larger circle.

The operation of the resolve of 1821 to render *any* marriage legal, which was not originally so, may well be questioned. But the difficulties in giving it a construction to legalize the marriage in question are insuperable. If it was not legal when the ceremony was performed, it must be regarded as void;—there is no medium;—it was nothing more than an agreement to marry, between persons who afterwards changed their minds. Their cohabitation, if evidence of their sense of the contract as a legal marriage, is more than counterbalanced by their subsequent separation. The exception in the resolve of those who have separated, and one of the parties "has been joined in *legal* marriage," though unmeaning, as such persons must have

remained unaffected, yet is a strong expression of the opinion of the legislature that the second marriage in such cases *is* legal, and consequently that the first was void. That being the case, it would be a singular exercise of legislative authority to declare that certain individuals might lawfully contract matrimony, but that when they had not availed themselves of this privilege they should be considered as already married to other persons.

The evils anticipated as resulting from the construction now contended for, are not chargeable upon the law, but grow out of the illicit connection of the parties, and are concomitants of a state of society where the laws regulating the marriage contract, which are plain and simple, are disregarded. Where this has been done inadvertently, it is just that punishment should be remitted, but the parties cannot reasonably claim of the Court all the privileges of those who have been joined in lawful wedlock.

The arguments, of which the foregoing is a summary, having been submitted in writing during the vacation, the opinion of the Court was now delivered as follows, by

Mellen C. J. In deciding this cause it is not necessary to consider all the objections and arguments which were urged on the trial. It is very clear that the marriage of the pauper with *Joseph Brazier* is void, according to the statute of 1786, *ch.* 3. *Mr. Hall* was not a *stated and ordained* minister of the gospel, within the meaning of that act. This is plain from the words of the act, and so it was decided in the case of *Comfort Smith* cited by the plaintiffs' counsel. And if he *had been* a settled and ordained minister in *Knox*, the marriage was void, because solemnized in *that* town, in which neither of the parties then resided, which is against the express directions of the statute.

It is equally clear that the *Stat.* 1811, *ch.* 6, cited by the defendants' counsel has made no alteration of the act of 1786, on the subject of marriages, nor given any power of joining persons in marriage, either express or implied, to ministers or teachers who are not *stated and ordained* in the manner contemplated in the latter act. And it is also equally clear to our minds that the marriage has not been confirmed by the resolve of *March* 19, 1821. We shall only assign *one* reason for this

opinion, though perhaps we might assign more if necessary. The preamble refers to "sundry marriages" which had been "solemnized within this State by ministers of the gospel who "were not *stated and ordained* ministers of the gospel, within the "meaning of the laws then in force; and who were believed to "have been under a *mistaken apprehension of the law*, and to "have supposed they were legally authorized to solemnize "marriages," &c.—and the resolve professes to confirm *such* marriages, and does not, in its language, embrace any others. The legislature evidently proceeded on the idea that the marriages they were confirming were in *all respects* solemnized according to law, excepting in the circumstance mentioned in the preamble,—viz.—the want of authority; and the "mistaken "apprehension of the law." They surely have not intimated any intention to confirm those marriages which had been solemnized in open violation of it. We ought then to give such a construction as to effectuate their intention, and nothing more.

It is unnecessary to make any further observations respecting the resolve, or its legal effects, because we are perfectly satisfied that it was never intended to be applied to such a marriage as that we have been considering, solemnized as that was, in direct violation of a statute long in force, and universally known. The result is that the action is maintained, and the defendants must be defaulted.

STURGIS *v.* REED, ADM'R.

If an administrator of an estate represented insolvent, assume the defence of an action pending against his intestate, and neglect to suggest the insolvency on record and pray a stay of execution, so that execution is issued, and returned *nulla bona*, it is waste, and he is liable to a judgment and execution *de bonis propriis*.

After an execution has been regularly issued and returned, it cannot be set aside.

THIS was a writ of *scire facias*, in which the plaintiff set forth a judgment recovered by him against the estate of the intestate, in the hands and under the administration of the defendant, at the Circuit Court of Common Pleas, *December* term, 1820, and

execution duly issued and returned *nulla bona*, and thereupon suggested waste by the defendant, and prayed judgment and execution *de bonis propriis*.

The defendant pleaded in bar, that since the commencement of this action, to wit, at the Circuit Court of Common Pleas, *August* term, 1821, he preferred his petition, praying that the execution aforesaid might be set aside, *for reasons set forth in his said petition*, which being continued to the *December* term following, the Court rendered judgment that the said execution be set aside, as by the record, &c.

The plaintiff prayed oyer of the record, from which it appeared that the original writ was sued out against the defendant's intestate in his life time,—that after his decease, pending the action, his administrator was admitted to defend said suit,—that previous to his assuming the defence he represented the estate insolvent, and a commission was duly issued,—that the defendant, being desirous that the Court should ascertain the validity and amount of the plaintiff's claim, did not plead the insolvency in abatement, but pleaded the general issue, giving verbal notice of the insolvency to the Court and the plaintiff's counsel,—and that since the rendition of judgment in that case and the issuing of execution thereon, the defendant had returned two reports of the commissioners to the Judge of Probate which he had accepted, and had settled an administration-account, from all which it appeared that said estate was absolutely insolvent:—and that upon this representation the Court adjudged that the execution be set aside as having been improvidently issued,—from which judgment the plaintiff claimed an appeal to this Court, which the Court below refused to allow;—all which being read and heard, the plaintiff thereupon demurs in law, and the defendant joins in demurrer.

R. Williams, in support of the demurrer.

If the administrator would avail himself of the insolvency of the estate, he should have taken the method prescribed by the statute of 1783, *ch.* 59. He might have had a continuance till the actual condition of the estate could be ascertained;—or possibly he might, on proper motion, have prevented the issuing of any execution. Neglecting this, the judgment was rendered

and execution regularly issued against the estate, which the administrator is bound at all events to discharge. *Clark v. May*, 11 *Mass.* 233.—Having obtained execution, if the plaintiff had received the money he would have had an unquestionable right to retain it;—and if so, he has a right of action against the administrator for not paying it. *Ramsdell v. Cresey*, 10 *Mass.* 170.

Nothing can be shown against the *scire facias* which might have been pleaded to the original action. Now the administrator might have pleaded the insolvency there, and of course it cannot avail him here.

There are but two cases where the creditor can have judgment but no execution;—1. where the commissioners on an insolvent estate reject a claim preferred before them, and a suit is brought at law to ascertain the debt;—2. where the creditor brings his action *directly* against the executor. *Stat.* 1784, *ch.* 2. But here the action being neither of these, and the fact of insolvency not judicially appearing to the Court, the execution rightly issued, and it was not in the power of the Court to set it aside. If they had such power, this was not a case for its exercise, for the precept was already *executed* and returned and this action brought, before any application was made for that purpose.

Emmons, for the defendant.

The defendant might have pleaded the insolvency in abatement of the original suit, admitting the plaintiff's demand; or he might have disputed the demand in a trial upon the merits. He deemed it his duty to do the latter;—and in this case it is well settled that no execution ought to have issued. *Hunt v. Whitney*, 4 *Mass.* 620.

Nor was it too late for the Court to set the execution aside. A regular judgment obtained by default has been set aside, to let in the administrator to plead, so as to prevent a judgment *de bonis propriis* by the negligence of his attorney. *Phillips v. Hawley*, 6 *Johns.* 129.

But if the execution had not been set aside, this action ought not to be sustained, until a summons had first issued to shew cause. *Hatch v. Eustis*, 1 *Gal.* 160.

The cause being continued to this term, the opinion of the Court was now delivered, by

Mellen C. J. By the 19th section of the Act of 1821, *ch.* 52, (being a transcript of the law now in force in *Massachusetts*,) upon the facts stated in the declaration, the plaintiff is entitled to maintain this action, his case being precisely within its provisions; unless the order of the Circuit Court of Common Pleas passed at *December* term, 1821, *setting aside* the execution after it was returnable, and actually returned in the manner stated in the declaration, has operated to divest the plaintiff of his cause of action, which was good when he commenced the same in *March*, 1821.—This order of Court which is the only material fact stated in the plea in bar was passed *for reasons set forth in the defendant's petition to said Circuit Court of Common Pleas:* but the plea does not state *what those reasons were.* The plaintiff, before demurring, sets out the petition at large; so that the reasons and grounds for the Court's proceeding are now before us on the record.—The record discloses nothing which shows that the execution on which the return was made, had issued irregularly or improperly. It is true it appears that the estate of the intestate was represented insolvent before the defendant assumed the defence, and that it actually is insolvent;—still as there was no averment in the defendant's plea in the former actions, that the estate was under a representation of insolvency nor any motion made and entered on the docket after judgment was rendered, for a stay of execution on account of such insolvency, the clerk was authorized and it was his duty to issue execution in the manner before stated It *was* issued, and by virtue of it, the officer to whom it was delivered, demanded payment of the administrator, and could not obtain it or find property of the deceased wherewith to satisfy it; and made a regular return thereon to this effect and returned the precept to the clerk's office.—Thus the execution was *functus officio*—and the plaintiff's right of action, founded on this return, had accrued and become perfect. It is not denied but that the Court, on the abovementioned petition, might legally have passed an order that *no further execution* should be issued on such judgement, and *thus far* protect the defendant from the

operation of the judgment. But we do not perceive how the order could have a *retrospective effect* and deprive the plaintiff of his rights, without any fault on his part, and, as it seems, without a hearing. There are many cases where an execution may be set aside; but those cases are where it has been *irregularly issued* or *executed.* 4 *Mass.* 483. Suppose that in this case the execution had been in due form extended on the real estate of the intestate, and regularly recorded in the registry of deeds; and that, instead of this *scire facias*, the plaintiff had brought a writ of entry to obtain the possession: would the present plea, stating that the Court had set aside the execution for the above reasons, long after the extent was completed, be any legal bar to such actions? The question admits of but one answer. For the same reason we think the plea is bad when offered as a bar in *this* action The decision of this cause may subject the defendant to some personal loss or liability; but it is owing to his own inattention. When he assumed the defence of the original action, he should have disclosed the representation of insolvency to the Court, either by *plea*, or motion for a *continuance* or a motion on record to *stay execution* on account of the insolvency.—Having done neither in due season, the plaintiff has a right to the advantage he has gained by his vigilance.—There must be judgment entered that the

Plea in bar is insufficient.

LEIGHTON, PETITIONER FOR REVIEW *v.* LITHGOW.

The three years limited for the prosecution of a petition for review, are to be computed from the term of which the judgment was entitled.

Lithgow recovered a judgment in the Circuit Court of Common Pleas against *Leighton* more than three years ago, but it was not in fact made up and recorded till last *April*, so that the petitioner could not prefer his petition till this term ;—and the question was, from what time the three years limited by the statute, beyond which petitions for review cannot be sustained, were to be computed ?

And THE COURT decided that the period was to be computed from the term when the judgment was entitled, and not from the time when it was actually made up out of term ;—and the plaintiff took nothing by his petition.

R. Williams, for the petitioner.

Boutelle, for the respondent.

THE STATE *v.* RICHARDSON.

A recognizance to appear and prosecute an appeal made to a higher Court, and abide the order of said Court thereon, and not depart without license, is not forfeited by a default at a *subsequent* term in the Court appealed to, the appeal having been duly entered at the first term, and the process continued.

THIS was a writ of *scire facias*, in which it was set forth that a complaint was duly made to a magistrate against the defendant for an assault and battery, and a warrant issued thereon, by virtue of which the defendant was arrested, tried before a justice of the peace on the plea of not guilty, convicted, and sentenced;—that he appealed from the sentence to the next Circuit Court of Common Pleas, to be holden in *December* then next, and entered into a recognizance conditioned that he should *appear and prosecute his appeal at the said Court, and should abide the order of said Court thereon, and not depart without license*;—that the recognizance was returned to and duly entered of record in the Court appealed to;—that the defendant appeared at the same term, and entered his appeal, *and the cause was then continued to the next April term*, at *which second term* the defendant, after trial and conviction by the jury, did depart without license, and being solemnly called did not appear but made default;—and he was now summoned to shew cause why judgment should not be rendered against him for the amount in which he recognized.

The defendant, after oyer of the condition of the recognizance, pleads in bar that a complaint was made to the magistrate against himself and one *Austin*, and others to the complainant unknown, for a riotous and tumultuous assemblage, making an affray, and committing an aggravated assault and battery on the complainant,—upon which a warrant duly issued, by virtue of which the defendant and said *Austin* were arrested and carried before the same justice of the peace named in the writ;—that they pleaded not guilty to the matter of the complaint;—that the magistrate after hearing the evidence, adjudged the said *Austin* guilty of an high and aggravated assault, and ordered him to recognize for his appearance at the next

Circuit Court of Common Pleas, to answer touching the same;—and adjudged the defendant guilty of aiding in said assault—and thereupon sentenced him to pay a fine and costs; from which sentence he appealed, and entered into recognizance, which is the same recognizance set forth in the writ.—Whereupon the Attorney for the State demurs in law.

Sprague, in support of the demurrer, and *Boutelle*, for the defendant, being about to argue upon the pleadings, were stopped by the Court, whose opinion was afterwards delivered to the following effect, by

MELLEN C. J. It appears from the record before us that the defendant entered into a recognizance before a justice of the peace, conditioned to appear and prosecute his appeal at the next *December* term of the Common Pleas, and abide the order of Court thereon and not depart without license; and that he did so appear, and prosecute his appeal, which the Court ordered to be continued. This was all he engaged by his recognizance to do. The cause being continued to *April* term, he should have been ordered again to recognize for his appearance at *that* term. But his departing without license at *that* term, at which he did not engage to appear, cannot be considered as a forfeiture of *this* recognizance.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

HANCOCK.

OCTOBER TERM,

1822.

ULMER & ALS. *v.* CUNNINGHAM.

If the goods of one of several joint debtors be taken in execution and wasted, the remedy should be sought by the owner of the goods alone, and not by all the debtors jointly.

So if the officer extorsively demand and receive of one of the debtors illegal fees.

THIS was an action for money had and received. It appeared at the trial that the plaintiff *Ulmer* was late Sheriff of this county, and the other plaintiffs his bondsmen, against all of whom, *jointly*, the defendant, being a deputy sheriff, in the year 1813, had eighteen several writs of execution in favour of *John T. Apthorp* late treasurer of the Commonwealth of *Massachusetts*, issued for the benefit of divers creditors of said *Ulmer*, upon a judgment rendered upon his bond of office as Sheriff;—by virtue of which executions he seized a large quantity of lumber and other personal property belonging to *some*, but not to *all* the plaintiffs, in severalty, but it was admitted that no part of the goods seized belonged to all the plaintiffs jointly.

The plaintiffs offered to prove that the writs of execution were never returned to the clerk's office from whence they issued,—that the defendant had never made any return nor exhibited any account of sales of said property,—that he had demanded and received of one of the plaintiffs fifty dollars in money in payment of said executions, over and above the money arising from the sales of the property,—that the de-

fendant had charged the plaintiffs upwards of ninety dollars for fees on the executions, and retained the same to his own use out of the money arising from the sales, though a large portion of the fees thus received was illegally and extorsively demanded.

But the Judge who presided at the trial rejected the evidence thus offered and directed a nonsuit, subject to the opinion of the whole Court, whether the action could be maintained.

Greenleaf and *J. Williamson*, for the plaintiffs, argued—1. That all the original debtors were rightly joined in the suit;—because they were jointly interested in the executions against them,—and because a recovery here would be a bar to any action by one alone. *Scammon v. Proprietors of Saco meeting house*, 1 *Greenl.* 262.—2. That a seizure on execution is no defence for the officer, unless he shews the execution *returned*. *Cotes v. Mitchell*, 3 *Lev.* 20. cited in 1 *Esp. Dig.* 103. And as the plaintiffs, when they shewed the taking, *necessarily* shewed it to be by color of process, they ought to have been permitted to shew the whole *gravamen*.—3. That the defendant took illegal fees, for which this action well lies. *Moses v. Macferlan*, 2 *Burr.* 1012.

Wilson and *White*, for the defendant, insisted that the remedy was wholly misconceived, several plaintiffs being joined who had no interest whatever either in the property taken, or the money paid. If there was any implied undertaking on the part of the defendant, it was with those only whose property he had taken, but not with those who have no right to retain the money they might recover in this action.

The cause having been continued for advisement, the opinion of the Court was now delivered, by

Mellen C. J. This being an action of *assumpsit* in which the plaintiffs declare on a promise made to them *jointly*, such promise must either be proved to have been made expressly, or else implied by law;—and the defendant may avail himself of the want of such proof, upon the general issue. *Chitty* 54. In the present case there is no proof of an express promise; and by the report it appears that the property, for the proceeds of

which the action was brought, "belonged to *some* of the plain-"tiffs, but not *to all*, in severalty: and that *no part* of the goods "seized belonged to *all* the plaintiffs *jointly*." If the goods seized had not been sold, the plaintiffs could not have joined in an action of replevin for them. *Co. Litt.* 145. *b.*—The nature of the promise which the law implies corresponds with the nature and ownership of the property which the defendant has taken, sold and turned into cash. That being the *several* and not the *joint* property of the plaintiffs, if any promise is implied on the part of the defendant to the plaintiffs in the present case, it is not a *joint* one; and of course does not support the declaration; and if any unlawful fees were taken by the defendant, it appears that such fees were deducted from the money arising from the sales of the property: and *that* not belonging *jointly* to the plaintiffs, the *amount of sales* did not; nor, of course, the unlawful fees so retained. The objection, therefore, lies to the whole sum demanded. In the case of *Weller & al. v. Baker*, 2 *Wils.* 423, the Court considered the interest of the *Tunbridge Dippers* as a *joint* one, and the injury which they had sustained by the act of the defendant as a *joint* injury. So in *Conyton & al. v. Lithebye*, 2 *Saund.* 115, though the plaintiffs' interest in the mills was *several*, the damage they had suffered was *joint*. Both actions were maintained. In *Osborn & al. v. Harper*, 5 *East.* 225, the sum sued for had been paid by the plaintiffs from a joint fund procured on their joint credit. On this ground, after some doubt, the action was sustained. In the case from *Roll. Abr.* 31, *pl.* 9. and cited in 2 *Saund.* 116, *b.* there was an express promise made to the plaintiffs jointly, founded on a joint consideration. On this ground the plaintiffs were permitted to recover. But all the before mentioned cases were different from the present, and founded and decided on different principles.

As we are all satisfied, for the reasons we have assigned, that the nonsuit was properly ordered, it becomes unnecessary for us to examine the *other branch* of the defence. Accordingly the motion to set aside the nonsuit is overruled and there must be judgment entered for the defendant for his costs.

TREAT & AL. *v.* McMAHON.

In a writ of entry the Court refused leave to amend by striking out the name of one of the demandants which had been improvidently inserted.

IN a writ of entry on the seisin of the demandants and a disseisin by the tenant, *Pond* moved for leave to amend the writ, by striking out the name of one of the demandants which had been improperly inserted.

But THE COURT, *absente Preble J.* ruled that the amendment was inadmissible. Whereupon the demandants had leave to discontinue.

Crosby and *Abbot* for the tenant.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

LINCOLN.

OCTOBER TERM,

1822.

VARNER *v.* THE INHABITANTS OF NOBLEBOROUGH.

The legal presumption arising from the fact of drawing a negotiable order, or making a negotiable note, which is received by the creditor, is, that it was intended to be, and in fact is, an extinguishment of the original demand or cause of action. But this presumption may be controled or explained by the agreement of the parties, or by proof of usages or circumstances inconsistent with such presumption.

A town order, drawn by the selectmen on the treasurer, must be presented to the treasurer for payment, before any action can be sustained on it, in the same manner as a note for the payment of money at a particular place. But no notice need be given to the selectmen, of non-acceptance or non-payment by the treasurer.

Such a town order is good evidence to support a count on an *insimul computassent.*

Assumpsit. The declaration contained two counts—one on an *insimul computassent*—and the other being a general *indebitatus assumpsit*—to which the general issue was pleaded.

To support the action, the plaintiff read to the jury an order drawn by the selectmen of *Nobleborough* on *David Dennis*, their treasurer, requesting him to pay the plaintiff a certain sum, being the amount due him for building a bridge for said town. But there was no proof offered that the order was ever presented to the treasurer for payment.

Hereupon, by consent of parties, a nonsuit was entered, subject to the opinion of the whole Court whether, upon this evidence, the action was maintainable.

Allen and *Bellard*, for the plaintiff.

The implied contract originally existing between these parties is still in force unless merged in one of an higher nature. But the paper offered in evidence cannot be regarded as a higher security, because it wants the essential attributes of a bill of exchange or a mercantile order. None of the parties to it are personally responsible in the event of its non-payment,—and it is payable out of a particular fund. 2 *D. & E.* 243. And if it were a bill of exchange, it would be no payment unless specially accepted as such. The taking of a negotiable paper is not necessarily a bar to an action on the original implied contract. *Maneely v. M'Gee*, 6 *Mass.* 143. And if it were, yet the instrument in the present case can be no other than a bill drawn by a party on himself, in which case no notice is necessary.

But in fact the paper is merely evidence of an *insimul computassent*. *Keyes v. Stone*, 5 *Mass.* 391. *Curtis v. Greenwood*, 6 *Mass.* 358. It is like the case of one who, having adjusted the account of his servant and ascertained the amount due him, gives him a draft or scrip addressed to his steward or cash-keeper, directing him to discharge the debt. And so, it is understood, this sort of instrument was treated in *Slemmons v. Westbrook*, decided some years since in *Cumberland*.

Orr, *Reid* and *A. Smith*, for defendants.

The paper offered in evidence is a negotiable order for the payment of money, and, like any other negotiable paper, it is a bar to any action on the implied contract, which it extinguishes. And it is to be treated as all other negotiable instruments, the drawers of which are entitled to demand on the drawee, and notice of non-acceptance, or non-payment. *Thatcher v. Dinsmore*, 5 *Mass.* 299. *Darrar v. Savage*, 1 *Show.* 150. 3 *Wils.* 353.

After this argument, which was had at the last term, the cause being continued for advisement, the opinion of the Court was now delivered, by

Mellen C. J. Although in this case there is no count upon the order, yet as there is one for services performed, and another upon an *insimul computassent*, we apprehend it was competent

for the plaintiff to declare in the manner abovementioned against the defendants, and maintain the action by giving the order in evidence, as well as by declaring on the order itself: and that in *this respect*, it is immaterial whether the order be considered as an extinguishment of the original cause of action or not.

The plaintiff has relied upon a decision of the Supreme Judicial Court of *Massachusetts*, not reported, in the case of *Slemmons v. the town of Westbrook*.—We have examined the record and statement of facts in that case. The suit was on a town order *not negotiable:* and there was also a count on an *insimul computassent*. We have also endeavoured to ascertain what facts took place and what observations were made by the Court at the trial; respecting both which the counsel who were engaged in the cause differ in their recollection and statements.—It seems that the cause was continued to ascertain whether the original debt, for the payment of which the order had been given, was discharged by a receipt or whether it was expressly received in satisfaction. No such proof was adduced; but the Court sustained the action, probably on the *second* count or *insimul computassent*. There was no evidence that *Slemmons*, the payee, had ever presented the order to the treasurer for payment. But on whatever principle the Court founded their opinion in that case, there is a difference in the two town orders. In the case before us the order, in form at least, is *negotiable;* in *Slemmons v. Westbrook* it *was not so*. That case therefore is no *direct* authority; and we must now decide whether the above difference between the two instruments leads to different conclusions in the application of legal principles.—It has been contended by the plaintiff's counsel that the order, though negotiable *in form*, is not so in legal *consideration;* being payable out of a particular fund, viz. the town's money in the treasury. We do not perceive the force of this objection.—The treasurer is requested to pay the amount of the order out of the treasury, where the funds of the town were deposited. This is no more than what is understood in case of all bills. They are to be paid out of the funds of the drawer in the hands of the drawee. When a bill is drawn payable from an uncertain fund, or one depending on a contingency, it is not negotiable.

It was next contended that, if the order be legally negotiable, it has not operated to extinguish the original debt and merge the original cause of action, so as to prevent the plaintiff from recovering upon it in the same manner as *Slemmons* was permitted to recover against *Westbrook*.—It is *admitted* by the counsel that the acceptance of a *negotiable promissory note*, does extinguish the original cause of action, according to the cases of *Thatcher v. Dinsmore*, *Maneely v. M'Gee*, and *Curtis v. Greenwood*, which were cited in the argument; but *denied* that a similar effect is produced by the acceptance of a *bill of exchange or order* given for a similar purpose.

Is there, then, any difference between a *negotiable promissory note*, and a *negotiable order*, as to its effect and operation to extinguish the original cause of action? No cases have been cited to shew the alleged distinction; on the contrary, the cases before mentioned assign the reason of the principle to be that "a creditor may indorse the note; and if he would compel "payment of the original debt, the debtor might be afterwards "obliged to pay the note to the indorsee, and thus *be twice* "*charged*, without any remedy at law." This is the language of *Parsons C. J.* in *Maneely v. M'Gee*. He used nearly the same expressions in *Thatcher v. Dinsmore*, and assigns the same reasons for the principle of law. The same principle is stated in *Johnson v. Johnson*, 11 *Mass.* 359. Now it is not easy to perceive why those reasons do not apply as fully and as forcibly in the case of an *order* as a *note*, where both are made negotiable; and why the danger of being compelled to make a *second* payment of a demand is not as great on the part of the drawer of *such* an *order* as the promiser of such a *note*, if the original debt and cause of action be not extinguished by the acceptance of the new negotiable security. It would seem that as in *both* cases the *reason* of the law is the same, so is *the law* the same.

But it has been further contended by the plaintiff's counsel that bills of exchange are often, perhaps generally, drawn without intending thereby to close an account or produce any effect on the subsisting demands between drawer and drawee *until payment*;—leaving them, until that time, unextinguished. Admit this to be the fact, and that the general usage and understanding be such as he has stated between merchants in the

transactions of commerce and remittance of monies, we apprehend the argument is not applicable to cases like that under consideration.

The legal presumption arising from the fact of drawing a negotiable order or making a negotiable note, which are received by the creditor, is, that they were intended to be and in fact are an extinguishment of the original demand or cause of action. But, as in all other cases, this presumption may be controled or explained by *the agreement of the parties*, or by proof of circumstances or usages inconsistent with such presumption. Still, in the absence of such controling or explaining evidence, the legal presumption must have its effect; all four of the cases before mentioned are explicit on this point.—Now, on examining the facts reported, we find nothing which has a tendency to shew that the order in question was not *given* and *received* as payment in full and a discharge of the original debt and cause of action.

The remaining inquiry is whether a plaintiff *declaring* on such a negotiable town order, or *giving it in evidence* in support of a count on an *insimul computassent*, must not prove the same facts relative to the *presentment* of it, to entitle him to recover, as he would be obliged to prove in case of an order drawn by one man on another, payable to order, in the common course of business, and having no connection with town proceedings.—Perhaps, in case of presentment and non-payment, no *notice* need be given to the selectmen; because, if an order under such circumstances is properly compared to a promissory note, no notice would be requisite, any more than in all other cases of promissory notes for cash, and payable on demand. Why should any distinction exist between *this* order and those in common cases, with respect to the circumstance of presentment for payment? What good reason can be found to support such distinction? It is urged that the several officers of the town are to be considered as *one person*, and identified with the town; that the mode by them adopted for transacting their prudential concerns, cannot affect the rights of those persons dealing with them; nor the transaction itself be governed by the principles of law regulating bills of exchange.—It has been said that an order drawn by selectmen on a town treasurer is nothing more in a

legal point of view, than an order drawn by the town on itself; or by any individual on himself. But on this principle the plaintiff has not entitled himself to maintain his action. *Chitty*, page 22, says "a bill will be valid where there is only one party "to it; for a man may draw a bill on himself, payable to his "own order:—but in such case it is said that the instrument is "more in nature of a *promissory note*, than a bill of exchange." See also *Bayl.* 26. The order in question was to be paid by the treasurer. The selectmen were the agents of the town—drawing the order on their account on the town's banker. The case may be justly compared to that of a draft by a man on his banker; or a note payable at his banker's, or by his agent. In which cases it seems settled that the draft or note must be presented at the place appointed. *Chitty*, 134, 135, and cases there cited. *Saunderson & al. v. Judge*, 2 *H. Bl.* 509. *Berkshire Bank v. Jones*, 6 *Mass.* 524. *Woodbridge v. Brigham*, 13 *Mass.* 556.

But in addition to the authority of decided cases, so nearly resembling this in principle, a strong argument against the present action arises out of the general—perhaps we may say universal mode of conducting the affairs of a town in the settlement of accounts and payment of debts due from the corporation to individuals.—Persons transacting business according to an established and well known usage, are presumed to assent to such usage and contract in reference to it.—*Lincoln* and *Kennebec Bank v. Page*, 9 *Mass.* 155.— —— *v. Hammet*, 9 *Mass.* 159.—*Weld v. Gorham*, 10 *Mass.* 366.—*Blanchard v. Hilliard*, 11 *Mass.* 85.—*Jones v. Fales*, 4 *Mass.* 245.—Now it is universally understood that selectmen, who draw an order on behalf of the town in favour of any of their creditors, have not the funds of the town in their hands; but that they are in the possession of the treasurer.—When any creditor of the town receives an order on the treasurer for the amount due to him, he must be considered as understanding these facts and assenting to this mode of receiving payment; and as accepting the order under an implied engagement to conform to the established usage, and present the order to the treasurer for payment.—Good faith requires him to do this and the law considers him as promising so to do.—If, on presenting the order, payment be refused, the town *which drew the order on itself* must be answer-

able *instanter* for the reasons before assigned.—But no sound reason can be given why a town should be subjected to the perplexity and costs of an action, before the payee of an order will give himself the trouble to do his duty and request payment of the money due him according to the terms of it.—We have no reason to believe but that the contents of the order would have been promptly paid on application at the treasury. Justice as well as law are against the plaintiff according to the facts before us.

As the plaintiff had no cause of action when he commenced it, the nonsuit must be confirmed.

Motion to set aside the nonsuit overruled—
and judgment for the defendants for costs.

RYDER & UX. *v.* ROBINSON.

If pending a real action brought by husband and wife in her right, the wife die, the husband cannot proceed in that suit for his estate by the curtesy, by *Stat.* 1822, *ch.* 186, but the writ abates.

If a real action is abated by the death of one of the demandants, the tenant shall not have costs, it being the act of God.

WRIT OF RIGHT. *Allen*, for the demandants, suggested that since the last term the wife, in whose right the action was brought, had died; and moved for leave to amend the writ by striking out her name, and that the cause might proceed for the husband alone, as tenant by the curtesy, pursuant to *Stat.* 1822, *ch.* 186;—which enacts that if one of the demandants in a real action die or intermarry, such death or intermarriage shall not abate the writ; but it being suggested on the record, the remaining demandant or demandants may amend the declaration so as to describe their interest in the land, and proceed to judgment, &c.

Greenleaf and *Ruggles*, for the tenant, objected that the statute could not enable surviving demandants to recover any other estate than that to which they were entitled at the bringing of the action, to which time every amendment must relate; and at *that time* the husband was not tenant by the curtesy.

And THE COURT, for this reason, refused the amendment; and the writ abated.

The counsel for the tenant then moved for costs against the surviving demandant, which the Court refused, the writ being abated by the act of God.

REID *v.* BLANEY.

The remedy against the indorser of a writ in case of the avoidance of the principal, under *Stat.* 1734, *ch.* 28. [*Stat.* 1821, *ch.* 59, *sec.* 8.] is by *scire facias*, and not by action of debt.

Debt does not lie upon a conditional or collateral undertaking.

THIS was an action of *debt* against the defendant as indorser of an original writ sued out by one *Dickey* against the present plaintiff; in which suit judgment was rendered in favour of the then defendant for his costs. The declaration alleged the judgment, the due issuing of execution, and the officer's return thereon, shewing the avoidance of *Dickey*, and averred the liability of the defendant for the costs, as indorser of the original writ, pursuant to the statute. To this the defendant put in a general demurrer.

Allen and *Bellard*, in support of the demurrer.

The nature of the defendant's liability as indorser of the writ, is wholly conditional and collateral. On such an undertaking debt will not lie. 1 *Chitty Plead.* 93, 106. *Bishop v. Young*, 2 *Bos. & Pul.* 81.

Nor is the engagement under seal; and therefore debt will not lie upon it, for the same reason that it will not upon a statute-staple. 1 *Chitty Plead.* 104. *Shep. Touchst.* 353.

And it is not matter of record. The stipulation of the defendant is wholly *in pais*. His signature may have been placed on the writ without his consent, or it may be the handwriting of another person of the same name; and the genuineness of the signature is a fact which may well be put in issue to the jury. But no plea which is admissible to an action of debt on a record, would let him in to this proof. *Nil debet* would be a confession of the signature. 1 *Chitty Plead.* 475—6.

Nor was the sum certain. The remedy under this statute in *Massachusetts* has always been sought by *scire facias*. *Ruggles v. Ives*, 6 *Mass.* 494. *Miller v. Washburn*, 11 *Mass.* 411.

Orr and *Reid*, *pro se*.

The *Stat.* 1784, *ch.* 28, gives a remedy against the indorser, in case of the avoidance of the principal, but does not prescribe the form of action. But in a case strictly analogous to this, viz. against the indorser of a writ of *audita querela*—the remedy is expressly given by an *action of debt*, by *Stat.* 1781, *ch.* 48. So far therefore as the intent of the legislature can be ascertained, the mode of remedy in the *Stat.* 1784, may be understood to be referred to that already existing in the like case under *Stat.* 1781.

But if the legislature has indicated no remedy, the common law will furnish one. *Smith v. Drew*, 5 *Mass.* 515. And the proper remedy is *debt*, because the money is reduced to a sum certain by the judgment, and it appears to be due by the evidence of a court of record. 2 *Bl. Com.* 464—5. The undertaking of the defendant is no otherwise collateral or contingent than is that of bail, against whom debt lies, as well as *scire facias*. The case may be compared with that of *Jeffrey v. The Bluehill turnpike corporation*, 10 *Mass.* 371, where the statute having made the defendants *liable* for all damages occasioned to any owner by laying the turnpike through his land, an action of debt was sustained for the amount awarded by the Sessions to the plaintiff, under the provisions of the act.

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

The only question raised by the demurrer is whether *debt* is the proper action.

It is admitted that in *Massachusetts* the action of debt is not used; but in all the reported cases the process was *scire facias*. No objection was made to that mode of proceeding; on the contrary the Court, in speaking of the *scire facias*, seem to consider it as the usual and proper process.

But there seems to be an objection, on principle, to an action of debt. The undertaking of an indorser of a writ is in its nature *conditional*; depending on the *avoidance* or *inability* of

the plaintiff; of which certain statute proof is required; and it is also a *collateral* undertaking by *one* man for the conditional payment of the debt of *another*. It seems to be settled that on such an undertaking or promise an action of debt will not lie. To this point see *Chitty on Pleading*, 94, 106.

The statute respecting the writ of *audita querela*, has provided that such writ must be indorsed; and that an action of debt may be brought against the indorser. This is a *special* provision in that particular case only.

We are therefore of opinion that this action cannot be maintained and there must be

Judgment that the declaration is insufficient.

FROST & AL. *v.* ROWSE & AL.

In debt on *Stat.* 1821, *ch.* 168, for the unlawful taking of logs out of a river, &c. it is not necessary to allege that the defendant knew the plaintiff to be the true owner of the logs.

In debt for a penalty given by statute, the wrong-doers may be sued either jointly or severally;—but the plaintiff can have but one satisfaction.

DEBT on *Stat.* 1821, *ch.* 168, for taking the plaintiffs' logs. In the declaration it was alleged that the defendants "did "take, carry away, saw, split, destroy and convert to their "own use one pine mill-log, of the value of ten dollars, the "property of the plaintiffs, put by them into the river called "the great Androscoggin, and marked by their mark, to wit, "&c. cut out thereon with an axe; which log the said—defend-"ants—did take, carry away, saw, split, destroy and convert "to their own use, without the consent of the plaintiffs, and "contrary to the form of the statute in such case made and "provided; whereby they have forfeited and become liable to "pay to the plaintiffs the sum of fifty dollars, and an action "has accrued," &c.

At the trial of this cause in the Court below, which was upon the issue of *nil debet*, the Court ruled that the action could not be supported, because there was no averment in the declaration that the plaintiffs were *known* by the defendants to be the owners of the logs,—and because three defendants were joined in the

writ, whereas the penalty accrues against each person found guilty, and not against any number of persons jointly,—and thereupon directed a nonsuit; to which direction the plaintiffs filed summary exceptions, and appealed to this Court.

It was submitted without argument, by *Orr*, for the plaintiffs, and *Ames*, for the defendants.

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

On the plaintiffs' exceptions two reasons appear to have been assigned by the presiding Judge in the Court below for directing a nonsuit.

As to the *first* reason assigned, it appears by an examination of the section of the statute on which the action is founded, that it is not necessary that the person committing the trespass should know the true owner of the logs;—and of course it was not necessary for the plaintiffs in the present case to state in the declaration that *they* were known by the defendants to be the true owners of the logs therein mentioned.

As to the *second* reason, we apprehend it to be at variance with the decision of the Supreme Judicial Court of *Massachusetts* in *Boutelle v. Nourse*, 4 *Mass.* 431. In that case it was decided that several persons guilty of a trespass *might* or *might not* be joined as defendants in an action of debt for a penalty incurred, according to the facts of the case. If the trespass was committed by several persons *jointly*, they *might* be jointly sued,—otherwise, not. But it cannot be ascertained by inspection of the declaration, whether the tort alleged was joint or several. *Parsons C. J.* in delivering the opinion of the Court in the above case, says—"although debt *qui tam* lies to recover the penalty, "yet the debt arises from a trespass, which in its nature is *sev-* "*eral* as well as *joint*. The action may therefore be sued against "*one* or *more* of the joint defendants, but the plaintiff can have "but one satisfaction." As we do not perceive any reason for questioning the correctness of the above mentioned decision, or the principles on which it is founded, we feel disposed to adopt it as the settled law applicable to the question before us. See also 1 *Chitty on Plead.* 74. *Burnham v. Webster*, 5 *Mass.* 266.

The exceptions are therefore sustained. The nonsuit must be set aside, and a trial be had at the bar of this Court.

BLANEY v. BEARCE.

As between the mortgagor, and *mortgagee*, the fee of the estate passes to the mortgagee at the execution of the deed; and he may enter immediately, or have a writ of entry against the mortgagor; unless there be an agreement in writing between them that the mortgagor shall retain the possession and receive the profits.

But as between the mortgagor and *other persons*, he is considered as still having the legal estate in himself, and the power of conveying it to a third person subject to the incumbrance of the mortgage.

Where an absolute deed of real estate is given, and a bond executed by the grantee *at the same time*, though bearing a *subsequent date*, to convey the same land to the grantor, upon payment of a certain sum, the two instruments are to be taken as constituting a mortgage. *Semble.*

Whether the mortgagee, after he has lawfully entered into the mortgaged premises, and before the right of redemption is foreclosed, has a right to cut down and carry away, for the purpose of sale, any timber or other trees growing thereon—*quære.*

TRESPASS *quare clausum fregit.* The defendant pleaded soil and freehold in himself, which was traversed, and issue taken thereon.

The defendant offered in evidence a deed from the plaintiff to *Samuel Woods*, dated *July* 14, 1819, conveying the *locus in quo*, with general warranty;—and an assignment on the back of said deed dated *November* 7, 1821, by which the said *Woods* assigned to the defendant all his estate in the premises, together with a note of hand for $2,800 given by *Blaney* to him dated *July* 15, 1819,—subject however to a bond given by *Woods* to *Blaney* dated *July* 15, 1819, binding himself to convey the premises to *Blaney* upon payment of the amount of the note.

The plaintiff then read in evidence the bond aforesaid, which it was agreed was executed at the same time with the deed from *Blaney* to *Woods*,—the condition of which set forth that whereas *Woods* had on that day bargained and sold to *Blaney* the land in question, and *Blaney* had in consideration thereof given to *Woods* his note of hand for $2,800 payable in one year, therefore if *after the payment of the said note*, and within eighteen months from the date of the bond, *Woods* should, upon request, convey the premises to *Blaney*, and also permit *Blaney* peaceably to receive and take to his own use the rents and profits of the premises and every part thereof until such conveyance, then the obligation to be void.

Upon this evidence the Judge who presided at the trial, intending to reserve the questions of law arising in the case for the consideration of the whole Court, directed a verdict to be returned for nominal damages for the plaintiff, which was to stand if, in the opinion of the Court, the action was maintainable, otherwise to be set aside.

Bailey, for the defendant.

The intent of the parties so far as it can be collected from the evidence in the case, was to give *Woods* the best possible security for his debt, by a conveyance absolute in its terms. The bond for reconveyance was probably dated subsequent to the deed, for the express purpose of avoiding its operation as a defeasance. And it contains in itself no apt words either of defeasance or of conveyance; but is merely an engagement to execute a deed upon payment of the purchase-money. The title therefore being absolute in *Woods* and by him assigned to the defendant, his entry was lawful, he being the owner of the soil.

Allen, for the plaintiff.

The plea having admitted the possession to be in the plaintiff, the question is upon the title of the defendant to the freehold. In the instrument of *July* 15, *Woods* declares that he "has this day bargained and sold" the premises to *Blaney*, and stipulates for his quiet pernancy of the rents and profits. By the words "bargained and sold" the estate passed from *Woods* to *Blaney*, subject to be defeated on *Woods*' cancelling the note, or tendering it to him when the day of payment should arrive. *Jackson v. Smith*, 10 *Johns.* 456. 11 *Johns* 498. And the negotiable note given by *Blaney*, was sufficient consideration for the conveyance.

But if the estate was not reconveyed by *Woods* to *Blaney*, then the latter never parted with his whole estate, but the transaction is to be taken as a mortgage to *Woods* to secure the payment of his debt, in which case the freehold is in the mortgagor till entry for condition broken. It has never been decided by our Courts that the fee is in the mortgagee till *such entry*, pursuant to our statute, or till entry under a writ of possession, for fore-

closure. Prior to this period the relation of the parties is merely that of debtor and creditor. The *debt* is the principal thing, the mortgage only a security for its payment. The reading of the late Judge *Trowbridge* to the contrary must be considered as controled by the subsequent statute of 1788, *ch.* 51. If the law were otherwise, the mortgagee might ruin the pledge. If he can cut trees he may cut all the trees on the land, and even remove the buildings, without remedy;—for we have no Court with power to grant an injunction to stay waste; and an action of the case in the nature of waste may be fruitless, if the mortgagee be unable to respond in damages. On this point the decisions of *New-York* are with us. *Runyon v. Mersereau*, 11 *Johns.* 534. So in *Goodwin v. Richardson*, 11 *Mass.* 474, the mortgagee has only the right of acquiring an estate. If he had a freehold, it would go to his heirs, not to the executor;—yet the *Stat.* 1788, *ch.* 51, makes provision for the case when the mortgagee dies before having acquired *seisin* of the land;—and the *executor*, and not the heir, may release the land, on payment of the money, and may recover *seisin* by process of law, as though the testator had died seised of the land, for the purpose of making sale for payment of his debts. If the fee were in the mortgagee, his widow would be entitled to dower in the premises,—and it might be taken for his debts. Yet the reverse of this is the settled law. *Blanchard v. Coburn*, 16 *Mass.* 345. His interest in the property may be transferred by *delivery over* of the note and deed; and therefore it is but a chattel. *Green v. Hart*, 1 *Johns.* 580. *Rex v. St. Michaels*, *Doug.* 632. So it is the interest of the *mortgagor* that gives him a settlement as a freeholder. The mortgagee gains no settlement by his mortgage. *Groton v. Boxborough*, 6 *Mass.* 52. Nor is it necessary that the rights of the mortgagee should be thus extended,—for he may always enter for condition broken; or before breach, by process of law;—but if the estate be a *pledge* for security of the debt, it ought not to be in his power to *destroy* it.

Wilson, in reply.

The law on this subject is well settled in *Massachusetts* in *Shaw v. Loud*, 12 *Mass.* 447, and some other decisions, that the freehold is in the mortgagee. And these cases must govern,

notwithstanding the decisions in other States, because they form part of the common law of *Maine*, and are founded on statutes which are copied into our own code. The only case cited from *Massachusetts* to the contrary, was not between parties or privies to the deed of mortgage;—and it is conceded and settled that as against *strangers*, the mortgagor may have rights, which he cannot claim against the mortgagee.

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

The only question put in issue by the pleadings in this case is, whether, at the time of the alleged trespass, the soil and freehold of the *locus in quo* was in the defendant as he has stated in his plea in bar.

In order to decide this question, it seems necessary to examine several points which have been made in the argument.

The defendant relies on the deed from *Blaney* to *Woods*, dated *July* 14, 1819, and on the deed of assignment from *Woods* to the *defendant*, dated *November* 7, 1821, as proof of his title.

The plaintiff relies on the instrument bearing date *July* 15, 1819, and signed by *Woods*, which is in the form of a bond with a condition.—The plaintiff's counsel contends that this instrument contains language amounting to a grant of the *locus in quo* from *Woods* to *Blaney*.—The expression in the instrument alluded to is in these words. "Whereas the above nam-"ed *Woods* has this day bargained and sold unto the above-"named *Blaney* a certain farm," &c. describing the before mentioned premises. It is urged that this reconveys the premises to *Blaney*, and proves the issue on his part. We are well satisfied that this construction cannot be admitted. The *whole* instrument must be examined, and taken together; and such a construction given, as to render it sensible and consistent.

A part of the condition of the instrument speaks of a conveyance of the estate by *Woods* to *Blaney* to be made on a future day, and on the performance of certain conditions. The plaintiff, therefore, cannot maintain this ground.

The next point urged by plaintiff's counsel is, that as the deed from *Blaney* to *Woods*, and the bond from *Woods* to *Blaney*, were executed at the same time, they both constitute but one contract, and render the deed from *Blaney* to *Woods* a mort-

gage. And in the argument, the defendant's counsel has viewed the conveyance in this light; and therefore it is unnecessary for us to give any opinion respecting it; because, if it be *not* a mortgage, it is perfectly clear that the title is in the defendant.

The next inquiry is, whether, at the time of the supposed trespass, *Blaney* had any *special rights*, beyond those belonging to mortgagors *in general*, in consequence of the provisions in the condition of the bond. By these provisions, the debt was to be paid in one year from the date of the bond; and *after* such payment, and on request, *Woods* was to make and execute a deed of the land to *Blaney;* and to permit and suffer *Blaney* peaceably and quietly to receive and take to his own use the rents and profits of the premises, until such conveyance should be made and executed. By this clause, we must understand that each party intended to perform his engagement according to the terms of it; and on this principle *Blaney* was to retain the possession and receive the profits of the land for the term of eighteen months from the date of the bond, unless he should receive a conveyance before that time, pursuant to the condition; though if he had paid the money at the time appointed, no conveyance would have been necessary; the estate would at once have revested in *Blaney*. But we must not give such a construction to the condition as to enable *Blaney* to take advantage of his own wrong; and by neglecting to perform *his own* engagement, continue his right of occupation and perception of profits, to the exclusion of the mortgagee or his assignee from the premises.

We are therefore satisfied that the special terms of the condition could have no effect upon the rights of the assignee of the mortgage, (it being admitted that the debt due from *Blaney* to *Woods* has never yet been paid) after the expiration of said eighteen months. It also appears that the supposed trespass was not committed until *after* that time.

In this view of the cause it results, that at the time of the alleged trespass, the defendant, as assignee of the mortgage, had a right to enter on the premises, for breach of the condition, in the manner by law prescribed; but it does not appear that he *then* or at any time *afterwards* did enter for *such purposes*.

The remaining question is, whether at the time above mentioned, the entry of *Bearce* on the lands mortgaged for any *other* purpose than a foreclosure of the mortgage was justifiable; or in the language of the plea in bar, whether the soil and freehold of the close was in *Bearce*.

It has been contended by the counsel for the plaintiff, *that until an entry for breach of the condition, made pursuant to law*, the *legal estate* remains in the mortgagor; and he has cited several authorities to support this position.

In examining this question, we must keep in view a distinction of importance; and one which may prevent confusion of ideas on the subject. The distinction is this. *As between the mortgagor and mortgagee*, the fee of the estate passes to the mortgagee at time of the execution of the deed; and the mortgagee may enter immediately or maintain a writ of entry against the mortgagor, unless there be an agreement in writing, on his part, that the mortgagor may retain the possession and receive the profits. In support of this principle, we may cite *Groton v. Boxborough*, 6 *Mass.* 50. *Gould v. Newman*, 6 *Mass.* 231. *Scott v. McFarland*, 13 *Mass.* 309. *Pomeroy v. Winship*, 12 *Mass.* 514. *Goodwin v. Richardson*, 11 *Mass.* 469. *Newhall v. Wright*, 3 *Mass.* 155. *Colman v. Packard*, 16 *Mass.* 39. 4 *Johns.* 216 and 6 *Johns.* 290.

But *as between the mortgagor and other persons*, he is considered as still having the *legal estate* in him, and the power of conveying the legal estate to a *third* person, subject to the incumbrance of the mortgage. In support of this principle we may cite *Wellington v. Gale*, 7 *Mass.* 138. *Kelly & ux. v. Beers*, 12 *Mass.* 387. *Porter v. Millet*, 9 *Mass.* 101, and the before mentioned case of *Goodwin v. Richardson*.

In the case of *Blanchard v. Coburn*, cited by the plaintiff's counsel, and in 4 *Johns.* 41. *a stranger to the mortgage deed* was attempting to derive the fee of the estate to himself by a levy of an execution on the lands *as the estate of the mortgagee*. The Court decided against his title; but in giving their opinion, they expressly notice the distinction which we have before stated, between the estate of the mortgagor in relation to the mortgagee, and in relation to the rest of the world. In *Smith v. Dyer*, the Court only decided that the heirs of a *mortgagee* could not

maintain an action on the deed against the mortgagor. The statute giving such action to the executor or administrator of the mortgagee.

According to the principles recognised or established in the foregoing decisions, the *legal estate* in the close in question, *as between Blaney* the *mortgagor* and *Bearce* the *assignee* of *Woods* the *mortgagee*, was at the time of the supposed trespass, in *Bearce;* and he had a legal right to enter on the premises for breach of the condition. And if he had a right to enter for *such purposes*, the entry was lawful, though he entered without executing his purpose, or even for other purposes. It is true, the entry, unless made in the manner prescribed by law, could not operate as an *entry to foreclose;* but still it was a lawful act on the part of *Bearce*. And as the jury gave only one dollar damages, which in the report are called *nominal* damages, we are not to presume that any act was done by the defendant on the land, inconsistent with the nature of the estate which he had as assignee of the mortgagee.

It is not necessary in this case to decide, and we do not decide, whether a mortgagee, who has entered into possession of mortgaged premises, *before* or *after* the breach of the condition, has a right to cut down and carry away timber trees or other trees for the purpose of sale, growing on the premises. Such a case may require the examination of other principles and further consideration.

For these reasons, we are of opinion that on the facts before us, the action is not maintainable; and accordingly the verdict must be set aside, and a new trial granted.

HENDERSON *v.* SEVEY.

Where a shipmaster received divers casks of lime on freight consigned to him for sales, which had been duly inspected and branded, and were represented by the owner as good lime, and accordingly sold as such by the master,—but in fact were filled with substances of little or no value,—whereupon he was sued by the vendee, and obliged to respond to him in damages;—it was held that he might recover of the owner of the lime the amount of the judgment recovered against himself, with all costs and expenses necessarily incurred in the defence, he having given the owner immediate notice of the commencement of such suit, and having faithfully and prudently defended it.

In such action against the owner, a copy of the judgment against the master is admissible evidence, though not conclusive.

THIS was an action of *assumpsit*. The declaration contained a general count of *indebitatus assumpsit*,—one for money had and received,—and one for money laid out and expended;—and it was tried upon the general issue.

The plaintiff gave in evidence a copy of a judgment recovered against him in the Supreme Judicial Court of *Massachusetts* for the county of *Essex* by *Jonathan Conner*, [see the case *Conner v. Henderson*, 15 *Mass.* 319.] which was finally tried at *November* term, 1819, upon a count filed subsequent to the decision of the reported case, charging *Henderson* with having sold him, as and for lime, and branded as lime, certain casks containing stones, sand, and dirt, of no value. He also proved that the casks which were delivered by him to *Conner* belonged to *Sevey*, for whom he carried them in his vessel on freight, and sold them to *Conner*, and paid over to *Sevey* the nett proceeds;—that he notified *Sevey* of the commencement of *Conner's* action against him, and sent him a copy of the writ and the directions of his counsel what evidence to produce;—that *Sevey* at first furnished him with the names of several witnesses, and consulted with him as to the best method of conducting the defence, and affirmed that the lime was good; but afterwards refused to do any thing which might make him liable over to the plaintiff;—that *Sevey* was regularly advised of the progress of that cause,—that it was well and prudently defended,—that it was proved at the trial that the contents of said casks sold and rep-

resented as lime, would not slack, nor take off hair, and were of no use for plaistering or brick-work,—and that he had expended divers sums for counsel, &c. in the defence of said action, over and above the amount of the judgment recovered against him, which he had also paid.

The defendant objected to the admission of the copy of that judgment as competent evidence in this case; and that the claim of monies paid for counsel ought not to be allowed. He also proved that at one time he declared to one of the witnesses that he would not aid in the defence of said action, and that if the lime was not good the plaintiff must call on the person who burnt it, or on the inspector;—and he produced several witnesses to prove that the lime was good.

The evidence to the quality of the lime was the same which was used at the trial of the case against *Henderson* in the county of *Essex*.

Upon this evidence the Judge who presided at the trial instructed the jury that if they were satisfied that the lime belonged to the defendant, and was forwarded by him on board the plaintiff's vessel, to be sold for the defendant's account, which business the plaintiff had faithfully performed, and had paid over the proceeds;—that the suit against the plaintiff was in consequence of such sale, of which the defendant had been seasonably notified and requested to undertake the defence, or aid and assist therein;—and that in the conduct of the defence of that action the plaintiff had acted with prudence, care and fidelity,—all which seemed to be well proved or admitted;—the plaintiff was entitled to recover an indemnity for all he had necessarily and inevitably lost in his business and service by reason of the bad and defective quality of the lime. And that the amount of the judgment recovered by *Conner*, with the officer's fees on the execution, and what the plaintiff had necessarily paid out in defence of that action, including counsellors' fees, with interest upon these sums,—together with such further sum for his own trouble and expenses as he proved himself to have sustained,—constituted the just measure of his damages.

In pursuance of these instructions the jury returned a verdict for the plaintiff, which was taken subject to the opinion of the whole Court upon the admissibility of the evidence, and the correctness of the Judge's instructions to the jury.

Orr, for the defendant, now objected that the judgment recovered in *Essex* ought not to have been admitted in evidence, because it was not conclusive, the defendant being a stranger to the suit. Nor was it a jurisdiction to which he submitted, or by which he has ever consented to be bound. The action too, in that case ought not to have been maintained being *assumpsit*,—whereas the *gist* of it was deceit. But if the plaintiff *has* a remedy, it is not against this defendant, but should have been brought against the *inspector* of the lime, who was the original wrongdoer. If the judgment is conclusive, it is against *him*, and not against this defendant, who rested, as all others have done, on the faith of the brand. If it be otherwise, and the defendant be liable for *costs* also, then a multiplicity of suits will be created, which the law abhors, and each successive party, through whose hands the article may have passed, may visit upon the head of his vendor a fearful accumulation of costs, the fruit of all the previous litigation. *Spurrie v. Elderton*, 5 *Esp.* 1. *Copp v. McDougal*, 9 *Mass.* 1.

Allen, for the plaintiff, contended that the defendant was no stranger to the judgment in *Essex*, having been duly notified to defend the suit, in which he was the only defendant in *interest*, that of the present plaintiff being but nominal. The judgment was rightly admitted, though not conclusive, as it formed a part of the circumstances of the case, which the jury must necessarily consider.

If the plaintiff is entitled to recover any thing, he has a right to a complete indemnity;—as well to the costs paid to the adverse party, as those incurred by himself. *Blasdale v. Babcock*, 1 *Johns.* 517. *Varney v. Dewey*, 13 *Johns.* 224. *Hamilton v. Cutts*, 4 *Mass.* 349. And the form of action is right, being the same which has been sustained against the present plaintiff.

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

Two reasons have been urged in support of the motion for a new trial.

1. That the record of the judgment recovered in *Massachusetts* by *Conner* against *Henderson* was improperly admitted in evidence.

2. That the instructions of the presiding Judge to the jury were incorrect.

As *to the first* objection, it may be observed that the judgment was not admitted as *conclusive* between the parties, but only as *competent* evidence;—and we cannot for a moment doubt that it was properly admitted. Indeed, it was the *only* admissible proof to shew that a judgment had been obtained against the plaintiff by *Conner* on the facts appearing on that record, and the amount of damages which had been recovered.—Parol evidence, if it had been offered to prove *these* facts, would have been rejected;—the record being higher and better evidence. There is no merit in this objection.

The *second* objection opens to view *all* the instructions given to the jury;—but, in the argument, the counsel for the defendant has principally confined himself to the opinion given as to the plaintiff's right to recover the expenses attending the trial of *Conner v. Henderson.* They were admitted to be reasonable, if a proper subject of charge in this action by way of damages. By the report it appears that nearly the same proof was used on both trials, as to the quality of the lime, and the principal facts. We apprehend that the question respecting the allowance of these expenses depends upon the circumstances under which they were incurred—if indiscreetly or unnecessarily, the plaintiff has no claim on the defendant for reimbursement; according to the case of *Fisher v. Fellows*, 5 *Esp.* 171.—On the contrary, if he has been guilty of no negligence or fault, he has such claim.—It appears that *Henderson* when sued by *Conner*, gave immediate notice to *Sevey*, the owner of the lime,—that *he* advised in preparing the defence,—that *Henderson* defended the cause faithfully; having had assurance from *Sevey* that the lime was good, and that he would succeed in the defence of *Conner's* action. With these facts before us we do not perceive how the plaintiff's claim for a reimbursement of the expenses can be resisted. The plaintiff has been in no fault, and fairly defended *Sevey* in the former action as far as law and evidence would justify, and under his advice and encouragement.—In *Hathaway v. Barrow & al.* 1 *Camp.* 151, the plaintiff would have been allowed to recover, by way of special damage, the costs of petition to the Chancellor, had there not then been in force a

order of the Chancellor for the payment of them, which the Court considered in that trial, as a satisfaction. And in *Sumner, ad'x. v. Williams & al.* 8 *Mass.* 222—being an action of covenant broken, the Court allowed the plaintiff, by way of damages, the expenses he had incurred in defending an action brought against him by *Dudley*, as inseparable from the claim of indemnity. See also *Ramsey v. Gardner*, 11 *Johns.* 439.

We do not think it necessary to notice particularly the objection as to the form of action. If we entertained any doubt on the subject, it is not a question raised by the report of the case, on a motion for a new trial.

On the whole, we are satisfied with the opinion and instructions of the Judge, and there must be

Judgment on the verdict.

CLARK *v.* ROGERS.

Where two were joint mortgagors of a piece of land, to secure the payment of a joint debt, and one of them, to protect the other against his liability for the payment of both moieties of the debt, delivered to him certain notes of hand not negotiable, to be collected, and the proceeds to be paid over to the mortgagee, to which delivery and appropriation the promissor in the notes was assenting;—it was held that the party so depositing and appropriating such notes could not afterwards lawfully receive payment of them from the promissor, nor release the latter from his liability to pay them to the holder.

ASSUMPSIT, upon three notes of hand. Plea, *non assumpsit.* At the trial the defendant read to the jury a receipt describing the notes declared on, of the following tenor;—"*Orono, May* "19, 1822. Received of *James Rogers* full pay for three notes "of hand by him to me or order, which notes were lodged in "the hands of *Reuben Haines* of *Topsham*, the date and amount "of said notes are as follows," [describing them] "received pay "for the same by indorsements on note, and notes given up to "me which the said *Rogers* held against me. *Thomas G. Clark.*" —At the bottom was this memorandum signed by the plaintiff.— "*Mr. James Rogers*, I have received my notes, and if it is not

"settled to your satisfaction I will settle with you, in *August* I "shall be at *Topsham.*"

The plaintiff then read in evidence a paper signed by said *Rogers* and others, of the following tenor;—"*Topsham, Novem-* "*ber* 11, 1817. Then *Thomas G. Clark* lodged in my hands the "following notes of hand signed by *James Rogers* and *Charles* "*Eaton*, according to the request of the said *Clark*, *Rogers*, and "*Eaton*, there they are to remain until they become due, after "that the proceeds of them are to be paid over to *Humphrey* "*Purinton* on the notes given him for the payment of a mortgage "deed of the land and privileges bought by the said *Clark* and "*Reuben Haines* in *May*, 1817. *Reuben Haines.*" Then followed a list of the notes referred to, among which were the notes declared on, at the bottom of which were the signatures of *Clark*, *Rogers* and *Eaton.*

The admission of this paper was objected to by the defendant's counsel on the ground that it had been altered in a material part by the addition of the name of *Haines* long after it was executed by the others, and that this alteration was made by *Haines*, which they offered to prove. But the Judge overruled the objection, and gave the plaintiff leave to become nonsuit, subject to the opinion of the whole Court whether the action could be sustained.

Orr, for the plaintiff.

The action, though brought in the name of *Clark*, is for the benefit of *Haines*, who is the plaintiff in interest, claiming the notes by virtue of the instrument of *November* 11, 1817. *Haines* and *Clark* had bought a parcel of land of *Purinton*, which they had mortgaged for the purchase money; and to secure the payment of *Clark's* moiety and protect *Haines*, the notes in question were deposited with the latter for the purpose mentioned in the paper. And the question is, whether this is such an equitable assignment as the Court will protect against any attempt by *Clark* to control it? It was an assignment upon good and sufficient consideration;—for *Haines* had an interest in the subject matter, being bound as mortgagor to pay the *whole* debt. The redemption of the land by him would enure for the benefit of

Clark, against whom he would have none but a *personal* remedy. It was also entered into with good faith. *Haines* had a trust, coupled with an interest. He was by common consent made trustee for the benefit of the concern. The funds were set apart at the request of *Rogers*, to perform *Clark's* own obligation. The contract could not be rescinded but by the same parties who entered into it; and one of these was *Haines*. *Dunning v. Sayward*, 1 *Greenl.* 366. *Dunn v. Snell*, 15 *Mass.* 481. *Jones v. Witter*, 13 *Mass.* 304. It was not material *when* he signed it, nor that all should sign it at the same time. It was probably executed by the other parties, and then carried by them to *Haines*, in whose possession it remained till the trial. Nor was it necessary that *Haines* should extinguish the liability of *Clark* to *Purinton*. This was not in his power, except by payment of the money, to obtain which the notes in suit were deposited in his hands. It was only necessary that the funds should be appropriated in good faith by *Clark*, and *accepted by Haines*; and this was done.

Allen, for the defendant.

The receipt offered in evidence is a complete answer to the action, unless *Haines* is beneficially interested as assignee of the notes. The only evidence of this interest is the paper of *November* 11, 1817; but this is void, having been altered in a material part, by adding the name of *Haines*. It was material, as making him a party to the contract, who was not so before. He was a mere depositary of the notes, without interest, and might be discharged at the pleasure of the parties. Had the money been paid to *Haines*, and not paid over by him to *Purinton*, the paper *as altered* would be evidence of itself to support an action against *Haines*. But *without* the alteration it would not. It was therefore a material alteration. *Homer v. Wallis*, 11 *Mass.* 312. *Hunt v. Adams*, 6 *Mass.* 519.

But if it be an immaterial alteration, and *Haines* really a party to the contract, yet being made *by him*, and after delivery of the instrument, it is void. *Hatch v. Hatch*, 9 *Mass.* 311. *Masters v. Miller*, 4 *D. & E.* 322.

And if it be immaterial, and rightfully made, yet *Clark* had a right to release the notes, unless he had parted with his *whole*

interest in them. Now the instrument itself contains no language of assignment,—and of course *Haines'* interest in the notes in his hands must depend on the other facts and circumstances of the case. But he had paid nothing for them. Nor had he discharged *Clark* from any liability in consideration of their being in his hands. The land was still under the mortgage. *Clark* was still liable on his notes given for the purchase money, and the land still liable to an entry for condition broken. And if *Haines* had chosen to pay the debt out of his own money, he might still claim of *Clark* a moiety of the money thus paid. As therefore he had no legal interest, because the notes were not regularly transferred to him,—and no equitable interest, because he had neither paid money nor assumed any liability in consequence of their being placed in his hands, he is not entitled to the protection of the law, against the rightful owner of the notes.

The cause being continued *nisi* for advisement, the opinion of the Court was delivered at the succeeding term in *Cumberland*, as follows.

Mellen C. J. By the report it appears that *Clark* and *Haines* in *May*, 1817, purchased certain real estate of *Purinton*, and gave their joint notes for the purchase money, and a mortgage of the same estate as collateral security for the payment.

It was contended by the counsel for the plaintiff that the receipt or certificate bearing date *November* 11, 1817, and signed by *Haines*, in one place and by *Clark*, *Rogers*, and *Eaton* in another place, shews an *assignment* of the monies due on the notes therein described to *Haines*, or an *appropriation* of those sums for the purpose of paying the debt to *Purinton*, so soon as *Haines* should collect the same;—and that as *Rogers* was *consusant* of this assignment or appropriation, and by his signature, *assenting* to it; it was not competent for *Clark* to receive the monies due on those notes and give a valid discharge to *Rogers* as he attempted to do by his receipt of *May* 10, 1821.

The counsel for the defendant objects to the *legal validity* of the receipt or certificate of *November* 11, 1817, on the ground of its having been altered by *Haines* by his signing his name to it for improper purposes; and even if it be not liable to objection

on *that* account, still that it does not amount to an assignment, or appropriation, or shew any equitable interest in *Haines*, entitled to legal protection.

With respect to this *first* objection, it may be observed, that fraud and forgery are not to be presumed; and according to the facts relating to this point which are stated in the report, it only appears that *Haines* signed the paper after it was executed or signed by the other subscribers; but no circumstances attending the signature are disclosed tending to shew that it was added with fraudulent intent, or even without the consent of the other signers; on the contrary, that part of the paper to which his name is signed is so drawn up, as evidently to shew that it was intended to be signed by *one person* only, and from the notes being deposited with him, that person must have been *Haines*. The language of the receipt or certificate is, "Then *Thomas G.* "*Clark* lodged in my hands," &c. For these reasons we are not disposed nor at liberty to consider the contract expressed in this paper as destroyed or impaired by the signature of *Haines*, under the circumstances of the case.

The remaining question is, what is the effect of the receipt or certificate above mentioned? If it be in legal contemplation an *assignment* or *appropriation* of the sum due on said notes to *Haines*, for the purpose of being paid to *Purinton*, in satisfaction of the joint notes and mortgage which he held, then *Clark* had no such controling power over the notes as he attempted to exercise; he had no right to discharge *Rogers* and thereby defeat the arrangement which all parties had made.

To render the assignment or appropriation a valid one, it must appear to have been made in legal form. The notes which were deposited with *Haines* do not appear to have been negotiable; or assigned by any instrument in writing other than the above mentioned receipt or certificate, which states the understanding and object of all concerned. But the notes were delivered over to *Haines* for the purposes contemplated; and we apprehend, according to the cases *Mowry v. Todd*, 12 *Mass.* 281, and *Jones v. Witter*, 13 *Mass.* 304, such an assignment is valid, if made on good and valuable consideration. To ascertain the consideration, we must have recourse to the above certificate. By that it appears to have been the object of those

who signed it, to place the notes in the hands of *Haines*, that he might be able to collect the monies due on them; and thence realize funds sufficient to pay *Clark's proportion* of the sum due to *Purinton*. In this manner, it must be understood, *Haines* was to be secured against the eventual payment of any thing more than *his own* proportion of the debts. In other words, *Clark* deposited the notes in the manner above mentioned with *Haines* in the nature of a pledge, and as collateral security for the benefit and safety of *Haines*.—In this view of the subject, *Haines* certainly had an equitable interest in the sum due on the notes, similar to what any pawnee or mortgagee of personal property has; an interest deserving legal protection, and one which *Clark* had no right to destroy or impair, in contravention of his own agreement and that of the others interested. And as *Rogers* was a party to this agreement, he had notice that the notes were to be paid to *Haines*, and not to *Clark*. After this notice, *Rogers* must be considered as paying the money to *Clark* in his own wrong. Of course the payment cannot avail him in this action; nor can *Clark's* discharge have any effect; *Clark*, it is admitted, never having paid his part of the joint debt to *Purinton*.

For many years courts of justice have been gradually becoming more and more inclined to protect *equitable interests*; less form is necessary now than formerly as to the mode of creating such an interest; the object has been to ascertain that *it is* an *interest* founded in *equity* and *justice* and on *good* and *adequate* consideration. The correctness of this position is in part proved by the cases of *Perkins v. Parker*, 1 *Mass.* 123. *Dix v. Cobb*, 4 *Mass.* 508. *Browne v. Maine Bank*, 11 *Mass.* 153. *Quiner v. Marblehead Insurance Company*, 10 *Mass.* 482. *Mowry v. Todd* and *Jones v. Witter*, before cited; and particularly *Dunn v. Snell*, 15 *Mass.* 481.

In the case before us, *Clark* by his receipt has attempted unjustly to destroy the effect of an equitable arrangement, to which he was a party, and thereby defraud *Haines*, whose interests this very arrangement was made to protect. It is the business of a court of justice to prevent the success of all such experiments.—We are satisfied that the nonsuit must be set aside.

Nonsuit set aside.

THE PROPRIETORS OF THE KENNEBEC PURCHASE *v.* LOWELL & AL.

In a writ of entry, if the land be described by the number of the lot as marked on a certain existing plan, it is sufficient, whether the plan be matter of record or not.

The line of the *Plymouth* patent, as run and marked by *Ballard* in 1795, is conclusive upon the Commonwealth, and upon the patentees, and upon all persons claiming under them.

THIS was a writ of entry, in which the demandants counted on their own seisin and a disseisin by the tenant, of "a certain "lot of land in *Palermo* in said county, being lot numbered 124 "according to a plan made by *Broadstreet Wiggin* surveyor, "containing one hundred and seven acres, more or less,"—without any other description of the premises demanded.

At the trial, which was upon the general issue, the demandants proved a certain lot, called the tenants', to be in *Palermo*, and offered to exhibit to the jury the plan made by *Wiggin*, to prove the number and extent of the lot;—they representing it to be the proprietors' plan, and to have been made by their order. To this evidence the tenants objected as illegal,—but the Judge overruled the objection, and permitted the plan to be exhibited to the jury.

The demandants then read, in support of their title, a deed from the Commonwealth of *Massachusetts* to them, dated *February* 18, 1789. They also read the deposition of *Ephraim Ballard*, who acted as a surveyor of the *Plymouth* patent under a commission signed by the committee for the sale of eastern lands, and by the agent for the plaintiffs, dated *June* 26, 1789, instructing him to begin at the head of the *Waldo* patent, at the distance of fifteen miles from *Kennebec* river, and thence running divers courses therein mentioned, to terminate at a line drawn northeast and southwest across *Androscoggin* river at the distance of five miles northwest from the twenty mile falls; and to make return of his doings as soon as might be to the committee for the sale of eastern lands; and to the clerk of the proprietors. He testified that in the autumn of 1789, in pursuance of those instructions, he surveyed and marked the line therein mentioned; and that in *August* or *September* 1795

he received another joint commission from the Commonwealth of *Massachusetts*, the proprietors of the *Kennebec* purchase, and the late *Gen. Knox* as representative of the *Waldo* claim, instructing him to survey the dividing line between the *Plymouth* and the *Waldo* patents, and the unappropriated lands of the Commonwealth situated between them;—in pursuance of which he proceeded to execute the service assigned him, and specified his doings; but before the work was completed he was intercepted by armed men, in disguise, and compelled, by threats of instant death, to desist from farther proceedings; that they forcibly took from him his instruments, and all his papers except his field book; of which violence he gave an account to the government.

It was farther proved that in 1806 *Charles Turner*, Esq. was empowered by another commission to examine *Ballard's* line and if found correct, to finish the survey of the easterly line of the *Plymouth* claim;—that one of the trustees of *Lincoln* academy attended with him at the survey;—that his admeasurements very nearly coincided with *Ballard's*, varying in one instance only two thirds of a chain in 15 miles;—that he came out on the south side of the lot demanded, thus including it within the lands of the demandants;—and that he thereupon extended the line commenced by *Ballard* southward, as the easterly line of the *Plymouth* patent.

It was also proved that *Wiggin*, in making his survey, fronted his lots on *Ballard's* line; but of the number of the lot demanded, and of the others, there was no evidence except the plan.

On the part of the tenants two witnesses testified to admeasurements made by themselves from *Kennebec* river eastwardly, tending to shew that *Ballard's* admeasurement of fifteen miles was too large; but the course they ran from the river was uncertain.

It was admitted that in 1806 the *Lincoln* academy received a grant from the Commonwealth of the land bounded on the *Plymouth* patent, and the tenants offered in evidence a deed of the demanded premises from the academy to themselves.

The tenants contended that it ought to be left to the jury, upon this evidence, to determine whether the demanded premises were within the limits of the *Plymouth* patent;—but the

Judge instructed the jury that the line run by *Ballard* was conclusive on the tenants, and they thereupon returned a verdict for the demandants. And it was agreed that if the direction of the Judge on the foregoing facts, so far as they were competent evidence, and the admission of the plan, were right, judgment should be entered on the verdict,—otherwise, it should be set aside and a new trial be granted.

The argument was had at the last term in this county by *R. Williams*, for the demandants, and *Orr* and *Stebbins*, for the tenants.

Stebbins, for the tenants, argued,—1st. That the line run by *Ballard* was not conclusive on the parties;—and 2d. That the plan made by *Wiggin* ought not to have been admitted in evidence to the jury.

As to the *first* point;—it does not appear by *Ballard's* deposition what lines he ran, nor that he *completed* any. And after he had surveyed the whole, he might have found it necessary to have altered some part of it. Nor was any person bound by what he or *Turner* did;—not the Commonwealth, nor the *Kennebec* proprietors, for *Ballard* made no report to them of his doings in 1795—nor the trustees of *Lincoln* academy, for *Turner* gave them no notice of his intended survey in 1806.

As to the *plan*;—the description in the writ is too loose and uncertain. The plan, to become part of a deed, ought to be a *public* document, to which all the citizens may have access. But this was a mere private paper, in the pockets of the demandants. If judgment be entered on the verdict, and a writ of possession issue, the sheriff could not find the land by the description given. If the disseisor must shew *distinctly* the extent of his possession, the demandant, by the same reason, must shew as *clearly* the extent of his claim. By the common law and by the statute, the tenant has a right to plead several pleas, which will be taken away unless the land be *described* to him, with *certainty*. Any other rule places him wholly at the mercy of the demandant. 2 *Selw. N. P.* 624 and authorities there cited. 5 *Com. Dig.* 32. *Bott v. Burnell*, 11 *Mass.* 165.

R. Williams, for the demandants.

Whether the description be certain or not, this is not the time to inquire. The tenants should either have demurred, or moved in arrest of judgment. Under the issue of *nul disseisin* that question is not open. Nor is here any hardship on the tenants. They may always defend *their own* land by metes and bounds, and disclaim all other; and this, be the description in the writ what it may.

The true question is—whether a writ of entry lies for "a *lot* "of land, No. 124, containing 107 acres;"—and we contend that it does. Our *lots* of land very soon acquire a reputation by their *numbers;* by which they are as well known as lands in *England* are by the names mentioned in the books. And the uniform practice agrees with this mode of designation, and reference to a plan. 2 *Selw. N. P.* 729. 2 *Bac. Abr.* 419. *Ejectment D.* 2. *in notis. Impey's Practice*, 578, 582. The description needs not to be so certain as that the sheriff can find the land;—the demandant must shew it at his peril.

And the plan was rightly admitted. This was not a question of boundaries, but of identity of lots. There was no doubt made as to the genuineness of the plan;—and supposing it to be mere chalk, yet it was sufficient for the purpose it was used for.

As to the conclusiveness of the line run by *Ballard;*—this depends on the question whether it is competent for two adjoining proprietors to agree on a dividing line. For this location was a matter of compromise between the government and the *Plymouth* company, and they alone were interested in its location. It was binding on them as far as it was run, and no other persons have a right to contest it. No return was required of the surveyor by the second commission in 1795,—of which his deposition was the best evidence, the original being taken from him and destroyed.

But whether conclusive, or not,—there was a line *de facto*, made in 1795; and it was a limit well known and defined, and long acquiesced in. By this limit the trustees of *Lincoln* academy were bounded, by the conveyance to them in 1806; and as to *them* it has the force of a known monument, beyond which they and the tenants, being their grantees, cannot pass. *Jack-*

son v. Williams, 2 *Johns.* 297. 3 *Johns.* 8. 11 *Johns.* 123. *Jackson v. Ogden*, 7 *Johns.* 233. *Makepeace v. Bancroft*, 12 *Mass.* 469. *Peake's Ev.* 27.

Orr, in reply.

Had *Ballard* completed the execution of his commission, or had the government expressly accepted his doings as far as they went, it would have been conclusive. But here was neither. And the acquiescence of the government is not to be inferred from its silence, as in the case of a private person.

As to the plan;—it was incompetent evidence. It does not appear that it was taken by *Wiggin*, nor that he made a survey, nor that the lot in controversy and that marked 124 on the plan are the same. All this was presumed, and therefore wrong.

The only certainty in the description is "No. 124," referring to a plan;—and the action is in tort. Now in a *personal* action of trespass or trover for goods, a reference to a schedule annexed is bad and judgment may be arrested,—*Kinder v. Shaw & al.* 2 *Mass.* 398—*a fortiori* here, in a real action;—for what better is the plan referred to, than a schedule annexed? If it be otherwise, a party may make his plan after commencing his suit, and prove his case by a paper of his own fabrication.

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

The counsel for the tenant relies on two objections to the verdict.

1. That the description of the premises was too loose and uncertain; depending on, and referring to a plan of a private nature, and which was improperly admitted in evidence in aid and explanation of the description.

2. That the opinion and instruction of the Judge to the jury as to the conclusiveness of *Ballard's* line was incorrect.

As to the *first point*.—It may be a question whether the plan was a necessary piece of evidence; and if not necessary, its admission, whether proper or not, would be no ground for a new trial.—The more correct and usual mode of taking advantage of the alleged uncertainty would seem to be either by demurrer or motion in arrest of judgment. *Ward v. Harris*, 2 *Bos. & Pul.* 265. 1 *East.* 441. 3 *East.* 357. But the tenant has

pleaded the general issue and thereby *admitted himself in possession of the premises demanded, whatever and wherever they are situate*, and put the title only in issue. *Higby v. Price*, 5 *Mass.* 344. *Brown v. Killeran*, 4 *Mass.* 443. *Pray v. Pierce*, 7 *Mass.* 381. Several of the cases cited by the demandant's counsel establish the principle that the demandant must cause his writ of possession to be executed at his peril. If he should take possession of lands not recovered by the judgment, he would be a trespasser. If he can find no land answering the description in the writ, judgment, and *habere facias*, he cannot cause the precept to be executed with any safety; and of course the tenant in the action can never be disturbed or injured by the judgment.

The cases touching the question of *certainty* in declarations in the description of premises demanded, and property taken away or injured, are somewhat confused and contradictory. In *Rex v. Horne*, *Cowp.* 682. *Ld. C. J. De Grey* says;—"we have no precise idea of the signification of the word "cer-"tainty," which is as indefinite in itself as any word that can "be used." In *Ward v. Harris*, 2 *Bos.* & *Pul.* 265, the plaintiff declared upon the sale of a *certain* house for a *certain* quantity of *certain* oil to be delivered to the defendant within a *certain* time.—Even this loose declaration was holden good after verdict, on motion in arrest of judgment. In *Doe v. Plowman*, 1 *East.* 441, the plaintiff in ejectment demanded *two dwelling-houses* and *two tenements*.—After verdict for the plaintiff judgment was arrested. In *Doe v. Denton*, 1 *D.* & *E.* 11, ejectment for a *messuage and tenement* was held good after verdict. *Cottingham v. King*, 1 *Burr.* 621. *Lord Mansfield* says, "The objection is the uncertainty of the claim or *description of* "*the premises*.—It is after verdict;—the title has been tried by "jury;—evidence has been given to them on which they have "found for the plaintiff." The description was much more general than in the present case. The judgment was unanimously affirmed; the Court observing that *after verdict*, the description must be intended to be sufficient. See the several cases cited in the note to *Doe v. Plowman*, 1 *East.* 441, agreeing with, and opposing the case in 1 *Burr.* 621. The description in the present case is at least as certain as that cited from *Impey's*

Practice. That was "a certain messuage demised by *J. S.* to *J. D.*" who must have been either the demandant himself, or a stranger; and in either case, there was no reference to any public record or document for the tenant's information; though it might be a guide to the sheriff in executing the writ of possession. But if a reference to *Wiggin's* plan, for the number, size and situation of the lot, be necessary to render the description sufficient, of what importance can it be whether the plan has been accepted by the proprietors, or placed on their records, or on any other record? Nothing is more common than in real actions to demand land by no other description than as a lot of a certain number on a certain plan. As, for instance, *M'Keckie's* plan, *Winslow's* plan, or *Jones'* plan. This has always been deemed sufficient; and yet it never appeared on the face of the declaration whether the plan was accepted and recorded, or not. The description of the premises demanded in this action was intelligible to the tenant; his plea admits him to be in possession of lot *No.* 121, on *Wiggin's* plan, containing 107 acres. The parties, therefore, agree as to the lot of land demanded, and only differ upon the question of title. As to the admission of the plan in evidence to the jury, we perceive no incorrectness in the decision of the Judge. The report states that the plan offered was *Wiggin's plan;* and that it was proved that *Wiggin*, in making his survey, fronted his lots upon the *Ballard* line; which is one of the boundary lines of one part of the tract which the demandants own. The plan and the *survey* thus taken in connection, must both be considered as made by him and for their use.

It is therefore sufficiently shewn to be the demandants' plan; and seems to be legal proof as much as any of their plans which have been formally accepted. In this action they claim an interest in it, and rights under it, and thereby sanction it. We therefore are of opinion that the tenant has failed in maintaining his *first* objection.

As to the *second* point, the conclusiveness of *Ballard's* line, it may be observed that in the year 1795, when it was run, no persons had any interest in the lands, but the *Plymouth Company* on one side, and the *Commonwealth* on the other. The line was not completed, on account of the violence he met with from the

settlers, and the loss of most of his papers. But he informed the government of the progress he had made. In 1806, *Turner* was employed to complete the survey, if on examination, he found *Ballard's* line correct. He did *examine* it, and *so find it;* and began to extend *his own* line from it southerly, as the easterly line of the patent. According to the line thus run by *Ballard* and continued by *Turner*, the land demanded is within the company's claim. We hear of no objection to this line on the part of the Commonwealth; and the proprietors, who are the demandants in this action, are satisfied with it, and claim according to it. Here is evidence of an acquiescence in the line as the true one, and even of its sanction by the parties in interest at the time. The deed from the Commonwealth's committee bounds the academy land, on one side, on the *Plymouth claim*, and this deed was given years after *Ballard's* line was run, which the Commonwealth afterwards recognized, in the manner above mentioned, as the true boundary line of that claim. The cases cited from *Johnson's* reports by the demandants' counsel to shew the effect of lines thus established, and their conclusiveness, are strong and direct.

On the whole, when we view all the facts in the case before us, and the manner in which the line in dispute was run and established by two different surveyors, we have no hesitation in saying that upon these facts in the case, as reported by the Judge, the line must be considered so established as to be conclusive. We are satisfied with the opinion of the Judge who tried the cause, with respect to this question, and perceive no reason for setting aside the verdict and granting a new trial.—Accordingly there must be

Judgment on the verdict.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

CUMBERLAND.

NOVEMBER TERM,

1822.

HASKELL *v.* HASKELL & ALS.

Where one devised lands and bequeathed personal estate to his son, whom he made executor of his will, therein directing him to make certain annual payments to his mother during her life time; and the son, after the death of the testator, assumed the trust, and entered into the lands, and made the annual payments, and then died, leaving minor children who entered into the lands by their guardian;—it was holden that the children were not liable in *assumpsit* during their minority, for the yearly payments accruing after the decease of their father.

THIS was an action of *assumpsit*, brought by the plaintiff who was the widow of *Moses Haskell*, under whose will she claimed an accruing legacy, against the defendants, who were minors and heirs at law of *Ebenezer Haskell*, son of said *Moses*.

In a case stated by the parties it appeared that *Moses Haskell* the testator, made his will, containing several devises of his estate, and among them the following;—viz.

"First, I give and bequeath to my beloved wife *Sarah Has-*
"*kell* the use of my dwelling-house I now live in, during her
"life, for herself and my daughter *Judith* to live in and im-
"prove. Also, I give unto my said wife the use of my house
"yard out to the road, and of the garden in front of said house
"and so much of the orchard as shall contain two rows of ap-
"ple trees on the southwest side thereof, during her life. I al-
"so give unto my said wife the use of all my household furni-
"ture during her life. Also I give as a legacy to my said wife

" yearly during her life time, to be paid her by my son *Ebene-*
" *zer Haskell*, the following articles"—enumerating divers arti-
cles of the yearly produce of a farm—" ten dollars in cash
" yearly"—fuel—" and in case my wife should be sick and
" stand in need of physicians or nurses, my said son *Ebenezer*
" to procure them and pay their bills, and also at her decease
" to give her body a decent burial."

" I give and devise to my son *Ebenezer Haskell* his heirs and
" assigns all my homestead farm, consisting of all the land I
" now own in the town of *N.* with the buildings thereon, ex-
" cept the house yard, garden, and part of the orchard that I
" have given to my wife and daughter *Judith*, to him the said
" *Ebenezer*, his heirs and assigns forever."

" I do further give and bequeath unto my son *Ebenezer Has-*
" *kell* all my farming tools, willing and requiring that he pay,
" deliver and perform unto my wife his mother as before speci-
" fied, and that he also pay"—certain other legacies—" and
" that he pay all my just debts and funeral charges"—and ap-
pointing him sole executor of the will.

The will was duly proved before the Judge of Probate *Feb-*
ruary 27, 1811, by the executor, who assumed the trust and immediately entered on the land devised and took possession of the personal estate bequeathed to him, of which he continued seized and possessed,—and continued to pay the legacy to his mother the plaintiff as the same became due, until his decease in *November* 1814. His administrator continued to make the same annual payments till the year 1818, when the guardian of the defendants in their behalf entered into the lands devised to their father, which he ever since continued to occupy and improve. No farther payments were made to the plaintiff, though she had duly demanded them.

If the action was not maintainable at law, the plaintiff agreed to become nonsuit, and that the defendants have their costs.

Fessenden, for the plaintiff, maintained the following positions.

1. That the devisee of lands charged with the payment of a legacy, is liable in *assumpsit* for the amount of the legacy,—especially after entry into the lands, and assuming on himself the burden of the payment. *Van Orden v. Van Orden*, 10 *Johns.* 30.

Even v. Jones, 2 *Salk.* 415. A legatee may have an action against the ter-tenants for a legacy devised out of the land. *Ld. Say & Sele v. Guy*, 3 *East.* 120. *Atkins v. Hill*, *Cowp.* 283. *Hawks v. Saunders*, *Cowp.* 289.

2. The heirs of the devisee are equally liable in *assumpsit* as ter-tenants, the land having descended to them *cum onere*. It will not lie against their personal representatives. *Livingston v. Ex'rs of Livingston*, 3 *Johns.* 189. 3 *Bac. Abr. Heir F. Graham v. Graham*, 1 *Ves. jr.* 272. *Pawlet v. Perry*, *Gilb. Eq. Ca.* 123. 2 *Vern.* 249, 444, 616.

3. And though the heirs are minors, yet they are liable, this case forming an exception to the general rule that infants are not liable except for necessaries. Here they have entered into the land and taken the rents and profits, and are bound by the conditions annexed to the grant. If not, the infant will be enabled to turn the protection of the law into an instrument of injustice. *Zouch v. Parsons*, 3 *Burr.* 1794. *Evelyn Ex'r v. Chichester*, 3 *Burr.* 1717. *Kinton v. Elliot*, 2 *Bulstr.* 69. 3 *Bac. Abr. tit. Infancy F. G.*

4. And this is the *only* remedy the plaintiff can have. That no action lies for this legacy against the administrator of the devisee, is already shewn. None lies in any case after four years, except on contracts payable at a day beyond that period. But this is no *contract*;—it is an accruing legacy; and when the devisee settled his administration-account at the Probate office, nothing was due. Further, a legacy might in general be defeated for want of assets. But here is a legacy charged on lands, and a descent cast; and the administrator of the heirs could not keep out the heirs, on the ground that the legacy *might* be due. They were entitled to enter on the death of their father.

Neither does any remedy exist against the estate of the devisor, the plaintiff's husband. No administrator *de bonis non* can be appointed, because all his estate is fully administered, and no contract of his exists. He owed nothing;—no debt was due to him;—and no chattels remain.

If it lies not in this form against the heirs of the devisee, then they obtain the land discharged of the condition, which is manifestly unjust.

E. Whitman, for the defendants.

1. Here is no lien on the land. The devise to the son of the testator was absolute, and the legacy was altogether an independant matter. Having taken the estate, he assumed to pay the mother; and she might have her action against him. He might have alienated the estate, free of any charge for the legacy;—or his creditors might have taken it;—or it might have been sold for taxes;—and in either case he, and not his creditor or grantee, would be liable for the legacy.

2. But if the legacy were a lien on the land, this would not create a *personal* liability on the heirs of the devisee. The only remedy would be an entry for condition broken, or by bill in equity. This is an action for which no precedent can be found in the books. It is a claim set up against infants, who ordinarily are incapable of contracting, except for necessaries;—it seeks to subject them to *imprisonment;* and this too, not in consequence of any contract of their making, but because of a *lien on land* which the law has cast upon them, as the heirs of their father. If it be a lien, the heirs are not *personally* answerable;—if not, the action should have been brought against the administrator of their father.

After this argument, which was had at the last *May* term, the cause was continued for advisement, and the opinion of the Court was now delivered by the Chief Justice.

Mellen C. J. This is an action of *assumpsit* by the widow of a devisor to whom an annual legacy or allowance was given in his will, against the *minor children* and heirs of one of the sons of the devisor, to whom a large portion of his real estate was devised; and who was appointed executor of the will and directed to pay the money and deliver the articles annually to the plaintiff, his mother. *Ebenezer Haskell*, the father of the defendants, entered into possession of the lands devised to him, and made the annual payments as directed, until his death. *Nelson*, his administrator, continued such payments to the year 1813, when the defendants, by their guardian, entered into the same lands, and have ever since occupied them;—but though the annual legacy or allowance has been demanded, it has not been paid: and this action is brought to recover the amount due.

Among other grounds of defence, the defendants rely on their *infancy*.—If this action furnishes an exception from the general rule, it is incumbent on the plaintiff to shew that the law *implies* a promise on the part of the defendants, which binds them more effectually than an *express* promise would in similar circumstances. It is not contended that the defendants are liable on the ground that the articles for which payment is claimed, come within the description of *necessaries*. The inquiry then is, does the law *imply* a promise on the part of these minors from the facts stated?—In the case of *Zouch v. Parsons*, 3 *Burr.* 5794, the question had reference to the legal effect of a certain conveyance of an infant, and his right to avoid it *by entry during infancy*.—In *Evelyn v. Chichester*, 3 *Burr.* 1717, it was decided that the lord of a manor may maintain an action of *assumpsit* against an infant copyholder, *when he comes of age*, for a fine on his admission *during his nonage*. In the argument of the cause, the plaintiff's counsel expressly admitted that the action would not lie against the infant *during his infancy*.—*Lord Mansfield* says, "Here is a reasonable fine assessed, the same his "father paid,—an enjoyment of sixteen years; *and part of it* "*since he came of age*—and no renunciation of the estate;—on "the contrary a *confirmation of the transaction*." The passage in 3 *Bac. Abr.* Infancy *F.* seems not to be supported by 2 *Bulstrode* 69, in its full latitude.—The same case is afterwards, and probably more correctly cited in the same book and title, letter I, 8. in connection with *Ketsey's* case, *Cro. Jac.* 320, both are cited to support the position that "if an infant take a lease for "years of land, rendering rent, which is in arrear for several "years;—*then the infant comes of age and continues the occupa-* "*tion of the land*;—this makes the lease good and unavoidable; "and of consequence makes him chargeable for all arrear- "ages *incurred during his minority*."—This is undoubted law; and the above named case from *Cro. Jac.* supports the principle. See also *Hubbard v. Cummings*, 1 *Greenl.* 11, and the cases there cited.—These all differ from the present case and we do not find any authorities which support the principle contended for by the plaintiff's counsel. We are all of opinion that the present action cannot be maintained; and the nonsuit is therefore confirmed.—At the same time we would observe

that we are not certain that the plaintiff may not have a remedy in some other mode.

Judgment for defendants for costs.

HARDING *v.* HARRIS.

If in replevin, a verdict be found for the defendant as to a small part of the goods, of less value than twenty dollars, yet he is entitled to full costs.

In replevin of a large quantity of goods, the jury found the property of a very small part of them to be in the person under whom the defendant justified, and for the plaintiff as to the residue; so that each party had judgment for costs;—and by virtue of the *Stat.* 1822, *ch.* 186, they also found and certified the value of the goods, of which those belonging to the defendant were of less value than twenty dollars.

And now *Emery* and *Longfellow*, for the plaintiff, moved that the clerk be directed to tax for the *defendant's* costs only one quarter part as much as the value of the goods found for him; under the equity of the statute, which limits the *plaintiff* to the same amount, in case the goods belonging to *him* are found to be of less than twenty dollars' value.

Orr and *Greenleaf*, for the defendant, objected that he was entitled to full costs as a "party prevailing," under the general statute regulating costs, which the statute of replevin did not expressly nor by necessary implication repeal.

And THE COURT refused the motion.

DRINKWATER *v.* GRAY & ALS.

Where one conveyed lands by deed, reserving to himself the use of part of the premises, and half the profits of the residue for life, and the grantee entered, and fulfilled the terms of the reservation, and then died insolvent, leaving children who were minors, and whose guardian entered into the land ;—but neglected to perform the terms of the reservation ;—it was held that *assumpsit* does not lie against them for the particular reservations in the deed, nor for the use and occupation of the land.

THIS was an action of *assumpsit*, brought against the defendants who were minors and children of *David Gray*. The plaintiff declared that on a certain day he conveyed by deed to said *David* a certain farm on which the plaintiff then lived, describing it, "subject however to the following reservation, viz. "reserving to the plaintiff himself during the term of his natu- "ral life the free use and sole occupancy of the southwesterly "room in the dwelling house on said farm, as also one half the "produce or income of said farm after the same should be "harvested or housed from year to year and every year dur- "ing the continuance of his natural life aforesaid, free of all "labour, trouble or expense on his part on or about said farm ;" and enumerating divers other reservations for his own use and that of his daughter ;—and alleged that the said *David* on the same day entered into and took possession of the premises, subject to the reservation aforesaid, by virtue of said deed, and continued in possession thereof until his decease, *August* 4, 1819, leaving the defendants his heirs, to whom, as heirs of said *David*, the same estate descended, and into which they entered as heirs, and took possession accordingly, subject to the aforesaid reservation ; and thereby became liable, and in consideration thereof promised the plaintiff faithfully to fulfil and perform all duties on their part to be performed and fulfilled, to keep and improve said farm in a husbandlike manner, &c.—enumerating the specific reservations in the deed ;—and concluded with a special demand of performance on the defendants, and their neglect and refusal. There was also a *quantum*

meruit for the use and occupation of the farm by the defendants;—and the common money counts. The defendants, by their guardian duly appointed, pleaded the general issue.

At the trial the deed was read in evidence;—and it was admitted that *David Gray*, the father, died in *August* 1819,—that at the time of his decease he occupied the land and buildings described in the deed, with the reservation therein mentioned, complying with the terms of the conveyance;—that the defendants, and their legal guardian, have continued so to occupy ever since, but have not accounted for the one half of the income according to the deed;—and that the estate of the father was represented insolvent.

On this proof, by consent of parties, the Judge who presided at the trial ordered a nonsuit, with leave for the plaintiff to move to set it aside, if the Court should be of opinion that the action was maintainable.

Emery, for the plaintiff, said that the action was brought to ascertain what was the legal effect of the deed given by the plaintiff to the defendant's ancestor. If it was a conveyance upon condition, or with exception, this action could not be maintained. But he should contend that it was a conveyance with a reservation of a rent for life out of the thing granted; and for which this was the proper remedy at law. *Goodwin v. Gilbert*, 9 *Mass.* 510. From the nature of the claim no remedy lies against the administrator of the grantee. *Royce v. Burrill & als.* 12 *Mass.* 395. And it can only be sought against his heirs, who, though minors, are bound by all charges annexed to their estate. 2 *Inst.* 233. *Whittingham's* case, 8 *Co.* 44. 2 *Rol. Rep.* 72. *Hard.* 11. *Latch*, 99. *Carth.* 43. *Cro. Jac.* 320. *Kiston v. Elliot.* 3 *Burr.* 1717. *Co. Lit.* 242. *a.* 142. *b.* 143. 2 *Saund.* 165.

E. Whitman, for the defendants, said that the grant was either absolute, or conditional. If *absolute*, the remedy does not exist against the *heirs* of the grantee. If *conditional*, then the remedy is by entry for condition broken.

But it was not conditional. It is a reservation only, and is void,—because it is a reservation of the *profits* of the estate

granted,—and because the thing reserved did not exist at the time of the grant. And he cited *Noy's max.* 70.

The cause having been continued from the last term to this, for advisement, the opinion of the Court was now delivered by

MELLEN C. J. This is an action of *assumpsit* against the defendants, who are *minor children* of *David Gray*, deceased, to whom the plaintiff had conveyed his homestead farm on certain conditions specially set forth in the deed. *David Gray* entered into and occupied the premises during his life, complying with the terms of the conveyance, and since his death the said minor children and their guardian have continued such occupation but have not accounted to the plaintiff for the one half the income, according to the reservation in the deed. This action is brought to recover its value,—and we are all satisfied it cannot be maintained. It is similar in principle to the case of *Haskell v. Haskell & al.* in this respect, and we refer to that case for the reasons of our opinion.

Judgment for the defendants for costs.

MARINER *v.* DYER, *in certiorari.*

Under the *Stat.* 1785, *ch.* 66, [*Stat.* 1821, *ch.* 72,] for the support and maintenance of bastard children, a bond is not necessary to give jurisdiction to the Court of Common Pleas, if the defendant appear, either in person, or by attorney.

And the Court may render a judgment of filiation upon default, the provision for a trial by jury being for the defendant's benefit, which he may waive.

An order on the putative father to pay a sum weekly *till the further order of Court*, is warranted by the statute.

So also is a judgment for costs, such having been the uniform practice under the statute.

The right to issue a *capias* is incident to the jurisdiction of the Court of Common Pleas, in all cases of contempt.

THIS was a *certiorari*, brought to quash the record of the Common Pleas, in a prosecution upon the bastardy act in which the present plaintiff was accused by *Almira Dyer* of being the

father of her illegitimate child. It appeared from the record sent up that *Mariner*, had been apprehended upon a Justice's warrant issued upon the complaint of *Almira Dyer*, and that he entered into a *recognizance* before the Justice, conditioned for his appearance at the Circuit Court of Common Pleas at *March* term, 1820, to answer to the complaint against him. At that term he appeared by his attorney who caused his name to be entered on the docket, and answered to the complaint then filed against him; but the Court ordered a continuance of the *recognizance* to the next *June* term, at which *Mariner* again appeared by attorney, and *refused to plead*, and afterwards *made default*. The Court thereupon adjudged him *to be the reputed father of the child*, and that he stand charged with the maintenance of it with the assistance of the mother; and for this purpose it was further ordered by the Court that he pay to the mother of the child three dollars per week from *March* 26, 1820, for ten weeks, and afterwards seventy-five cents per week *till the further order of Court;* and that he pay the *costs of prosecution*, and give bond to the prosecutrix with sufficient surety or sureties in the penal sum of five hundred dollars to perform said order; and also that he give bond to the inhabitants of *Cape Elizabeth* with sufficient sureties in the like sum, conditioned to indemnify them against the charge of maintaining the child; and that he *stand committed* until he give said bonds.

This order not being complied with, and it appearing to the Court that *Mariner* had departed in contempt of its authority, a *capias* was thereupon awarded against him, returnable at *November* term, 1820, to which term the cause was continued.

At *November* term the *capias* being returned, it appeared that *Mariner* had been arrested and imprisoned, but that he had been discharged by *habeas corpus*, on giving bond with sureties for his appearance at that term to receive the sentence and judgment and abide the order of Court thereon; which bond was returned with the *capias*. But being called to receive the sentence and order, he did not appear, but again made default.

Davis, for the present plaintiff, took the following objections to the record.

1. The proceedings in this case being not according to the course of the common law, but wholly by statute provisions, if

these are not strictly pursued, the whole is void. But the duty of the Justice as prescribed by the statute, is not to take a *recognizance*, but a *bond* for the defendant's appearance,—which not having been done, the proceedings are discontinued, and all the subsequent matter is void. *Smith v. Rice*, 11 *Mass.* 510. *Baxter v. Taber*, 4 *Mass.* 367. *Jones v. Hacker*, 5 *Mass.* 266. *Drowne v. Stimpson*, 2 *Mass.* 445. The Common Pleas could have no jurisdiction till a bond was taken. Nor is this cured by the appearance of the party;—for this doctrine applies only to those cases in which the proceedings are according to the course of the common law. Inferior Courts of special authority can have no jurisdiction conferred by appearance and confession of judgment. 3 *Caines* 129. *Coleman's cases* 470. And the statute requires *personal* appearance; for the bond is to have the effect of a recognizance, which is not saved by an appearance by attorney.

2. The Court, at *March* term 1820, did not require the security demanded by the statute. They continued the *recognizance*, when they should have required *bond*.

3. Here is an adjudication *upon default*, which the Court had no power by law to do. The whole doctrine of the common law on the subject goes to compel the personal appearance. It authorizes a fine, and attachment for contempt, and outlawry;—but does not authorize the entry of judgment *pro confesso*. *This* is founded wholly on the positive enactment of our statute, which is limited, by a fair construction, to proceedings by *writ*, for it speaks of appearance in person *or by attorney*. The recent extension of this authority to prosecutions under the bastardy-act of *Maine*, shews that it was not so under the old statute on which the present prosecution was founded. This stood upon the foundation of prosecutions by complaint for the removal of paupers, where the *evidence* is specially made part of the record;—or of libels for divorce, where no default or confession is admitted to supply the place of proof of the fact. The bond also, is to have the *effect of a recognizance*, upon forfeiture of which an action of debt lies, but the course is never to enter judgment *pro confesso*. The statute authorizes a judgment of filiation only upon *trial*, in which the woman is to be a *witness*. It must be upon *issue*, and *verdict*, without which the whole is *coram non judice* and void.

4. The *capias* was issued without law. The power to issue attachments for contempt does not belong to inferior Courts, of limited jurisdiction; but only to superior Courts, *proceeding according to the course of the common law*. And this must be given by statute. 4 *Bl. Com.* 283. 2 *Hawk. P. C.* 272, 292. *Stat.* 9 & 10, *W.* 3, *ch.* 15. It cannot be taken by implication.

5. Nor had the Court power to adjudicate that the defendant should pay a fixed sum "till the further order of said Court;"—for this may be substantially perpetual. 2 *Show.* 129.

6. Nor to award *costs*. These depend wholly on statute provisions;—and the statute, in this case, gives none.

Longfellow, è contra.

The only material questions are—whether the Court of Common Pleas had jurisdiction,—1st, of the subject matter,—2d, of the person.

The *first* is expressly given by the statute.

As to the *second*;—the proceedings before the Justice shew that the original defendant was apprehended, and brought before him, and ordered to appear at the next Court of Common Pleas to answer to the complaint. So far was legal, and it was his duty to appear. The error of the Justice in taking a *recognizance* instead of a *bond* for his appearance, does in no wise discharge him of that duty. And the end of such bond, had it been taken, is answered by the appearance by attorney. *That* was a submission to the jurisdiction because the Court had already jurisdiction of the subject matter. A personal appearance was not necessary, because this is not a criminal, but a civil process. And it is not the bond which gives jurisdiction in this case,—it is the law itself. Otherwise, if the party refuse to give bond, the Court cannot continue the process, but the whole will be defeated,—thus placing the remedy wholly in the power of the defendant. So if the bond taken by the Justice be insufficient, or if the defendant, having refused to give bond for his appearance, had been committed and were still in prison, can it be said that the jurisdiction of the Court is thereby taken away? May he escape, leaving the injured party to a remedy merely nominal on a bad bond? The course, it is believed, has always been otherwise. The Court proceeds to trial upon an

appearance by attorney, and renders judgment in the case. If the party, being present, refuse to perform their order, the Court may commit him;—and why not attach him, if absent? The proceedings, after the process comes into that Court, are all according to the course of the common law, as far as regards the pleadings, evidence, mode of trial, and judgment; and unless the Court can exert the common law powers of enforcing its judgments, all its proceedings must end in mere nullity. The party having once appeared and submitted to the jurisdiction, the Court has a right to proceed to final judgment;—and a departure in contempt is, by one of the most familiar rules of evidence, a silent admission of the accusation.

As to the costs—they are awarded, under the general statute, to the party finally prevailing. The order to pay "till the further order of the Court" was consonant to the invariable usage under the statute, notwithstanding the obscure note in *Shower*. And with good reason, for if the order were for a definite period, it might well be doubted whether the Court could afterwards control it; but now it may be varied on application of either party, according to the justice of the case.

The cause having been continued under advisement from the argument at *November* term, 1821, to this time, the opinion of the Court was now delivered by

Weston J. In the proceedings before the justice, the party accused *recognized* for his appearance before the next Circuit Court of Common Pleas, to answer to the complaint preferred against him; instead of giving *bond* according to the statute. At the next term of the Common Pleas he appeared by attorney to answer to the complaint, and also at the succeeding term; as appears by the record before us. It has been decided that a recognizance, taken in a proceeding of this sort, is inoperative and cannot be enforced against the recognizors. *Merrill v. Prince*, 7 *Mass.* 396. The justice should bind the party over to answer to the charge before the proper tribunal, by bond with sureties.

It is insisted that a bond was necessary to give jurisdiction to the Common Pleas. We cannot assent to the correctness of this position. If the authority of the Court to proceed depend-

ed upon the giving of the bond, their authority, as well as the right of the complainant to prosecute, might be defeated by the refusal or inability of the party charged to find the security required. The support of the infant, a portion of which, by the humane provisions of the law, is to be imposed upon the putative father, is an immediate charge, and it could never be intended or tolerated that the party accused should, by his obstinacy, suspend or delay, without good and sufficient cause, the investigation of the truth of the complaint preferred against him, upon which his liability is made to depend. A bond is required for the security of the complainant; and the respondent having appeared, and made no objection to the regularity of the proceedings, he ought not now, in the opinion of the Court, to be permitted to assign, as an objection on his part to their validity, either the omission of the justice to take such bond, or of the Common Pleas to require a recognizance for his appearance at the second term. But we are not to be understood as intimating that these proceedings could have been sustained, had there been no appearance on the part of the respondent before the Court of Common Pleas, where the complaint was entered.

It is further urged that the Court could not legally adjudicate upon default, without the intervention of a jury. The statute prescribes, that certain preliminary steps being taken, which existed in this case, the respondent shall be adjudged the putative father of the child, unless from the pleas and proofs by him produced, and other circumstances, the jury shall be of opinion that he is not guilty. *Stat.* 1785, *ch.* 66. The interposition of the jury is provided for his benefit; and if the respondent in this case thought proper to forego the chance of an acquittal by them, of which he might have availed himself, he cannot at this time be received to object that the verdict of a jury was not taken which could only be necessary upon his denial of the charge, to pass upon the testimony by him exhibited, compared with that which the statute has made evidence in behalf of the complainant.

The course of proceeding, in certain of its prominent features, was regulated by the statute before cited; but in many particulars, where that was silent, it was necessarily governed by the common law and by the practice and usage of the Court, to

whose jurisdiction the subject matter was referred. If the party accused denied the charge, and put himself upon the country for trial, the jury were to determine the question of his innocence or guilt. If he pleaded guilty, the Court entered up judgment against him upon his own confession. But if he wilfully and obstinately refused to answer, he could not thus elude the justice of the Court; but they might proceed to adjudge him the putative father, if they found the preliminary proceedings and the evidence exhibited to be in accordance with the statute.

By the revised statutes, *ch.* 72, § 1, which passed since the judgment in the case before us was rendered in the Court below, the Court of Common Pleas are now authorized, in express terms, to adjudicate upon the confession or default of the party charged.

Another exception taken to the judgment in this case is, that the Common Pleas had no authority to direct that a certain sum should be paid weekly to the mother, *until the further order of Court;* and a case is cited from 2 *Shower*, 129, where a similar order in a bastardy case was quashed upon this ground. The case in *Shower* is very briefly reported; but it would undoubtedly be an authority in point, provided the language of the English statute, under which the justices there acted, be found to be the same with that, under which the Common Pleas proceeded. The English statute, which is that of 18 *Elizabeth*, *ch.* 3, prescribes, as well for the punishment of the parents, as for the relief of the parish, that two justices, *quorum unus*, shall charge "the mother or reputed father with the payment of money "weekly, or other sustentation for the relief of such child, in "such wise as they shall think meet and convenient." The language of our statute is, that "he shall be adjudged the re-"puted father of such child, notwithstanding his denial, and "stand charged with the maintenance thereof, with the assist-"ance of the mother, as the justices of the same Court shall "order." It may be urged, that the principle of the case in *Shower* applies with equal force to cases arising under our own statute; but we do not consider this point settled by the authority of that case, a different usage prevailing here, and the decision there being predicated upon a statute varying in its terms

from our own, and prescribing, not that a sum shall be paid by the reputed father to the mother to aid her in the support of the child, but that a weekly sum, to relieve the parish from the charge of its maintenance, shall be paid by the reputed father or by the mother.

Upon examination it has been found, that this form of adjudication, under our statute, has been extensively, if not uniformly, adopted. The party is to stand charged, "as the justices shall order." Their first order is necessarily predicated upon existing circumstances. By inserting therein the limitation, "until "the further order of Court," they reserve to themselves the power to order the weekly sum imposed to be increased or diminished, or to be altogether discontinued, as the equity of the case, having a due regard to the necessities of the child, and the situation of the parties, may from time to time require. We do not consider this reservation of the power to exercise a further discretion on their part, unreasonable or unwarrantable. It is impossible precisely to foresee the period, when the charge ought to cease. Much will depend upon the health and capacity of the child. It is not to be presumed that the Court will change or modify their order, without first giving due notice to the parties to be affected; or that they will refuse to discontinue the charge, when the necessity, upon which it is founded, no longer exists.

The authority of the Court to award costs is controverted. This process is regarded as a civil remedy; and for that reason depositions, which can be used only in civil causes, are received in prosecutions of this sort. Whether within the technical meaning of the statute which gives costs in all actions to the party prevailing, they could properly be allowed in this case, might admit of doubt; but as they have in practice, so far as we have been able to ascertain, been uniformly awarded and acquiesced in, we do not feel warranted to disturb the proceedings upon this exception.

The last point taken is, that the Common Pleas transcended their powers in directing a *capias* against the accused, upon his avoidance. The right to order a *capias* is incident to their jurisdiction in all cases of contempt. They are expressly authorized by the statute to commit the party charged to prison,

until he find sureties to perform their order. If he avoid, a *capias* becomes essentially necessary to the due and proper exercise of this authority.

Upon full consideration the opinion of the Court is, that the judgment and proceedings of the Common Pleas ought to be affirmed.

Note.—The Chief Justice having formerly been of counsel for one of the parties, did not sit in this cause.

SMITH *v.* GOODWIN.

If the assignee of the mortgagor remove fixtures from the land, though erected by him after the execution of the mortgage, the assignee of the mortgagee may have an action of trespass against him for their value.

In an action of trespass *quare clausum fregit* the cause was thus: In the year 1811, *Philip Mills* purchased the *locus in quo* of one *Wheelwright*, to whom he at the same time mortgaged it, as security for the purchase-money, of which no part appeared ever to have been paid. Afterwards, in the same year, *Mills*, being in possession of the estate, erected thereon a dwelling-house with a cellar and chimney; and soon afterwards sold the estate to one *Wight*, who occupied it till *October* 1813, when he sold the house and chimney to the defendant, with authority to remove them from the premises, which was immediately done, and for doing which this action was brought.

Goodwin was not aware that his right to remove the building he had thus bought would or could be disputed.

Soon after the making of the mortgage, and while *Mills* was in the actual possession of the land, *Wheelwright* assigned the mortgage to the plaintiff;—and after the removal of the house by *Goodwin*, the plaintiff brought an action upon his mortgage against *Mills*, and had judgment at *November* term, 1813, for possession of the land.

Upon these facts the parties agreed that the Court should render judgment for the party entitled by law to recover.

Frost, for the plaintiff.

The plaintiff being assignee of the mortgage, has all the rights of the original mortgagee. *Hills v. Elliot*, 12 *Mass.* 26. 1 *Cruise's Dig.* 106—110. And he was seized of the whole premises and estate, if of any.

The mortgagor and his assigns have but a mere equity of redemption. They have no right to emblements, their estate being defeasible by title paramount; much less may they remove fixtures. *Elwes v. Maw*, 3 *East.* 38.

In *England*, Chancery will grant an injunction to stay waste by the mortgagor. 3 *Atk.* 223. And the remedy in this State may well be by action of trespass, there being nothing in the relation of the parties to each other, inconsistent with that form of action. *Starr v. Jackson*, 11 *Mass.* 519.

Greenleaf, on the other side, stated the following points and authorities, furnished by *E. Whitman C. J.* of the Court of Common Pleas, who had been of counsel for the defendant.

The right of the mortgagor to take away buildings erected by himself with his own materials, at any time before actual possession taken by the mortgagee, is settled in *Taylor v. Townsend*, 8 *Mass.* 411.

In *New York*, while remaining in the undisturbed possession of the estate mortgaged, he is considered as the owner in fee. 6 *Johns.* 290. 7 *Johns.* 376. And he may even sue the mortgagee in trespass, if he commit waste. 11 *Johns.* 534.

It is true it has been decided in *Massachusetts* that trespass may be maintained after possession taken for an injury done before;—*Starr v. Jackson*, 11 *Mass.* 519—but in *New York* it has repeatedly been decided otherwise. 3 *Johns.* 468. 9 *Johns.* 61. 12 *Johns.* 183. 14 *Johns.* 213. 15 *Johns.* 205,—and these decisions agree with 3 *Bl. Com.* 210. *Com. Dig. Trespass B.* 3. 2 *East.* 38. 5 *East.* 435.

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

This is an action of trespass by the assignee of a mortgagee, against a person claiming under the grantee of the mortgagor, for having taken away from the mortgaged premises a dwelling-

house, which had been erected thereon by the mortgagor, after the conveyance in mortgage; and which the defendant had purchased of such grantee.

In the argument two questions were made:—1, whether the plaintiff had such a possession as entitled him to maintain an action of trespass:—2, whether the act complained of was in itself a trespass.

As to the *first* question, it is well settled that as between mortgagor and mortgagee, the legal estate is in the latter, and the possession of the mortgagor is not adverse to the mortgagee, but in fact is *his* possession. See *Blaney v. Bearce*, *ante*, *p.* 132. and the cases there cited. On this principle the possession of the plaintiff, as assignee of the mortgage, was sufficient to entitle him to maintain the action against the defendant, provided the act done by him was inconsistent with the estate of the mortgagor, or his grantee.

This leads us to the *second* question;—and on this point we think there can be no doubt. The dwelling-house, which was sold to the defendant and by him removed, was a part of the freehold which belonged to the mortgagee or his assignee. It was a fixture, attached to the land, and in legal contemplation inseparable from it, though built by the mortgagor after the execution of the deed of mortgage. The case of *Taylor v. Townsend*, cited by the defendant's counsel, is in two respects different from this. That was an action by the mortgagor against the assignee of the mortgagee; and the trespass complained of was the taking down and removal of a barn and shed erected by him, and which, as the Court observed, were not *fixtures*, or so connected with the soil that they could not be removed without prejudice to it.

On legal principles we do not perceive any defence in the action, and a default must be entered, pursuant to the agreement of the parties.

LITTLE *v.* MEGQUIER.

An entry on land under a deed recorded, and payment of taxes, is no evidence of a disseisin of the true owner, unless the person who entered *has continued openly to occupy and improve it.*

In such a case, though the deed may not convey the legal estate, yet the possession of a *part* of the land described in it, under a claim of the *whole*, by the bounds therein expressed, *may* be considered as *possession* of the whole, and as a disseisin of the true owner; and equivalent to an actual and exclusive possession of the whole tract, unless controled by other possessions.

THIS was an action of trespass *quare clausum fregit*, for cutting and carrying away certain trees from the lots numbered 57 and 58 in the second division in *Poland*, between *February* 8, 1814, and *February* 8, 1820.

The defendant, besides the general issue, pleaded—1st, that the soil and freehold in lot numbered 57 was in *Robert Waterman*;—2d, that the soil and freehold was in *Robert Snell*, and the heirs of *Edmund Megquier*;—which were traversed, and issues taken thereon.

The plaintiff, to prove the issues on his part, produced a deed from *Oliver Osgood* to himself, dated *March* 25, 1796, acknowledged *June* 23, 1814, and recorded *August* 1814, of *one half of the lot numbered* 57. He also produced a deed from *Benjamin Osgood* to himself, dated *May* 23, 1800, acknowledged *May* 23, 1804, and recorded *August* 13, 1804, of *the other half of said lot.*

The defendant offered a deed from *Nathaniel Sawtel*, collector of taxes for the town of *Poland* for the years 1788 to 1791, and for 1793 and 1794 to *Robert Waterman*, of that part of the lot numbered 57 on which the supposed trespass was committed. This deed was dated *April* 1, 1795, acknowledged *January* 22, 1798, and recorded *January* 27, 1801. He also offered to prove that *Waterman*, immediately after the giving of the deed to him, entered upon and surveyed the land, which was wholly uncultivated. And he further offered in evidence a deed of the same land from *Waterman* to *Snell* and *Megquier*, dated *April* 11, 1809, recorded *June* 20, 1820. He also offered to prove that the tax-bills, warrants, and evidence of the proceedings on the part of *Sawtel* the collector were accidentally consumed by fire;—and

that *Waterman*, and his grantees, since the date of the deed to him, had paid all the taxes assessed on the land described in his pleas, to the present time. But the presiding Judge refused to admit the deed from *Sawtel* in evidence, unless the requisites authorizing him to sell, so far as they were recorded on the town books, were first proved;—and these not being shewn, he directed the jury to return a verdict for the plaintiff, which was taken subject to the opinion of the whole Court upon the correctness of that direction.

Fessenden, for the defendant, now contended—1. That the deed from *Sawtel* to *Waterman*, being recorded, is equivalent to livery of seisin, and works a disseisin of all others claiming title to the same land.—2. That six years' possession, by the operation of the *Stat.* 1821, *ch.* 47, which gives the tenant a right to the value of his improvements made on the land, by necessary implication takes away the right of entry, and bars the action of trespass *quare clausum;* because in this action the improvements cannot be estimated.—3. That the regular evidence of the collector's proceedings being lost, the presumption of law is that his doings were regular and legal, until the contrary appears.

Little, for the plaintiff, replied, that if a deed recorded was evidence of an ouster or disseisin, then the deed from *Osgood* to the plaintiff is such, which was given in 1796 and recorded in 1814;—that if the *Stat.* 1821, *ch.* 47, can be understood to take away the right of entry, yet it applies only to cultivated lands, held by open, visible and actual possession;—and that every person claiming under a collector of taxes, must at least shew a legal authority in the collector to sell the lands. *Thurston v. Little*, 3 *Mass.* 429. Though the collector's papers were lost, the town records might have been produced to shew his election, and the raising of the taxes. There is therefore no deed under which the defendant can claim, and his entry in 1801 was a mere trespass.

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

On examining the facts in this case it is very clear that the deed from the collector to *Waterman* was not admissible in evi-

dence as proof of title to the *locus in quo;* there being no proof adduced to shew that any preliminary proceedings on the part of the town of *Poland*, or its officers, in relation to the voting and legal assessment of the taxes, for the non-payment of which the land was sold, had ever existed. The loss of some of the papers, which had been committed to the collector, whether by fire or otherwise, can be no reason for the non-production of copies from the town records, proving the legal choice of assessors and collector,--their having been duly sworn,—the tax regularly assessed. &c.—On this point the defence fails.

But it is contended that though the deed from the collector to *Waterman* was not admissible as proof of *title*, it was good evidence of the *extent of his claim;*—having been recorded in the registry of deeds in the year 1801; and he having caused the land to be run out according to said deed, and paid the taxes which had been assessed upon it, though the same was a wild and uncultivated lot of land, still *these facts*, together with the *record of the deed*, constituted a *disseisin* of the plaintiff. And as he has not made any entry on the land *since*, he has had no possession sufficient to authorize him to maintain this action. We cannot admit the correctness of this reasoning, or the conclusion drawn from it. The principle certainly cannot be applicable, unless in a case where the person claiming title, by a deed *duly registered*, has entered into possession of the land under his deed, and continued *openly to occupy and improve it.*—In such a case, though the deed may not convey the legal estate, still the possession of a *part* of the land described in it, under a claim of the *whole*, by the boundaries therein expressed, *may* be considered as a *possession* of the *whole* and as a disseisin of the true owner; and equivalent to an actual and exclusive possession of the whole tract, unless controled by other possessions.

On this ground also the defence fails. We are all satisfied that the opinion of the Judge by which the deed from *Sawtel*, the collector, to *Waterman* was rejected, was correct, and accordingly there must be

Judgment on the verdict.

THE INHABITANTS OF WESTBROOK *v.* NORTH.

If a county road be laid out and accepted over land of a private citizen, to whom damages are awarded for the easement, which are paid by the town, and the road is afterwards discontinued without having been opened, the town cannot recover back the money thus paid.

The discontinuance of a road by the Court of Sessions is no reversal of the proceedings respecting its location.

IN this action, which was *assumpsit*, a verdict was taken for the plaintiffs, subject to the opinion of the Court whether the action was maintainable, upon the following facts.

In the autumn of 1817 a county highway was laid out and accepted across the defendant's land in *Westbrook*, and damages awarded to him to be paid by the plaintiffs to the amount of $112,50. In 1819 the defendant removed a barn off from the land over which the road was laid, and built a fence on one side of the road, and took his warrant for the amount of damages awarded him, which was paid by the plaintiffs. The road was never opened, nor any other damage than the above sustained by the defendant; and in the autumn of 1820 the road was discontinued. The verdict was for the amount of damages paid the defendant, deducting the cost of the fence and the expense of removing the barn.

Greenleaf, for the plaintiffs, now argued—1st. Here is a failure of consideration. The sum awarded in damages to *North* was for a *public easement* over his land, which the public have never enjoyed.—2d. The defendant has received money which *ex æqua et bono*, he ought to refund. He received $112,50 in anticipation of damages *to be* sustained, if the road should be opened and maintained;—but the jury have found his damage to amount to no more than $62,50; and he can sustain no more, the road being discontinued. Of course he cannot, in conscience, retain the surplus.—3. The defendant cannot retain the money on the ground that it was paid to him under a judgment; for the discontinuance of the road is in the nature of a reversal.

Longfellow and *Anderson*, for the defendant, contended,—1st. That this action would not lie for money had and received under a judgment of a Court having jurisdiction of the subject matter, until that judgment is reversed. *Newdigate v. Davy*, 1 *Ld. Raym.* 742. *Marriot v. Hampton*, 7 *D. & E.* 269. And here is no reversal. If a highway be once established and used, a subsequent discontinuance of it is no reversal of the original location. The records of the Sessions would only shew that at one time it was expedient to establish the road, and at an after period it was no longer expedient to continue it.—2d. The consideration has not failed. The public took to themselves the right of passing over the land of the defendant as long as they might see cause; and the sum given was for whatever damages he might sustain, more or less. And the jury having found that he sustained damages, he has a right to the whole money.

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

By the constitution, the public have a right to take the property of an individual for certain purposes, without his consent, making him compensation therefor; the mode being pointed out by law.—In virtue of this constitutional authority, and the law made in pursuance thereof, the defendant's land was appropriated by the *Court of Sessions* as a highway. The fée of the land still remained in *North*; but by the order or judgment of that Court on the acceptance of the road as located, the public became the purchasers of an *easement*, at the price estimated by the committee. And *North* thereupon became entitled, by such order or judgment, to the sum awarded to him as damages. That sum he has received, and he claims a right to retain it. He admits the right of the public to purchase the *easement* in the manner above mentioned, and take it without his consent; but he denies that the public have any right to *compel* him to purchase it again, at any price. And the road has been discontinued. He contends that such discontinuance does not vacate the proceedings as to its location; that the original order, or judgment of Court remains in full force; and that the discontinuance is only prospective in its operation. We are satisfied with this reasoning of the defendant's counsel, and do not per-

ceive how the action can be maintained. There is no promise to refund the money, either express or implied. It was received in virtue of a judgment of Court, and that judgment has not been reversed; or, in other words, the proceedings of the Court by which the road was laid out and established, have never been quashed. The public have only done an act by which their easement has been extinguished, but this cannot create any obligation on the part of the defendant to purchase the easement against his consent, by paying back the sum which he received for it.

Accordingly the verdict must be set aside and a nonsuit entered.

CUTTER, PLAINTIFF IN ERROR, *v.* TOLE.

If the captain of a company of militia be imprisoned for debt, he is nevertheless competent to issue orders for a company training.

The Statute requiring that all excuses for non-appearance at a company training be made *within eight days*, does not apply to one who, though he may have been notified in a manner prescribed by law, yet had no *actual* notice to appear, and who, of course, could not know that he was under any legal obligation to offer an excuse, nor that he had been guilty of any neglect which required one.

Error, to reverse the judgment of a justice of the peace, rendered in favour of the defendant in an action of debt for a penalty for neglect of military duty.

From the bill of exceptions sent up, it appeared that *Cutter*, the original plaintiff, was a sergeant, and clerk *pro tempore*, of a company of militia in *Westbrook*, the captain of which was confined within the debtor's limits in *Portland*;—that the lieutenant, supposing himself to be the commanding officer during this confinement of the captain, issued his orders to one of the company, by virtue of which *Tole*, who was enrolled as a private soldier in the company, was duly warned to appear at a certain place in *Westbrook* on the seventh day of *May* 1822, for

military duty and view of arms;—that the captain also issued his orders from *Portland*, to *Cutter* the clerk *pro tempore*, by virtue of which *Tole* was duly warned to appear on the same day, and for the same purpose, at *another* place in *Westbrook*;—and that he was also duly summoned to attend as a witness at the Supreme Judicial Court which commenced its session on the same seventh day of *May*, at which he attended on that and the eight following days; but he did not within that period assign any excuse for his non-appearance at the company training.

Upon this evidence the justice decided—1. that the captain, by reason of his imprisonment, was disqualified from issuing any military order as commanding officer of the company;—2. that *Tole* was under a paramount obligation to attend the Supreme Judicial Court in obedience to his summons, of which he might avail himself by way of defence at the trial, notwithstanding he had not offered any excuse to the commanding officer, within the eight days mentioned in the statute.

And these two points, thus decided, were assigned for error.

The case was briefly spoken to by *Morgan* for the plaintiff in error, and *Fitch* for the defendant; after which the opinion of the Court was delivered as follows.

Mellen C. J. Two errors are assigned, viz.

1. That the justice who tried the cause decided that the confinement of the captain of the company, within the liberties of the prison in *Portland*, at the time of issuing his orders to the original *plaintiff* to notify a meeting of the company at the time and place mentioned, operated to deprive him of the authority to issue the order; and that it was therefore void.

2. That the said *Tole*, under the circumstances of the case, was not bound to attend at the time and place appointed; nor to offer his excuse to his commanding officer within eight days next after the day of muster.

As to the *first* point. The 16*th sect.* of the *Militia Law of this State*, *ch.* 164, provides "That whenever the office of Major "General, Brigadier General, Colonel, Major, Commandant or "of Captain shall be vacant, the officer next in grade and in "commission in the division, brigade, regiment, battalion or "company, shall exercise the command and perform the duties

"thereof, until the vacancy shall be supplied." If the office of captain was not vacant, according to the intent and meaning of the above provision, it follows that *his* order to the plaintiff was legally given, and superseded the order which the *lieutenant* had previously issued.

It is urged by the defendant's counsel, that as the captain, at the time of issuing the order, was legally deprived of his liberty, and of the command even *over himself* and *his own actions*, it would be an unreasonable construction of the statute, to consider his military authority *over the company* as continuing, under such circumstances. To this argument it may be replied that the imprisonment of the captain, in the present case, could not deprive him of the means of *issuing the order* to the plaintiff; and he, being at liberty, could and did notify the company pursuant thereto. Besides, it appears on the record, that the captain was liberated from the limits of the prison on the second of *May;* nearly a week before the day appointed for the muster; at which time he might have attended and taken the command of the company, had he not been prevented by the reasons assigned by the justice as the ground of his opinion on the second point. It may be further replied, that though the captain was within the limits of the prison, and at large, in consequence of having given bond pursuant to law, not to depart beyond those limits; still that was an arrangement merely between him and his creditor. It was a contract which he might violate at his pleasure, if he inclined to incur the consequences of an escape. He was under no *physical* restraint; and we are not prepared to say that a captain must be considered as vacating his office, merely by laying himself under bond to absent himself from the territorial limits of his command on the day he issues orders for mustering his company, or from the place of parade on that day. Nor can we believe that his power to issue such an order is suspended by his being in close confinement on execution for debt, any more than if the captain, at the time of issuing the order, had been confined to his chamber by sickness; a species of restraint, over which he has no control, and which, surely, could not be considered as vacating his office.

It is not perceived how any inconveniences can possibly result from the established principle above stated; because, if

after an order has been issued by a captain for the purpose of mustering his company under circumstances like those in the present case, he should be unable to attend on the day of muster and take the command of the company, the officer next in seniority on the field, would, by military usage, be the commander of the company for the day.

It is not necessary on this occasion to decide whether the conviction of a commanding officer of an infamous crime, and imprisonment under sentence for such crime, would operate to vacate such commander's office;—nor how far the decision of a court martial in such case would be necessary completely to vacate the office;—nor how far the question, whether a military officer has vacated his office, be a question merely of military jurisdiction. It is sufficient for us to say, that in the present case, we perceive no facts which can authorise us to pronounce the order of the captain as illegal, for want of authority in him to issue it.

We are accordingly of opinion that the *first* error is well assigned.

As to the *second* point, we are not required to give any opinion; but as it has been intimated that several causes are depending upon its decision, we have bestowed our attention upon it, and will state the result.

It is not denied that the defendant was under a paramount obligation to attend upon this Court on the day of muster, in obedience to its process; but the objection is, that he did not, within the eight days next following, offer his excuse to the commanding officer, according to the statute, *art.* 32; nor shew that he was prevented therefrom by severe sickness, according to said article.—This objection is founded on the facts of the case. In the case of *Tribou v. Reynolds*, 1 *Greenl.* 408, it was decided that by the "severe sickness" mentioned in said article, 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.—The statute has reference to all kinds of excuses. But as the provision contains a very *strict limitation*, in giving a construction to it, we apprehend it ought never to be applied against a person who, though he might have been notified in a manner by law prescribed, had in fact receiv-

ed no *actual notice ;* and of course was not apprized that he was under any legal obligation to offer an excuse, or that he had been guilty of any fault or neglect which required one.

In the case before us, however, it appears that the defendant was duly notified and warned ; and it is not intimated that such notice was not *actual* and *full.* We therefore think the justice erred in *this* particular, and that the *second* error also is well assigned.

The consequence is, that the judgment of the justice must be reversed, and a trial be had at the bar of this Court.

Judgment reversed.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

YORK.

APRIL TERM,

1823.

THOMPSON *v.* LINSCOTT.

Where a minor purchased lands, and for the purchase-money two of his friends of full age gave their joint note of hand, which the minor promised he would sign and pay after he should arrive at full age; and afterward, having come to full age, he by a memorandum on the bottom of the note *acknowledged himself holden as co-surety*;—in an action by the payee against him, as on an original promise, it was holden that the plaintiff might well shew by parol that the promise was for the defendant's own debt, and not a collateral engagement, and so no new consideration necessary to be proved.

THIS was an action of *assumpsit* against *Benjamin Linscott*, and came before the Court upon a motion to set aside a nonsuit.

At the trial of the issue, which was *non assumpsit*, the plaintiff read the note declared on, of the following tenor:—"*York* "*Jan.* 2, 1818. We the subscribers jointly and severally, for "value received promise to pay *Joseph Thompson, Esq.* or or- "der three hundred and forty-two dollars on demand, interest "till paid.

Jeremy Linscott.
Samuel Linscott.

"I acknowledge myself holden as co-surety for the payment "of the above demand of the note, witness my hand

Benjamin Linscott.

"*York, April* 3, 1821."

The plaintiff then offered to prove that the true date of the note was *January* 2, 1819; on which day *Samuel Linscott* owning ten acres of land in common with *Jeremy Linscott* the defendant's father, the defendant, who was then a minor, wished to purchase it for his own accommodation;—that his father approving and recommending the bargain, the defendant then agreed to purchase the land, and *promised to pay for it*;—that the principal part of the money was agreed to be paid to the plaintiff, to whom *Samuel* was indebted, and the residue to *Samuel* himself;—that on the 19th day of *January* 1819 a deed was accordingly executed and delivered by *Samuel* to the defendant, who paid down fifty-eight dollars, of which the plaintiff received twenty, and *Samuel* the rest;—that the plaintiff declining to take the defendant's note, because he was a minor, his father and said *Samuel* made and signed the note declared on, the defendant promising that *he would pay the money* on the note, and *would sign it when he should come of age*;—that the defendant entered into possession of the land under the deed, and ever since had continued to occupy it;—that during his minority he made several payments on the note;—and that after he became of full age, in further performance of his original agreement, he made and signed the memorandum at the bottom of the note declared on.

This evidence the presiding Judge rejected, and directed a nonsuit subject to the opinion of the whole Court whether it ought to have been admitted, and if so, whether it was sufficient to maintain the action.

Emery, for the plaintiff.

The case shews that so far as the enjoyment of the land goes to constitute a consideration for the defendant's engagement, he has had it; and if he were not a minor there could be no doubt that he would be bound as though he had originally contracted. His minority was a personal privilege, of which he might avail himself, or not, as he might choose; and he very properly elected, when he came of age, to complete the engagement *bona fide*, which he had previously entered into, and partly performed. Any consideration, however slight, is sufficient to support a promise thus founded in justice.

As to the question whether the plaintiff might go into evidence to prove the consideration, and whether if this had been the debt of another, the contract would be void for want of *expressing* the consideration, the law on this subject has lately been settled in *Massachusetts*, in *Packard v. Richardson*, 17 *Mass.* 122. See also *Hunt v. Adams*, 6 *Mass.* 519. *Leonard v. Vredenburg*, 8 *Johns.* 23. *Ulen v. Kittredge*, 7 *Mass.* 233. *Moies v. Bird*, 11 *Mass.* 436. *White v. Howland*, 9 *Mass.* 314. *Bailey v. Freeman*, 11 *Johns.* 221. *Joscelyn v. Ames*, 3 *Mass.* 274.

Burleigh, for the defendant.

The written agreement of the defendant, is not sufficient to support any action whatever. It was a collateral undertaking, subsequent to the original contract, and to give it vigour there must have been a *new consideration*. *Leonard v. Vredenburg*, 8 *Johns.* 23. There was no privity between the plaintiff and defendant. *Fish v. Hutchinson*, 2 *Wils.* 94. *Charter v. Becket*, 7 *D. & E.* 201.

And the consideration should be expressed in writing, in the body of the agreement, or it is void by the statute of frauds. By the *Stat.* 29. *Car.* 2. the law was so far changed as to require that what was before proveable by parol, should in future be expressed in writing; and the reason is the same for requiring written proof of the consideration, as of the promise. *Sears v. Brink*, 3 *Johns.* 211. *Stadt v. Lill*, 9 *East.* 348. 1 *Campb.* 242. *Hunt v. Adams*, 5 *Mass.* 358. *Carver v. Warren*, 5 *Mass.* 545. *Adams v. Bean*, 12 *Mass.* 137. *Duval v. Trask*, 12 *Mass.* 154. *Bailey v. Freeman*, 11 *Johns.* 221. *Thatcher v. Dinsmore*, 5 *Mass.* 300. In *Packard v. Richardson* the Court admit that the true meaning of the word *agreement* would require that the consideration be expressed in the writing. Now the true meaning of the word is the same in popular acceptation, as in legal; and of course the decision ought to have been the same here as in *England*. In *Saunders v. Wakefield*, 4 *Barn. & Ald.* 595, in 1821, the Court were unanimous that the consideration ought to be expressed.

But independent of the statute of frauds, the parol evidence offered by the plaintiff was inadmissible, as it went to contradict, or at least to add to a written contract. The obligation of

the defendant was *expressly* as co-surety for the original promisors, which the plaintiff proposed to disprove. *Roberts on frauds*, 10, 11. 2 *Black.* 1249. 2 *P. Wms.* 420.

At the succeeding *September* term at *Alfred*, the opinion of the Court was delivered as follows, by

MELLEN C. J. By the report it appears that the plaintiff offered to prove that *Samuel Linscott*, one of the signers of the note declared on, in 1819 was part owner of a piece of land in common with *Jeremy Linscott*, the other signer; and then conveyed his part, being ten acres, to the defendant, who was then a minor, for the price of $400;—that a part of the purchase-money was paid to *Samuel Linscott;* and the note in question given for the balance to *Thompson*, the plaintiff, to whom *Samuel* stood indebted. The defendant being a minor, his security would have been unavailing; and accordingly the note was signed by *Samuel* and *Jeremy* as the friends of, and in the nature of sureties for *Benjamin;* who, though he did not *then* sign the note, promised that he *would sign* it, when he should come of age, and pay it. A part of the note having been paid by the defendant during his minority, he, *after he became of full age*, did sign the note on the *third* of *April*, 1821, engaging to pay the balance due upon it.—This proof was rejected by the Judge who presided in the trial of the cause; and the question is, whether it was rejected properly. In deciding this question, we may consider the facts in the same manner as though they had been proved, and the inquiry then is whether they are sufficient to maintain the present action; if so, the nonsuit must be set aside.

The principal objection to the plaintiff's right to recover seems to be the want of sufficient consideration to support the defendant's promise.

It is perfectly settled, that in an action on a promissory note by the promisee against the promisor, it is competent for him to shew, by parol evidence, that there was no consideration received by him, although on the face of the note a consideration is expressly acknowledged to have been received. It is equally clear that it is not necessary that the consideration of

the promise should appear on the face of the note; but it is always a subject of proof by parol evidence; as in the case of Bank notes, for instance, where the usual words "value received" are seldom, if ever, inserted. In the case before us, therefore, we perceive nothing irregular in the introduction of parol evidence to prove a consideration, by shewing the circumstances under which the note was signed in the first instance, and by the defendant, after his arrival at full age. Such proof does not tend to contradict or explain the written contract, but is offered for the express purpose of confirming and giving it effect.—It is not necessary to consider the defendant's engagement and signature in the light of a guaranty of a debt due from *Jeremy* and *Samuel Linscott;* because it appears that the defendant was the purchaser of the land, and bound in equity to pay for it; and he, in fact, has paid all the sums which have been indorsed. He was under a moral obligation to pay the note in consequence of his having received a conveyance of the land, and having engaged, during his minority, to sign and pay the note when he should arrive at full age;—and *such* an obligation is in law a good and valid consideration to support a new promise made *after* full age. This principle is too plain to require any authorities to establish its correctness.—Suppose the note in question had never been signed by *Jeremy* and *Samuel Linscott;* but that the defendant's verbal promise had been accepted by the plaintiff at the time the deed was given, and that on the *third* of *April* 1821, he had made and signed the note *alone;* why should it not bind him? Is it less binding *on him*, because two other persons had signed it a year before? It was a promise to pay a debt of his own, which he was under a moral obligation to pay, and which, while a minor, he had faithfully promised to *secure in legal form*, when legally capable of binding himself, and honestly to pay afterwards.

Neither is the defendant's promise within the operation of the statute of frauds; because it was not a promise to pay the *debt of another*, but a *debt of his own*. And if the original signers, *Jeremy* and *Samuel*, had paid the note the next day after the defendant had signed it, they could, upon the evidence before us, maintain an action against the present defendant, and compel him to reimburse to them the amount so paid.

We are of opinion that the evidence which was rejected, ought to have been admitted—and accordingly the nonsuit must be set aside and the cause stand for trial.

DENNETT & AL. EX'RS. *v.* CHICK & AL.

If one of two *joint* promisors have neither domicil nor property in this State, a *separate* action may be maintained here against the other.

A judgment in another State against one of two joint promisors, without satisfaction, is no bar to an action in this State against the other, upon the original contract.

Assumpsit on a joint promissory note, made by the defendants to the plaintiffs' testatrix. The defendant *Ham* not being to be found in this State, and having no domicil *here*, no service was made on him. The defendant *Chick* appeared, and pleaded in bar a judgment of the Court of Common Pleas for *Strafford* county in the State of *New-Hampshire*, recovered by the testatrix against *Ham*, in an action on the same note, *Chick* having no domicil nor property in *that* State; on which judgment a writ of execution had been issued, and returned without satisfaction. To this plea the plaintiff demurred.

J. Holmes and *Hayes* in support of the demurrer.

The justice of the case is obvious; as well as the necessity of preventing co-debtors from avoiding their joint contracts by taking a residence in different States.

If a foreign judgment be pleaded, it should be with *satisfaction;* without which no collateral security, not even a judgment, is a bar. *Chipman v. Martin*, 13 *Johns.* 240. 3 *Caines*, 4. 14 *Johns.* 444.

Shepley, for the defendant.

The law is the rule of decision; and the *law* is the justice of every case.

The note was *joint*, and not several; and by the common law of *England* it is necessary to sue both, and pursue to outlawry.

And no statute or usage exists here to the contrary. The cases of *Tappan v. Bruen*, 5 *Mass.* 193, and *Call v. Hagger & al.* 8 *Mass.* 420, go only to the manner of the remedy, but do not deprive the party of any defence he may have at common law. Had the suit here been against both promisors, it could not be maintained, because a judgment had been had against one. The parol contract is merged in a higher security; and the *joint* promise exists no longer. *Ward v. Johnson & al.* 13 *Mass.* 148. 1 *Chitty on plead.* 29.

MELLEN C. J. at the following *May* term in *Cumberland*, delivered the opinion of the Court as follows:

Chick and *Ham* having given a *joint* note to the testatrix, she commenced an action in *New-Hampshire* on the note; declaring against *both* the promisors; but as *Chick* was not then an inhabitant of that State, the writ was served on *Ham* only, and judgment was rendered against *him*.—In the *present* action, the writ has been served on *Chick only*; as *Ham* was not within the jurisdiction of the Court; and the question is whether the judgment in *New-Hampshire* rendered against *Ham*, and which is pleaded in this case by *Chick* in bar of the action, constitutes a legal defence.

If one of two *joint* promisors be sued, it is well known that, unless he plead the non-joinder of his co-promisor in *abatement*, he is liable to a *several* judgment in the action.—The judgment in *New-Hampshire* was rendered on default; and if that action had been sued in this State, and against *Ham only*, such a judgment would have been regular.—In those cases where the promisors in a *joint* note live in *different* states, no *joint action* can be maintained and pursued to judgment; and unless a suit can be sustained against one of the promisors *alone*, no remedy can be had by the promisee.—These inconveniences are considered in the case of *Tappan v. Bruen*, 5 *Mass.* 193, and seem to be the basis of that decision. It is there decided that in such a case according to immemorial usage an action may be maintained against the promisor who lives *in* the State, where no service could be made on the *other*, living *without* the State.—The same principle is recognized in a note to the case of *Call v. Hagger & al.* 8 *Mass.* 423. It is true that

in *Ward v. Johnson & al.* 13 *Mass.* 148. the Court decided that, as the plaintiff had in a former action recovered a judgment against *one* of the defendants, such judgment disproved the *joint* promise on which the plaintiff relied, and formed a bar to the action.—In two respects, however, *that* action differs from *this*.—*There*, the former judgment was recovered in *Massachusetts* against *one* of the promisors; and the writ in the latter was served on *both* the promisors, and they *both* joined in pleading the several judgment in bar.—In the case before us, the writ was served on *Chick only*, and he only appears and pleads the *New-Hampshire* judgment.—Can *he* avail himself of a judgment recovered against *another* person, merely because he was a *joint* promisor?—It is a general rule that no person is bound by a judgment, or can avail himself of it, unless he be a party or privy to it.—In this case the plea does not contain any averment that the former judgment has been satisfied.—The justice of the case is so clearly with the plaintiffs, that unless some unquestioned principle sanctions the defence, we are disposed to render judgment in their favour.

No case has been found precisely similar to the one before us. *Shechy v. Mandeville*, 6 *Cranch*, 253. has a strong resemblance to it.—The facts were these.—In 1805 the plaintiff brought an action against *Jameson* and obtained judgment against him.—Sometime after, discovering that *Mandeville* was a *secret partner* of *Jameson*, the plaintiff commenced another action against *Jameson* and *Mandeville*.—*Jameson* having been discharged under an act of Congress for the relief of insolvent debtors within the District of *Columbia*, no further proceedings were had against him. In the *second* action *Mandeville* pleaded the judgment against *Jameson* in bar; and on demurrer, the Circuit Court held the plea good; but, on error, the Supreme Court reversed the judgment. In delivering the opinion of the Court, the Chief Justice observed, "that admitting for the "present that a previous judgment against *Jameson* would be a "sufficient bar, as to him; had *Jameson* and *Mandeville joined* "*in the same plea*, it would have presented an inquiry of some "intricacy, how far the benefit of that bar could be extended "to *Mandeville*. But *they have not joined* in the same plea. "They have severed; and as the note is not merged in a judg-

" ment against *Jameson* on his individual *assumpsit*, the Court " is not of opinion that *Mandeville* has so pleaded this matter " as to bar the action." As *Jameson* had ceased to be a party to the suit, by his discharge, and the pleadings were by *Mandeville* only; such discharge would seem to have the same effect and leave the cause in the same situation as though he had never been joined and declared against in the action; or rather, had never been served with legal process.—He was then placed in the same circumstances, with respect to *Mandeville*, as *Ham* is in this action with respect to the defendant *Chick*.—We do not perceive any technical rule of law by which the plea in this action can be considered a good bar; and for the reasons given we are of opinion that the plea in bar is insufficient.

Judgment for the plaintiffs.

THE INHABITANTS OF SANFORD *v.* THE INHABITANTS OF HOLLIS.

The *wife* of an alien, having her lawful settlement in this State, together with their *children*, being paupers, are to be supported by the town where that settlement may be;—though the husband, and of course the family may require and receive relief as paupers in the first instance from another town, in which they happen to reside, under *Stat.* 1821, *ch.* 122, *sec.* 18.

This was an action of *assumpsit* for the support of *Joseph Temple* and his family as paupers, and came before the Court upon a case stated by the parties.

Temple was an alien born, having no legal settlement in *Massachusetts*. His wife, at the time of the marriage, had her settlement in *Hollis;* but at the time of passing the act of *March* 21, 1821 respecting the settlement and support of the poor, and for several years previous, they resided as housekeepers, with their family, in *Sanford*.

From *May* 1818 to *April* 13, 1819 they were supported by *Sanford*, for which support an action was brought against *Hollis*, which the latter town adjusted by payment of the debt and

costs; and at the same time entered into contract with an individual in *Sanford*, to supply them with necessaries at the expense of the town of *Hollis*, which he continued to do from that time till *September* 22, 1821, and was paid accordingly; the paupers residing in *Sanford* during all this period, with the consent of the inhabitants of *Hollis*. *Temple* was put on the list of State-paupers, soon after he first became chargeable in *Sanford*, at the request of the inhabitants of *Hollis*, who received of the State the expenses of his support, till *March* 21, 1821.

On the 21st of *September* 1821 *Hollis* rescinded the contract made for the support of the paupers, for whose subsequent expenses this action was brought. The legal notice and reply were admitted.

Burleigh, for the plaintiffs.

Temple, being a foreigner, must be supported in the town where his wife has her settlement; and the fact of their being *at board* in *Sanford*, *at the expense of Hollis*, does not vary the case, for that very reason. Upon any other construction of the statute, the husband and wife will be separated, which is not to be permitted.

Shepley, for the defendants.

The *Stat.* 1821, *ch.* 122. *sec.* 18. requires overseers of the poor to relieve and support " all poor persons residing or found " in their towns, having no lawful settlements within this State." *Temple* was " residing and found" within *Sanford*;—and the words of the Statute being thus satisfied, *Sanford* is bound to support him. The provisions respecting the settlement and support of the poor are arbitrarily assumed, and therefore always receive a literal construction. There is no moral obligation, no right or wrong, in the case. The only subject of inquiry is the literal meaning of the law. *Townsend v. Billerica*, 10 *Mass.* 414. *Billerica v. Chelmsford*, 10 *Mass.* 397.

The wife's settlement in *Hollis* makes no difference. That town had paid something for their support, tis true; but it was under a mistake as to their legal rights. They were not bound to support the paupers till they were *removed* to *Hollis*. 13 *Mass.* 504.

The adjudged cases are, that the husband and wife shall not be separated. The statute says that a poor foreigner shall be supported by the town where he is "residing or found;"—and if so, then his family also, for they cannot be taken from him. Thus the law is consistent. It is the *temporary* settlement of the foreigner,—determined, like all cases of *permanent* settlement, by the mere arbitrary and positive enactments of the statute; and carrying with it, as in all other cases, the settlements of his family.

Burleigh, in reply.

A foreigner gains no *settlement*. The words of the statute, *sec.* 18. are, "having no *settlement*." And if he has none, he can give none to the wife; and therefore she does not lose the settlement which she had at the time of the marriage, which was in *Hollis*. *Shirley v. Watertown*, 3 *Mass.* 323. *Hallowell v. Gardiner*, 1 *Greenl.* 93.

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

By the statement of facts it appears that *Joseph Temple* is a foreigner by birth, and has never gained any settlement in *Massachusetts*. It also appears that his wife, at the time of her marriage with him, had her legal settlement in *Hollis*.

It was contended by the counsel for the defendants that *Joseph Temple*, since the separation of *Maine* from *Massachusetts*, had gained a settlement in *Sanford* by residing with his family in that town on the 21st of *March* 1821, being the day on which the act relating to the poor was enacted in this State.—In the *seventh* mode, pointed out in the second section, of gaining a settlement it is provided thus:—"Any person resident in any town "at the date of the passage of this act, who has not within one "year previous to that date received support or supplies from "some town as a pauper, shall be deemed to *have a settlement* in "the town where he then dwells and has his home." It appears that *Temple*, though living at that time in *Sanford*, had received support and supplies within one year previous to the passing of the act. Of course he gained no settlement in this manner.

It was next contended that he had gained one, in virtue of the 18th section of the act abovementioned.—The part of the section relied on is in these words:—"Be it enacted that said "Overseers shall also relieve and support, and, in case of their "decease, decently bury, all poor persons residing or found in "their towns, having no lawful settlements within this State, "when they stand in need; and may employ them, as other "paupers may be; the expense whereof may be recovered of "their relations, if they have any chargeable by law for their "support, in manner herein before pointed out; otherwise it "shall be paid out of the respective town-treasuries."—This section, is not designed to designate the mode of gaining a settlement.—It proceeds on the ground that the persons supplied have no legal settlement in the State.—Besides, the second section of the act points out the several modes of gaining legal settlements and provides that they shall not be gained "otherwise."

As the husband has never gained any settlement in this State, the settlement of the wife has not been "lost or suspended by "the marriage"—and for the same reason, the children "follow "and have the settlement of the mother"—according to the provisions of the second section as to the *first* and *second* mode of gaining settlements.

But it was further urged that, even if the wife and children must be considered as having their settlements in *Hollis*, still nothing can be recovered in this action, inasmuch as they have not been *removed* from *Sanford* to *Hollis*.—This objection was supposed to be founded on the decision in the case of *Cambridge v. Charlestown*, cited in the argument. Upon looking into that case, it appears to have been a question depending upon a clause in the *first* mode pointed out in the second section of the act of *Massachusetts* of 1793, *ch.* 34. which is in these words,—"And in case the wife shall be removed to her settle-"ment, and the husband shall want relief from the State, he "shall receive it in the town where his wife shall have her set-"tlement, at the expense of the Commonwealth."—As it was not intended by our Legislature, at the time they revised the poor laws of *Massachusetts*, that any paupers should be supported by the State, the clause above quoted was struck out, and not

enacted; inasmuch as it would not comport with the system which was adopted.

The result of this examination is, that the plaintiffs are entitled to recover the expenses incurred by them in supporting the *wife* and *children* of *Joseph Temple*; but *not Temple himself*—and judgment must be entered accordingly.

WITHAM *v.* PRAY.

The *Stat.* 1822, *ch.* 193. authorizing the filing of exceptions in a summary manner to any decision of the Court of Common Pleas, does not apply to causes brought there by appeal from the judgment of justices of the peace.

An appeal from the judgment of a justice of the peace having been made to the Court of Common Pleas, that Court, on opening the case, being of opinion that it could not be supported, ordered the plaintiff to become nonsuit; to which opinion he filed exceptions in a summary manner and brought the case here by appeal, pursuant to *Stat.* 1822, *ch.* 193.

But the Court dismissed the cause from the docket, observing that the statute authorized such summary proceedings only in cases originally commenced in the Court of Common Pleas. In cases brought there by appeal from the judgment of a justice of the peace, the remedy for the correction of errors, is by writ of error at common law.

J. Holmes, for the appellant.
Wallingford and *Butler*, for the appellee.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

CUMBERLAND.

MAY TERM,

1823.

SCOTT *v.* M'LELLAN & TURNER.

A supercargo cannot, in virtue of that capacity, bind his principals as acceptors of a bill of exchange drawn by himself, without express authority from them to that effect, communicated to, and relied upon at the time, by the party who received the bill.

It is not the *amount* of interest which determines the question of the competency of a witness. Any *direct* interest, however small, is sufficient to exclude him, even if it be only in the costs of the suit.

The drawer of a bill of exchange is not a competent witness for the indorsee, in an action against the acceptor, because of his liability to damages, interest, and costs, if the party calling him should not prevail.

ASSUMPSIT, by the indorsee against the defendants as acceptors of a bill of exchange, drawn on them by one *Bradshaw*.

At the trial, which was upon the general issue, the plaintiff, to prove the authority given by the defendants to draw the bill in question, offered the deposition of *Bradshaw* himself, who was appointed by the defendants supercargo of the ship *Romeo* for a voyage on their account, and drew the bill for payment of part of her return cargo of salt. This deposition was objected to, on account of the interest of the deponent in the present suit; and was rejected by the presiding Judge, on the ground that the deponent would be answerable to the holder for a greater sum if he failed to recover, viz. for the damages and other charges, than to the defendants, should judgment be rendered against them.

It was then proved by the plaintiff that in *February* 1820 the bill was presented to the defendant *M'Lellan* for payment; and that he acknowledged in behalf of himself and *Turner* that *Bradshaw* was agent for the voyage,—that they had received the salt for which the bill was drawn, and had in their hands a balance of about $300 due from them to *Bradshaw*, which they would pay and have indorsed on the bill;—but that they would not accept the bill, because *Bradshaw* had spent some of their funds for some *Nicaragua*-wood, which proved to be of little value.

The plaintiff also proved that in *April* 1820 another application was made to the defendant *M'Lellan* for payment of the bill,—when he acknowledged that they had about $300 of *Bradshaw's* money in their hands which they would pay; but would not accept it, nor pay any greater sum. This the plaintiff did not receive, and the bill was duly protested.

The Judge hereupon directed the plaintiff to become nonsuit, with leave to move to set it aside, if the whole Court should be of opinion that the deposition was improperly rejected, or that the other testimony was sufficient to support the action.

Emery, for the plaintiff.

The question is, whether the defendants, from the nature of *Bradshaw's* general authority, as agent for the voyage, are not *bound* to pay such bills as he might draw in the regular course of his employment, without a formal acceptance?

He was sent to purchase a cargo—without limitation of his authority, or of the means he should employ—the trust was not novel, but regular and ordinary—and the defendants have at no time denied his authority to draw, but only complained that he had imprudently vested some of their funds in goods of little value, thereby causing them a loss.

Now employers are answerable *civiliter* even for the *frauds* of servants, if done in the course of their employment. 1 *P. Wms.* 396. 2 *D. & E.* 97. The mere fact of the employment involves in itself authority to do all things usual and proper in the course of the business. But if special authority is necessary, it may be inferred from the fact of the money or goods coming to the hands and use of the principal. *Clark's*

Ex'rs v. Van Riemsdyk 9 *Cranch*, 153. *Rusby v. Scarlett*, 5 *Esp.* 76.

The principal may be liable for the act of his servant *without* authority, if the money be actually applied to his use. 1 *Ld. Raym.* 225. And if a previous employment and course of dealings establish the existence of a *general* agency, the principal is liable for acts done by the servant in the course of such general agency, even though the act be against the letter of particular instructions. *Whitehead v. Tucket*, 15 *East*, 400. *Howard v. Bailey*, 2 *H. Bl.* 618. 3 *D & E.* 757. *Polleys v. Soame*, *Goldsb.* 138.

Here, therefore, the defendants having received the salt, and adopted the agency of *Bradshaw* in obtaining the cargo, they are bound to adopt the means he lawfully employed to obtain it. They cannot be admitted to recognize part of the transaction and reject the rest. 2 *Str.* 859.

As to the interest of *Bradshaw*,—it was balanced, or nearly so. The chance of paying a little more *cost* in one case than in the other was not sufficient to exclude him. *Ilderton v. Atkinson*, 7 *D. & E.* 476. *Staples v. Okines*, 1 *Esp.* 332. For certain purposes the drawer of a bill of exchange is always admitted as a witness. *Chitty on bills*, 531, and the cases there cited. *Masters v. Abraham*, 1 *Esp.* 375. *Phillips' Evid.* 76. *note*. *Snee v. Prescott*, 2 *Atk.* 248. *Johns v. Pritchard*, 2 *Esp.* 507. *Poole v. Pousfield*, 1 *Camp.* 55. *Storer v. Logan*, 9 *Mass.* 55. *M'Leod v. Johnson*, 4 *Johns.* 126. *Wise v. Wilcox*, 1 *Day*, 22. *Cushman v. Loker*, 2 *Mass.* 106. 2 *Caines*, 77.

But he is not interested. If he had a right to draw, then, if the bill was drawn for the benefit of the defendants, they are holden at all events to pay. If the bill was drawn for *Bradshaw's* own accommodation, then the defendants stand in the place of his sureties, the act being done in the course of his employment; and they have a right to retain his funds sufficient to meet all their liabilities on his account.

At all events the plaintiff is entitled to recover on the money counts; for the case finds an offer to pay part after protest,—which is equivalent to a conditional acceptance for that amount, and is irrevocable. 1 *Camp.* 175. *Mitchell v. Degrand*, 1 *Mason*, 176.

Longfellow, for the defendants.

The cases cited on the other side either go on the ground of general agency, or are cases of subsequent assent, and so inapplicable to the present.

Bradshaw was interested, because he had drawn a bill which was not accepted. He was liable to the payment of damages and expenses, as well as of the bill itself, unless he could shew his authority to draw, which he had therefore a direct interest in proving. Had the bill been accepted, and protested for non-payment, the amount of his liability would have been different.

Further, the bill was made chargeable, not to the drawer, but to the "charterers of the ship *Romeo*." Had it been accepted, the defendants could not recover it of *him*;—and therefore he was interested to cause them to pay it at all events.

As to his agency,—no supercargo or master is authorized to draw on his owners, unless he is ordered to buy, without being furnished with funds, or is specially empowered. A different principle would be destructive of mercantile confidence. And in this case he did not draw as agent.

Nor are the defendants liable on the money counts. Here is no privity between the parties, except as parties to the bill; and there is an express contract by the bill, in which any implied contract is merged. If the plaintiff would avail himself of the money offered, he should have taken it, and protested for the rest. But he *refused* it;—and the action now stands on the bill alone.

After this argument, which was had at the last *November* term, the cause stood over for advisement, and the opinion of the Court was now delivered as follows, by

Weston J. Two questions are presented to the consideration of the Court. Is the action sustainable upon the evidence admitted? If not, ought the testimony of *Bradshaw*, the drawer, which was rejected by the Judge, to have been received?

The defendants are charged upon the common money counts, and as acceptors of a bill of exchange drawn by *Bradshaw* in favour of *James Munro* or order, and by him indorsed to the plaintiff. The bill was originally drawn in consideration of a

quantity of salt purchased of the payee by *Bradshaw*, as the agent of the defendants, which afterwards came to their use.

If they were liable to the payee for the value of the salt purchased of him by their agent, that obligation or liability could not be assigned to the plaintiff, so as to enable him to maintain the action in his own name; unless, of which there is no proof, the defendants, upon notice of such assignment, had expressly promised to pay the plaintiff as assignee. He cannot recover therefore upon the money counts; there being no legal privity between him, and the defendants. 1 *East.* 98. *Johnson v. Collings.*

If this action can be sustained at all, it must be upon the count, charging the defendants as acceptors. There was no direct acceptance of the bill, either in writing or by parol; for although the defendants, at two several times, offered to pay thereon the sum of three hundred dollars, which they acknowledged they had in their hands of *Bradshaw's*, they at each time expressly refused to accept the bill. There being no acceptance, or agreement to accept, after the bill was drawn, the plaintiff must rely upon an agreement to accept before it was drawn, either expressly made, or resulting from the relation in which *Bradshaw* stood to the defendants. If there had been an express agreement to accept this bill before it was drawn, such agreement is available to the party to whom it has been shewn, and who receives the bill upon the strength of it. *Johnson v. Collings* before cited. *Mason v. Hunt & al.* 1 *Doug.* 296. *Wilson v. Clement*, 3 *Mass.* 1. And it may be questionable whether the benefit of such special agreement is negotiable. But no express agreement to accept is pretended in the present case. Did it result from the relation in which the defendants stood to *Bradshaw?* He was their agent and supercargo. No case has been cited, nor can, it is believed, be found, tending to shew that in this capacity, he could bind his principals as acceptors of a bill which he might draw, without express authority from them to this effect communicated to, and relied upon at the time by, the party who received the bill.

But if such authority was incident to his character as supercargo, we have no evidence that it was exercised on this occasion. It is true that as drawer of the bill, he undertakes that

the drawees shall accept; but that is his agreement, not theirs. The bill does not purport to have been drawn by him as their agent. He signs his own name without any qualification; and no other person is responsible or can be charged as drawer. *Mayhew & al. v. Prince*, 11 *Mass.* 54. We perceive therefore nothing in the evidence admitted, which can have the effect to establish the liability of the defendants as acceptors.

We are next to inquire whether the deposition of *Bradshaw* was rightfully rejected, upon the ground of interest. It is contended that he stands indifferent between the parties. If so, his testimony is without doubt legally admissible. But such does not appear to be the fact. If the plaintiff prevails, *Bradshaw* will be liable to account to the defendants for the amount of the bill only. If they succeed, he, as drawer, will be answerable to the plaintiff, as holder, not only for the amount of the bill, but also for charges, damages, and interest. Upon principle there seems to be no good reason why a balance of interest should not have an equal effect to exclude a witness, as where he is interested to the same amount in favour of one side only. It is insisted however, that the balance of interest, if it exists, is to be disregarded; and express authorities to this effect have been adduced.

In *Dickinson v. Prentice*, 4 *Esp.* 34. the drawer was received as a witness to prove the hand-writing of the acceptor; but the objection there taken to his competency and overruled was upon another ground, namely, that if the jury found the acceptance to be a forgery, the forgery might be imputed to him, and he might be committed and tried for a capital offence. In a previous case, *Barbor v. Gingell*, 3 *Esp.* 60. the drawer was admitted as a witness in an action against the acceptor, and an objection to his competency, similar in principle to the preceding, was overruled. In *Storer v. Logan & al.* 9 *Mass.* 55. the drawer was called and admitted as a witness *for the defendant*, who was charged as acceptor. In the case of *Ilderton v. Atkinson*, 7 *D. & E.* 480. which was an action of *assumpsit*, the question was whether *A. B.* who had received the money due from the defendant to the plaintiff, received it in the character of agent; the Court held that *A. B.* might be called by the defendant to prove his agency, notwithstanding it was objected

that if he had received the money under a misrepresentation of his own character, the defendant might, if he failed in his defence, recover from him the costs of the action then depending, as well as the money. The Court in this case considered the witness as having no interest which would exclude his testimony within the general rule of law; and they did not place it upon the ground that his relation as agent brought him within any exception to that rule. And upon the authority of this case, the Court decided in the case of *Birt v. Kirkshaw*, 2 *East*, 458, that the indorser of a note, who had received money from the drawer to take it up, was a competent witness, in an action by the indorsee against the drawer, to prove, on the part of the defendant, that he, the indorser, had satisfied the note, notwithstanding he was liable to the defendant, if the plaintiff prevailed, for the costs of the action, but to the plaintiff only for the amount of the note, if the defendant prevailed.

Except the case of *Storer v. Logan*, where the drawer was called to testify against his interest, the preceding cases, especially the two last, are authorities in favour of the admissibility of the deposition rejected. And if the two last cases, where the balance of interest was expressly overruled, and disregarded, are to be considered as law, the deposition of *Bradshaw* ought to have been received. If no opposing decisions could be found, notwithstanding it might be difficult to reconcile these cases with general principles, their authority would have a strong claim upon our consideration.

It is not the amount of interest, which determines the question of competency. A small interest may have as much influence upon some minds, as a greater upon others. In order to exclude altogether testimony, which might be liable to that bias, by the general principles of the law of evidence, any direct interest, however small, renders the witness incompetent.

In an action by an infant plaintiff, his prochien amy or guardian are not competent witnesses for him, as they are liable to costs. *James v. Hatfield*, 1 *Strange*, 548. *Hopkins v. Neal*, 2 *Strange*, 1026. So a person, who has given a bond to indemnify the plaintiff from the costs of the suit, is incompetent. *Butler v. Warren*, 11 *Johns.* 57. If therefore a person liable to the costs of the action, but having no other interest therein, is in-

competent, of which there seems to be no doubt, his interest, and the influence it may have upon his mind, is precisely the same where he is answerable to one of the parties, if he fail, for the amount in dispute; but to the other party, if he fail, not only for that amount, but also for the costs. If we are bound to consider him competent in the one case and incompetent in the other, it must be upon authority, not principle.

But authorities of a more recent date are to be found, which appear to accord better with the general law of evidence than some of those before cited.

In *Jones v. Brooke*, 4 *Taunton*, 464. which was an action against the acceptor of a bill accepted for the accommodation of the drawer, it was decided that the wife of the latter was an incompetent witness for the defendant to prove that the holder received the bill upon an usurious consideration, upon the ground that the drawer was bound to indemnify the acceptor, who had become such for his accommodation, not only for the principal sum but also for the costs of the action, if it should be sustained. This decision was not predicated upon the rule laid down in the case of *Walton v. Shelly*, that a party to a negotiable instrument shall not be received as a witness to prove it originally void, which prevails here; but which had been previously overruled in the English Courts.

In *Townsend & al v. Downing*, 14 *East.* 565. the case of *Ilderton v. Atkinson*, before cited, was adduced by counsel to prove that a liability for costs on one side only did not render a witness incompetent; where he was equally liable to an action, in either event of the cause. *Leblanc* J. in reply said there was a late cause in C. B. where that matter had been questioned: and Lord *Ellenborough*, C. J. asked why there should not be an interest in costs, as well as on any other account.

Hubbly v. Brown & al. 16 *Johns.* 70. was *assumpsit* by the indorsee against the defendants, as indorsers of a note made by *Rufus Clap*, payable to their order. *Clap* was offered and, although objected to, received as a witness for the defendants to prove that, after the note had become due, a further time of payment had been given to him by the holder. Whether the witness was rightfully received or not, was a question referred to the consideration of the whole Court. *Spencer* C. J. after-

wards in delivering their opinion says, " if this was an accom-
" modation note, the objection to the witness was well founded;
" because if the defendants were rendered liable in this action,
" they would have a remedy over against the maker of the
" note, not only for the principal and interest, but for the costs."
And he cites with approbation the case of *Jones v. Brooke*, before mentioned.

Upon the whole we are all of opinion that the deposition rejected was inadmissible, upon the ground of interest; and the motion to set aside the nonsuit is overruled.

MEAD *v.* SMALL.

If the indorser of a note has protected himself from eventual loss by taking collateral *security* of the maker, it is a waiver of his legal right to require proof of demand on the maker, and notice to himself.

Nothing but *payment* of a note will destroy its negotiability. Nor will *this* when made by the *last indorser*, or when made by any *prior* indorser, if the *subsequent* indorsements are struck out before it is again put into circulation.

Assumpsit on a promissory note made by *Jacob Allen*, payable to the defendant, and by him indorsed in blank. It came before this Court upon exceptions filed to the opinion of the Court of Common Pleas, where, upon the evidence adduced, the plaintiff was nonsuited.

It appeared from the exceptions that the plaintiff called *Ebenezer Cobb*, who testified that *he*, the witness, received the note from the defendant, who indorsed his name on it in blank, in payment of a debt due from the defendant to him;—that it was at the same time agreed between them, the note being not then payable, that he should hold the note and receive payment in labour;—that *Allen* should not be sued, he having no personal property liable to attachment; but if *he* could not pay the note, it should be returned to *Small*, who held a mortgage of *Allen's* real estate as collateral and sufficient security for the amount;—that on the day when the note came to ma-

turity, or the day following, the witness went to a place where he understood the maker to be at work, to demand payment, but could not find him; but that about ten days afterwards he demanded payment of the maker, and notified the indorser forthwith of his refusal to pay;—that sometime after the dishonour of the note, the witness transferred it to the plaintiff, who filled up the indorsement as a transfer directly to herself, and thereupon brought this action to recover the amount.

Hopkins and *Perley*, for the plaintiff, made the following points.

1. Here was as much diligence used, as was necessary, under the particular circumstances of this case. No damage could happen to the defendant, he being fully secured by mortgage; and the injunction to receive labour in payment, shews that the payment was not to be expected till some indefinite period after maturity of the note. *Freeman v. Boynton*, 7 *Mass.* 483. *Bull. N. P.* 273. *May v. Coffin*, 4 *Mass.* 431. *Putnam v. Sullivan*, 4 *Mass.* 45. *Chitty on bills*, 87, 130, 131. *Bond v. Farnham*, 5 *Mass.* 170. *Crossen, v. Hutchinson*, 9 *Mass.* 205.

2. The right of the defendant to *notice* was waived. No notice to the indorser is necessary, unless he hazards the loss of his debt. But here no risk was incurred; and where the reason for notice fails, the right to it may be presumed to be waived. *Copp v. M'Dugal* 9 *Mass.* 1. *Lincoln and Kennebec bank v. Page*, 9 *Mass.* 155. *Chitty on bills*, 171, 172, 198, 162, *note.*

3. And this waiver enures to the benefit of the plaintiff. Where a negotiable paper is put into circulation, the rights of preceding parties pass into the hands of subsequent indorsees;—and any agreement to waive rights, is an agreement with every subsequent holder of the bill or note. Whatever has been done or omitted here, was done or omitted at the defendant's request; and it is unjust to permit him to take advantage of it. *Chitty*, 306. 13 *East.* 417. 1 *Campb.* 383. 1 *Taunt.* 224. 3 *D. & E.* 83, *note.*

Frost, for the defendant.

Here has been no diligence used in demanding payment of the note and giving notice to the indorser;—and upon the plainest principles governing mercantile transactions, he is therefore discharged. *Chitty on bills*, 212—214. *Hussey v. Freeman*, 10 *Mass.* 84. 13 *Mass.* 556.

Nor has he waived this right. The agreement with the person to whom he transferred the note, rested wholly on the expected diligence to be used in collecting it of *Allen*. If that could not be done, the note was to be *returned to Small*. But these terms were never complied with.

But if there had been such agreement to waive the right to notice, it is not transferable, being out of the course of mercantile business, and not within the principles of the law relating to negotiable paper.

This argument was had at the last *November* term, and the cause having been continued for advisement, the opinion of the Court was now delivered by

Mellen C. J. It is admitted that all the parties to the note in question reside within ten or twelve miles of each other, and therefore, according to numerous decisions, the demands made upon *Allen*, and the notice given to the defendant, were both ineffectual. No demand was made till ten days after the maturity of the note, and then, and not till then, was notice given to *Small*. If the demand had been made in season, still the notice to the defendant was very clearly too late. If there were no other facts in the case, the action certainly could not be maintained. We must then examine and see if there are any other facts which entitle the plaintiff to recover, without having made any demand on the maker, or given any notice to the indorser. It is contended by the plaintiff's counsel that the defendant by his own acts has waived his right to object to the want of such demand and notice. By examining the exceptions it appears that *Allen* was destitute of all personal property liable to attachment; that *Small* received and held a mortgage of *Allen's* real property, sufficient to secure the payment of said note; and which was made for that express purpose. These facts present a stronger case in favour of the

plaintiff, than those in the case of *Bond v. Farnham* which was cited by the plaintiff's counsel. There the property pledged was not a *sufficient* indemnity to the indorser, but it was all which the maker had. Here it is proved to be sufficient. The mere insolvency of the maker is no reason why the indorser should not be entitled to the usual proof of demand and notice.—*Woodbridge v. Brigham & al.* 13 *Mass.* 556. and *Hussey v. Freeman*, 10 *Mass.* 84. But if the indorser has protected himself from eventual loss by his own act in taking security from the maker, such conduct must be considered as a waiver of the legal right to require proof of demand and notice. And we are of opinion accordingly that the facts before us clearly shew such a waiver in the present case. It was also intimated, and briefly urged by the counsel for the defendant, that as the note in question was not transferred by delivery to the plaintiff until some time after the day of payment, and after it was dishonoured, the right of action which *Cobb* had to recover the amount due upon it from the defendant was a personal right, and not transferable to any one, and of course that the plaintiff cannot maintain this action as indorsee, even though the facts would enable *Cobb* to recover, in his own name; and we understand that the decision in the Court of Common Pleas rested on this ground. If such be the law, the nonsuit was proper, and must be confirmed.

Assignments of bills of exchange are usually made after acceptance, and before the day of payment. *Chitty on bills*, 112. But "the transfer of a bill or note may be made at any time after it has issued, even *after the day of payment.*" *Kyd*, 89. See also *Chitty on bills*, 113. 1 *Lord Raym.* 575. 3 *D. & E.* 80. 1 *H. Bl.* 88, 89. When a bill of exchange is drawn, and the drawee refuses to accept it, the common course is for the payee to return it to the drawer, or resort to him by action; and not to indorse it or dispose of it. But this usage does not apply to promissory notes, because "the making a promissory note is equivalent to an acceptance of a bill of exchange." *Kyd*, 68. A promissory note, when indorsed, assumes the shape, and in a legal contemplation becomes an accepted bill of exchange. 1 *Burr.* 676. If then an accepted bill may be indorsed after the day of payment, and consequently after it has been dis-

honoured by those who were bound to pay for it; for the same reason a promissory note, after its maturity, and after the liability of the maker and indorser has been fixed by legal demand and notice, may be indorsed a second time. And it does not seem to be denied that such second indorsement will give to the second indorsee as good a right of action as the original indorsement gave to the first indorsee, as against the maker of the note. The question is, whether the right of action is against him only, or exists against the indorsers also.

The statute of *Anne* makes no distinction, but gives to the indorsee the same remedy by action against the maker and the indorser of a promissory note, in like manner as in cases of inland bills of exchange. No case has been cited in support of the distinction which has been relied on, shewing that the indorsee of a promissory note cannot indorse it again or transfer it by delivery to a third person, and thereby enable such third person to maintain an action against the first indorser, as well as the maker. And we are not aware of any such distinction or limitation of the principle of law touching the negotiability of bills or notes. On the contrary the case of *Crossly v. Ham*, 13 *East*, 497. seems to prove that no such distinction exists. In that case *Clark* drew a bill of exchange on *Dickerson & Co.* for £450 at sixty days sight, payable to *Ham* or his order, who indorsed it at the same time, and it was passed in payment to *Parry*, whose agents caused it to be presented for acceptance on the 26th of *April*, 1804. The next day it was protested for non-acceptance. On the 6th of *June* following the bill came into the hands of the plaintiff, who was then informed that it had been dishonoured, and that he must take it under all existing circumstances, and liable to all the infirmities that attended it. After this dishonour of the bill, the plaintiff negotiated it again to certain persons, from whom he again took it up, and on the 29th of *June* the bill was presented for payment, and was finally dishonoured. *Lord Ellenborough*, in delivering the opinion of the Court, says, "The plaintiff took this bill "after this dishonour of it by the drawees. He therefore took "it with all the existing infirmities belonging to it at the time." He then proceeds and states what those infirmities were, viz.—an agreement made by the agents of *Parry* with *Ham*, by vir-

tue of which a substantial defence to the action was furnished; and accordingly the verdict, which was returned for the plaintiff, was set aside, and judgment entered for the defendant. No question was made as to the plaintiff's right to recover in consequence of his having become the holder and owner of the bill after its dishonour. The defendant prevailed *merely* on the ground of the special agreement of *Parry*, of which the plaintiff was apprised at the time he received the bill, and by which he was therefore bound in the same manner as *Parry* would have been, had the suit been in his name. That action was against the indorser, and so is the present; and in fact the two cases are in all essential particulars precisely similar. It is no objection to say that *Cobb's* right of action was not transferable;—the statute of *Anne* has altered the common law and made such right transferable; as well the right of action against the indorser, as the maker. It is also a common principle that in declaring on a promissory note, on which are the names of several indorsers, the holder of the note may strike out all the names but the first, and allege the note to have been indorsed directly to himself. It is therefore no objection in the present case, that the note was indorsed, and delivered by the defendant to *Cobb*, and not to the plaintiff, and that she received it by delivery from him. It does not appear that any thing, except payment of a bill or note will destroy its negotiable quality. Many cases shew that payment has that effect. *Chitty on bills*, 115. and cases there cited. *Boylston v. Green*, 8 *Mass.* 465. *Blake v. Sewall*, 3 *Mass.* 556. *Baker v. Wheaton*, 5 *Mass.* 509. and *Emerson v. Cutts*, 12 *Mass.* 78. But to this principle there is a limitation; payment will not destroy such negotiability when made by the last indorser of a note or bill of exchange; or when made by a prior indorser, if the subsequent indorsements are struck out before it is again negotiable, as settled in *Callon v. Lawrence*, 3 *Maule & Selw.* 95. and *Guild v. Eager & al.* 17 *Mass.* 615. In the present case, therefore, if *Cobb* had returned the note to *Small*, and he had paid *Cobb* the amount, still *Small* might again have put it in circulation; and *Cobb* might have transferred it also in the manner he did; because, by such negotiation, no new liabilities would have been created.

We have no doubt that the plaintiff may avail herself of the waiver of the defendant's right to call for proof of demand and notice, in the same manner as *Cobb* himself could, were he plaintiff; and we are all of opinion that the nonsuit must be set aside, and the cause stand for trial.

PIKE *v.* DYKE.

Where lots have been granted, designated by number, according to a plan referred to, which has resulted from an *actual* survey, the lines and corners made and fixed by that survey are to be respected, as determining the extent and bounds of the respective lots.

The rule that all the declarations of a party, or parts of an instrument, offered in evidence, are to be taken together, does not extend to the transactions of proprietors at different adjournments of the same meeting.

If at a proprietors' meeting a grant of land be made by vote to an individual, by which the estate passes, it is not competent for the proprietors at a subsequent adjournment to resume it. And when the grantee exhibits evidence of the vote on which his title depends, he does not thereby preclude himself from objecting to the admissibility of the doings of the same proprietors at an adjourned meeting, by which they have undertaken to vacate or modify the grant.

This was an action of trespass *quare clausum fregit*, for cutting down trees on the plaintiff's lot numbered *eleven*, in range *five east*, in the town of *Baldwin*.

At the trial, which was upon the general issue, the defendant admitted the plaintiff's title to lot numbered *eleven*, it having been drawn *January* 5, 1786, to the original right of *Charles Kilham*;—but he insisted that the land on which he entered was without the bounds of that lot, which, he contended, consisted of only one hundred acres.

The defendant exhibited, as chalk, an unauthenticated plan, purporting to be a plan of *Baldwin*, on which it appeared that in the *fifth*, and several other ranges of lots, the numbers began with *one*, and continued in regular series as far as *eleven*, and then followed number *twelve* and onward. The plaintiff

contended that number *eleven* extended from *ten* to *twelve*, in which case it would be twice as large as the other lots—viz. 200 acres. The defendant contended that it extended only half the distance from *ten* to *twelve*, which would give it the size of the other lots, being 100 acres;—the intermediate space being, as he said, an undrawn lot.

To shew that the piece of land in question was not an undrawn or proprietors' lot, the plaintiff read from the records of the proprietors of *Baldwin* the transactions of a committee of the proprietors *January* 31, 1797, appointed to ascertain what lots were yet unappropriated, and the doings of the proprietors upon the report of said committee, in which report no mention was made of lot numbered *eleven*, nor of any land adjoining it.

The plaintiff also read from the records the appointment and report of another committee to ascertain all the undivided lands, lotted or not lotted; which report, accepted at a meeting *September* 11, 1805, specified several lots and parcels of land, but not the land in question.

The *defendant* then offered to read from the same records the transactions of the proprietors and their committee at an *adjournment* of the *same* last mentioned meeting, held *September* 14, 1808 after several intermediate adjournments; to shew that they had discovered and reported the land in question as undivided land, and to satisfy the jury that the *proprietors never designed* that the lot numbered *eleven* should include the whole intermediate tract between *ten* and *twelve*, and that in fact it *was not so included*. To this evidence the plaintiff objected, and the Judge who presided at the trial refused to admit it.

There was other testimony introduced to satisfy the jury as to the original location of the lot numbered *eleven*; and the Judge left the cause to the jury upon the whole evidence,—instructing them that the determination of the cause depended entirely upon the original location of that lot, as laid down upon the face of the earth, prior to the drawing in 1786. If they were satisfied that the *locus in quo* was within the limits of that lot as located prior to 1786, they would find for the plaintiff,—otherwise, for the defendant;—and they returned a verdict for the plaintiff, which was taken subject to the opinion of the

whole Court, whether the evidence offered and rejected ought to have been admitted.

Longfellow and Greenleaf, for the defendant.

The defendant was not a trespasser, unless the *locus in quo* was part of lot numbered *eleven*,—and the only question to the jury was, what were the bounds of that lot?

The object of the evidence offered was, not to *defeat* a grant, —though the proprietors might lawfully, by a subsequent act, declare a draft null, if made erroneously and improperly, the lands still remaining in the hands of the proprietors;—but it was to ascertain the *extent* of the grant; and this could not appear without recurrence to the records and plan. If the plaintiff had not read from the records, the defendant might,—not to defeat the grant,—but to ascertain *how much* was granted.

And this evidence was admissible. The plaintiff had introduced it, and could not therefore complain;—and the whole ought to be taken together. It was a record of the transactions at the same meeting—relating to the same subject matter —reported by the same committee—being a continued investigation of facts, and reported from time to time, as fast as they could be ascertained.

Fessenden, for the plaintiff.

The question is not upon the *effect* of the evidence offered, but upon its *competency*. It is a record of transactions *three years after* those read by the plaintiff, and thus not coming within the rule of taking all the declaration of the party together;— and it was twenty-two years *after* the original draft of the lots in 1786. It is at most only the declaration of a grantor, made after the grant; and its admission would be destructive to rights vested under the prior location. Upon the same principle *any* draft of lots might be vacated at an adjournment of the same meeting, though years afterwards.

As a *confession* of the grantors, the part read by the plaintiff was good evidence against them, as it went to shew the construction which they had given to their own grant;—but the part offered by the defendant related to *another* time, when the proprietors had *an interest* to narrow their grant. To suffer

this would be to permit a grantor to control the deed after he had parted with the fee. *Bartlett v. Delprat*, 4 *Mass.* 702. *Clark v. Wait*, 12 *Mass.* 439. 1 *Johns.* 159.

WESTON J. delivered the opinion of the Court as follows.

It is admitted that from the records of the proprietors of *Baldwin*, it would appear that on the fifth of *January*, 1786, lot numbered *eleven* in that township was drawn to the original right of *Charles Kilham*. By these proceedings, the regularity of which is not questioned, a title to that lot passed to *Kilham*, to hold to him and his heirs in severalty, in the same manner as if a deed to that effect had been formally executed. It is further admitted that the title to this lot, thus drawn, is now in the plaintiff.

The jury have found that the place, where the trespass was committed, was within the bounds of lot numbered *eleven*, as actually located upon the face of the earth prior to 1786. Whatever, by this location, was included in number *eleven*, passed by that designation; as much as if the exterior bounds of the location had been specified with precision, and with reference to known existing monuments. Where lots have been granted designated by number, according to a plan referred to, which has resulted from an actual survey, the lines and corners, made and fixed by that survey, have been uniformly respected in this State, as determining the extent and bounds of the respective lots. It would be impossible to relax this rule, without producing the greatest confusion and uncertainty in almost every part of the country.

When an estate in lands has once been legally conveyed from one man to another, no declarations made or acts done by the grantor can impair or affect the interest vested in the grantee. Of this description was the evidence offered and rejected of the transactions of the proprietors of *Baldwin* in 1808, relative to the land in question, twenty-two years after they had parted with their interest in lot number *eleven*.

But it is contended that the evidence was admissible, inasmuch as it exhibited the proceedings of an adjournment of the meeting held in 1805, the transactions of which had been adduced in evidence by the plaintiff. It is a familiar and well

settled principle of law, that if part of an instrument be read in evidence by one party, the other has a right to require that the whole shall be exhibited; and if the declarations of a party are adduced against him, he has thereby a right to prove all that he said at the same time, although operating in his favour. The claim of the defendant however, in regard to the testimony rejected, does not appear, upon any fair analogy, to fall within this principle. Proprietors of this description oftentimes transact their business by regular adjournments, from time to time, for a series of years. In the present case three years elapsed between the proceedings of the meeting adduced by the plaintiff, and those attempted to be connected with it by the defendant, as transacted at a continuation of the same meeting through several intermediate adjournments. These successive meetings may derive their efficacy by relation to the day of their commencement; and in legal estimation, with a view to the regularity of their organization, may be considered as one meeting; but a subject taken up and finished, in which the rights of third persons are concerned, is not liable to be affected by what may be done at an adjournment on another day, which may be years afterwards. If on one of these days a grant be made of land by vote to an individual, by which the estate passes, it is not competent for the proprietors at a subsequent adjournment to resume it. And when the grantee exhibits evidence of the vote, upon which his title depends, he does not thereby preclude himself from objecting to the admissibility of the doings of the same proprietors at an adjourned meeting, by which they may have undertaken to vacate or modify the grant.

We are of opinion that the evidence of the transactions of the proprietors offered by the defendant, was rightfully rejected, and that there must be

Judgment on the verdict.

Note. The Chief Justice, having been of counsel, did not sit in this cause.

HALE & AL. v. CUSHING.

It is not necessary for the purchaser of lands sold for non-payment of the direct tax of the year 1813, in an action between him and the original owner of the land, to shew that the collector had given *bond* for the faithful performance of his duty, this being intended only for the security of the United States.

In such action the administration of the oath of office to the assistant assessor may be proved by parol;—the statute requiring a certificate of the oath to be filed in the collector's office being merely directory. See *Stat. U. S. July* 22, 1813, *sec.* 3.

ENTRY SUR DISSEISIN. The tenant claimed title under a sale, for non-payment of taxes, by the collector of the direct tax of the United States for the year 1813.

There was no *certificate* produced to prove that *Levi Quinby*, the assistant assessor, had been *sworn* as such; and the collector testified that he could not find that one had ever been returned to his office. The presiding Judge thereupon admitted *Quinby* to testify that he was sworn, either by the collector or a magistrate.

The assessment was offered in evidence, but there was no legal proof that the collector had ever given a bond, approved at the treasury department as the law requires, to qualify him to receive the assessment and proceed to its collection. To supply this defect of an authenticated copy of the bond, the defendant offered to prove by the oath of the collector that a bond was regularly given and approved. But the Judge refused to admit him, and rejected the assessment; and thereupon a verdict was returned for the demandants, which was taken subject to the opinion of the whole Court upon the questions whether *Quinby* and the collector were properly admitted to testify to the facts proved by them; and whether the assessment was rightly rejected.

Emery, for the defendant.

The statute requiring the collector to give bond is merely *directory*. It imposes no penalty, and its object was to protect the *United States* from losses by defalcation of the collector, and to secure the regular settlement of accounts, and transmis-

sion of monies to the treasury after they were collected;—not to afford any security to the persons taxed. Of course the giving of bond was not one of those acts *en pais* of the collector or assessors, which it was incumbent on private persons to prove. It does not belong to the regular history of the title. Whether the bond was in due form, or was approved by the comptroller of the treasury, or whether this security was given at all, are questions between the officer and the government, in which individuals can have no interest whatever. If these preliminaries be observed, it is well;—if not, the government have the power to remove him. But while he is continued in office, it is to be presumed that the public are properly secured against his neglect of duty. It is enough for individuals to ascertain that he is duly appointed to the office.

But if it was necessary that it should appear that a bond was given, the oath of the collector, for the purposes of *this trial*, was sufficient.

The oath to *Quinby* was properly proved by himself. The regular evidence was a certificate lodged with the collector;—but this being not to be found after diligent search, the secondary proof was the best the nature of the case would admit.

Fessenden, for the plaintiff.

The statute of the *United States* is to be construed in the same manner as those of our own State relating to similar subjects; and by these in all recent cases, the Courts require of the collector evidence of a strict compliance with the provisions of law. *Porter v. Whitney*, 1 *Greenl.* 306.

He has no authority to receive taxes till he is qualified by giving bond; and this is to be proved, like all other facts, by the best evidence, namely, an office-copy. The bond, if given, was filed in the proper office of the treasury, and without the production of a copy, it could not certainly be known that it was made conformable to law.

The certificate of the assistant assessor's oath should have been deposited with the collector. The provision of the statute in this respect is similar to that of our State law, requiring a copy of the assessment of taxes to be deposited in the clerk's office; both are designed for the information and

protection of the people, and both are necessary to the validity of the tax. But the evidence here is, not that this certificate was now lost, but that it had never been filed; and of course the officer was not qualified to act, and the assessment made by him was merely void.

By the Court. We think that under the circumstances of this case *Quinby* was properly admitted a witness to prove that he had been sworn as assistant assessor; it appearing that no certificate of the oath was on file in the office of the collector, and there being no proof that it had ever been returned to that office.—It is true that the third section of the act of Congress requires that such a certificate shall be so returned and filed; but this is directory;—and we do not think that when this requirement is omitted, a purchaser ought to suffer for it. There being then no record of the oath, parol proof is the next best evidence. A certificate of marriage under the hand of the officiating magistrate is no better proof of such marriage than the testimony of a witness who was present.

We think, however, that the decision of the Judge in rejecting the assessment, because there was no proof that the collector had given bond as required by the act before receiving such assessment, was incorrect. The bond is intended for the security of the *United States;* but as it regards the *purchaser* under a sale by the collector, and the original owner of the land sold, it is a subject of no importance.

The verdict therefore must be set aside, and a new trial granted.

TWOMBLY & AL. *v.* HUNEWELL, SHERIFF, &c.

Where an officer is charged by the original debtor with having lost or wasted a portion of the goods which he had attached, it is competent for him to excuse himself from liability by shewing that he has applied the amount to the use of the plaintiff, by paying with it the expenses of keeping the goods.

The expense of the safe custody of goods attached on mesne process, is a lien on the goods; and it is not affected by the allowance of a sum for that purpose by the Court in the taxation of costs for the original plaintiff.

THIS was an action of the case against the late Sheriff of this county, for the neglect of one of his deputies. The plaintiffs declared that the deputy, having a writ of attachment against them at the suit of one *Gay*, attached by virtue thereof a large quantity of goods,—that judgment was recovered in due course of law against them in favour of *Gay* for the amount of his debt, and costs of suit, "and thirty dollars allowed by "the Court in full of all expenses in keeping, storing and re- "moving said property attached, pending said suit, making "whole costs forty-nine dollars and sixty-five cents,"—that he duly sued out his writ of execution on the judgment,—yet the defendant and his deputies did not safely keep the attached goods while the suit was pending, and for thirty days after judgment, that they might be seised in execution, but within that time wasted, consumed and destroyed them, &c.

It appeared in evidence on the trial, that after the goods were attached, which were in the plaintiffs' store on one of the islands in the bay, they were left by the officer in the custody of one *Johnson*, at the request of *Twombly*, under whose control they were immediately placed again by *Johnson*;—that *Twombly* continued to manage the business and sell the goods as before, taking the money to his own use;—that the officer sometime after went to the store and caused an account to be taken of the goods attached and then on hand, and by agreement of all concerned, *Johnson's* accountable receipt was given up, and a new arrangement made. One *Hussey* was then appointed by the officer to superintend the attached property, of which he took charge accordingly; and with his permission *Twombly* sold a part of it, to the value of $175, for

which amount *Twombly* gave *Hussey* his note. All the residue of the property was either appropriated to the use of *Twombly*, or duly sold and accounted for on the execution, which issued on *Gay's* judgment against the present plaintiffs.

It further appeared that when *Hussey* was appointed to the charge of the goods, it was expressly agreed on the part of *Twombly*, that his services should be no expense to *Gay* or to the officer, and that *Twombly* should defray the whole of that charge. It also appeared that *Hussey* was retained in service longer than was anticipated, in consequence of *Twombly's* breach of his engagement to pay *Gay's* debt before judgment;—and that when the judgment was made up in favour of *Gay*, an allowance of thirty dollars was made in the taxation of costs, for the custody of the goods while under attachment, and for *Hussey's* care.

The plaintiffs contended at the trial for the right to recover the 175 dollars, which they said had never been applied to satisfy the judgment against them, which had been *otherwise* fully satisfied by *Twombly*. But the defendant resisted this demand, on the ground that the sum thus claimed had been wholly absorbed in the expense of the custody of the goods, and the wages of *Hussey*, for whose services *Twombly* engaged to pay.

The Judge who presided at the trial instructed the jury—that if they believed the testimony, *Twombly* had made a special agreement to pay all the expense incurred by *Hussey's* employment and services in the custody of the attached property;—that if those expenses exceeded what was expected, in consequence of the wrong and breach of promise on *Twombly's* part, of which they would judge, he could not avail himself of the objection;—that in the employment of *Hussey*, the officer and *Gay* were one;—that *Hussey* was in law the agent of the officer, to whom *Twombly* was indebted for the amount of his services;—that though the Court below, in the taxation of costs, had allowed the officer, as custody-fees, only thirty dollars, that could not affect his rights;—that the Court might justly consider the property attached as chargeable with that amount; and whether there was a special agreement on the part of *Twombly* to pay a larger sum, or not, was not a question to be *finally settled by them*. He further instructed them that

the payment of 175 dollars to *Hussey* was to be considered as a payment by the officer, his principal; and that therefore, as his wages amounted to more than that sum, exclusive of the thirty dollars allowed by the Court, it was competent for the officer to appropriate the money, thus in his hands, to his own indemnity, wherewith to pay *Hussey's* wages;—and that this was such an accounting for it, as to discharge him and the defendant from all liability in the present action; it would prevent circuity of action, and do justice to all concerned;—an object desirable in the present case, as *Gay* was admitted to have since died insolvent, and *Twombly* also to be destitute of any property.

The jury thereupon returned a verdict for the defendant, which was taken subject to the opinion of the whole Court upon the correctness of the Judge's instructions.

Todd and *Longfellow* now argued against the verdict. They insisted 1st. that the expense of keeping the goods was not a charge to the officer, and of course he could not retain for it. It was his duty to have removed them to a place of safety, in which case the whole expense would not have exceeded ordinary truckage and storage. The contract between *Twombly* and *Hussey* was wholly personal and private, with which the officer had nothing to do; and his payment to *Hussey* is entitled to no more favour than if, without request or assent, he had paid any other debt of the plaintiff.—But 2d.—if the sheriff had been liable to *Hussey* for his fees and expenses, yet this subject had been adjudicated by a Court of competent jurisdiction. The sheriff's fees and expenses are always chargeable, in the first instance, to the plaintiff, who taxes them in his bill of cost against the defendant. This taxation is wholly within the control of the Court which renders the judgment, and by that Court it has been finally determined in the present case without appeal or exception. *Sewall v. Mattoon*, 9 *Mass.* 535. *Blake v. Shaw*, 7 *Mass.* 506.

Emery and *Davis*, *è contra*, contended—1st. that the expense of keeping the goods was in the first instance a charge on the property itself, to be deducted by the sheriff from the proceeds

of the sales. *Tyler v. Ulmer*, 12 *Mass.* 168. And thus it is ultimately paid by the debtor. *Caldwell v. Eaton*, 5 *Mass.* 402. If the expenses in this case were large, it was the fault of *Twombly*. A keeper was necessary, because of the peculiar situation of the goods. 2d. As to the adjudication of the question by the Common Pleas it was void;—1. because that Court was not competent to decide it, for the expenses were a lien on the goods, which the Court could neither destroy nor impair; and 2d. because the question was not properly before them, the officer not being a party, and never having been heard. It would be a violation of one of the plainest principles of natural justice, to conclude the rights of any citizen, without affording him an opportunity to maintain and defend them.

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

The justice of this case is so evidently with the defendant upon the finding of the jury and the report of the Judge, that, unless some principle of law clearly forbids it, we feel disposed to confirm the verdict.

It is perfectly plain that an officer, who attaches personal property on mesne process, is bound to keep it safely in possession or under his control; and that he is answerable for the property, in case of loss by his omitting to take proper care of it.—This is the law where neither of the parties consents to any particular disposition of it.

If the plaintiff consents to any such particular arrangement or disposition, he cannot afterwards object to it or claim damages of the sheriff on account of it.—So if such disposition be made by the consent of the defendant and for his accommodation, he ought not to complain of the consequences of it.—In some instances an arrangement is made by consent of *both parties* and the *Sheriff;* as in case of attachment of personal property, where it is agreed by all concerned that the property shall be sold by the officer *before judgment.*—In such a case the officer is justified in carrying the agreement of the parties into effect.—In the case at bar the goods attached were, at the *request*, and for the *accommodation* of *Twombly*, left in his possession, under the accountable receipt of *Johnson;* and were after-

wards, by a general arrangement among all concerned, placed in the care and custody of *Hussey*, who was appointed by the officer as his agent to take care of the property; *Twombly* agreeing that the services of *Hussey*, thus appointed, should be no expense to *Gay* or the officer; but should be a charge upon himself.—The note for $175 was given by *Twombly* to *Hussey* for a part of the goods which he had sold by *Hussey's* permission; and all the residue of the goods attached, or their proceeds, have been accounted for, and have gone to the use and benefit of *Twombly;* and the question is whether the above sum of $175 has not *also* been so applied.—A payment of that sum to *Hussey* was in law a payment to the officer, his principal.—As the officer appointed *Hussey*, he was bound to pay him; and *Twombly* engaged to indemnify him by furnishing the funds for the purpose.—The officer then, having their funds to the amount of $175 in his hands, instead of paying them over to *Twombly* and then recovering them back again upon *Twombly's* agreement to pay them, retains them for his own indemnity and the payment of *Hussey's* wages. And why should he not be permitted so to do? It is true, that in an action of *assumpsit* the $175 note could not be offset against the plaintiff;—but in the present action, wherein the officer is charged with having lost and wasted the goods, we are well satisfied that it is competent for the defendant to excuse himself from liability, by shewing that he has applied that amount to the use and benefit of *Twombly*, by paying *Hussey's* wages with it, according to his express agreement, for services in guarding the property where it was left for *Twombly's* accommodation;—*unless* the taxation of the $30 by the Court is to be considered as a final adjustment of all claim on *Twombly*, beyond that sum, on account of *Hussey's* wages.—We do not consider this taxation as affecting the question.—The sum thus taxed, *Gay* was authorised to recover—it was a direct lien on the goods; and the Court would have had just the same power to allow that sum in the taxation, had there not been any express agreement of *Twombly* to defray *all the expenses of custody*, high as was their amount.—But it does not appear that the officer had any knowledge of this taxation, or ever consented that *that* sum should be accepted by him as an equivalent for the engagement of *Twombly*. We are very clear

that such a proceeding cannot deprive the officer of his claim, or settle his rights upon the contract.—We are all of opinion that, upon the evidence before us, the motion for a new trial cannot prevail.—There must be

Judgment on the verdict.

KIMBALL *v.* KIMBALL.

In an action of dower, it is not competent for the tenant to shew that the demandant's husband, under whom he claims, was only colorably seised, by virtue of a deed made to defraud the creditors of his grantor.

This was an action of dower, in which the seisin of the demandant's husband was the only fact in issue.

It was proved or admitted that one *Thomas Morse*, being seised of the demanded premises, conveyed them to *Christopher S. Kimball* the demandant's husband, by deed dated *April* 6, 1810, taking his promissory note for the price; that afterwards, on the 23d of *May* 1810, said *Christopher* sold and conveyed the same land by deed to *Cotton Kimball* the tenant, taking his note for the price, which note he transferred to *Morse* in payment for the land;—that *Morse* afterwards died, and his administrator recovered judgment upon the note against *Cotton Kimball*, and caused his execution to be extended upon the demanded premises, which were afterwards conveyed to said *Cotton*, by the administrator, before this action was commenced.

The tenant then offered to prove that *Morse*, at the time of making the deed to *Christopher*, was deeply in debt;—that the conveyance was made to defraud *Morse's* creditors, of whom the present tenant was one, his debt being more than seven hundred dollars;—and that *Morse's* estate was insolvent. But the Judge who presided at the trial rejected this evidence, and a verdict was returned for the demandant, subject to the opinion of the Court upon the question whether the evidence offered was admissible.

Emery, for the tenant, now contended that the verdict ought to be set aside. He argued that the seisin of *Christopher*, if such it could be regarded, ought not to support the claim of dower, because it was tainted with fraud. At best it was not actual, but merely technical and constructive. It was an unlawful attempt to defeat public justice and impede the due course of law, and ought not, even indirectly, to receive a judicial sanction. No consideration ever passed to *Morse*, until the estate became revested in his personal representative, by the extent. In equity the estate was never out of him, but was liable to sequestration for the benefit of his creditors, of whom the tenant was a principal one, and whose title, as derived from the administrator, deserves an unqualified preference before that of the demandant, founded, as it is, in fraud.

Longfellow, on the other side, was stopped by the Court, whose opinion was afterwards delivered as follows, by

MELLEN C. J. The defence in this action does not appear to be founded in justice or law.—Not in justice; because the tenant has never been disturbed by the claim of any one; but continued to hold the premises under the deed of *Christopher S. Kimball*, until they were taken on execution to satisfy a debt which he justly owed. The fee of the estate vested in him, and he continued to enjoy it until he realized its value; and yet he contends against the claim of his grantor's widow. On legal principles the defence is equally destitute of foundation. No man is permitted to deny the title under which he claims and holds. This is a common principle.—In *Bancroft v. White*, 1 *Caines*, 185. it was decided that a person holding under a conveyance in fee from the husband of the demandant in dower is estopped from controverting the seisin of the husband.—See also *Hitchcock v. Carpenter*, 9 *Johns.* 344. Besides, *Christopher S. Kimball* was seised in fact, under *Morse's* deed, at the time of the conveyance to the tenant, subject only to be ejected by some future action, in case it should be proved that the conveyance to the demandant's late husband, from *Morse*, was made to defraud his creditors.—There must be

Judgment on the verdict.

LITTLE *v.* THOMPSON.

In an action on *Stat.* 1821. *ch.* 161. *sec.* 1. the want of the owner's consent forms a constituent part of the offence, which must be alleged in the declaration, and proved at the trial.

After verdict, those facts *only* are presumed to have been proved, which are either alleged in the declaration, or are so connected with the facts alleged, as that the latter could not have been proved without proving the others also.

IN DEBT for taking and carrying away the plaintiff's logs, against the statute, the declaration was thus:—"for that the "plaintiff at, &c. on the first day of *May*, *A. D.* 1819, being "possessed of two hundred white pine mill-logs, and fifty Nor- "way-pine mill-logs, which he had turned and put into the "great Androscoggin river, above the falls in said *Lisbon*, with "his mark on the same, to wit, —— and being so possessed of "the same, the said *Thompson* at said *Lisbon*, on, &c. took, and "sawed, and cut up, and carried away and destroyed the said "logs, contrary to the statute in such case made and provided; "whereby an action hath accrued to the said *Little* to have and "recover fifty dollars for each and every log so sawed and cut "up, carried away and destroyed as aforesaid, and amounting "in the whole to ten thousand dollars.

"And for that the plaintiff at, &c. on the first day of *May*, "*A. D.* 1819, being possessed of two hundred white pine logs, "and fifty Norway-pine logs, other than those aforemen- "tioned, which he had turned into the great Androscoggin "river, above the falls in said *Lisbon*, marked, &c. and being "so possessed of the same, the said *Thompson*, at, &c. on, &c. "took, and sawed, and cut up, and carried away, and destroyed "the said logs, contrary to the statute in such case made and "provided; whereby an action hath accrued to the said *Little* "to have and recover," &c. The writ was dated *August* 28, 1821.

After verdict for the plaintiff, the defendant moved in arrest of judgment for the following reasons;—

1. Because it appears by both counts in the declaration that the taking, carrying away, and disposing of the logs therein set

forth was in the year 1819, when the several statutes of the Commonwealth of *Massachusetts* in this case made and provided were in full force; and it is not averred in said counts or either of them that the said taking was contrary to the form of said several statutes of the said Commonwealth, as ought to have been averred.

2. It is not averred, nor does it appear in and by either of said counts in the said declaration, that the taking, sawing, cutting up, carrying away and destroying the logs therein mentioned, was done and committed by the said *Thompson* without the consent of the said *Little*, the owner, as by law it ought to have appeared and been averred.

3. It does not appear that the said logs in either of said counts were suitable to be sawed into boards, or made or sawed into timber, shingles, joist, clapboards, or any other lumber whatever.

4. The said declaration is unsubstantial, and alleges no offence or cause of action against the defendant.

Orr, for the defendant, was about to argue upon the first cause assigned in the motion, but it appearing that the action was brought *after* the passage of the law of *Maine* on this subject, *this* ground was abandoned.

Fessenden, for the plaintiff, being called upon by the Court to support the verdict against the second cause assigned, contended that the exception was not material, the fault being cured by the verdict. It is the case of a good title, defectively set out. The want of the consent of the owner was a material fact, without proof of which he could not have had a verdict; and it must now be taken to have been proved at the trial. *Moor v. Bosworth*, 5 *Mass.* 306. *Pangburn v. Ramsey*, 11 *Johns.* 141. *Bayard v. Malcolm*, 2 *Johns.* 550. No greater strictness is required here than in the case of a tort at common law. The statute is not penal, because it does not create an offence where none before existed;—but it is cumulative and remedial, and ought therefore to receive a liberal exposition.

Orr, in reply, only referred to *Spears v. Parker*, 1 *D. & E.* 141.

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

The first cause assigned for arresting the judgment is abandoned; it appearing that the supposed offence was committed since the statutes of *Massachusetts* were revised, and the statute of this state was enacted. The only question is, whether the *second* reason assigned is sufficient. It seems to be admitted that, on demurrer, the declaration would be clearly bad, because it does not contain an allegation that the logs were taken, sawed, destroyed, &c. "*without the consent of the said Josiah Little the owner.*"

The words of the act of 1821. *ch.* 168. *sec.* 1. are, "if any "person shall take, carry away or otherwise convert to his own "use, *without the consent of the owner*, any log suitable to be "sawed or cut into boards, clapboards," &c. The want of the owner's consent forms a constituent part of the offence created by the statute.

There being no averment that the logs were taken and carried away with force and arms, all the declaration may be true; and yet they may have been taken and carried away by the consent of the owner, without the commission of trespass at common law. The only charge is, that they were taken, &c. contrary to the statute in such case made and provided; and there is no statute against such taking and carrying away as is alleged. The statute also says the logs must be suitable to be sawed or cut. Has the verdict cured these defects? It is a general rule of pleading that, in declaring upon a penal statute, the offence must be brought within the statute description, and it seems to be well settled. The argument is, that if the plaintiff had not proved that the taking was without his consent, he could not have obtained a verdict in his favour, and that therefore the Court must now presume that such fact was proved. Upon this point, the authorities do not perfectly agree; but the line of distinction between those things which *may*, and those which *may not* be presumed after verdict, has in modern cases been drawn more clearly than in some of the ancient decisions. The case of *Spears v. Parker*, 1 *D. & E.* 141. is a strong one to shew that the verdict has not cured the defects of the declaration. Judgment was there arrested because the exceptions in the enacting clause of the statute, on which

the action was founded, were not negatived by the plaintiff in his declaration. *Buller J.* says,—"As to its being intended "after verdict, nothing is to be presumed but what is express- "ly stated in the declaration, or what is *necessarily implied* from "those facts which are stated. I know of no decision against "this rule." The principles of law on this subject, as settled by the numerous cases in the books, are concisely stated in a learned note to page 186, 1 *Day's Rep.* which is understood to have been drawn up by Judge *Reeve.*

Some of the rules he lays down may be cited here. "The "total omission of any material fact, which is in no way con- "nected with any fact alleged, is not cured by verdict."—"In "many cases, facts entirely omitted are so connected with facts "alleged, that the facts alleged cannot be proved, without prov- "ing those omitted. For instance, where notice to the defend- "ant is necessary to be stated, if notice is stated, but the time "and place when and where given is omitted; as notice could "not be proved without proving the time and place, these are "presumed to be proved to the jury. But let the fact of *notice* "be omitted, and it could not regularly be proved, and, of "course, there is no room for presumption. And so it is in "every case where a fact is omitted which makes a part of the "gist of the action; and I think all the cases on the subject "will come within some of the rules and distinctions mentioned "above. See *Doug.* 683. 1 *Salk.* 364. 2 *Salk.* 662. 1 *D. &* "*E.* 141." "Another substantial reason why material facts "not stated cannot be presumed to have been proved, is, that "the jury are bound to find a verdict for the plaintiff when "they find all the facts stated in the declaration to be true; "and the plaintiff is not obliged to prove any more than he has "stated. The idea then which has been entertained by some "respectable lawyers, that after verdict the Court will presume "facts, not stated, necessary to support legal inferences, ap- "pears to be unfounded."

Several of the cases cited in the above note, and some of the illustrations, refer to actions at common law, as on contract, &c. And if these principles are applicable to that class of actions, *a fortiori*, they are to actions on penal statutes, although of a remedial character. The case of *Moor v. Bosworth* cited

by the plaintiff's counsel was decided upon the principle that a substantial offence was set forth, and the fact omitted must have been proved in establishing the facts which were stated; viz. the payment of the fees unlawfully demanded. But in that case, if the declaration had not contained an averment that the defendant wilfully and corruptly received the money, it would have been clearly bad, because those words are a substantive part of the description of the offence, as, in the case before us, are the words "without the consent of the plaintiff."

It is our opinion that the declaration is fatally defective, and that the defects are not cured by the verdict. And accordingly the

Judgment is arrested.

GORHAM *v.* BLAZO.

If the sheriff's return of an extent on land have no date, it will be presumed to refer to the date of the appraisement.

If there are inherent defects in the return of an extent on land, or if the land is appraised at too high a price, the creditor may waive the extent, at any time before acceptance of the land.

But by the acceptance of livery of seisin, from the sheriff, of the lands so taken, the creditor acquires a vested and perfect title to them, *as between him and the debtor*, which he cannot afterwards waive, and resort to debt on his judgment.

An extent on lands, accepted by the creditor, is a statute-purchase of the debtor's estate; and is good against a subsequent purchaser from the debtor, with notice. *Semble.*

This action, which was debt on a judgment, came before the Court upon a case stated by the parties.

It appeared that a writ of execution on the judgment had been sued out, and duly extended on the defendant's land. The return of the appraisers was dated *August* 3, 1820, in which they described the estate set off by metes and bounds,

as *having been shewn to them* by the creditor, to satisfy the execution; and the creditor, by an indorsement on the execution under his hand, acknowledged that he had received livery of seisin of the land in full satisfaction of the execution and fees of extent. The sheriff in his return, which was without date, certified the proceedings on the extent, and that he had left the creditor in quiet possession of the land.

The plaintiff on the fifteenth of *November* sent the execution to the registry of deeds to be there recorded, but soon after, and before it was recorded, he withdrew it from the office; and it never had been recorded, nor returned to the clerk's office.

It was further agreed that notwithstanding the extent, *Blazo*, the debtor, still continued to occupy the land, and afterwards, in *July* 1821, for a full consideration, bargained and sold the same land by deed with general warranty to one *William Blazo*, his brother, who has ever since continued to hold it by virtue of his deed; *Gorham* never having exercised any ownership or made any claim to the land, other than by receiving livery of seisin from the sheriff.

After this conveyance by the debtor, of the land extended upon, the plaintiff brought the present action.

Greenleaf, for the plaintiff, now contended that he had a right to waive the extent, and resort to debt on his judgment;—because—1st, the extent was not made matter of record, in the registry nor in the clerk's office, and so the title of the debtor was not divested;—*Ladd v. Blunt*, 4 *Mass.* 402. *Tobey v. Leonard*, 15 *Mass.* 202.—2d, the appraisers' return was defective on the face of it, as it does not state that the appraisers *went upon, or examined* the land; and that of the sheriff was without date;—*Tate v. Anderson*, 9 *Mass.* 92. *Bott v. Burnell*, 11 *Mass.* 165. *Lawrence v. Pond*, 17 *Mass.* 433.—3d, the plaintiff did not remain in possession, but the defendant entered upon him;—*M'Lellan v. Whitney*, 15 *Mass.* 139. *Gooch v. Atkins*, 14 *Mass.* 381.—4th, and subsequently sold the land;—and the plaintiff might also have waived his right under the extent, if he was not satisfied with the appraisal. *Judge Trowbridge's reading*, 14 *Mass.* 481, 482.

The debtor has consented to this waiver, by having since sold the land. In this particular this case differs from all those which have been cited, and is stronger. If this action cannot be maintained, the debtor gets his pay twice,—viz. by satisfaction of this debt, and by the proceeds of the sale,—but the creditor loses his debt without remedy. The defendant cannot be admitted to say that his deed was fraudulent, for this will be taking advantage of his own wrong.

Emery, for the defendant. The common learning on this subject is, that until the party had *accepted* livery of seisin, he might have deliberated, and have waived the extent, if he saw fit;—but not after he had deliberately accepted the land in satisfaction of his debt. The time to make his election was after the extent, but before the acceptance. Here, the party has made that election, and is concluded. If he has lost the benefit of his extent by neglecting to record it, this is his own laches. But whether this be the fact or not, is a question which cannot be tried in this action, it being between other parties.

As to the supposed defects in the return;—the whole proceedings may well be referred to the date of the appraisement; and the appraisers must be presumed to have entered on the land and examined it, since the contrary does not appear, and they have described it by metes and bounds.

At the ensuing August term in *Oxford* the opinion of the Court was delivered by

Mellen C. J. If the proceedings relating to the levy of the plaintiff's execution upon the real estate of the defendant have been such, as that the fee of the land on which the levy was made was transferred to the plaintiff; then the judgment declared on was thereby satisfied; and, of course, the present action cannot be maintained.—Several reasons have been assigned by the plaintiff's counsel, for the purpose of shewing that the levy was informal and ineffectual; and that by means of it no estate passed to him from the defendant.

1. It is urged that the levy is void and inoperative, for reasons appearing on the face of the return; because it is not

stated that the appraisers went upon the land to view and examine it, and because the return is not dated.

In answer to this objection we would observe, that the lands appraised are described carefully by metes and bounds; and it is stated that they were *shewn to them* by the plaintiff.—It would seem that they must have examined them; at any rate it does not appear that they *did not*.—It is said they could form no just estimate of the value of the estate without viewing and examining. Perhaps they could not so well judge of its value in any other mode; but still, whether they appraised the land at too high or too low a price, can be of no importance, if the levy and return appear in legal form.—As to the omission of a date to the officer's return, the reply is obvious.—At the head of the proceedings indorsed on the execution is the certificate of the magistrate who administered the oath to the appraisers, bearing date *August* 3, 1820.—The appraisers afterwards on the *same day* made their return;—and as the sheriff's return and the creditor's acknowledgement of livery and seisin delivered to him have no date, we must presume they have reference to the date before stated.—At any rate, the return must have been made and signed before *November* 15, 1820; because on that day the plaintiff sent the execution and return to the registry of deeds.

2. In the second place, it is contended that, as the execution and return have never been recorded in the *registry of deeds*, but were withdrawn therefrom by the plaintiff's order; and as the execution has not been returned to the *clerk's office*, he thereby waived all rights under the levy;—that no estate passed to him; and, of course, that the judgment declared on remains unsatisfied.

In answer to this objection it may be observed in the first place, that in the cited case of *Tate v. Anderson*, the action of debt was maintained on the ground that the proceedings under the execution were so defective that the plaintiff did not thereby acquire any title to the land set off.—On the same principle the action of *Gooch v. Atkins* was maintained. In both the above cases there was an *inherent defect in the return*, so that no title passed.—Therein *they* differed from the case at bar.—The next inquiry is whether, after the plaintiff had received seisin

and possession of the estate on which the execution had been extended, he could, by *refusing* or *omitting* to cause the execution to be *returned to the clerk's* office, and *that* and the *proceedings* thereon to be *recorded in the registry of deeds*, waive the levy and render all anterior proceedings null and void. Or, in other words, what facts are necessary to effect a conveyance of the fee from the *debtor* to the *creditor* by the levy of an execution.

The levy of an execution is often called a *statute purchase* of the debtor's estate,—subject to his legal right of redemption.—In the common case of a purchase by *deed*, the delivery of the deed by the *grantor* to the grantee, and his acceptance of it, are sufficient, as between them, to transfer the estate.

And in *McLellan v. Whitney* it was decided, that "where all "had been regular, except the timely recording of the levy in "the register's office, and there has been no intervening at- "tachment or levy or subsequent purchase, but the creditor "remains in possession, the levy is not void; but the title is in "him against the judgment debtor and his heirs.—The debtor "cannot avoid the levy for want of the record, that not being "for his benefit but the benefit of the public; nor can any "creditor or purchaser avoid it, having knowledge of the for- "mer levy."

In the case of *Ladd v. Blunt*, the defendant pleaded that the plaintiff had caused his execution to be levied on the defendant's land in full satisfaction of the same, as by the officer's return on said execution might fully appear.—The plaintiff in his replication alleged that there was no such record of the return on said execution of the levy on the real estate of said *Blunt*, *&c.*—*Blunt*, by his demurrer, *admitted* that there was no such record.—He, therefore, on his own shewing had no defence.—In the case before us the parties have agreed that the lands were appraised—seisin delivered to and received by the plaintiff—and a return of all the proceedings made on the execution.—In *Lawrence v. Pond* before cited, after noticing the particulars respecting the case of *Ladd v. Blunt*, the Court observe that, if *Blunt* had in his rejoinder alleged that the creditor *neglected* to record his execution and levy, the judgment might have been different from what it was.—In the above

case, *Lawrence* took the execution from the register's office, *after* it was recorded there, *before* it had been returned to the *clerk's* office, and ever after retained it in her possession.—The Court observe,—" But after seisin is delivered by the sheriff " under a lawful levy, *which divests the title of the debtor*, the " creditor cannot waive the levy and resort to his judgment." The only difference between *that* case and the one before us, is that in the former, the levy was *recorded in the register's office*, but not *returned to the clerk's office ;*—in the latter, it has neither been *recorded* nor *returned.*—The *record* and *return* must both take place, from the nature of the thing, *after* seisin has been delivered by the sheriff; and as, according to the decision in *Lawrence v. Pond*, the creditor *cannot waive the levy* after such delivery of seisin; it cannot be of any importance, whether the execution and levy be *recorded* in *one* office, and *returned* to the *other* ;—or whether *one only* of these particulars has been complied with ;—or whether *either* of them has been done ;—because the creditor has made his election and acquired his title by a *previous act*,—that of accepting seisin and possession from the sheriff;—an act, which, as before mentioned, gives him a good title *as between him and the debtor.* And as he may, by *recording* the execution and levy within three months, and the return of the execution to the *clerk's* office, perfect his title *as to all persons ;* so he may neglect to attend to these particulars and precautions, if he be so disposed; but must not complain of the consequences of his own acts or omissions.

3. It is further contended by the plaintiff's counsel that, as the defendant continued to occupy the land *after* the levy, and in *July* following sold the land to *William Blazo*, this furnishes proof of the *assent of the debtor* to the *waiver of the levy* by the creditor. But this argument is founded in part on the *assumed principle*, that a creditor *can* waive the levy, *after* having received delivery of seisin from the sheriff.—The defendant's counsel deny the correctness of the principle; considering the estate as transferred from debtor to creditor by the levy and delivery of seisin.—It is true, as stated, that Judge *Trowbridge* lays down the principle that a creditor may waive a levy if, in his opinion, the land is appraised too high; but he does not say he may do it *after* he has received seisin and possession.—There

are frequent instances of waiver *before*, and for satisfactory reasons.—But if the estate has passed to the creditor, it cannot be *waived*;—this would be passing real estate from one man to another by *parol*, contrary to the statute of conveyancing.—This acceptance of seisin and possession on the levy of an execution, may, not unaptly, be compared to an entry of a mortgagee to foreclose;—such entry is an election to take the land and hold it.—Though after this the mortgagor may redeem and regain the estate; yet if he do not so incline to do, the mortgagee has no election to waive the estate and resort to the personal security for its value.

It is urged that if this action cannot be maintained, the plaintiff is without remedy; inasmuch as the defendant has sold the land to *William Blazo*, and it does not appear in the case that he was conusant of the levy of the plaintiff's execution and acceptance of seisin and possession.

To this argument there are several answers.

If the plaintiff has lost his title to the land *as against strangers*, it is his own fault.—He should have caused the levy to have been recorded and the execution returned to the clerk's office. The rule, *lex vigilantibus*, &c. may well be applied to his case.

But, though it does not appear by the statement of the parties whether *William Blazo* knew of the levy at the time of his purchase or not; still it may appear and be proved in an action brought against him for the land. We cannot try *that* question in *this* cause; we are only to settle rights between *these parties*;—and if the estate has passed by the levy from the defendant to the plaintiff so as to make a good title in him *as against the defendant*, it is a sufficient answer in this suit.—Besides, if the plaintiff could not maintain a writ of entry against *William Blazo* for the land, on the ground of his being an innocent purchaser for valuable consideration and without notice of the levy; still it does not follow, that he might not maintain a special action on the case against *Ebenezer Blazo* the defendant for fraudulently conveying away the lands to *William* to defeat the levy. However, it is not necessary to decide this; nor do we mean to give any opinion on that subject. Our business is only to decide the present cause upon

those facts which belong to it;—and we are all of opinion that, for the reasons we have given, this action cannot be maintained.

Plaintiff nonsuit.

POTTER, JUDGE, &c. *v.* MAYO & ALS.

If in an action on a probate-bond, the writ, besides the usual indorsement of the attorney's name, be also indorsed with the name of the person who is entitled *in any capacity* to receive the money sued for, it is a sufficient compliance with *Stat.* 1821. *ch.* 51. *sec.* 70. though the party have only an *equitable* interest in the subject of the suit.

DEBT on an administration-bond. The writ was indorsed with the name of the attorney who brought this action;—and with this further indorsement;—"This action is brought for the "benefit of *John McLellan* of *Portland* aforesaid, *assignee* of the "amount of an invoice or bill of fish included in a judgment "recovered in favour of *Nathaniel Martin* against the executors "of *James Weeks* in the Supreme Judicial Court; and for the "benefit of *Charles Stewart Daveis* of *Portland* aforesaid, attor-"ney at law, attorney in the action, on account of his lien for "the costs contained in said judgment. The same being the "interest of *a creditor* assigned for the amount of said demand, "and subject to the lien of the attorney for the amount of his "bill of costs, fees, and disbursements aforesaid."

The defendants pleaded in abatement of the writ, that it had not, in addition to the usual indorsement of the name of the plaintiff or his attorney, the name of any *heir*, *legatee*, or *creditor* now living of the deceased person, as whose executors the defendants made and executed the bond declared on, for whose particular use and benefit this action is brought, written thereon.

The plaintiff replied, "that the said writ, in addition to the "usual indorsement of his attorney, hath also the names of *the* "*person or persons* for whose particular use and benefit the suit

" is brought written thereon, viz.—the name of *John McLellan* " of *Portland* aforesaid, *creditor in interest*, and the name of " *Charles Stewart Daveis* of said *Portland*, attorney at law, and " attorney *in the original action* aforesaid," and this, &c.

To this the defendants demurred, assigning for cause,—1. that the replication does not deny, nor confess and avoid the matter of the plea;—2. that it does not state *of whom* said *McLellan* is the creditor;—3. that it does not state that said *Daveis* is either *heir*, *legatee*, or *creditor* of the deceased, nor attorney to either.

Hopkins, in support of the demurrer, contended that the replication was bad, because it did not shew that the persons, for whose benefit the suit was commenced, were either heirs, legatees or creditors of the deceased. These are the only persons for whom the Judge of Probate is trustee, by the statute; and he has no powers except such as are expressly conferred. Courts, it is true, have protected the equitable interests of assignees of a chose in action, but it is always by a suit in the name of the assignor, and never by a suit in the name of the assignee, as is the case here. *Gould v. Newman*, 6 *Mass.* 239. *Porter v. Millett*, 9 *Mass.* 101. The executors cannot tell, and have no means of knowing, what objection the assignor might have to a recovery by *McLellan* in this case;—and should his assignor or his legal representative bring forward another suit for the same cause of action, a judgment in this case might not protect the present defendants against such subsequent suit.

Emery and *Daveis*, for the plaintiff. The indorsement, it is true, shews no interest of an heir or legatee; but it does shew the beneficial interest of a creditor, which is sufficient;—the statute only requiring that it should state the name of the person for whose *use* the action is brought. The interest of the party seeking the remedy is such as the law will always protect; it being an equitable assignment of a debt standing in judgment, to which the lien of the attorney is superadded, constituting him also a creditor. This lien is recognized by our own statute, the doctrine of which is expounded in *Baker v. Cook*, 11 *Mass.* 238.

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

By the 70th section of the act of 1821. *ch.* 51. it is provided that in a suit upon a probate-bond "the writ, in addition to the "usual indorsement of the name of the plaintiff or his attorney, "shall also have the name of the person or persons, for whose "particular use and benefit the suit is brought, written thereon." The defendants plead in abatement, that "the writ has not in "addition to the usual indorsement of the name of the plaintiff "or his attorney, the name of any heir, legatee, or creditor "now living, of the deceased person, as whose executors the "said *Mayo & als.* made and executed the bond declared on, "for whose particular use and benefit the action is brought, "written thereon." The first question is, whether the *plea* be good. The essence of it is, that the name of no heir, legatee, or creditor is indorsed thereon. But this is no objection, if the writ be indorsed as the law requires; and we have seen that it requires only the name of the person or persons, *for whose use* the action is brought, to be indorsed upon it. And it would seem, from the generality of the language used, that it was intended to embrace all persons, who might, *in any capacity*, be entitled to the money which is the object of the suit, whether, as heir, legatee or creditor, or as executor or administrator of an heir, legatee or creditor, or as assignee of either of them, and so entitled to the sum sued for. And certainly the executor or administrator of an heir might indorse a writ or a probate-bond to recover the share due to such heir, and yet the name of the heir need not and *cannot* be indorsed after his death. It must be that of his legal representative. And why not his *equitable* representative or assignee? The plea therefore is bad, as it only alleges that the writ is not indorsed in a manner which the statute does not require.

But if the plea had been good, denying that the writ had the name of the person or persons, for whose use and benefit the action was brought written thereon; still, the replication would have been a good answer to it, because it denies it by affirming that the names of two persons are written thereon; the one, a creditor in interest, and the other an attorney in the original action, as by the record of the indorsement appears, and prays an inspection of it. The existence of this record not being de-

nied, the demurrer admits it, and the facts appearing upon it. On inspecting it, we find that *McLellan* is assignee of *part* of the judgment recovered by *Nathaniel Martin* against the executors of *James Weeks* aforesaid, and that *Charles S. Daveis* was the attorney in the above action, having a lien for his fees contained in the judgment. Here is an equitable interest in both, which the laws ought to protect; and on this demurrer, the fairness and consideration of the assignment and the lien are not to be questioned. The action then ought to proceed, that the sum which is due from the executors may be recovered in the name of the Judge of Probate for the use of those, who have an equitable interest in it.

We adjudge the plea in bar bad,
and the defendants must answer over.

LITTLE *v.* LIBBY.

To constitute a disseisin, the possession of the disseisor must have been *adverse to the title of the true owner*, as well as open, notorious, and exclusive.

The parol declarations of a person in possession of land, are admissible to shew the character and intent of such possession, notwithstanding the statute of frauds.

This was an action of trespass *quare clausum fregit*, and was tried upon the general issue. The *locus in quo* contained thirty-five acres, as to a small part of which the defendant pleaded that it was his own soil and freehold, but no question of law arose upon this part of the case. The whole lot, of which the *locus in quo* was a part, contained originally one hundred and thirty-five acres.

The plaintiff proved the act alleged as a trespass; and that the whole lot, in the year 1780 was regularly conveyed to *Moses Little*, whose son and heir he was;—that the father made his will, which was duly approved *June* 4, 1793 whereby he devised this lot, with other lands, to the plaintiff.

The defendant proved that about thirty-seven years ago he caused the whole lot to be run out, and the lines and corners marked;—that about a year after, he made a fence round the lot, and removed his family upon it;—that he had dwelt there ever since, and had kept up and repaired the surrounding fences in the same manner as farmers generally do;—cultivating and improving a part, and claiming the whole.

To rebut this testimony, the plaintiff proved that in the year 1804 the defendant tendered to him the sum at which the whole lot had been appraised by commissioners, appointed for that purpose, among others, by the Commonwealth;—that in *October* 1809 the defendant purchased of the plaintiff one hundred acres of the lot, including that end on which he dwelt and had made his principal improvements;—that he received a deed of it, and had it surveyed by two successive surveyors, to his entire satisfaction. The plaintiff also proved by a witness that they both went to the defendant's house in 1808, being then on the business of examining the plaintiff's lands generally, in that town;—that on this occasion the defendant expressed his wish to purchase of the plaintiff the 100 acres above mentioned;—that the defendant a short time after, on several occasions, said that he wished to purchase the *residue* of the lot;—that six or seven years ago he repeated the wish;—that three years ago he said he did not own the land;—that on another occasion the witness, who was agent for the plaintiff, called on the defendant for rent, which he did not then *agree* to pay, but said it would do no harm to the plaintiff for *him*, the defendant, to improve the land;—that about eighteen months since, the witness told the defendant that he had heard he intended to hold the land by possession, which the defendant distinctly disavowed, declaring that he had no such intention;—and that in 1808 and 1816 the defendant made similar declarations of his wish to purchase the land in dispute in this action, as soon as he should be able so to do.

Upon this evidence the Judge who presided at the trial instructed the jury that the proof offered by the defendant seemed to establish the defence, by exhibiting those facts which have been considered as satisfactory evidence of a disseisin, if not controled or explained by other testimony; and that, of

course, it was necessary for them to inquire and decide whether the facts proved on the part of the plaintiff, did disprove or control the evidence exhibited on the other side.

He then informed them that to constitute a disseisin, the possession of the occupant must be *notorious, exclusive, and adverse to the title of the true owner;*—that the *intention* of the possession therefore was a subject of inquiry;—that if the possessor of land hold under the true owner, or in submission to his title, it would not be a disseisin;—that they must decide, from the facts proved, whether the defendant thus held possession adverse to the title of the plaintiff, or of *Moses Little*, or otherwise; and that they might gather his intention from all his conduct and declarations which had been proved;—that as he had purchased the 100 acres, and had repeatedly expressed his wish to purchase the 35 acres now in dispute, and disavowed all intention to hold or claim the lands by possession, they were at liberty from these facts to draw their own conclusions as to his intention in entering upon and occupying the lands in question;—that if they should believe that *Moses Little* was disseised at the time of making his will, then nothing passed to the plaintiff by the will, but as son and heir he took the land by descent; and if he had entered into the land so descended, and become legally possessed of it, then he might maintain this action;—that if at the time the plaintiff went to the dedefendant's house in 1808, the defendant had held the land by disseisin for twenty years next preceding, then he had a right to keep the plaintiff out, and to forbid his entry into and possession of the land; but that the defendant might, if he were inclined, give up the possession, and permit the plaintiff to enter and become possessed;—and that if they should be satisfied, from all the facts, that the defendant had admitted the right and title of the plaintiff, and voluntarily yielded up any possessory title of his own, then the possession of the plaintiff was sufficient to maintain this action.

Under these instructions the jury returned a verdict for the plaintiff; and the foreman, being interrogated by the Judge, said that the jury were of opinion that neither the testator nor the plaintiff had been disseised by the defendant. The questions of law arising upon the facts in this case as reported by

the Judge, were reserved, at the request of the defendant, for the consideration of the whole Court.

Orr and *Fessenden*, for the defendant, now contended that, upon the facts reported, the verdict ought to have been for the defendant. 1. There was no entry of the testator or of the plaintiff within twenty years after the *first* entry of the defendant; and so the plaintiff's right of entry was gone, and he was driven to his possessory action. The parol evidence of the defendant's declarations was inadmissible, as tending to defeat a title acquired to lands, and therefore contrary to the statute of frauds. It was enough that the defendant had the open and visible possession more than twenty years, which gave him *an interest* in the lands,—no matter whether defeasible or not,—and which could not be controled or defeated by mere parol. The tender in 1804 could have no effect, being at best but an offer of compromise. *Jackson v. Cary*, 16 *Johns.* 302. *Atkyns v. Horde*, 1 *Burr.* 119. *Fisher v. Prosser*, *Cowp.* 217. *Shaw v. Barber*, *Cro. El.* 830.—2. Nothing passed to the plaintiff by the devise, so as to enable him to maintain an action without entry; the ancestor not being seised. *Wells v. Prince*, 4 *Mass.* 64—67. Had the testator or the plaintiff conveyed the land to a stranger, the grantee must have brought a writ of entry in the name of his grantor.—3. If the defendant did not hold adverse to the plaintiff, he must be considered as his tenant at will;—in which case trespass will not lie till after half a year's notice to quit. A tenancy at will is to be treated as a tenancy from year to year; and the strongest case for the plaintiff which can be made out from the evidence is, that the defendant was in possession by his consent. *Flower v. Darby*, 1 *D. & E.* 159. 2 *Bl. Com.* 146—7. *Clayton v. Blakey*, 8 *D. & E.* 3. *Ward v. Willingale*, 1 *H. Bl.* 311. If any action would lie against the defendant, without notice, the remedy should have been in case, and not in trespass.—4. The deed of 100 acres does not estop the defendant from claiming title by possession to the residue of the lot. If one take a lease of his own land, he is estopped only during the term. *Co. Lit.* 47. *b.*—As to the finding of the jury that the defendant's possession of the land did not amount to a disseisin of the plaintiff,—this, they contended, was not

within their province to determine. Disseisin is a legal result from certain facts, and the jury should have been instructed by the Court whether the facts proved constituted a disseisin or not. It was wholly a question of law.

Longfellow, for the plaintiff, said that the rule of the cases cited upon the statute of frauds was, that the verbal declarations of a person having an interest in lands cannot be received to transfer that interest to another. It was never held that the declarations of a party in possession could not be received to shew the character of his occupancy. The jury were rightly instructed that to constitute a disseisin the possession must be *adverse*, as well as open and visible; and the principal question before them was, whether the possession of the defendant was of that description or not. The defendant himself best knew his own motives and intentions, and the relation in which he stood to the owner of the land; and his own declarations afforded the best possible explanation of his acts, which might or might not constitute a disseisin, according as he intended them at the time.

If then, the possession of the defendant was not adverse, the ancestor was seised at the time of making his will, and no entry by the devisee was necessary; the possession, in law, following the right, which descended to the plaintiff. But he did in fact enter in 1804, and also in 1808 when he conveyed the 100 acres.

The possession of the defendant was not a tenancy at will; but was rather a possession as servant of the plaintiff, or at most, a holding by sufferance. *Co. Lit.* 57. *a.* But if a tenant at will, he was not entitled to notice to quit, for such is not the common law either of England or this country. It depends wholly on statute. And if it were otherwise, yet here he is a trespasser for *cutting trees*, which is the act alleged in the writ and found by the jury. 3 *Cruise's Digest*, 554. 9 *Rep.* 106. *a.* 5 *Cruise's Digest*, 321. *Smith v. Burtis*, 6 *Johns.* 197. *Commonwealth v. Dudley*, 10 *Mass.* 403. *Propr's Ken. Purchase v. Springer*, 4 *Mass.* 416. *Boston Mill Corp. v. Bulfinch*, 6 *Mass.* 90.

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

The facts in this case present the defendant as having been for a long period in possession of the plaintiff's land; but at the same time as having for many years past disclaimed all pretence of title or claim to it; and expressly disavowing any intention of considering his possession as adverse to the rights of the plaintiff.—In such circumstances, nothing but an *unbending* principle of law ought to defeat the present action, and turn him round to another remedy; yet if such a principle, though purely of technical law, should be found applicable to the case, it must of course have its operation.—We will examine and see if such be the fact.

It is not necessary to give any other definition of disseisin than was given to the jury. To constitute a disseisin, the person claiming to have gained a title by disseisin must prove that his possession must not only have continued a sufficient length of time, but must also have been *open*, *notorious*, *exclusive* and *adverse*.—The evidence upon this point having been all laid before the jury, they have decided that neither *Moses Little* nor *the plaintiff* was ever *disseised* of the land in question. This fact being thus settled, the next inquiry is, whether there is any legal objection against maintaining the present action. In the case of *Wells v. Prince*, 4 *Mass.* 64. it was decided that, upon the death of a devisor, dying seised, the devisee becomes seised without an actual entry, where the lands are vacant and *without an occupant*, or in possession of a stranger under or *acknowledging the title of the devisee*. There are numerous facts in this case shewing the *acknowledgment* of the plaintiff's title by the defendant; and therefore an entry by the plaintiff in form, before commencing the action was unnecessary, as he was seised before such entry under the devise in his father's will. But even if this point admitted of any doubt, there was proof submitted to the consideration of the jury tending to shew that the defendant had yielded up to the plaintiff all possessory title, if he had any; and part of the instruction of the Judge to the jury was, that if they believed such proof, it might furnish evidence of what was in law an actual entry; and on that ground they might find for the plaintiff. Their verdict shews they *did* believe the evidence and find the fact. The plaintiff

therefore, being seised of the lands, and the acts of the defendant not amounting to a *disseisin*, they must be considered as no more than successive *acts of trespass* committed on the plaintiff's land. Such is the principle even where there *has been* a disseisin, which has afterwards been purged by an entry. Thus if *A.* six years ago disseised *B.*, *B.* may recover in an action of trespass for the first wrongful act which constituted the commencement of the disseisin; but *during* its continuance *B.* can maintain no such action for *A's* intermediate acts. But *B.* may *enter* and put an end to the disseisin; and may then maintain an action of trespass and recover of *A.* damages for all those intermediate wrongful acts; the entry of *B.* in such case having a *retrospective* operation, and giving *B.* the same rights during the whole period, as though he had not been disseised. In the case before us, the testator was never disseised;—and the plaintiff was never disseised; therefore no special entry was necessary to give the right of action.

But it has been urged that from the facts reported the Court must consider *Libby* as the tenant at will of the plaintiff; and therefore, as no notice to quit was given, an action of trespass will not lie against him. The relation of landlord and tenant is always created *by contract*, either express or implied. It cannot exist without such contract.—What is the evidence of such contract and tenancy in the present case? On a certain occasion—the time not particularly mentioned—the defendant was called on by the plaintiff's attorney to pay some rent for the use of the land. The defendant *made no agreement* to pay any; but said it would do no injury to the plaintiff for him (the defendant) to improve the land; and we hear of no reply or assent to this observation. On another occasion, he denied that he did *improve* it; which might be consistent with his occasionally depasturing it.—Here, then, is no *express* contract for the tenancy supposed.—From what facts then is the contract to be *implied?* A year and a half since, the plaintiff's attorney and the defendant are found conversing about the character of the defendant's possession; and he distinctly disavowing the intention, which had been imputed to him, of intending to *hold the lands by possession.*—Does this conversation recognize any such relation as is supposed? Does it not clearly

shew that neither party had any such idea? Does not the plea of *sole and freehold*, which the defendant has filed, shew that he claimed *at last* to hold the land by his possession, notwithstanding his repeated declarations to the contrary and propositions to purchase?—The case furnishes nothing but some uncertain and ambiguous facts relating to this point, from which the defendant's counsel have *inferred* the relation of *landlord* and *tenant*. But the present defence is not of such a character as to claim from the Court any solicitude to draw conclusions *against* the support of the action from *doubtful circumstances*; and infer a tenancy to *defeat* it, from acts and expressions which may, with perfect consistency, receive a different construction.

On the whole, we perceive no reason for sustaining the motion for a new trial; and there must be

Judgment on the verdict.

ATTWOOD, PLAINTIFF IN ERROR, *v.* CLARK.

What is reasonable time within which an act is to be performed, when a contract is silent on the subject, is a question of law.

IN a writ of error to the Court of Common Pleas, the case appeared to be thus:

It was an action of *assumpsit* by *Clark* against *Attwood*, and was tried upon the general issue. It appeared that the contract was made at *Portland*, *May* 27, 1818, concerning a crate of crockery ware sold on credit by *Attwood* to *Clark* the original plaintiff, the terms of which were—that the crate was an assorted crate, which had not been repacked since its importation;—that a discount of five per cent. was made from the price,—that the plaintiff was to take it home to his store in *Turner*, and on opening it, was to make an account or minute or memorandum of what should be found broken;—and that the defendant should pay the plaintiff for all the ware which should be found broken, over and above the amount of the five

per cent. deducted at the sale. Nothing was said concerning the *time when* the plaintiff should furnish the defendant with the memorandum of the broken ware.

It also appeared that on opening the crate at *Turner* about one fourth part of the ware was found broken. The plaintiff marked the quantity broken on the margin of the invoice or bill of parcels which he received from *Attwood*, against each respective kind of ware; which bill was produced at the trial.

This bill thus marked the plaintiff in *May* 1819 delivered to a person resident in the same town with himself, and who was also a trader and had originally introduced him as a customer to *Attwood*, and witnessed the bargain, to present to him for adjustment according to the original contract;—but the witness did not find him at his store, neither at that time, nor at the several times at which he afterwards called, during two years in which he kept the bill;—nor did the witness leave any message at the store of the defendant relating to the bill, but after about two years he returned it to the plaintiff.

The plaintiff also proved that in *August* 1822 he handed the same bill to another witness, requesting him to present it to the defendant and demand payment of the sum marked thereon as the amount of the broken ware; which the witness did,—telling the defendant that the demand was for the broken crockery mentioned on the bill, and that the plaintiff was willing he should take the bill and examine it for himself, and make a new calculation if he was dissatisfied with that already made; —to which the defendant replied—" how do I know but it was broken by running against a tree or a shed ?"—but said nothing as to the *lateness* of the demand.

The Judge who tried the cause in the Court below left it to the jury to decide, as a question of *fact*, whether it was a part of the contract that the plaintiff should furnish the defendant with an account or memorandum within a reasonable and convenient time; and if it was, then a reasonable time had elapsed before the demand;—but if they believed that it was not a part of the contract that notice should be given within a convenient time, then they might return a verdict for the plaintiff, in case they should also find that the figures in the margin of the bill were such a memorandum as, within the meaning of the contract,

the plaintiff was bound to have made. The jury found for the plaintiff; and the defendant thereupon filed exceptions at common law to the opinion of the Judge.

The errors assigned were, in substance, that the questions left to the decision of the jury were questions of law, which ought, therefore, to have been settled by the Court. Plea *in nullo est erratum.*

Fessenden and *Deblois*, for the plaintiff in error.

The time in which the contract of *Attwood* was to be performed not having been fixed by the parties, the omission is supplied by the rule of law, that it is to be done in reasonable and convenient time. 1 *Comyn on Contr.* 3, 4. 1 *Com. Dig. Assumpsit, a.* 3, 4. 1 *Rol. Abr.* 14. *l.* 50. It is a case, in which the jury are to receive this part of the contract from the bench, as a matter of law, instead of being left to find it as a question of fact. *Tucker v. Maxwell*, 11 *Mass.* 143. *Thompson v. Ketcham*, 8 *Johns.* 189. And it stands on the same principle with indorsed notes and bills of exchange, where the time of demand and notice is regulated wholly by legal intendment, when it is not otherwise settled by the parties themselves. *Hussey v. Freeman*, 10 *Mass.* 84. 1 *D. & E.* 167. *Chitty on bills*, 164, 197—9. *Freeman v. Haskin*, 2 *Caines*, 369. 6 *East*, 3—16. *Tidd's Pr.* 388. 4 *Com. Dig. Pleader, c.* 74. 16 *Vin. Abr. tit. Notice* 5.

The promise of *Attwood* was also *dependent* on the previous condition, that *Clark* should furnish him with a memorandum or account within a reasonable time. Until thus furnished, it was not possible for him to know what he was bound to pay. The time for performance of this part of the contract, on the part of *Clark*, not having been fixed by the parties, was also limited by the law to a reasonable and convenient time. 1 *Selwyn's N. P.* 94, 95. *Ranay v. Alexander*, *Yelv.* 76. And until such an account was taken and presented to *Attwood*, he was not liable to pay; nor did the statute of limitations begin to operate upon the contract till that time; because then, and not before, did the right of action against him accrue. *Thorpe v. Thorpe*, 1 *Salk.* 171. *Johnson v. Read*, 9 *Mass.* 78. *Wilson v. Clements*, 3 *Mass.* 1.—Now the lapse of four years, before the bill ap-

pears to have been presented to *Attwood*, was an unreasonable delay; and to sanction it would impose on the transactions of merchants, and especially on commission-business, a degree of uncertainty and delay, in its consequences most embarrassing.

Nor was the demand made in *August* 1822 in itself such as the original defendant ought to be bound by. The witness who made it was not furnished by *Clark* with any explanation of the paper; and the memorandum on the face of it was not intelligible, nor was it signed by *Clark*. It being a special confidence reposed in *Clark*, a *personal* notice by *himself* was indispensable.

Greenleaf and *W. K. Porter*, for the defendant in error.

The questions whether, by any express contract, *Attwood* engaged to pay money in any event to *Clark*,—and whether the memorandum exhibited was such as the parties intended, —were matters of fact, to be found by the jury. Another question was, whether the parties themselves fixed any time within which this memorandum was to be exhibited,—and if any, then *what* time? This also was a question of fact. It might have been *expressly* agreed by *Attwood* that he would pay whenever, sooner or later, it should be demanded;—like the case of a note made payable on demand. And the jury had good ground to believe this from the evidence of the witness who testified that when he presented the memorandum and demanded payment, *Attwood* did not object that it was too late;—thus plainly admitting that the demand was not out of season. Having given one reason why he refused payment—specifying the supposed *cause* of the damage,—it is a legal conclusion that no other existed. If it did, he waived it.

If no time was limited by the parties for the exhibition of the memorandum, then the only remaining question was, *when* the plaintiff ought to have exhibited it?—and this was in effect decided by the Judge. The obvious meaning and import of his language to the jury was,—that if they should find that no time was expressly limited by the parties for the delivery of the memorandum, but that it was left to the *legal period of reasonable and convenient time*, then *that period* had elapsed. He evidently adverted to the term "reasonable and convenient time," as a term well known and defined in the law; and such is the substance of his language to the jury.

The object sought by the plaintiff in error is to deprive the defendant of a verdict well founded in equity and justice. The case of *Wilkinson v. Payne*, 4 *D. & E.* 468. shews how far the Court will go to support a verdict found for the plaintiff upon a presumption even *contrary* to evidence, where they were satisfied that he was entitled, in conscience, to recover. See also *Booden v. Ellis*, 7 *Mass.* 507. *Goodrich v. Walker*, 1 *Johns. Ca.* 250.

MELLEN C. J. at the succeeding *November* term delivered the opinion of the Court.

The statement of a few plain propositions and principles will simplify the cause and lead to an easy decision.

If the contract on which the original action is founded had been *in writing*, and *no time* had been mentioned within which the account or memorandum of broken ware was to have been furnished by *Clark* to *Attwood*, the law would have supplied what the parties had omitted; or rather would have decided *when* the memorandum should have been furnished; i. e. *in a reasonable time*. In such a case the *question of time* would be purely a matter of *legal* construction. We need not cite authorities in support of this position.

The contract on which the action *is* founded is a *parol contract;*—and it appears on the exceptions that the only witness by whom it was proved, and by whom all the terms were distinctly stated, was introduced by the original plaintiff; and he testified also *that nothing was said* "about the time when the "plaintiff should furnish the defendant with the account, min-"ute or memorandum aforesaid."

It then appears, that as to *this particular*, there was *no contract* between the parties, made and expressed by them.

The contract thus made and undisputed as to its terms, stands on the same foundation, in point of construction, as though it had been reduced to writing; and the law must complete it in the same manner, by deciding *as to the time* within which the memorandum of broken ware was to have been furnished; viz. it was to have been within a *reasonable time*.

What *is* a *reasonable time*, within which an act is to be performed, when a contract is silent on the subject, is a *question of law*.

The Judge instructed the jury that, if they believed it was no part of the contract that notice should be given within a reasonable time, they might return a verdict for the plaintiff.

He also instructed the jury that a reasonable time had elapsed before the demand of payment.

Now as it appears by the exceptions that no time was mentioned in the contract, within which the memorandum was to be furnished, the *law fixed the time*, as we have before stated, viz. a *reasonable time;* and such time had elapsed before demand made, according to the Judge's opinion;—there was, therefore, nothing as to this point for the jury to decide; the contract as proved was not denied; and no fact existed from which they would have had a right to presume that the time for furnishing the memorandum *did* form a part of the contract.

Such then being the contract, the question as to reasonable time being a question of construction for the Court as matter of law; as in cases of demand and notice in actions against indorsers of promissory notes; and such being the opinion of the Judge as to reasonable time; we think his instructions to the jury on this point were incorrect, because he informed them that they might find a verdict for the plaintiff if they believed—what they could not help believing and were not at liberty to disbelieve upon the evidence—that it was *not a part* of the contract that notice should be given within a reasonable or convenient time. The very circumstance thus mentioned shows that the jury had nothing to decide on this point. If reasonable time did form a part of the contract, then the Judge stated that notice was not given *within* such reasonable time. If it *did not* form a part of the contract, the jury had no concern with the question. It was the business of the Court exclusively, to give a legal construction to the contract on that head, and thus complete the contract by annexing what the law implied, viz. that the memorandum should have been furnished and the demand made on *Attwood* within a reasonable time. Had he done this, the principle of law which he clearly stated to the jury, would have led him further to instruct them that on the facts disclosed, and on legal principles, the action was not maintainable. On this ground, we think the judgment is erroneous; and being satisfied on this point, it is not necessary for us to pay any par-

ticular attention to others, or to the arguments which have been urged relating to them. The inquiry whether there was a waiver of objections on account of the delay to furnish the memorandum, seems not to have been submitted to the jury's consideration.

The judgment is reversed; and a new trial may be had at the bar of this Court.

FROTHINGHAM *v.* DUTTON & ALS.

PRACTICE.—The defendant, in an action in the Court of Common Pleas of which it has not final jurisdiction, is not bound to disclose the matter of his defence, but is entitled to have a verdict returned, and to appeal.

The power of the Court, in an action of which it has final jurisdiction, to order the entry of a default, is derived from the consent of the party.

THIS was *assumpsit* by the plaintiff as indorsee of a note of hand for three thousand dollars, against the defendants as makers; to which they pleaded the general issue. The cause being called for trial in the Court of Common Pleas, the Court, on motion of the counsel for the plaintiff, called on the counsel for the defendants to state whether they had any substantial defence to the action. He thereupon stated that he had recently received a letter from one of the defendants, instructing him to appear and answer to the action, and if judgment should be rendered against them, to enter an appeal to the Supreme Judicial Court; but that the letter did not contain the developement of any ground of defence to the action, other than to put it to the jury and appeal. The Court then demanded of the defendants' counsel if he *believed* that his clients had any substantial defence to the action,—to which the counsel declined to answer;—observing that he had no means of knowing, except from the letter, from the tenor of which he said it might reasonably be inferred that they had a substantial defence. The Court thereupon ordered the defendants to be called, which being done, their counsel persisted to answer in their behalf, and claimed for them the right to a trial by the jury.

But the Court refused to permit them to answer, and to put the cause to the jury to be tried; and ordered the clerk to enter on the record that the defendants did not appear but made default; which the clerk entered accordingly. The cause came to this Court upon summary exceptions to the proceedings in the Court below, filed by the defendants pursuant to the statute.

Fessenden and *Deblois*, for the plaintiff.
Greenleaf, for the defendants.

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

As no issue was *joined* in the Court of Common Pleas, the defendants could not by law appeal to this Court. Their only remedy was by exceptions in the manner pointed out by *Stat.* 1822. *ch.* 193. *sec.* 5.; and this remedy has been pursued. The Court below directed a default to be recorded, although the defendants appeared by their attorney—had pleaded the general issue—answered when they were called, and claimed a trial by jury. Under these circumstances we are of opinion that the defendants ought not to have been defaulted. They had a *constitutional* right to a verdict of the jury, and to call on the plaintiff to prove, before them, the demand on which he founded his action. They had also a *legal* right, if a verdict had been returned, and judgment entered against them, to bring their cause to this Court by way of appeal, and have another trial here, if they so inclined. We are therefore of opinion that the default must be set aside, and the cause stand for trial at the bar of this Court.

We have no doubt, from the facts of the case, that the course pursued in the Court of Common Pleas was considered as fully justified by a usage and mode of proceeding in *this* Court, with respect to actions in which the counsel for the defendant, when called on by the Court, cannot say he has been instructed to make a defence, or that he believes there is one. Where counsel cannot state this, the Court have considered that there could not, in any probability, be an intention to defend the action. Relying on professional integrity and candour, the Court ask the questions; and when they cannot be answered in the affirmative, the same integrity and candour are considered as

dictating silence on the part of the counsel; and this silence is deemed an acquiesence in the opinion of the Court, and in the default which they order. We do not say that this course would be pursued where the defendant's counsel insists on a trial, files his plea, and claims a verdict.

But though we have adopted the course just mentioned, in *this* Court of *final* jurisdiction; the same reasons do not exist for it in the Court of Common Pleas, in those actions which by law may be brought to this Court by appeal. A defendant may have a good defence, but may choose to withhold the knowledge of it from the plaintiff, till tried on the appeal;—or he may not be prepared,—or not have given such explicit instructions to his counsel as to enable him to disclose the merits of his defence. But it is to be presumed that no gentleman of the profession, in either Court, will ever attempt to mislead them by appearances merely, if he knows or verily believes that there is no reality, comporting with such appearances.

POTTER, JUDGE, &c. *v.* WEBB & ALS.

A decree of the Judge of Probate, not appealed from, in a matter of which he has jurisdiction, is conclusive upon all persons.

In a *scire facias* brought to have further execution of a judgment rendered upon a Probate bond, for the amount of a dividend decreed since the judgment, a plea by the sureties in the bond that the decree was obtained by fraud and collusion, without naming the parties to the fraud, was held bad.

THIS was a *scire facias* on a judgment of this Court at *May* term 1814, for ten thousand dollars, being the penalty of a bond given by *Joshua Webb* and *Susanna Webb* as administrators on the estate of *Jonathan Webb*, the other defendants being their sureties. In the writ it was recited that, at a Probate Court on the fourth Wednesday of *April* 1819, a further dividend of the sum of $5250 was decreed by the Judge to be made among the heirs of the deceased, being part of the balance of an account then settled by *Joshua Webb* as sole administrator, of which five hundred dollars was decreed to be paid to *Samuel D.*

Pike and *Mary* his wife, in her right, and for which sum this suit was brought to obtain execution, in their behalf.

Joshua Webb entered no appearance to the action. *Susanna*, with her husband, she having become a feme covert since the rendition of the judgment in 1814, appeared, and with the other defendants pleaded—

1. That there was no such decree; which was traversed, with a profert of the record, and issue taken thereon.

2. In bar of further execution—that in the last account of said *Joshua Webb*, on which the decree was founded, there were errors and mistakes, he being charged with rents of real estate for which he was not chargeable as administrator; and with sundry notes of hand and bills of exchange as due from himself to the deceased, for which his sureties were not liable.

To this the plaintiff demurred, assigning for cause—1. duplicity, in alleging divers errors and sums for which the administrator was not chargeable, and other sums for which his sureties were not chargeable, without any averment that the administrator was not liable for these last sums;—2. because pleaded by the administrator and his sureties jointly, whereas if good at all, it was good for the sureties only;—3. because double, informal, &c.

3. In bar of execution beyond the sum of $291,12, because the sureties in the bond had paid to heirs and creditors, and for charges of administration, the whole penalty except that sum.

To this the plaintiff demurred, alleging for cause, that it shewed no payment of interest beyond the penalty of the bond, nor denied that any was due;—and that it did not answer the whole declaration; and was informal, &c.

4. In bar of further execution, because in the account on which the decree was founded, *Joshua Webb* was charged erroneously with large sums which were not due from him, and for which his sureties were not liable.

To this the plaintiff demurred—assigning the causes stated in the demurrer to the second plea.

5. In bar of further execution, because, in the account on which the decree was founded, *Joshua Webb* was fraudulently charged with divers sums of money not due from him to the estate, and for which his sureties were not liable.

To this also the plaintiff demurred, alleging, among other causes, that it contained no averment, that said *Joshua* was charged by the fraud or collusion of any heir, legatee, or creditor of the deceased, nor of any other person but himself.

Hopkins and *Anderson*, in support of the demurrers, argued—1. that the decree of the Judge of Probate, having been made after public notice, upon a matter within his exclusive jurisdiction, and not appealed from, nor reversed, was now conclusive and binding upon all persons. *Hunt v. Hapgood*, 4 *Mass.* 117. *Sumner v. Parker*, 7 *Mass.* 83. *Smith v. Rice*, 11 *Mass.* 507.—2. that the third plea was bad, because it admitted a part of the debt to be due;—*Fitzgerald v. Hart*, 4 *Mass.* 429; and because it does not allege payment of interest on the judgment;—*Powel on Mortg.* 405. 1100.—3. that the fifth plea was bad in not naming the parties to the alleged fraud.

Longfellow and *Greenleaf*, for the defendants, observed that the case of the sureties presented a strong claim in equity; the administrator being insolvent, and having, without their knowledge, settled an account and obtained a decree distributing a large sum, partly to himself as an heir, on items of account for the most part not chargeable to an administrator. They urged also that as the record now shewed the marriage of the feme administratrix since the rendition of judgment, the bond ought to be considered as thenceforth inoperative, and the sureties released, the marriage being a repeal, *pro tanto*, of the administration;—and they likened it to the case of a bond given for the fidelity of a clerk to a mercantile house, which is void upon any change of partners in the firm. Upon the matter of the pleas they argued—1. That the decree was not conclusive, it being against the administrator alone. The sureties were not parties nor privies to it. Had the bond been sued against the principal alone, and judgment had thereon, this judgment would not bar the sureties in another action against them at common law on the same bond;—*a fortiori* the decree is no bar here. *Kip v. Bridgham*, 6 *Johns.* 158. *Fowler v. Collins*, 2 *Root*, 231. *Peake's Ev.* 38.—2. That the demurrer admitting the payment of the money alleged in the third plea, it is good

evidence on a hearing in chancery, if not a good bar as pleaded.—3. That the allegation of fraud was well pleaded. If it was the fraud of the administrator himself, it was enough to invalidate the decree as to the sureties, and all others whom it injured. The plea alleges the existence of a vitiating ingredient, which, not being traversed, must be taken still to exist in the decree, and to render it void. It was as easily traversable as if the party contriving it had been particularly named.

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

Several objections are made to each of the pleas in bar.—The second plea is founded on an alleged mistake in the probate-account settled by *Joshua Webb*, one of the administrators, by means of which he was made chargeable for a much larger amount than was actually due.—The answer to this is, that an appeal should have been claimed from the decree of the Judge of Probate, to this Court, as the Supreme Court of Probate.—As none was claimed, the decree passed by that Court on that occasion is in full force—and this Court, sitting as a Court of common law, cannot examine it, or the accounts on which it is founded. This plea is therefore bad.

As to the third plea, were there no other objection against it it is bad, as it admits a forfeiture of the bond at law;—because the averment in it is, that the sureties have paid away to heirs and creditors the sum of nine thousand, seven hundred and eight dollars and eighty-eight cents, being the whole penalty of the bond excepting the sum of two hundred and ninety-one dollars and twelve cents.—As the sureties are answerable to the extent of the penalty at least, the fact pleaded, if true, can only be good by way of defence in chancery.

The fourth plea is bad for the same reasons that we have pronounced the second to be so.

The averment in the fifth plea is, that in the account settled in the Probate Court by *Joshua Webb*, one of the administrators, on which the decree was passed, he was "fraudulently and collusively charged with divers sums of money, of great amount, "*viz.*—to the amount of ten thousand dollars, which were not "due from said *Joshua* to said estate;" and for which his sureties "are not liable."—But there is nothing in this plea which

implicates any one in particular in the alleged fraud and collusion; certainly nothing shewing or leading us to suspect that the Judge of Probate, or any person or persons for whose use and benefit this action is commenced and prosecuted, were parties to the fraud. There are other defects in the plea which it is unnecessary to examine. This therefore must share the fate of the three preceding pleas.

Pleas in bar adjudged insufficient.

COBB & AL. v. LITTLE.

Where the promissee in a negotiable note, payable in six months, sold it, having made and signed this indorsement on it—"I guaranty the payment of the within note in six months"—this was holden to be an absolute and original undertaking, by which it was the duty of the *guarantor* to see that the maker paid the money within the time specified,—or to take notice of his neglect and pay it himself.

If an action against the maker of a note be brought in the name of *one only* of two joint indorsees, and judgment be had therein; they are not thereby estopped to maintain a *joint* action against the indorser, as guarantor of the same note.

THIS was an action of *assumpsit* on a promissory note, made by one *Thomas Crague*, *April* 30, 1817, payable to the defendant or his order in six months; on the back of which was written as follows;—"I guaranty the payment of the within note "in six months. *Thomas Little*. *June* 3, 1817." to which were added by *Mr. Kinsman*, one of the plaintiffs, these words—"to *Matthew Cobb* and *Nathan Kinsman*."

The plaintiffs, at the trial in the Court below, after producing the note, called a witness, who testified that on the third day of *June* 1817, he was present when the defendant contracted with *Mr. Kinsman* for the purchase of certain real estate in *Windham*, which the witness had previously mortgaged to *Kinsman* and *Cobb*;—that the note in question, with another against *Crague* of the same date and tenor, but payable in three months, were among others delivered by *Little* to *Kinsman* in part payment for the real estate;—that he saw the defendant

sign the guaranty on the back of the notes against *Crague*, and heard him say they were good, and that he would guaranty the payment of them at all events;—that the witness then executed a deed of the land to the defendant at *Cobb* and *Kinsman's* request;—and that a small sum remaining, over and above the amount due on the mortgage, in the hands of Mr. *Kinsman*, was by him paid over to the witness.

The plaintiffs also proved that they sued *Crague*, in the name of *Matthew Cobb* alone, for payment of the note in question in *April* 1819, and recovered judgment in *November* following; and that though a small sum was collected of him by another creditor in the course of that year, yet he was unable to pay this judgment, and discharged himself from prison by taking the poor debtor's oath. They also proved by *Crague* that he was sued in *November* 1817 on the other note, which was payable in three months, of which fact he gave the defendant immediate notice; and that he paid the judgment recovered in this last suit after the issuing of execution thereon.

The defendant proved that in the years 1817 and 1818 *Crague* was possessed of sufficient visible property to pay his debts, and that large debts were collected of him during that period; but that no demand of payment was made of him till he was sued in the year 1819 as above mentioned. And no demand appeared to have been made on *Little*, or notice given to him that the note was unpaid, till after *Crague* had taken the benefit of the poor debtor's oath.

Upon this evidence the Judge in the Court below instructed the jury that the facts constituted no defence to the action, and accordingly they found for the plaintiffs, to which the defendant filed exceptions pursuant to the statute.

Frost and *Fessenden*, for the defendant, contended—1. that the plaintiffs were guilty of gross negligence, which exonerated the defendant. The very nature of guaranty, which is a collateral undertaking, implies something to be done by the holder of the note; which is, to use, with all diligence, the legal means to collect it;—and to suffer a long period to elapse without enforcing payment is in effect saying that the holder will look to the debtor alone. *Moakly v. Riggs*, 19 *Johns.* 69. *Bank of N.*

York v. Livingston, 2 *Johns. Ca.* 409. *Stafford v. Low*, 16 *Johns.* 67. *Beekman v. Hale*, 17 *Johns.* 134. *Tilghman v. Wheeler*, 17 *Johns.* 326. *Warrington v. Furber*, 8 *East.* 240. *Phillips v. Astling*, 2 *Taunt.* 206. *Joslyn v. Ames*, 3 *Mass.* 274.—2. That the note having been sued against the maker in the name of *Cobb* alone, the plaintiffs are estopped from claiming it as their joint property, the case finding no new facts to change the original contract. 4 *Com. Dig. tit. Estoppel A. B. Bull. N. P.* 170. *Commonwealth v. The Pejepscot proprietors*, 10 *Mass.* 155. *Tyler v. Binney*, 7 *Mass.* 479.

Emery and *Kinsman*, for the plaintiffs, said that the defendant here had made himself responsible at all events, thus placing himself in the situation of a surety to *Cragne*, and therefore the doctrine of laches did not apply. It was the duty of the defendant to have paid the note at the end of six months according to his stipulation. Had he done this, he might have protected himself against the loss of which he now complains, and which is imputable to himself alone.—*Upham v. Prince*, 11 *Mass.* 14.—As to the estoppel—the doctrine advanced is applicable only to real estate;—and if it was pertinent to this case, the fact of *Mr. Kinsman's* not having been a party to the guaranty, if true, should have been shewn in abatement.

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

One objection to the plaintiff's right of recovery is, that *Cobb alone* commenced the action on this note against *Cragne* the promisor, and obtained judgment against him; and that therefore they are now estopped to aver that the property of the note is in *both* the plaintiffs.

As the defendant in this action is not bound by that judgment, he cannot avail himself of it by way of estoppel, as against the plaintiffs. See *Phil. Evid.* 249. and cases cited. Besides, in the action against *Cragne*, *Cobb* declared that the note was indorsed to him; and being a blank indorsement, it might be alleged to have been indorsed to a person to whom *Cobb* had transferred it by delivery. For convenience he might sue in his own name only, as indorsee, though he was not the

sole owner. And it may be further observed, that there is proof in the case of a joint interest in the two plaintiff's in this action, and no objection was made to its admission. There is nothing of the nature of an estoppel, according to the legal import of the term, applicable in this case. And we think this objection cannot prevail.

Another objection is, that the defendant is discharged from the obligation of his guaranty, by the negligence of the plaintiffs in not collecting the amount of *Cragué;* it appearing that the suit against him was not commenced, till about eighteen months after the note became due; during which time *Cragué* was solvent, and possessed of sufficient visible property. It is understood that the defendant and *Cragué* both live in the same town; and the pecuniary circumstances of the latter must have been known to him, more easily than to the plaintiffs, who reside in *Portland;* and as it does not appear that the defendant had any doubts of the solvency of *Cragué* before, or at the time *Cobb* commenced his action against him, and if he had, that he communicated them to him, so as to put him on his guard to secure the demand, or intimated a wish to have *Cragué* sued for the money, we do not perceive that the plaintiffs have been guilty of such negligence as to have lost their remedy against the defendant.

But we think there is another ground on which the action is sustainable. The guaranty, in its terms, is *absolute*, that the note should be paid in six months. Sometimes a guaranty is conditional, as in the case of *Tyler v. Binny*, 7 *Mass.* 479; sometimes absolute, as in the case before us, and in *Bank of New York, v. Livingston*, cited by the defendant's counsel. Parties make this species of contract, like all others, on such terms as they choose. But it is contended that where a guaranty is absolute in its terms, still it is incumbent on the creditor to use all due diligence to obtain payment of the original debtor, or he will lose the benefit of it. No cases have been cited to establish this position, and the question is, why a person should not be bound as effectually and as long upon an absolute guaranty, as upon any other absolute promise, (unless perhaps, in case of *fraud* or very gross negligence on the part of him to whom it is given;) and why the court should attach a

tacit condition in *one* case, and not in the other, when in both the written engagement is absolute. In *Hunt v. Adams*, 6 *Mass.* 519, the guaranty or promise relied on was in these words; "I acknowledge myself to be holden as surety for the payment of the above note." The note had been signed by *Chaplin*. *Parsons C. J.* in delivering the opinion of the Court says, "We are satisfied that the defendant is answerable as "an original promisor, and not merely on the contingency "of *Chaplin's* failing to pay. However, it was in evidence "that when the note was delivered to *Bennett*, he and *Chaplin* "considered the defendant as holden for the payment, on the "condition that *Chaplin* could not pay. It would require some "consideration before evidence of this kind was admitted to "control the legal effect of the writing." None of the cases cited by the defendant's counsel are like this. In *Moakly v. Riggs* the engagement was collateral and conditional. In *Stafford v. Low*, *Beekman v. Hale* and *Tilghman v. Wheeler*, no express guaranty was given. In *Phillips v. Astling* particularly relied on by the counsel, the guaranty of the defendant was, that the debt should be paid by a bill to be drawn by *Davenport & Phinny* on *Houghton*; and the case shows that the bill, though drawn and delivered to him, was never presented to *Houghton* for acceptance or payment, or any notice whatever given to the defendant of this omission or the non payment of the debt.

In the case before us the defendant's engagement was absolute, that the note should be paid in six months. It was not paid by *Cragne* or by him. It was the duty of the defendant upon such an engagement, to see that *Cragne* paid the money within the time specified; and if he did not, to take notice of his neglect and pay the amount of the note himself. Accordingly the judgment of the Court of Common Pleas is affirmed.

CUSHMAN *v.* BLANCHARD & ALS.

Where one conveyed lands in fee with general warranty, and a stranger at the same time was seised in fact of part of the same land by an elder and better title, the entry of the grantee under his deed gives him seisin only of that part of which his grantor was seised;—but as to the stranger, the entry of the grantee is a mere trespass.

If, in such case, the stranger sue the grantee in trespass, and recover damages and costs against him, yet the grantee can only recover of his grantor the proportion of the consideration-money and interest;—the damages and costs being recoverable only when incurred in defending the seisin which a grantee actually gained by conveyance from one who was seised in fact.

THIS was an action of covenant, brought upon all the covenants in a deed of lands, with general warranty, made by the defendants to the plaintiff; and came before this Court by appeal from the judgment of the Court of Common Pleas, rendered upon a case stated by the parties.

It appeared that at the time of the conveyance to the plaintiff, one *Paine* was seised and possessed in fact, by an elder and better title, of six acres, being part of the land described in the deed;—that the plaintiff "entered into possession of the "land under said deed", by direction of the defendants, the same being surveyed and run out to him by them;—that *Paine* immediately commenced an action of trespass against the plaintiff's servants for cutting trees and removing the fence on the part claimed and possessed by him, and recovered damages and a large sum in costs against them;—that they justified under the plaintiff's title; that the plaintiff notified the defendants of the pendency of that action, requesting them to assume its defence; and that he paid and satisfied the judgment therein, and sustained the expense of defending it.

Upon these facts the Court below rendered judgment for the plaintiff for that portion of the consideration-money, which the land of which the grantors were not seised in fee amounted to, on the ground that if he entered on that portion of the land, he was instantly evicted by *Paine*, and that his subsequent trespass and defence was his own act, for which the defendants were not responsible.

Emery, for the plaintiff, maintained that as between *these* parties an entry must be considered as made by the defendants at the time of their survey and conveyance to him;—that of course the plaintiff was seised at the time of the conveyance, and lost part of the land by the judgment in trespass;—and that the defendants having been notified to defend that suit, ought now to pay him, not only the value of the land at the time he thus lost it, but the costs and expenses of the suit, incurred in attempting to retain what the defendants had covenanted that they held in fee, and had good right to convey, and would warrant and defend to him. The plaintiff had a right to believe the representations made by the defendants, and to consider their deed as declaring the truth. If it was false, justice requires that they alone should bear the consequences. *Sumner v. Williams*, 8 *Mass.* 162. *Domat, p.* 79. 2 *Saund.* 181. *Hamilton v. Cutts*, 4 *Mass.* 349. *Gore v. Brazier*, 3 *Mass.* 523. 4 *Maule & Selw.* 53. *Morris v. Phillips*, 5 *Johns.* 59.

Mitchell, for the defendants, contended that as *Paine* was in the quiet and exclusive possession of part of the land at the time of the conveyance, that part did not pass by the deed; and the covenants, as to this portion, were broken as soon as made, and the plaintiff's right of action accrued *instanter*. His entry on that part gave him no right of possession, and his subsequent litigation with *Paine* was therefore at his own peril. *Bickford v. Page*, 2 *Mass.* 455. *Marston v. Hobbs*, *ib.* 433. *Caswell v. Wendall*, 4 *Mass.* 108. *Twombly v. Henly*, 4 *Mass.* 441. *Nichols v. Walker*, 8 *Mass.* 243. *Harris v. Newhall*, *ib.* 262. *Leland v. Stone*, 10 *Mass.* 459. *Hathorne v. Haines*, 1 *Greenl.* 238.

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

This case comes before us by appeal from the judgment of the Court below on an agreed statement of facts. The counsel for *Cushman* the appellant complains of the judgment, as having been rendered for too small a sum. He contends that damages should have been given for the value of the lands, which he was unable to hold by the deed, at the time when the

action of trespass mentioned in the statement was decided against him; and also for the amount of the expenses incurred by him in the defence of that action. We will consider each of these objections.

In *Massachusetts* it is settled by numerous decisions, which have been cited in the argument, that when the covenant of seisin and good right to convey is broken, and nothing passes by the deed declared on, the rule of damages is the amount of the consideration paid, and interest from the time of payment to the time of entering up judgment. And when the grantor was seised in fact at the time of the conveyance, and the grantee enters under the deed, and also becomes seised in fact, but is afterwards evicted, or fairly yields up the possession to him who has a better and paramount title; in such case, the rule of damages is the value of the lands at the time of eviction, or what is deemed equal to it, and interest thereon from such time, to the entering up of judgment, and the expenses of defending the suit by which he was evicted. These are the damages when the covenant to warrant and defend has been broken.

In this State, we consider the same principles to be established. In almost all cases that occur, if the covenant of seisin and right to convey, which are synonymous, is broken, the covenant to warrant and defend is not broken; for this plain reason, that if a man gains no sort of estate by the conveyance, he can lose none by eviction, or in any other manner. On the contrary, if the grantor was seised in fact, though not of an indefeasible estate, and the grantee enters under his deed, then the covenant of seisin is not broken; but the grantee may be evicted by elder and better title, and then the covenant to warrant and defend is broken, and no other.

Let us now examine the facts in the case before us and thereby ascertain which of the covenants in the deed of the defendants has been broken.

The lands, for the loss of which the plaintiff is seeking damages are only part of the large tract conveyed by the defendants' deed. But at the time the deed was executed, *Thomas Paine* was seised of this part in fee, by elder and better title, and in actual possession. Now as to this part, according to legal principles which are perfectly at rest, no estate whatever,

not even a right of entry passed by this deed to the plaintiff; though as to the residue of the lands described in the deed, it operated as an effectual conveyance.

Here then the covenant of seisin and right to convey was instantly broken. To this point many of the cases cited by the defendants' counsel are direct authorities. And on this principle the estimate of damages as to the value of the land was perfectly correct, being the consideration paid and interest.

But it is further contended, that the plaintiff entered into possession of the land under the deed. As to a part, such entry was legal; but he also by the defendants' direction entered into the possession of the disputed part, of which *Paine* was seised in fee, and in possession at the time of the conveyance. He had not a shadow of right to enter into possession of such part, and the defendants' direction could not certainly give him any. His entry then was a mere trespass on the rights and property of *Paine*, for which he rightfully recovered judgment against the plaintiff's servants. The question now is presented, why should the defendants be compelled to pay the expenses incurred in defending an action brought against the plaintiff's servants for his own wrong? This item in damages is only recoverable when incurred in defending the seisin, which a grantee has gained by a conveyance from a man who was seised in fact. A person thus seised in fact may lawfully convey; and such a seisin supports the covenant of seisin. *Gerrish v. Bearce*, 11 *Mass.* 193. *Marston v. Hobbs*, 2 *Mass.* 433. *Twombly v. Henly*, 4 *Mass.* 441. *Prescott v. Freeman*, *ib.* 627. A grantee entering lawfully under such a conveyance from one covenanting that he will warrant and defend the lands to him, is, on the principles of good faith and substantial justice, entitled to be indemnified for his expenses in defending the defeasible title which had been conveyed to him. Upon consideration of the facts in this case, and the established principles of law applicable to them, we cannot entertain any doubt as to the correctness of the judgment of the Court of Common Pleas;—and accordingly the

Judgment is affirmed.

WALKER *v.* FOXCROFT, SHERIFF, &c.

In this State a deputy sheriff acquires a special property to himself in goods by him attached, which the sheriff can neither divest nor control; his character essentially differing from that of a sheriff's servant or deputy in *England.*

If one deputy sheriff attach goods, and another deputy of the same sheriff attach and take the same goods out of his possession by virtue of another precept against the same debtor, the deputy who made the first attachment may have trespass *vi et armis* for this injury, against the sheriff himself.

TRESPASS, for taking a horse from the plaintiff. The plaintiff, being a deputy of the defendant, who is sheriff of the county, in the execution of his official duty attached the horse by virtue of an original writ in his hands against the owner of the horse, and delivered him to a third person for safe keeping, taking an obligation from the bailee to see him forthcoming; and made due return of the precept with his doings thereon.

Afterwards, and while this attachment was in force, *another* deputy of the defendant, having an execution against the same debtor, seised the horse while in custody of the plaintiff's bailee, and sold him in part satisfaction of the execution, though forbidden so to do by the bailee, both at the time of the taking and at the sale.

Upon this evidence, the Judge who tried the cause in the Court below, ordered the plaintiff to be nonsuited, to which he filed exceptions.

Fitch, for the plaintiff, observed that the nonsuit in the Court below was probably ordered on the ground that the sheriff and his deputy were to be regarded in law as one person. But he maintained—1. that the sheriff and his deputy were in this country distinct officers, the latter not being under the control of the former, in the execution of his duty, though liable on his bond, for damage occasioned to the sheriff by his malfeasance or neglect:—2. that if this be not so, yet the deputies of the sheriff, as to each other, are distinct and independent officers, for whose doings the sheriff is responsible to the party injured.

To the first point he argued,—that the deputy is liable and may be sued for his own doings—*Walker v. Haskell*, 11 *Mass.* 177. *Nye v. Smith*, 11 *Mass.* 188. *Draper v. Arnold*, 12 *Mass.* 449. 1 *Chitty on Plead.* 72, 73, 47, 48;—that he may maintain a suit for disturbance of his rights—*Gibbs v. Chase*, 10 *Mass.* 125. *Baldwin v. Jackson*, 12 *Mass.* 131. *Train v. Wellington*, 12 *Mass.* 495—and that these cases are grounded on the principle that by the attachment of goods he acquires a special property to himself;—that he is recognized as a separate officer by various statutes, which require him to be sworn—to serve precepts—to pay over money collected, under penalty of thirty *per cent.*—to return *talesmen*—to collect taxes—to serve precepts after the death or removal of the sheriff, and even precepts in his hands at the time of his own removal; &c. —and that the sheriff ought not to control his actions, or interfere in the discharge of his duty, since he is liable personally both to creditor and debtor, against whom the sheriff cannot protect him.

To the second point he cited *Denny v. Warren*, 16 *Mass.* 420. *Thompson v. Marsh*, 14 *Mass.* 269. *Gordon v. Jenney*, 16 *Mass.* 469. *Vinton v. Bradford*, 13 *Mass.* 114. *Bac. Abr. Sheriff, H.* 1.

Longfellow and *Kinsman*, on the other side, contended for the doctrine that the sheriff and his deputy were one person; and that whatever possession the deputy had, in fact, of goods attached, was in law to be treated as the possession of the sheriff. They argued from adjudged cases that if goods be attached by a deputy, and a second precept against the same debtor be delivered to the sheriff himself, this delivery renders the sheriff liable as for a second attachment; which could not be, unless the goods were constructively in his possession. The present contest being originally between two servants of the same sheriff, he alone is the person to adjust it. The act of each of them was his own act; so that in legal contemplation the sheriff has merely applied the goods to satisfy a second attachment, thus rendering himself liable for the first; which was still in force. And if, by thus doing, he exposes the deputy who made the first attachment, the latter doubtless is not without remedy; but it cannot be sought by an action of *tres-*

pass, there being no violation of the possession which was always that of the sheriff alone. *Watson v. Todd*, 5 *Mass.* 271. *Perley v. Foster*, 9 *Mass.* 112.

MELLEN C. J. delivered the opinion of the Court, at the ensuing *August* term in *Oxford*, as follows.

No case, in all respects similar to the present, has been cited on either side; yet we think that the principles which are established in some of those which have been cited, lead to an easy and satisfactory decision of the case at bar. Though the action is against the sheriff, the exceptions show that it was commenced to recover damages for an alleged wrong of *Swett*, one of his *deputies*.

In this state, a deputy sheriff is an officer under oath, having rights and being subject to liabilities, not only to the sheriff, but to third persons who may have employed him in his official capacity. His character essentially differs from that of a sheriff's servant or deputy in England. In this particular, therefore, English decisions are not applicable; nor can the course of proceeding which may be proper there, in the adjustment of disputes among the inferior officers of the sheriff, be a rule in the settlement of questions as to attachments, and their priority, made by deputy sheriffs under our laws, and according to our usages. The decisions of the Supreme Judicial Court of *Massachusetts*, at the time this State was a part of that Commonwealth, furnish us with valuable commentaries upon our laws, and seem to have established the principles by which this cause must be decided.

By our law, if a *deputy sheriff* has been guilty of misconduct in his office, by neglecting his duty, or violating the rights of a debtor or creditor, the injured party may, *at his election*, bring his action *directly* against the deputy, or against the *sheriff;* and may, in the *latter* case, charge the wrong *generally*, as committed by the sheriff, and on trial prove it to have been committed by the deputy, for whose act he is answerable;—or he may, in his action against the sheriff, declare *specially*, alleging the wrong to have been committed by the deputy. The cases cited by the defendant's counsel, from 11 and 12 *Mass.* and also *Campbell v. Phillips*, 17 *Mass.* 244, clearly establish this point.

Being therefore liable *himself*, the law furnishes him with a remedy against those who violate his rights, by taking away or injuring property in his custody, or under his control, and for which he stands officially responsible. This is shewn by six or seven cases also cited by the plaintiff's counsel. The case of *Gibbs v. Chase* and *Baldwin v. Jackson*, were actions of *replevin*, and *Train v. Willington* was *trespass*. Each action was by a deputy sheriff against a coroner. The actions *Thompson v. Marsh* and *Denny v. Warren* were both *trover;* and *Gordon v. Jenney* was *replevin*. Each action was by *one deputy sheriff* against *another*. The case beforementioned, of *Thompson v. Marsh*, is in all respects exactly like the one before us, except that the *present* action is against the *sheriff* for the *deputy's neglect*, instead of being against the *deputy himself* for *his own* neglect or wrong; and except also that, in the case mentioned, the action was *trover*, and in the case at bar the action is *trespass vi et armis*.

If the difference, in *neither* of the foregoing particulars, is material, the plaintiff's exception must be sustained. By law the sheriff is answerable for the *official acts* of his deputies, and if the wrong complained of had been committed by the deputy *Swett*, against any person, except *another deputy* of the defendant, it is not contended that the action would not be maintainable. It appears that *Walker* made the first attachment. *Walker* was then *entitled and bound* to hold the property safely; no *other* deputy could afterwards attach it, because he could have no right to the possession of it. Another creditor, by placing his writ in the hands of the deputy who made the *first* attachment, might have caused it to be attached by him, subject to the *first* attachment; and *perhaps* if such second writ were placed in the hands of the *sheriff himself*, the goods might be considered as attached by him, subject to the prior attachment made by his deputy. Be this as it may, no act of the sheriff, or any other deputy, can defeat or impair the rights of the first attaching deputy. In the present action, the sheriff is not sued for *his own* act, but the act of *one of his deputies*, for which, *if wrongful*, he is by law liable to the injured party, and the deputy is liable over to him.

But it is contended that according to the cases of *Watson v. Todd*, 5 *Mass.* 271. and *Perley v. Foster*, 9 *Mass.* 112. the sheriff's deputies are to be considered but as one officer; that the possession of the deputy is the possession of the sheriff; and that therefore it is against all principle to maintain the present action, and allow a servant to call his master to account for his alleged misconduct. These cases have been reviewed in *Thompson v. Marsh*, and *Gordon v. Jenney*. The language of *Parsons C. J.* has been restricted, to a certain degree, and though true in a limited sense, the Court, speaking of a sheriff's deputies, say in *Gordon v. Jenney*—"although servants of the "same master, they act *independently of each other*, and the one "who *first* makes an attachment, acquires a special property, "which entitles *him* to an action against *any person* who interferes with his possession." The act of *Swett* being, therefore, a wrongful violation of the rights of *Walker* the plaintiff, and the sheriff, the defendant, being answerable for *Swett's* wrongful acts, and in this action being sued in the capacity of *Swett's* principal, for *his* misfeasance, we are of opinion that the plaintiff is entitled to recover, unless the objection to the *form of action* be a substantial one; otherwise the plaintiff would be without remedy, in case *Swett* were insolvent or deceased. The reason assigned why trespass *vi et armis* will not lie, is, that the possession of the plaintiff is the possession of the sheriff; and that *both* being in possession, trespass will not lie by one against the other. This seems to be an objection more *technical* than *true* in fact, and more refined than solid. Neither the *special property*, nor the *possession* of the plaintiff is *joint* or in *common* with the sheriff, or *Swett;* and if it were, *that* circumstance would furnish an objection as fatal to an action of trover, as to an action of trespass. 1 *Chitty's Plead.* 66, 155. And yet numerous cases of trover and replevin have been sustained in similar circumstances. On review of all the cases we have found upon this subject, we do not perceive any well-grounded objection to the present action; and we are of opinion that the exception was well taken by the plaintiff's counsel. Accordingly the nonsuit is set aside, and there must be a trial at the bar of this Court.

Note. In this cause PREBLE J. gave no opinion.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

LINCOLN.

MAY TERM,

1823.

PREBLE J. did not attend at this, nor any of the succeeding terms on the spring circuit, by reason of indisposition.

THE PROPRIETORS OF THE KENNEBEC PURCHASE *v.* LABOREE & ALS.

If a man enters upon land under a deed duly registered, though from one having no legal title to the land, and has a visible possession, occupancy and improvement of only a part of it, such occupation and improvement, unless controled by other facts, is a disseisin of the true owner, as to the whole tract;—because the extent and nature of his claim may be known by inspection of the public registry.

The *Stat.* 1821. *ch.* 62. *sec.* 6. was enacted to abolish the distinction, existing at common law, between a possession under a *deed recorded*, and a possession without such title on record; attaching, as against the demandant, the same legal consequences to both.

So far as this section is *retrospective*, it is unconstitutional, and cannot be carried into effect, because it would impair vested rights.

THIS was a writ of entry, in which were demanded 200 acres of land in *Whitefield*, on the east side of *Sheepscut* river, 100 rods wide, and extending back from the river one mile; the demandants counting on their own seisin within 30 years and a disseisin by the tenants.

As to a part of the premises adjoining the river, being about twenty-five acres of the front of the lot, the tenants pleaded a

disclaimer, which was admitted. The title to the residue was tried upon the issue of *nul disseisin.*

The demandants gave in evidence the patent from the governor and council of *Plymouth* to *Antipas Boyes* and others, dated *October* 27, 1661, and it was admitted that the demandants had all the title conveyed by that patent, which was subsequently confirmed to the demandants by the Commonwealth of *Massachusetts* by deed dated *February* 18, 1789. They also read the deposition of *Ephraim Ballard*, a surveyor appointed by the committee for the sale of eastern lands, and by a committee of the demandants, in 1798, to ascertain and mark the true southern boundary of the *Kennebec* purchase, coinciding with and passing through the utmost limits of *Cobbessecontee*,—testifying that he did so ascertain and mark that boundary, at a red oak tree on the west bank of *Kennebec* river; the line running east-south-east, and west-south-west, and terminating fifteen miles from the river;—and it was proved that the demanded premises are within fifteen miles of the river, and north of the *Ballard*-line.

The tenants then proved that one *Nathan Longfellow* went upon the front of this lot 46 or 47 years ago, cleared the land, and erected a house on the part disclaimed; and about 42 years ago erected another house on the front of the part defended, where he dwelt until he sold the land in *July* 1794 to his son *Jacob*, under whom the tenants derived their title by regular conveyances;—that he continued to enlarge his improvements from year to year, so that he had cultivated and enclosed with fences about one half of the lot from the river eastward, as long since as thirty years before the commencement of the action;—that soon after *Longfellow* entered upon this lot, it was known that there were marked trees at the northeast and southeast corners of the lot demanded, which *Longfellow* claimed as the corners of his lot, and that for more than thirty years before the commencement of this action, there were marked trees on the lines running from these corners to the river, and also across the head of the lot, which he claimed as the lines of his lot;—that he cut and took away the timber on the back end of the lot, as he wanted it; and for thirty years before the action was brought, he had cut wood and tim-

ber on any part of the lot as he had occasion; forbidding others who were in that vicinity from cutting on his lot, the lines of which were well known and recognized as the bounds of *Longfellow's* lot;—and that he paid all the taxes assessed thereon.

The easterly half of the demanded premises had never been fenced, nor cleared.

Upon this evidence the Judge who presided at the trial instructed the jury, that if, from the facts proved, they were satisfied that the "possession, occupation, and improvement" by *Nathan Longfellow* of the premises defended, for more than thirty years before the commencement of the action, was, agreeably to *Stat.* 1821. *ch.* 62. *sec.* 6., "open, notorious and "exclusive, comporting with the ordinary management of sim-"ilar estates in the possession and occupancy of those who "have title thereunto, or satisfactorily indicative of such exer-"cise of ownership as is usual in the improvement of a farm "by its owner;" and that the same occupancy, possession and improvement was continued by the tenant and the intermediate grantees of said *Longfellow* up to the time of the commencement of this action, they ought to return their verdict for the tenant. And he further instructed them that if they believed the witnesses, the tenant had entitled himself to their verdict upon these principles.

A verdict was thereupon returned for the tenant, subject to the opinion of the whole Court upon the correctness of these instructions.

The question was argued at *May* term, 1822, by *Orr* and *R. Williams*, for the demandants, and *Stebbins* and *Barnard*, for the tenants.

For the demandants it was contended—1. That upon the facts proved, the tenants shewed no title by disseisin to *any* part of the lot. Their claim is not to be favoured. It was hostile in its inception. It is essential that they should shew that *Nathan Longfellow* entered *under claim or colour of title*, that his entry was not congeable, and that it was an actual ouster of the freehold. *Brandt v. Ogden*, 1 *Johns.* 156. *Jackson v. Sharp*, 9 *Johns.* 163. *Smith v. Burtis*, 9 *Johns.* 174. *Jackson v. Ellis*, 13 *Johns.* 118. *Jackson v. Belden*, 16 *Johns.* 293. *Jackson v.*

Waters, 12 *Johns.* 365. These cases agree with the ancient decisions. *Co. Lit.* 181. *a.* 277. *a.* 2 *Bac. Abr. Dissesin, A.* 1 *Salk.* 246. 3 *Bl. Com.* 169. *Atkyns v. Horde*, 1 *Burr.* 61. *Cowp.* 689. *Blunden v. Baugh*, *Cro. Car.* 302.

2. That if the facts shew a title in the tenants by disseisin to any part of the premises, this extends only to that part of which they had the visible occupation by inclosure in fences. *Jackson v. Schoonmaker*, 2 *Johns.* 230. *Prop'rs Ken. Pur. v. Call*, 1 *Mass.* 483. *Prop'rs Ken. Pur. v. Springer*, 4 *Mass.* 416. *Brown v. Porter*, 10 *Mass.* 93.

3. That the *Stat.* 1821. *ch.* 62. *sec.* 6. establishing a new doctrine of disseisin, must be construed prospectively,—or it is unconstitutional, and void. No legislature has a right to declare what the law *was*,—but only what it *shall be*. If they choose to adopt the mischievous principle of putting disseisors on an equal footing with the lawful owners of land, permitting them to enter on one parcel in the name of all the vacant lands in the same county, it is a power which they can exercise only in subserviency to rights already vested, and to contracts already in force. These are beyond the control of any legislature, under any form of free government, whether protected by the express letter of the constitution or not. Yet the section on which the tenants rely is pressed into their service, to the entire subversion of the demandants' vested right to enter upon the east end of the lot, which was never fenced; which right they had enforced by this action, before the statute was enacted. 6 *Bac. Abr. Statute c. Ogden v. Blackledge*, 2 *Cranch* 272. *Dash v. Van Kleeck*, 7 *Johns.* 477, 500. *Society v. Wheeler*, 2 *Gal.* 105. *King v. Dedham Bank*, 15 *Mass.* 447. *Holden v. James*, 11 *Mass.* 396. 3 *Dal.* 386. The power of the legislature to confirm the doings of public officers—to suspend the operation of the general statute of limitations—to provide new remedies for the enforcement of existing rights, &c.—which has been exerted in numerous instances, rests upon other principles, and is not contested.

For the tenants it was insisted—1. That the statute was not at variance with the common law. In effect it merely declares that to constitute a disseisin, a *fence* is not necessary;—that

possession *as a farm* is sufficient. It leaves to the tenant the burden of proving the extent of his possession; requiring him to shew that he conducts, *in all things*, as an owner conducts with his farm. *Mill Corporation v. Bulfinch*, 6 *Mass.* 234. *Cutts v. Spring*, 15 *Mass.* 135. *Small v. Procter*, 15 *Mass.* 498. 3 *Bl. Com.* 177. It is a statute which is to be favourably regarded. 3 *Bl. Com.* 168. *Atkyns v. Horde*, 1 *Burr.* 60. 3 *Cruise's Dig.* 564. *Cummings v. Wyman*, 10 *Mass.* 468.

2. That if the statute has altered the common law, it was competent for the legislature to exert all the power implied in its literal interpretation. *Walker v. Bacon*, 8 *Mass.* 468. *Patterson v. Philbrook*, 9 *Mass.* 151. *Trull v. Wilson*, 9 *Mass.* 154. *Bacon v. Callender*, 6 *Mass.* 303.

The cause having been continued to this term for advisement, the opinion of the Court was now delivered as follows, by

Mellen C. J. The general title of the demandants to what is commonly called the *Plymouth* claim or patent, is not disputed. But it was urged by the counsel for the tenant, that the land demanded in this action, though within fifteen miles of *Kennebec* river, is not within the true bounds of the claim. The deposition of *Ballard* has been relied on to shew what are the utmost limits of *Cobbessecontee;* and of course what is the true southerly line of the patent. If the line run by him be the true line, it is admitted that the land in dispute lies north of it. The release from the Commonwealth of *Massachusetts*, bearing date *February* 18, 1789, to the company, conforms to this line; and it has once or twice been decided by the Supreme Judicial Court of that Commonwealth, that this release has settled the question as to the limits of the claim. Besides there is, we may say, an almost universal acquiescence, even among the settlers themselves who are upon the tract, with respect to this point; and for nearly thirty years past the Courts have considered the question as at rest; though within that time it has, by a few individuals, been moved and briefly discussed when all other grounds of defence had failed. Without dwelling on this part of the cause, we would observe, that we consider the south line as established, and of course the title of the demandants

to the premises in dispute is a valid one, unless it is defeated, in whole or in part, by the facts and principles which the tenants rely upon in their defence. This defence is grounded on the possession which they, and those under whom they claim, have had of the demanded premises; the west half or part, for more than thirty years next before the commencement of the action, having been completely and constantly occupied and improved and inclosed by fences; and the east half or part having been claimed and possessed by marked trees, and lines, and corner bounds, and the cutting and carrying away of timber and wood, as occasion required, for more than thirty years before the action was commenced; and during that time by payment of taxes on the premises demanded, and exercising an authority over the lands by forbidding persons to cut wood, &c. thereon.

The counsel for the demandants, to this defence, have opposed sundry objections, which may be reduced to two heads.

1. They have contended, that the possession above mentioned has not been of such a nature as to amount to a disseisin of the demandants as to *any part* of the demanded premises.

2. But if they have been disseised of any part for thirty years next before the commencement of this action, it is only of the west half or part; and that as to the residue of the premises they are entitled to judgment, notwithstanding any of the provisions of the *Stat.* 1821. *ch.* 62. *sec.* 6. which have been urged and relied upon by the counsel for the tenants.

As to the *first point.*—By an inspection of the facts reported in this case, it does not appear in *express terms* with what motives *Nathan Longfellow* entered into and occupied the premises, or his son after him, or those to whom his interest was conveyed. It is not stated that the possession was adverse, and under claim of title; nor that it was by the express or implied permission of the proprietors. The intentions then of those, who successively possessed the lands, must be collected from the acts they performed, the language they used, and all the circumstances attending the possession.

The opening counsel for the demandants, with great industry and intelligence, has collected and arranged a long list of authorities; many of which were intended to shew that no pos-

session of the lands of another can amount to a disseisin of the true owner, unless such possession appeared to be under a claim of title, and of course an adverse possession; and unless it was also open, notorious, continued, and exclusive, and the extent of it marked by fences inclosing the lands, and erected for the purpose of protecting them from incursion. We do not deem it necessary for us to bestow particular attention on the numerous cases and books referred to on this head.

The doctrine of the common law on this subject seems to be plain and well settled. A possession must be adverse to the title of the true owner, in order to constitute a disseisin. The possessor must claim to hold and improve the land for his own use and exclusive of others. The cases cited from the *New-York* Reports appear to be in accordance with these principles. It may be more to our present purpose to compare those principles with the law of disseisin, as understood, recognized, and practised upon in *Massachusetts*, prior to our separation from that State, and by this Court since its organization, in those cases which have come before us. We are inclined to believe that upon examination it will be found that the principles of the common law are applied in *England*, and in *New-York*, with more strictness, as it regards the *occupant* of the land, than they have ever been in *Massachusetts*, or with us, upon the doctrine of disseisin, at least so far as relates to the presumption of law in reference to the intentions of the possessor. However this fact may be, so far as we have been able to examine and ascertain, it appears that in the trials which have taken place for a long series of years in the Supreme Judicial Court, before we became an independent State, it was never considered incumbent on the tenant in the case of a count on the demandant's own seisin, to prove any thing more than his continued and exclusive possession and occupancy, for thirty years next before the commencement of the action, using and improving the premises, after the manner of the owner of the fee; such possession, occupancy, and improvement, unless explained, affording satisfactory evidence to the jury that such tenant claimed to hold the lands as his own.

This was the common course of proceeding, and no distinct and additional proof was necessary, in the first instance, to

show that such possession was adverse, and under claim of title; nor necessary in any stage of the cause, unless rendered so by proof offered on the part of the demandants, tending to shew that such possession was never intended to be adverse, but on the contrary in submission to or consistent with the title of the true owner. In *Commonwealth v. Dudley*, 10 *Mass.* 407, *Jackson* J. when speaking of the possession of a third person, which might defeat the operation of the deed of the true owner, says, "the possession is not of itself conclusive "against the effect of the conveyance. It may always be ex- "plained, as by shewing that the occupant was tenant for "years of the grantor, or that he held in any other manner "with knowledge of the grantor's title, and acknowledging its "validity." A vast number of suits, wherein the present demandants were parties, have been tried and decided on these principles. In some cases the presumption of adversary claim has been removed, by proof on the part of the demandants, and, of course, the title by disseisin set up by the tenant has failed; and in all other cases it has succeeded, if open, continued and exclusive. This course has been so long pursued, and such has been the uniform and steady acquiescence in its legality, by successive Judges, lawyers and the community at large, that we do not feel authorized or inclined to change it.

In the case at bar, the tenants have proved their possession of the west half or part of the premises by fences, which have enclosed it for more than thirty years next before the commencement of the action. These fences have been repaired, and renewed by the possessors; a house has been erected on the land; improvements gradually made and extended; corner bounds and lines preserved; the income exclusively enjoyed by the successive occupants; taxes paid by them, and the controling power of a rightful owner constantly and peaceably exercised, during all the above term. This is the usual process of a disseisin, and brings the case within the principles relating to disseisin, as understood, recognised, and in practice in this State. No fact appears, tending in any degree to shew that the possession was under the title of the demandants, and not completely adverse to it. We are therefore of opinion, that the first objection of the demandants' counsel cannot pre-

vail; and that as to the *west half* or part of the premises in question, the tenants have established a good and valid title.

As to the *second point.* The questions which have arisen in our consideration of this part of the cause have presented some doubts and difficulties; and for that reason we have delayed our decision until this time. The merits of the objection we are now examining, and of that part of the defence to which it is opposed, must depend on the construction to be given to the sixth section of the statute of limitations of 1821, *ch.* 62. The demandants' counsel contend that they are not bound in this case, by the provisions of that section; that it is retrospective, unconstitutional, and so far as it respects past transactions and vested rights, is void.

All this is denied by the counsel for the tenants, who considers the section as introducing no new principle; but only as removing doubts, and in clear language expressing what the common law was before, which in some recent decisions appeared to have been mistaken, and rendered in some measure uncertain. Hence it becomes necessary for us to ascertain, in the first instance, what were the true principles of the common law on the subject of disseisin, at the time our statute of limitations was enacted, and then inquire whether those principles have been altered, and if so, to what extent, by the before mentioned section of that statute. We have already stated some of the general principles of the common law respecting disseisins, more particularly with reference to a claim of right on the part of the person in possession, and the nature and presumption of his intentions in holding possession. We would now add that the possession must not only be, in its nature, adverse to the rights of the true owner, but it must be open, notorious, continued, and exclusive. *Atkyns v. Horde*, 1 *Burr.* 60. *Butler's* notes to *Co. Litt.* 380, *b. note* 285. *Smith v. Burtis*, 6 *Johns.* 198. *Brandt v. Ogden*, 1 *Johns.* 158. *Jackson v. Waters*, 12 *Johns.* 368. *Jackson v. Schoonmaker*, 2 *Johns.* 230. But the facts, relied on to prove the possession exclusive, may be different in different cases; and such are not, and cannot be distinctly defined in our law books, when laying down general principles. They must however be such as at once to give notice to all, of the nature and extent of the possessor's improve-

ments and claim; and show the exclusive exercise of dominion over the land, and appropriation of it to his own use and benefit. It must be such an open and visible occupancy, that the proprietor may at once be presumed to know the extent of the claim and usurpation of him who has intruded himself unlawfully into his lands, with intent to obtain a title to them by wrong.

We apprehend that there were several modes of shewing the exclusiveness of possession, before the statute of limitations was passed, besides natural boundaries, or surrounding fences. We are sensible that since the decision of the case of *Ken. Prop'rs v. Springer*, 4 *Mass.* 416. a different opinion has been entertained, and a different practice has prevailed in jury trials in the several Courts before and since our separation. And no distinction seems to have been generally made in such trials, between those cases where the person in possession entered and claimed to hold under a deed duly registered, (though from a person not owning the estate,) and where he entered without any such deed, and without any claim or colour of title. In both cases trials have proceeded on the same principles; and it has been usual to call on the tenant to prove that he himself, or he and those under whom he claimed, had possessed the land within fences for the time by law required to bar such action. Now we apprehend there is a distinction between the two cases above mentioned, which has often been sanctioned by individual Judges of *Massachusetts*, and of this Court; and in some reported cases decided by the Supreme Judicial Court of that State, it seems to have been expressly recognized as law. This distinction, when examined, may serve to aid us in giving a construction to the section in question, and render the case of *Ken. Prop'rs v. Springer* liable to no objection.

It seems to us, that the principles of that decision have not been understood exactly as was intended by the learned and distinguished Judge, who pronounced the opinion. By a careful examination of that case, it does not appear, in any part of it, that the Court expressly decided, that a surrounding fence for thirty years was necessary to constitute a disseisin, even when the occupant entered *without* any claim of title under a

deed. It is true it appeared in that case that the land demanded had not been fenced for thirty years. It had only been run round and its lines marked by a surveyor at the request of the tenant's father. The Chief Justice says, "There is no "evidence that he (the father) ever fenced any part of the "land, till the year 1792, which is within thirty years, or ex- "ercised any act of ownership on it, except that he some "times cut the grass on a small meadow which was part of it. "The running round the land by a surveyor, and marking the "lines by the direction of one *who claims no title in the land*, is "not such an exclusive occupation of the land as can amount "to a disseisin of the demandants; neither can the cutting "grass on the meadow by *Springer*, who does not appear to "have claimed the land, amount to a disseisin. To constitute "a disseisin of the owner of uncultivated lands, by *an entry* "*and occupation* of a party not claiming title to the land, the "occupation must be of *that nature and notoriety*, that the owner "may be presumed to know that there is possession of the "land adverse to his title." But this does not prove that nothing except a natural boundary or a surrounding fence would in any case constitute a disseisin. It rather seems to show that it is *one mode* of proof, and in *some cases* it may be the only one. If we are correct as to the import and extent of the above cited decision, it will not be found to have established any principle variant from the former part of the section, as hereafter explained and construed. We shall notice this more particularly, when we examine the different parts and provisions of the section.

We now proceed to notice the distinction which we have before alluded to, between an entry upon, and a possession of another's land, *without a claim of right under a recorded deed*, or other matter of record; and an entry upon and a possession of such lands, *under such a claim* and such a deed or matter of record. The case of *Ken. Prop'rs v. Springer* expressly recognizes and establishes this distinction. *Parsons C. J.* in delivering the opinion of the Court, says, "When a "man enters on land, claiming a right and title to the same, "and acquires a seisin by his entry, his seisin shall extend to "the whole parcel; for in this case, an entry on part is an "entry on the whole. When a man not claiming any right or

"title to the land, shall enter on it, he acquires no seisin but "by the ouster of him who was seised; and to constitute an "ouster of him who was seised, the disseisor must have the "actual exclusive occupation of the land, claiming to hold it "against him who was seised; or he must actually turn him "out. When a disseisor claims to be seised by his entry and "occupation, his seisin cannot extend further than his actual "and exclusive occupation." It is evident from the whole case, that when the Chief Justice is speaking of an entry of a person claiming title, he means claiming it under a deed of conveyance, or some other matter of record. Perhaps it may be said that when speaking of such claim of title, he means a good right and title against all others; but in the case of *Higbee & al. v. Rice*, 5 *Mass.* 344. the same Chief Justice in pronouncing the opinion of the Court, says, "A conveyance "by deed duly acknowledged and registered, is, by our statute "of enrolment, equivalent to livery and seisin. Under this "deed the tenant entered into the whole, and acquired a free-"hold estate either by right or by wrong. If by wrong, as "appears in this case, it was an actual disseisin." See also *Jackson v. Elston*, 12 *Johns.* 454.

From these two cases then it appears that if a man enters upon a tract of land under a deed duly registered, though from one having no legal title to the land, and has a visible possession, occupancy and improvement of only a part of it, *such occupation and improvement*, unless controled by other facts, being continued thirty years, is a disseisin of the true owner of the *whole tract;* and the reason is, the *extent and nature* of his claim are or may be known by inspection of the public registry. His deed being registered there gives notoriety to his act and his motives, respecting the lands he occupies. To this point see also the case *Little v. Megquier*, [*ante*, *page* 176.]

Having thus taken a view of the principles of the common law respecting the doctrine of disseisin, as existing and applied in this State at the time the statute of limitations was enacted, we now proceed to a more particular examination of the sixth section of the act. The section is in these words: viz.

"Be it further enacted, that in any writ or action which *has* "*been* or may be hereafter brought, for the recovery of any

"lands, tenements or hereditaments, it shall not be necessary "for limiting the demandant and barring his right of recovery, "that the premises defended shall have been surrounded by "fences, or rendered inaccessible by other obstructions, but it "shall be sufficient if the possession, occupancy and improve- "ment thereof by the defendant, or those under whom he "claims, shall have been open, notorious, and exclusive; com- "porting with the ordinary management of similar estates in "the possession and occupancy of those who have title there- "unto, or satisfactorily indicative of such exercise of owner- "ship as is usual in the improvement of a farm by its owner; "and no part of the premises demanded and defended shall "be excluded from the operation of the aforesaid limitation, "because such part may be woodland or without cultivation."

The inquiry now is, whether the above quoted section has introduced any new principles of law, by altering the common law, as to the doctrine of disseisin. If the section had been concluded with the words "*shall have been open, notorious and exclusive,*" we apprehend that upon the common law construction of those terms, it would not be considered as having established any new principle. This we have intimated before; but the descriptive words which follow immediately and complete the sentence, were evidently intended to explain, qualify and restrain the *generality* of the terms "open, notorious and exclusive," and thereby change their meaning; otherwise they must have been used without any intention; and this we are not to presume. The only sensible, fair, and rational construction of the whole sentence is this; that it shall be sufficient if the possession of the defendant shall have been *as* "open, notorious and exclusive" as is usual in the case of the ordinary management "of similar estates *in the possession and occupancy of those who have title thereunto.*" The concluding sentence of the section is in unison with this idea, and a distinct affirmation of it. In a word, the whole section, taken together, appears to have been enacted with a view, and for the purpose of abolishing the distinction, well known to have then existed between a possession *under a claim of title on record*, and a possession without any such claim or pretence of title. For by law, as well known and understood, there was no such thing as a *con-*

structive possession in favour of a person entering and claiming to hold by disseisin merely, without title or colour of title. The object of the section was to authorize and require a constructive possession in *both cases*; and to attach to it the *same* legal consequences in respect to the rights of the demandant.

If the section had been in its terms *prospective only*, or been so worded as to admit of our giving it such a construction, on the ground that such was the intention of the legislature, no objection would exist against their authority to enact it; nor would there be any inconveniences in giving it the intended operation. Nor is there now any objection to the provisions of the section, so far as they may apply to and govern facts, which have taken place since the act was passed, or may take place in future. Whether the section, or any part of it, be liable to the objections, which have been urged against it by the counsel for the demandants, as being *retrospective* and *unconstitutional*, is a question which remains to be considered.

The section is certainly retrospective as well as prospective. It professes to establish principles by which causes, then pending, as well as those which might in future be commenced, should be decided. It professes to operate on *past* transactions, and to give to facts a character which they did not possess at the time they took place; and to declare that in the trial of causes *depending on such facts*, they shall be considered and allowed to operate in the decision of such causes, according to their *new character*. It professes to settle rights and titles depending on laws as they existed for a long series of years *before* the act was passed, by new principles which, for the first time, are introduced by its provisions. It professes to change the nature of a disseisin, and of those acts which constitute a disseisin, and thereby subject the true owner of lands to the loss of them, by converting into a disseisin, by *mere legislation*, those acts which, at the time the law was passed, did not amount to a disseisin. It professes to punish the rightful owner of lands, by barring him of his right to recover the possession of them, when, by the existing laws, he was not barred, nor liable to the imputation of any *laches* for not sooner ejecting the wrongful possessor.—It is true that there is no *express* provision in our constitution, as there is in that of *New-Hampshire*,

by which the legislature are prohibited from enacting retrospective laws; though upon examination, we apprehend it will be found to contain certain provisions which were intended to be, and must be considered, as prohibitions. These will presently be noticed. In the case of *Fletcher v. Peck*, 6 *Cranch.* 87. *C. J. Marshall*, in pronouncing the opinion of the Court, says, "It may well be doubted whether the nature of society and of "government does not prescribe some limits to the legislative "power; and if any be prescribed, where are they to be found, "if the property of an individual, fairly and honestly acquired, "may be seized without compensation." When speaking of the act of *Georgia*, he observes, "*the validity of this rescind-*"*ing act, then might well be doubted, were Georgia a single sovereign* "*power.* But she is a part of a large empire. She is a mem-"ber of the *American* Union; and that Union has a constitution "which declares that no State shall pass a law impairing the "obligation of contracts." He afterwards adds, "The estate "having passed into the hands of a purchaser for a valuable "consideration, without notice, the State of *Georgia* was re-"strained, *either by general principles which are common to* ALL *our* "*free institutions*, or by the particular provisions of the constitu-"tion of the United States." In the case of *Society, &c. v. Wheeler*, 2 *Gal.* 105, *Story J.* in delivering his opinion says,—"Upon "principle, every statute which takes away, or impairs, vested "rights, acquired under existing laws, or creates a new obliga-"tion, imposes a new duty, or attaches a new disability in re-"spect to transactions or considerations already past, must be "deemed retrospective; and this doctrine seems fully support-"ed by authorities." He cites *Calder v. Bull*, 3 *Dall.* 386, and *Dash v. Van Kleek*, 7 *Johns.* 477, and then adds,—"The "reasoning in these authorities, as to the nature, effect and in-"justice in general of retrospective laws, is exceedingly able "and cogent; and in a fit case, *depending on elementary princi-*"*ples*, I should be disposed to go a great way with the learned "argument of Chief Justice *Kent*." It was not necessary in that case to decide on elementary principles, in consequence of the provision in the constitution of *New-Hampshire* respecting *retrospective* laws, to which we have before alluded. We will not cite passages from the opinion of the Court in *Dash v.*

Van Kleek. The whole case is full of learning upon the subject now under consideration. See also *King v. Dedham Bank*, 15 *Mass.* 447. *Medford v. Learned*, 16 *Mass.* 215. *Foster v. Essex Bank*, *id.* 245.

The provisions in our constitution relating to this subject are the following.

The *first* is contained in the first article of our declaration of rights and the first section.—This section, among other things, secured to each citizen the right of "*acquiring*, *possessing*, *and* "*protecting* property, and pursuing and obtaining safety and "happiness." By the spirit and true intent and meaning of this section, every citizen has the right of "possessing and pro- "tecting property" according to the *standing laws* of the state in force *at the time of his* "*acquiring it*, and *during the time* of his continuing to possess it. Unless *this* be the true construction, the section seems to secure no other right to the citizen, than that of being governed and protected in his person and property by the laws of the land, for the time being. Such a provision for such a purpose merely, would not have been introduced, even by jealousy itself. The design of the framers of our constitution, it would seem was, by the part of the section above quoted, to guard against the retroactive effect of legislation upon the property of the citizens. This construction is strongly corroborated by the language of the constitution of this State, article 4, part 3, sect. 1, defining the powers delegated to the legislature; viz:—"The legislature shall have full "power to make and establish all *reasonable* laws and regula- "tions, for the defence and benefit of the people of this State, "not repugnant to this constitution, nor to that of the United "States."

The twenty-first section of the article first quoted is in these words;—"Private property shall not be taken for *public uses*, "without just compensation; nor unless the public exigences "require it." This article was designed to guard private property from the operation of laws merely prospective, in all cases except of public exigency;—and even then the individual is not to be injured by the ademption of his property; he is to receive "just compensation."—But the *private* property of one man cannot be taken for the *private uses* of *another* in any case.

It cannot by a *mere act of the legislature* be taken from *one man*, and vested in *another directly;* nor can it, by the *retrospective operation* of laws be indirectly transferred from one to another; or subjected to the government of principles in a Court of Justice, which must necessarily produce that effect.

In order to shew the importance and correctness of the principles which we have stated, and to render them still more plain, one or two illustrations may be useful.

According to the law now in force in this State, revised in 1821, no devise of real estate is valid, unless the will is attested by *three* or more witnesses.—Let us suppose a will made on the first of *January* 1822, and attested by only *two* witnesses.—Should the devisee of a tract of land, thus devised, enter into possession, and hold it against the heir at law, such heir could maintain his writ of entry against the devisee; and the will, thus imperfectly executed, could furnish him with no legal defence in the action.—But let us suppose further, that at the next session of our legislature, they should pass a law declaring that, "in any action then pending, or which might be "brought, it should not be necessary in any such action, "brought by an *heir* against a *devisee*, claiming the premises "demanded, under the will of the ancestor, for the defendant "to prove that the said will was attested by *three* or more wit-"nesses; but that it should be sufficient to bar such action, if "on trial it should appear that said will was attested by *two* "*witnesses only.*"

Now if after the passage of such a law, the heir, in the case supposed, should bring his action against the devisee to recover seisin and possession, can any Judge or any man in the exercise of a sound understanding for a moment believe that such a law could create and furnish to the tenants a substantial defence in the action? The question admits of only one answer.

According to existing laws, deeds of conveyance of real estate must be *under seal.* Such deeds, to pass a *fee-simple estate*, must contain certain legal terms; viz.—the conveyance must be to the grantee and his *heirs.* To entitle a widow to dower in her deceased husband's estate, he must have been seised of it *during the coverture.* Now if our legislature should at the next session pass a law declaring that all deeds of conveyance

of real estate, that had *before that time* been executed, or should in future be executed, should be considered and adjudged sufficient in law to pass the estate therein described, in fee simple, though such deeds were not under seal, and contained no words of inheritance;—and that a widow should in all cases be entitled to dower in her deceased husband's estate where he had died, or might in future die, seised of such estate at any time *before* as well as *during* the coverture;—will the principles on which a free government is founded,—will the principles of common honesty and justice, sanction such a law, so far as to give it a *retroactive* effect, and thereby disturb, impair and destroy the vested rights of those, who had become the owners of the estates under *then* existing laws? There is yet another point of view in which the subject may be placed, well adapted to shew the character of the provisions of the section in question, and the danger of giving legal effect to them in the manner contended for by the counsel for the tenants. According to the well established principles of the common law, as we have before observed, no man or corporation can maintain a writ of entry against any person who, for thirty years, has had the *open, notorious, adverse and exclusive* possession of lands belonging to such man or corporation. Against such a claim, such possession is a good and sufficient title in law. Would it be in the power of the legislature to divest and destroy such a title by a mere act of retrospective legislation;—and by declaring that such a possession and disseisin should avail nothing in an action brought to recover possession of such lands? The mere statement of the case shews that a law of the description above mentioned would, if it could produce the intended effect, violate the plainest principles of law and justice.—To illustrate the case and bring it home to the understanding of all, let us suppose that the tenant in this action, and those under whom he claims, at the time it was commenced, had been in the open, adverse and exclusive possession of the demanded premises for *thirty* years, and during all that time had maintained surrounding fences. Let us further suppose that the action had not yet been tried, but was to be tried at this term. Let us further suppose that the legislature, at their last session, had passed a law declaring that in all actions, *then pending or that*

might be commenced after the passing of such act, no adverse, notorious and exclusive possession of the demanded premises, although surrounded with fences, should be a bar and constitute a good defence in such action; unless such possession and disseisin has, or shall have been continued for *forty* years, next before the commencement of such action.—Now would the tenant or any other man, understanding and respecting principles, consider such a law constitutional? On the contrary, would it not be at once pronounced unjust and void? If such an act of the legislature could be sanctioned, not only the tenant, in the circumstances we have supposed, would be deprived of his estate by a destruction of vested rights, but a large class of citizens, similarly situated, would suffer under similar deprivations. The more the principle of the section in question is examined, the more distinct becomes its objectionable features.

We have thus far considered the section in question rather in the light of a law defining and settling the rights of parties in real actions, and establishing certain principles to be observed in their decisions by Courts and juries. We now proceed to consider it as a part of a statute of limitations, and examine its character and merits in that point of view. The authority of the legislature to pass statutes of limitations, in the form in which they are usually enacted, will not be denied. Such statutes have been considered salutary in their consequences. With respect to *personal* actions, they serve to render people attentive to the early adjustment of demands, and prevent the disturbance of settlements which have been made, but of which the proof may have been lost. But in all such cases, the legislature have allowed a certain time *after* the passage of the law, and before its operation should commence, within which, creditors might institute legal process for the recovery of the debts due them, if they should incline so to do. And it is very clear that if no such interval is allowed, but the act is permitted to take effect *instanter*, thereby depriving creditors at once of all legal remedy for the recovery of those demands which it purports to bar,—it unquestionably violates the constitution, by "impairing the obligation of contracts;"—and the Courts of law would be bound to consider it as void. The limitation of *real* actions is equally salutary; and the community has doubt-

less derived much advantage from those laws which have gradually reduced the time, after which the owners should be barred of their actions. But all such laws have allowed a reasonable time within which they might prosecute their claims and make their entries.—A sense of right and justice seems to have dictated this provision; and all the reasoning, founded on *moral principle*, is applicable with the same force to the limitation of real, as personal actions. In *Call v. Hagger & al.*, 8 *Mass.* 423. an act of limitation was objected to, as being unconstitutional. The Court observe,—"To extend this principle to acts for the "limitations of suits at law, which, when enacted with discre- "tion, *and a reasonable time allowed for the commencement of suits* "*on existing demands*, are wholesome and useful regulations, "would be extravagant." But in that case the Court did not allow the limitation to extend to actions on bonds, where the escape had taken place before the passing the act, and a right of action had vested in the creditor.—*Story J.* in the beforementioned case of *Society, &c. v. Wheeler*, says,—"If the legis- "lature were to pass an act of limitations, by which all actions "upon *past disseisins* were to be barred, without any allowance "of time for the commencement thereof *in futuro*, it would be "difficult to support its constitutionality, for it would be com- "pletely retrospective in its operation on vested rights." In the case of *Sturgis v. Crowninshield*, 4 *Wheat.* 122, *Marshall C. J.* says,—"If in a State where six years may be pleaded in "bar to an action of *assumpsit*, a law should pass, declaring "that contracts *already in existence*, *not barred* by the statute, "should be *construed* to be within it, there could be little "doubt of its unconstitutionality. So if a law should declare "that contracts entered into, and reserving *legal* interest, "should be *usurious and void*, either in whole or in part, it "would impair the obligation of the contract, and would be "clearly unconstitutional." Without adducing any more authorities to this particular point, we would observe, that many of the cases and much of the reasoning, which we have applied to the section in question under the other view of it, are applicable to it as an act of limitation.

The result of this investigation then is, that the section of the statute under review, so far as it is *prospective*, is liable to no

objection; but so far as it is *retrospective*, and has *altered the common law*, it is *unconstitutional*, and cannot be carried into effect; because *such* operation would impair and destroy *vested rights*, and deprive the owners of real estate of their titles thereto, by changing the principles and the nature of those facts, by means of which those titles had existed and been preserved to them in safety. We have before stated wherein the common law is changed by the provisions of the section in question, viz., the well known distinction between a possession of lands under a *claim of title on record*, and a possession *without any such claim* is abolished; and Courts of law are authorized and required to extend to possessors in *both cases*, and in the same manner, the benefits of *constructive possession*, and attach to it the same legal consequences as to all concerned.

Let us now apply the principles, thus ascertained and established, to the present case.

It appears that the tenants have no title except what they have derived from *Nathan Longfellow*, who entered *without any pretence of right*, as a mere possessor and wrong doer. In the year 1794, twenty-four years before the commencement of this action, *Longfellow* released all his right to the premises, on which he had entered, to his son *Jacob*, under whom the tenants claim by regular conveyances. It does not appear that the deed of release, or any of the subsequent conveyances, were ever registered. It is stated that the *easterly half or part* of the demanded premises, the part now in question, has *never been improved or cleared.* It is true, it appears by the report *that it was known* that there were marked trees at the northeast and southeast corners of the lot demanded, which *Longfellow* claimed as the corners of his lot. And for more than thirty years before the commencement of this action there were marked trees on the lines running from the corners to the river, which he claimed as the lines of his lot, and also across the head thereof;—that *Longfellow* cut and took away timber and wood on the back end, and any part of the lot, as he had occasion, and forbid others from lumbering and cutting on the lot; and paid all the taxes assessed on *the lot;* and that the said lines were openly known and recognized as the bounds of *Longfellow's* lot, during said thirty years. Do these facts

amount to a disseisin of the demandants as to said *easterly half* of the lot?

With respect to the taxes, it may be observed, that as the west end of the lot was in *actual possession*, and under *actual improvement*, the assessors were by law bound to assess *Longfellow*, and we must presume that they assessed him for his visible improvements. At best, however, such proof in general is of little importance, as of itself it proves no disseisin. *Longfellow* would have been assessed in the same manner, had he been a tenant of the demandants. It does not shew a possession to be adversary or exclusive. What facts are there in the case shewing the possession to be *exclusive?* The lines and bounds were claimed by *Longfellow* to be his; and *this fact* was openly known. He also cut wood and timber on any part of the lot, as he had occasion; and so in the case of *Ken. Prop'rs v. Springer*, the tenant's father cut the grass on a meadow, a part of the premises demanded; in that case the lands had been surveyed and the bounds marked by spotted trees. Indeed the *facts* in that case are nearly the same as in the present, excepting that there, no part of the demanded premises had been enclosed by fences for thirty years; in the case before us, a part has been, and the title of the tenants in such part is secured to them as we have already decided. As we understand and have explained the case of *Prop'rs v. Springer*, it has not established, nor was it intended to establish any new principle. The objection of the tenant's counsel has been urged against that decision, on the ground that it *had* introduced and established a new principle. We consider that case as a strong authority in this, in favour of the demandants; marking clearly the distinctions to be observed between *different kinds of possession*, as under claim of *title on record*, and *mere naked possessions*. In the case before us, there is no proof of any fence, or natural obstruction to guard the *easterly half* of the lot from incursion; no actual improvement and cultivation, notoriously marking the bounds of the tenant's claim, and excluding all others; no registered title or claim of title, shewing the extent of such claim, or the grounds on which it is placed, and operating as the *assertion of right* in opposition to all others; nor any thing but surveys, and lines, and corner

bounds; with the exception of those acts of cutting timber and wood, which might be proved in the case of common trespasses. The before cited case of *Jackson v. Schoonmaker*, 2 *Johns.* 230. is equally in point against the tenants, upon the evidence before us. It is there decided that even a possession fence, made by felling trees and lapping them one upon another around the lot, will not suffice to make out an adverse possession, when that is the only defence; but that there must be a substantial enclosure and real occupancy; a *pedis possessio, definite, positive, and notorious*, to countervail a legal title. This case carries the principle farther than that of *Ken. Prop'rs v. Springer.*

Upon principle and authority, we are therefore of opinion, that, in regard to the *easterly half* or part of the demanded premises, the instructions of the Judge to the jury were incorrect, and of consequence, that the verdict must be set aside, and a new trial granted.

We are aware that the opinion we have now delivered has been extended to an unusual length; but being aware also that it is a cause of much expectation, the decision of which involves a constitutional question, and may be extensive in its influence in other cases, and to a wide extent; we have bestowed much attention in the examination of principles, and cautiously arrived at the result. It is always an unpleasant task for a judicial tribunal to pronounce an act of the legislature in part or in whole unconstitutional. We agree with the Supreme Court of the United States, in the case of *Fletcher v. Peck*, that "the "question whether a law be void for its repugnance to the con- "stitution is, at all times, a question of much delicacy, which "ought seldom, if ever, to be decided in the affirmative, in a "doubtful case. But the Court, when impelled by duty to "render such a judgment, would be unworthy of its station, "could it be unmindful of the obligation which that station im- "poses."

We cannot presume that the legislature, which enacted the law, considered the section in question, as violating any constitutional principle, or in any manner transcending their powers. Be that as it may, the oath of office, under which we conscientiously endeavour to perform our duties, imposes upon us as solemn an obligation to declare an act of our legislature *un-*

constitutional, when, upon mature deliberation, we believe it to be so; as it does to give prompt and full effect to all *constitutional* laws, in the administration of justice.

Verdict set aside and a new trial granted.

WILLIAM PARSONS, APPELLANT FROM A DECREE OF THE JUDGE OF PROBATE *vs.* SARAH PARSONS, APPELLEE.

Of the evidence to establish a nuncupative will.

THE appellee was the widow of *James Parsons*, who died without issue, leaving the appellant, who was his father, his heir at law;—and the appeal was from the decree of the Judge of Probate establishing a nuncupative will of the deceased.

The evidence was,—that the deceased was a shipmaster, but that he sickened and died at home;—that on the morning before his death, being asked who he intended should have his property, he replied that his wife should;—that his father, being present, thereupon observed that *he* did not wish for a cent of his son's property, but desired that it might go to the wife; and spoke of it both then, and on another occasion, as a matter well understood and agreed upon;—that in the evening of the night on which he died, the deceased being again asked whether he wished his wife or his father to have his property, he replied "all to my wife; that is agreed upon,"—and thereupon looked up to his father, as if for his assent;—that the father, rightly interpreting this appeal to him, replied "yes—yes,"—and the deceased, turning his eyes to his wife, said "you see my father acknowledges it."

Allen, for the appellant, contended that this evidence did not satisfy the provisions of the statute of wills, which requires that the testator should bid the persons present to bear witness that such was his will, or *to that effect*. This last solemn act ought to proceed voluntarily and unsolicited from the party, and not merely in reply to an interrogatory. The practice of making nuncupative wills has at no time been treated with favour or indulgence. *Toller*, *Ex.* 8 and *Blackstone*, 2 *Com.* 500. con-

sider it as open to all the objections which the statute of frauds was enacted to prevent; as having become nearly obsolete at the time they wrote; and as limited to those cases only where the testator was surprised by sudden and violent sickness. There is still less reason for regarding it with favour in this country, where education is so common, and the practice of writing is nearly universal; and especially in this case, where the party was a man of business, dying gradually, in the full possession of his faculties, in the bosom of his family, and surrounded by magistrates competent to have advised in the legal execution of a written testament; and where the equal and beneficent provisions of the statute of distributions have made ample provision both for the widow and the heir at law.

Ruggles, on the other side, contended that the evidence in the case sufficiently satisfied the words of the statute, and plainly shewed a *testamentary disposition* of his whole estate. And he cited 7 *Bac. Abr.* 314, 339. 1 *Mod.* 211. *Osgood v. Breed*, 12 *Mass.* 582. *Bond v. Seawell*, 3 *Burr.* 1775. *Mason v. Dunman*, 1 *Munf.* 456.

Mellen, C. J. delivered the opinion of the Court at the ensuing term in *Kennebec*.

The third section of the statute of 1783, *ch.* 24. [*Stat.* 1821, *ch.* 38.] provides that "no nuncupative will shall be good, "whereby the estate thereby bequeathed shall exceed the "value of one hundred dollars, that is not proved by the oath of "three witnesses, who were present at the making thereof; nor "unless it be proved that the testator, at the time of pronouncing the same, bid the persons present or some of them to bear "witness that such was his will, *or to that effect.*" The section contains some other provisions which, in the present case, need not be examined.—The only question which has been made is, whether any nuncupative will was made, coming within the provisions of the act. The testator had no children; and of course his father was heir at law to his estate;—or rather to one half of it: the estate being *personal*, one half of it by law belonged to the widow of the deceased. In general, nuncupative wills should be examined with a very critical eye, es-

pecially when made by persons who were among friends and dependants, and in situations where a written will might easily have been made. In such circumstances it is the duty of the Court to see that the statute is strictly complied with, and the rights of heirs duly protected. It was well observed by the counsel for the appellant that the great object in view in multiplying checks in such cases, is to guard the interest of the the heirs at law from the dangers of fraud and imposition.

It is satisfactorily proved in the case before us that on one or two occasions prior to the evening when the testator died, his *father*, the heir, stated that he had no wish to have his son's property, but desired it might be given to the wife; and spoke of it as a matter which had been understood, arranged, and agreed upon by all concerned. Accordingly when the testator, a short time before his death, was asked to whom he wished to give his property,—he immediately replied—"to my wife; that is agreed upon;"—and when giving this answer, he looked up in his father's face, by way of appealing to him for the correctness of the answer, as the witnesses construed it; upon which the father instantly said—"yes, yes." The testator then turned his eyes on his wife and said, "you see my father acknowledges it." These are the circumstances relied on by the appellee to shew that, though the testator did not *bid* the witnesses, or some of them who were present, to *bear witness that such was his will*, yet he did what was "*to that effect.*" And when we consider the previous understanding and agreement with the father as to the disposition of his son's property, and his own disavowal of a wish for any part of it; and further consider that this arrangement was alluded to by the son a short time before his death, not only in plain language, but also in his silent appeal to the father, and the remark to his wife, founded on his father's answer; when we further consider that all this took place in the presence of the three witnesses who have testified in the cause, and that the father and heir at law was also present and assenting, and compare these facts with the cases cited for the appellee, we are of opinion that the spirit, intent, and meaning of the statute has been complied with in every essential particular; and accordingly

We affirm the decree of the Judge of Probate.

THE CASE OF JAMES M. ROGERS.

The statutes of *Massachusetts* incorporating banks in *Maine* and in force at the time of the separation, being recognized in the public statutes of *Maine* for the regulation of banking corporations, are thereby become public statutes and may be proved by a printed copy.

ROGERS being convicted of uttering as true a certain false and counterfeit bill of the *Kennebec Bank*, with intent to defraud, &c.—now moved that the verdict be set aside and a new trial granted, because the Judge who presided at the trial admitted the *printed* law establishing that corporation to be read in evidence to prove the existence of the corporation, without proof of the loss of the original act, or the production of a certified copy,—though objected to by the prisoner.

Orr and *Fessenden*, in support of the motion, contended that the act incorporating the Bank was a private statute, and that the proof of it stood at common law, under the attestation of the Secretary of State. It is an act of the Commonwealth of *Massachusetts*. But the *Stat.* 1821. *ch.* 59. *sec.* 33. only authorizes the printed copies of the *laws of this State* to be used in evidence. And the act in question, though operating *in* this State, is not a law *of* this State, and so not within the provisions of the general statute.

The Attorney General doubted whether the objection ought, on any principles, to prevail, inasmuch as it was altogether technical, and substantial justice was already done by the verdict. 2 *Salk.* 644. *note a.* *Chitty's Crim. law*, 100, 535. 1 *Burr.* 54. 2 *Burr.* 665, 936.

But he insisted that a private act, recognized by a general law, was thus rendered a public act;—1 *Phil. Ev.* 220. *Bull. N. P.* 224. 2 *D. & E.* 569.—and that the statutes of *Massachusetts*, being so recognized by the Constitution of *Maine*, *Art.* 10. *sec.* 3. were thereby made public acts in this State. But if not, yet the *Stat.* 1821. *ch.* 59. must be understood to apply to all laws *in force* in this State, whether enacted before or after the separation.

Per Curiam. It is admitted that an act incorporating a banking company is a private act; and in the case before us we have no proof that any *such* companies have been incorporated by the legislature of this State. We must therefore proceed on the ground that none such have been *so* incorporated.

But it is a principle of law that if a public statute in its language recognizes the existence of a private statute it thereby makes such private statute a public one, which Courts of justice must afterwards regard *as such. Samuel v. Evans*, 2 *D. & E.* 569. *Saxby v. Kirkus*, *cited in Bull. N. P.* 224. 7 *Bac. Abr. Stat. F. note.*

The *Stat.* 1821. *ch.* 143. provides that "if any *incorporated* "*bank within this State* shall refuse or neglect to pay on de- "mand any bill or bills by such bank issued,—such bank shall "be liable to pay to the holder of such bill or bills two per "cent. per month," &c. The third and fourth sections impose certain restrictions on *all the banks in the State* as to the form and amount of bills to be issued by them. The *Stat.* 1821. *ch.* 144. imposes a tax on *each and every bank in this State*, to be paid semi-annually,—points out the mode of enforcing its payment,—and subjects *all the banks* to the performance of certain duties. The *Stat.* 1821. *ch.* 145. imposes further duties on the *several banks in this State.* So of the *Stat.* 1821. *ch.* 146.

Now according to the principle of law before stated, this Court is bound to take notice that there are banks established and in operation in this State, all of which being recognized by our statutes above quoted, must be considered as established by acts of a legislature authorized to enact them; which acts, by such recognition, have become public statutes. It is well known and admitted that Courts of law, and all persons are bound to take notice of a public statute, whether it be published or not. By looking at our constitution we learn that all laws enacted by the legislature of *Massachusetts*, and in force on the fifteenth day of *March*, 1820, should remain and be in force in this State until altered or repealed by our own legislature;—and by examining the public general repealing act of 1821, *ch.* 180. we find that none of the acts of *Massachusetts* incorporating banks now in existence and in operation in this State have been repealed. It results, therefore, that the *printed copy* of the

act of *Massachusetts* by which the *Kennebec* bank was incorporated was properly admitted in evidence to the jury, in the same manner and for the same purpose that printed copies of any public acts are read to a Court or jury.

Motion overruled.

NOTE. After this decision the prisoner filed a new motion to set aside the verdict, grounded on the subsequent discovery of a fact not known at the trial, viz.—that one of the jurors, before the trial, had expressed to divers persons his opinion that the prisoner was undoubtedly guilty of the offence charged in the indictment, and said that all the world would not convince him to the contrary. And this being proved, the Court granted the motion.

THE CASE OF CHARLES ROGERS.

If a statute contains provisions of a private nature, as, to incorporate a bank, &c., yet if it contains also provisions for the forfeiture of penalties to the State, or for the punishment of public offences in relation to such bank, it is a public statute.

The statute incorporating the Bank of the United States is a public statute.

THE prisoner was convicted of bringing into and having in his possession within this State five false forged and counterfeit bills purporting to be bills of the *Kennebec* bank, and six other false, forged and counterfeit bills, purporting to be bills of the Bank of the United States, with intent to utter and render them current as true, knowing them to be false, &c. The indictment contained but one count. At the trial the presiding Judge admitted the printed statute-books to be read as evidence of the incorporation and existence of the banks mentioned in the indictment, though objected to by the prisoner, for which cause he now moved that the verdict be set aside and a new trial be granted.

Orr and *Fessenden*, for the prisoner, argued respecting the act incorporating the bank of the United States, that it is a private act, because it is a mere grant of private privileges, for the benefit of individuals in particular and not of the public in

general, which the United States cannot revoke, and over whose lawful operations they have no control.

The Attorney General argued for the public character of the act, from the interest which the government had in it, as secured in the second, eighth and fourteenth sections. And he cited the case of *M'Culloch v. The State of Maryland*, 4 *Wheat.* 316.

MELLEN C. J. So far as the motion before us has reference to the bills mentioned in the indictment as purporting to have been issued by the *Kennebec Bank*, we have considered and disposed of it in the case of *James M. Rogers;* and to that we refer for the reasons of our opinion.

But in *this* indictment the defendant is charged with having had in his possession sundry forged and counterfeit bills, purporting to have been issued by the *Bank of the United States*, knowing them to be false and forged, and for the purpose of rendering them current as genuine; and as to these the objection is, that the Judge before whom the cause was tried admitted the *printed copy* of the act of Congress, establishing that bank, to be read to the jury as proof of its incorporation.—The argument in support of this objection is that the act is a *private* one. The only question, then, is, whether the act be a *public* or *private* act? It is well known that the Bank was established for *public* purposes, as an important aid in conducting the fiscal concerns of the nation. The United States own a large portion of the funds of the Bank,—its bills are receivable in payment of the revenue; and in the case of *M'Culloch v. Maryland*, 4 *Wheat.* 316. the Supreme Court of the United States, speaking of the act incorporating the National Bank, pronounced it one of the supreme laws of the land.

But although a statute be of a *private* nature, as, if it concern a particular trade, yet if a forfeiture be thereby given to the King, it is a *public statute*. *Rex v. Bagg, Skin.* 429. On examining the act under consideration, we find that the twelfth and thirteenth sections provide penalties of different amounts for violations of certain parts of the act; and a moiety or a less proportion of the penalties is given to the United States.

The eighteenth and nineteenth sections provide punishments to be inflicted on those who may be convicted of counterfeiting the bills of the bank, passing them, possessing them, &c. It is believed that in common cases, acts of incorporation, of a private nature, do not contain provisions for the forfeiture of penalties and infliction of punishments. Such provisions are to be found in the general and public statutes, and not elsewhere.

For these reasons we cannot feel ourselves at liberty to pronounce this act of Congress to be a merely *private act*, proveable to a jury only by a copy attested by the Secretary of State. The motion, therefore, to set aside the verdict and grant a new trial, must be overruled and sentence be passed upon the prisoner.

CLAP *v.* DAY.

If a promissory note be made to the agent or treasurer of a private association by his name, with the addition of his agency or office, he may have an action in his own name on the note, the addition of his character being but *descriptio personæ*.

In this action, which was *assumpsit*, the writ contained two counts;—one upon a note of hand made by the defendant, payable to the plaintiff "as treasurer of the proprietors of the new "meeting-house in *Nobleborough*, or his successor in said of-"fice;"—and the other upon a note of the same date and amount, payable by the defendant to the plaintiff in his private capacity.

The defendant protesting that the plaintiff at the time of suing out the writ was not the treasurer of the proprietors, but had been succeeded in that office by one J. G. pleaded in bar that the notes mentioned in the two counts were one and the same,—that the proprietors were a voluntary association for the purpose of building the meeting-house,—that the plaintiff and the defendant, and divers other persons were members of the association,—that the note declared on was an accommodation-

note, made for the purpose of ascertaining who were creditors and debtors among said proprietors in building the house;— and that the note and all other credits among the proprietors is the common and joint property of the whole association, they all being in law but one person.

The plaintiff replied that before action brought, for a good and valuable consideration, he sold and transferred the note to one *S. C.* in whom the equitable interest became vested and now is, and for whose use and benefit this action is brought, and that he received the full payment of *S. C.* therefor, as treasurer and trustee of the proprietors.

Whereupon the defendant demurred in law.

Allen and *Bellard*, in support of the demurrer. The pleadings disclose the fact that the defendant and other persons are equally interested with the plaintiff in the note in suit; and it is a well settled principle that all who have the legal interest must join in the action. It does not appear that the plaintiff is treasurer of the association by any legal appointment, or has been constituted to sue for their use, or is entitled to sell and dispose of securities belonging to the company. If he should die, the note would not be assets in the hands of his executors, but must go to the associates who alone are interested in the money, and who ought, therefore, to have joined in the suit. In that way also the defendant might avail himself by way of set-off, of his demands against the association, which, if this action can be sustained, will be defeated. 1 *Chitty Pl.* 5, 8. *Pigot v. Thompson*, 3 *Bos. & Pul.* 147. *Gilmore v. Pope*, 5 *Mass.* 491. *Niven v. Spikerman*, 12 *Johns.* 401.

But if the plaintiff might sue, yet as between him and the defendant the note is void, being without consideration. Nothing passed from the plaintiff, and no benefit accrued to the defendant. Nor would a judgment in this case be any bar to a future action in the name of all the company. *Fowler v. Shearer*, 7 *Mass.* 14. *Pearson v. Pearson*, 7 *Johns.* 28.

Orr, for the plaintiff. The amount of the plea is that the note was an accommodation-note, and is the joint property of all the company. But this contradicts the note on the face of it, and therefore it cannot be received in evidence.

There being no corporation, the description of the plaintiff's capacity is naught, and may be rejected. It is but *descriptio personæ*.

Here also a consideration appears. Each individual had received his proportion of the common benefit, for which he was indebted to the common fund; and this debt is the sum he has agreed to pay.

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

The first question is, whether the declaration be good. It is contended that the plaintiff has no *legal* interest, and that therefore *he* cannot maintain this action. The association is said to be voluntary, and without any legal incorporation. The cases of *Gilmore v. Pope* and *Niven v. Spikerman* were those of incorporated companies, and were decided on the ground that agents of such companies could not sue in their own names, there being no consideration as between such agents and the persons contracting with the corporation. In *Pigot v. Thompson* the promise was to "the treasurer of the commissioners," but not by his name. The case of *Buffum v. Chadwick*, 8 *Mass.* 108. is directly in point for the plaintiff. The action was founded on a note signed by the defendant, whereby, for value received of the *Providence* hat-manufacturing company, he promised *Buffum* as the agent thereof, to pay him, &c. On a motion in arrest of judgment the case of *Gilmore v. Pope* was cited by the defendant's counsel; but the Court overruled the motion, and considered the two cases as different;—observing that in the case then at bar the contract was with the *agent personally*, and his adding his character to his name in the writ amounted only to a description of his person. We are of opinion that the objection to the declaration is not maintained.

In support of the plea it is urged that the note declared on is an "accommodation-note;" but it does not follow from that circumstance that it is without consideration. It is also alleged that it was given for the purpose of ascertaining who were creditors and who were debtors among the proprietors in building the house, but it is not stated that the defendant was a creditor and not a debtor;—of course this does not shew a want of

consideration. If the allegation in the plea be intended as an averment that the note was *conditional* in its origin, then it is inadmissible as contradicting the note, which on the face of it is absolute. The averment also that the note is the common and joint property of the whole association contradicts the promise in writing, because the defendant is alleged to be one of the proprietors, and he cannot make a promise to himself. The language of the plea is by no means definite as to the meaning intended to be conveyed;—it neither admits nor traverses the promise declared on, nor discloses any facts shewing the contract of the defendant to be different from that alleged in the writ. For this reason it is unnecessary to examine the replication; as the plea itself is bad, the plaintiff is entitled to judgment.

HOSMER, ADMINISTRATOR *v.* CLARKE.

Where money in a bag has been deposited merely for safe keeping, no action lies for it, till after a special demand.

And if the party depositing the money be dead, the usual public notice given by the administrator, of his appointment, calling on all persons indebted to make payment, is not a sufficient demand for that purpose.

THIS was *assumpsit* for money had and received, and came before this Court upon summary exceptions taken by the plaintiff to the opinion of the Court of Common Pleas given in favour of the defendant upon a case stated by the parties.

It appeared that *Asa Hosmer*, the plaintiff's son, being mate of a brig of which the defendant was master, delivered to the defendant in the West Indies a bag of money *to keep for him*, and soon after went ashore at *Port au Prince* and died without issue, leaving the plaintiff his father and heir at law. The defendant immediately on his return to *Camden* where the parties lived, caused the bag of money to be delivered for safe keeping to the mother of the deceased, who had for several years lived apart from the plaintiff her husband, without any separate

maintenance, or support from him. The plaintiff then demanded the money, as heir to his son, of the defendant, who refused to deliver it to him as heir, and soon afterwards sailed on another voyage to sea. After the departure of the defendant, the plaintiff obtained a letter of administration on the estate of his son, of which he posted up the legal notifications, therein calling on all persons indebted to the estate to make payment to him; and then commenced this action without making any other demand, the defendant being still at sea, and ignorant of the appointment of an administrator. After his return the defendant admitted the money to be in his hands, and offered to pay it to the plaintiff, but refused to pay costs.

Orr and *Thayer*, in support of the exceptions, denied that any special demand was necessary before action brought, especially as the money had become assets in the hands of the administrator, who could not be supposed to know the circumstances under which it was deposited with the defendant. And they cited *Cooper v. Mowry*, 16 *Mass.* 5. But if any demand was necessary, the public notice given by the administrator was sufficient.

Wheeler, on the other side, relied on *Gray v. Portland Bank*, 3 *Mass.* 368. and *Foster v. Essex Bank*, 17 *Mass.* 479. to shew the necessity of a special demand, this being a case of naked deposit for safe keeping;—and he contended that the representative of the intestate could be in no better situation, in this respect, than the intestate himself.

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

Two questions have been made in this case;—1. whether the action is maintainable before demand made on the defendant, of the money deposited with him?—2. whether the notice given by the plaintiff of his appointment as administrator, in the usual form, can be deemed in law a sufficient demand?

As to the first point;—it appears that the defendant received the bag of money belonging to the intestate, merely as an act of friendship,—that the intestate soon after died in the West Indies,—that the defendant carefully brought the money home with him in the same bag, and has kept it safely ever since, always having been ready to deliver it to any person legally

authorised to receive it. Upon these facts it is clear that an action of *trover* could not be maintained, there having been no demand nor conversion of the property. And we do not perceive any reason why *assumpsit* should lie, or on what principle it can be maintained. The defendant has complied with his engagement by keeping the money safely; and if no demand has been made on him for it which he has not been willing to comply with, then no promise on his part has been violated; and of course, without proof of demand and refusal, *assumpsit* will not lie.

As to the *second* point;—it appears that the defendant went to sea before the plaintiff's appointment as administrator, of which fact he had no knowledge till after the commencement of this action. The main object in requiring an administrator to give public notice of his appointment is, that the creditors of the intestate may know on whom to call for payment of their demands within the four years allowed them for that purpose. The usual call on all persons indebted to the estate to make payment is inserted for the convenience and at the pleasure of the administrator. Such notice, from its nature, must be general. In the present case it did not reach the knowledge of the defendant till the action was commenced. Besides, it is very questionable whether it would have amounted to a legal demand, if it had reached him in season. The advertisement contains only a demand on all persons *indebted*;—but before a legal demand and refusal the defendant cannot be considered as *indebted* to the estate. Accordingly the exceptions are overruled, and the judgment below is affirmed.

FEYLER *v.* FEYLER.

No appeal lies from an order of the Court of Common Pleas directing the plaintiff to become nonsuit. The remedy for the party aggrieved, is by exceptions pursuant to *Stat.* 1822. *ch.* 193.

Whether the plaintiff may file a new writ, the original being lost, *quære.*

WHILE this action, which was trespass *quare clausum fregit*, was pending in the Court below, the original writ was acci-

dentally lost. The plaintiff thereupon moved for leave to file a new writ, which was refused by the Court, who ordered a nonsuit to be entered, and gave judgment for the defendant for costs. From this order and judgment the plaintiff appealed to this Court, and now entered his appeal, and renewed his motion for leave to file a new writ; producing a substantial copy of the original, verified by the affidavits of the attorney who drew it, and of the officer who made the service.

Orr and *Reed* resisted the motion, on the ground that here was nothing to amend by, the declaration, by our practice, being inserted in the body of the writ. But they also objected that the case was not regularly before this Court, the law permitting an appeal only in cases where an issue has been joined.

Allen and *Bulfinch*, to shew that the remedy was by appeal, cited *Bemis v. Faxon* 2 *Mass.* 141. *Lampheare v. Lamprey*, 4 *Mass.* 107. *Tappan v. Bruen*, 5 *Mass.* 193. *Wood v. Ross*, 11 *Mass.* 271. And to shew the authority and practice of the Court to grant leave to file new writs, they cited the case of a loss of the records of *nisi prius* and writs of *hab. cor. jurat. Barnes' Notes*, 466—issue roll and records, 1 *Caines*, 496—indictment, 3 *Caines*, 104, 88.—*fieri facias*, 3 *Johns.* 448.

Mellen C. J. delivered the opinion of the Court at *Augusta* in the ensuing week, as follows.

The *Stat.* 1822. *ch.* 193. *sec.* 4. provides for an appeal by either party in any personal action, wherein *any issue has been joined*, under certain limitations as to the amount, and conditions as to costs. There was a similar limitation of the right of appeal in the *Stat.* 1811. *ch.* 33.; but not in the *Stat.* 1782. *ch.* 11. which permitted an appeal by "any party aggrieved at the "judgment of the Court of Common Pleas upon any action." This provision remained in force till the *Stat.* 1803. *ch.* 155. took away the right of appeal from any judgment rendered in that Court upon default. The cases of *Bemis v. Faxon* and of *Lampheare v. Lamprey*, which refers to it, were founded on the act of 1782, which did not confine the right of appeal to cases

where issue had been joined. But our *Stat.* 1822. *ch.* 193. *sec.* 5. expressly provides that "either party aggrieved by any "*opinion*, *direction*, or *judgment* of said Court of Common Pleas "in any matter of law, may allege exceptions to the same," in a summary manner, and pursue his remedy in the mode there pointed out;—and this provision extends to cases where either party is aggrieved, *whether issue has been joined or not.* No party therefore is without remedy. The plaintiff should have pursued this course in the present case; but having omitted so to do, the case is not regularly before us, and we can only dismiss it as a misentry. Of course it is not necessary that we should give any opinion on the question of filing a new writ. It is hardly necessary to add that the cases cited from *Massachusetts* bear no resemblance to this, and were decided upon principles which have since been changed.

See *Frothingham v. Dutton*, *ante*, p. 255.

THORNDIKE *v.* BARRETT.

Where the proprietors of a large tract of land had conveyed a parcel to *R. T.* by metes and bounds, and also contracted to sell him an adjoining parcel, which, under that contract, he had entered upon and enclosed within fences, —and afterwards they conveyed to *W. M.* "*all their unappropriated lands*" in the same tract, bounding it in part "*on land of R. T.*" whose deed was not then on record;—it was holden that the lands thus possessed by *R. T.* were "*appropriated*," and did not pass to *W. M.*

The lands of a person deceased, of which he was disseised actually and not colourably at the time of his death, are not liable for the payment of his debts.

This was a writ of entry in which the demandant counted on his own seisin within thirty years, and a disseisin by the tenant; and it was tried upon the general issue, at the last *October* term in this county.

The demandant, to prove the issue on his part, read in evidence a deed to himself from *Mary Molineaux*, administratrix on the estate of *William Molineaux*, dated *September* 11, 1818, and a

licence from the Common Pleas to her for that purpose. He also proved that after the date of his deed and before the commencement of this action, he entered peaceably into the land, the tenant opposing and forbidding him for the sole purpose of trying his title.

The tenant then read in evidence a deed of the premises from one *Joseph Pierce* to him, dated *April* 1, 1817; and proved that at the date of the demandant's deed, the tenant was in fact in possession of the land, having it enclosed in fence and under cultivation. He also read a deed from the *Twenty Associates*, dated *February* 15, 1806, conveying the premises to *Pierce*, his grantor.

The demandant then offered in evidence a deed dated *September* 14, 1790, from one *John Molyneaux* in his capacity of clerk to the *Twenty Associates*, and by virtue of divers votes of the proprietary *therein recited*, conveying to said *William* a large tract of land called *Beauchamp Neck* containing *five* hundred acres, of which the premises were a part; it being the same deed mentioned in *Barrett v. Thorndike*, 1 *Greenl.* 73. and on which the standing committee of the proprietors had certified their approbation. This deed recited a vote of the proprietors *September* 23, 1785, directing the sale of *Beauchamp Neck* by the standing committee;—a vote of the standing committee *October* 31, 1785, mentioning that several offers had been made for *Beauchamp Neck* "supposed to contain about *five* hundred acres," and accepting the offer of *W. Molyneaux* it being the highest, and thereupon voting to sell him "*all the unappropriated lands on* "*Beauchamp Neck*, he paying six shillings per acre;"—another vote of the proprietors *December* 12, 1789, in which the two preceding votes were recognized, and the clerk directed to make out to *Molyneaux* "a good and lawful deed agreeably to the "usual forms in like cases practised," he having "complied with "the conditions as per account settled the fourth instant;"—also a prior vote of the proprietors passed *May* 13, 1768, empowering the clerk to execute any deeds which the standing committee shall judge necessary for conveying any lands of the proprietors, to be approved by an indorsement by at least two of the committee in writing, on the deed;—and then proceeded to convey the lands, describing them as bounded "northwest

"on land of *Abraham Ogier*, and land of *Robert Thorndike* con-
"*taining fifty acres*, and a pond." To this the tenant objected, that it purported to be, not the deed of the proprietors, but of *John Molyneaux*, who did not appear to have any interest in the land;—and if not, yet the recitals in the deed were not the proper evidence of his authority to convey. He also offered to prove that in one of the recitals in the deed there had been a fraudulent alteration of the word *four* hundred to *five* hundred acres, by which the authority of the deed, as evidence of the vote, was wholly destroyed. But the presiding Judge overruled this objection, and admitted the deed.

The demandant also read a deed from the *Twenty Associates* to *Robert Thorndike* of fifty acres of land, dated *November* 9, 1768, and recorded *January* 21, 1794.

The tenant then offered to prove that the alteration of the word *four* to *five* was made by *William Molyneaux* himself, and that he had also fraudulently interlined the words "*containing* "50 *acres*" in the description of the land, and to shew the materiality of the alterations, he further offered to prove that at the date of the deed to *Molyneaux* and long before, *Robert Thorndike* was in possession of the demanded premises, adjoining his fifty acres, having the land inclosed in fences and under actual improvement, under a contract with the *Twenty Associates* for the purchase of it; that no line had then been run between the demanded premises and the fifty acres; and that the land in dispute, as well as the fifty acres, was commonly called in that neighbourhood *Robert Thorndike's* land, and that this was well known to all parties. He also offered to prove that *William Molyneaux* was never in the actual possession of the premises, but that *Thorndike* continued to occupy the same till the deed to *Pierce*, and that *Pierce* entered and occupied till he conveyed to the tenant. He also offered to read a copy of the judgment in trespass in the case of *Barrett v. Thorndike* rendered for the present tenant upon a final trial;—also an account settled by *William Molyneaux* with the *Twenty Associates* in which he credited them with the price of the *Beauchamp* Neck, as containing *four* hundred acres.

All this evidence was rejected by the presiding Judge.

It also appeared that *Robert Thorndike* always denied and resisted the claim of *William Molyneaux* to the demanded premises, but never pretended to hold in opposition to the right of the *Twenty Associates;* from whom in 1804 he took a lease of the premises for the term of one year.

The tenant then contended that, inasmuch as he was in the open and visible possession and occupation of the premises at the time of the execution of the deed from the administratrix to the demandant, nothing passed by this deed;—but the Judge overruled this objection, and instructed the jury that by the original conveyance from the *Twenty Associates* to *William Molyneaux* the demanded premises passed to the grantee, and that the demandant had maintained his action; and they found for the demandant. The verdict was taken subject to the opinion of the whole Court upon the correctness of the opinions of the presiding Judge, in admitting or rejecting the evidence aforesaid, as stated in his report of the trial.

Orr, *Fessenden*, and *Wheeler*, for the defendant.

1. Nothing passed by the deed from the administratrix to the demandant, because her husband was never actually seised of the land. *Thorndike* having held adversely from the year 1790, the right of entry in *Molyneaux* was gone. He *always* resisted the latter's right to the land. *Atkyns v. Horde*, 1 *Burr.* 107. *Co. Lit.* 29. *a.* 153. *a.* 1 *Taunt.* 588. 3 *Bl. Com.* 176. *Prop'rs of No.* 6 *v. M'Farland*, 12 *Mass.* 325. Or if the intestate was *ever* seised, yet he died *disseised*, and so the land was not liable for the payment of his debts. *Nason v. Willard*, 5 *Mass.* 240. *Poor v. Robinson*, 10 *Mass.* 131. *Boylston v. Carver*, 4 *Mass.* 607.

2. The deed from *John Molyneaux* conveyed nothing, it not being in terms the deed of the proprietors. If he had authority to convey, it was never properly executed. *Stinchfield v. Little*, 1 *Greenl.* 231. *Elwell v. Shaw*, 16 *Mass.* 42. But he had no authority, the recital of the votes in the deed being not the proper evidence of the fact. 1 *Phil. Evid.* 319—321.

3. If, however, these recitals might be sufficient under other circumstances, yet the deed being materially altered, all its credit is destroyed. And the tenant ought to have been ad-

mitted to prove these alterations. The existence of a deed to *Thorndike* was not conclusive evidence of the extent of the land called his, since he claimed and held within fences the adjoining land under a contract, the land being thereby "appropriated," and so not within the deed to *Molyneaux*. And so *Molyneaux* understood it, or he would not afterwards have altered his own deed. These parts were proveable by parol. *Storer v. Freeman*, 6 *Mass.* 435. *King v. King*, 7 *Mass.* 496. *Albee v. Ward*, 8 *Mass.* 83. *Townsend v. Weld*, 8 *Mass.* 146. *Leland v. Stone*, 10 *Mass.* 459. *Adams v. Frothingham*, 3 *Mass.* 352.

4. The deed to *Molyneaux* was obtained by fraud, and is therefore void. It appears from his account settled with the proprietors at *Boston* that he was their agent for the survey and care of these remote lands; and that he falsely represented the Neck to contain but 400 acres, when in truth it contained at least *five* hundred. A deed thus obtained by imposition and fraud ought not to be received as evidence of title;—and the grantors might well convey the lands to another. *Smithwick v. Jordan*, 15 *Mass.* 113.

Longfellow, *Greenleaf*, and *Thayer*, for the demandant.

1. The recitals in the deed are good evidence, *prima facie*, of the votes of the proprietors, especially after this lapse of time. If not, they may be considered as certified by the clerk, his signature being upon the deed. And the original vote directing the clerk *to convey* is a prospective ratification and adoption of such deed as he might make and the standing committee approve. If the authority was defectively executed, it is cured by *Stat.* 1823. *ch.* 228.

2. By the land of *Thorndike*, mentioned in the deed, must be understood the land he *owned*, which could only be known by reference to his title-deed. The parol evidence offered would have contradicted this, and was therefore inadmissible; or, if not, it was not the *best* evidence of the fact. *Storer v. Freeman*, 6 *Mass.* 440. *Crosby v. Parker*, 4 *Mass.* 110.

3. Of the estate thus conveyed *William Molyneaux* was seised. The lease from the proprietors to *Thorndike* in 1804 was an admission of *their* seisin, which instantly enured to the benefit of their grantee; whose seisin both the parties to the lease

are thereby estopped to deny. If not, yet the demandant entered under his own deed, which he might well do, the right of the intestate being conveyed thereby. *Drinkwater v. Drinkwater*, 4 *Mass.* 354.

4. The alterations have been decided to be immaterial, and not to affect the title to the estate. *Barrett v. Thorndike*, 1 *Greenl.* 73. And it does not appear but that the quantity was truly represented at *four* hundred acres.

WESTON J. delivered the judgment of the Court as follows.

Whatever may be the true construction and effect of the deed of the fourteenth of *September* 1790, purporting to convey to *William Molyneaux*, the title of the *Twenty Associates* to the lands therein described, it does not appear that the said *William* in his life time ever had the actual occupation of the premises demanded. Admitting the land in controversy to have been included in, and to have passed by, this deed; yet it appears that this effect was contested by the grantors. *Robert Thorndike* then in possession under them, continued to occupy the premises, denying and resisting the claim of *Molyneaux*. In this he was supported, as the tenant offered to prove, by the *Twenty Associates*, who recognized and claimed *Thorndike* as their tenant; and in *February* 1806, actually conveyed the land in question to *Joseph Pierce* in fee, who, by his agent, took possession of the same, which was continued until he sold to the present tenant, who has ever since had the exclusive possession and occupancy of the demanded premises; claiming to hold them as his own. *William Molyneaux* therefore became disseised, if he ever was in fact seised; and this disseisin must be considered as having commenced soon after the date of his deed. The grantor cannot lawfully enter upon and oust his grantee, but such act would notwithstanding be a disseisin, as much as if committed by a stranger.

It is true that in a comparison of title, if the deed to *William Molyneaux* passed the premises, the subsequent adverse possession of *Robert Thorndike*, and of *Joseph Pierce* and his grantee, would be found to have been tortious. Each deducing his right from the same origin, *Molyneaux's*, as the more ancient, must have prevailed. But the disseisin would continue until it was

purged or extinguished by peaceable entry, or by judgment of law. It does not appear that *Molyneaux* availed himself of either of these remedies. He died therefore disseised. He in his life time, while the disseisin continued, could not by law have passed his right to a stranger. Could his personal representative do so, upon his decease? If she could not, then however well founded the right of the intestate may have been, the title of the demandant fails.

It is insisted that under a license of Court duly obtained, the administratrix might lawfully sell the right of the intestate; and that it was competent for the demandant, as the purchaser to enter upon the premises and to demand the same in a suit at law, as he has now done, counting upon his own seisin. The case of *Drinkwater v. Drinkwater*, 4 *Mass.* 354. is relied upon as an authority justifying this course. Chief Justice *Parsons*, in delivering the opinion of the Court there says, "if the lands "are liable to the payment of the intestate's debts, he (the ad- "ministrator) may lawfully sell them on license, whether they "are in the possession of the heir, or of his alienee or disseisor. "For no seisin of the heir, or of his alienee, or of his disseisor, "can defeat the naked authority of the administrator to sell on "license." But this reasoning is predicated on the assumption that the intestate died seised. In the case of *Willard v. Nason*, 5 *Mass.* 240. the same learned Judge, commenting as the organ of the Court, upon the statute of *Massachusetts*, under the authority of which the sale was made to the demandant in this action, remarks that "it may be further observed that the "lands of a person deceased are not liable for the payment of "his debts, unless he died seised of them, or had fraudulently "conveyed them, or was colourably and fraudulently disseised "of them, with the intent to defraud his creditors." And this is the language also of the fifth section of the statute of *Massachusetts* 1805. *ch.* 90. and of the revised statutes of this State, *ch.* 72. *sec.* 1.

Thus it clearly appears that the lands of a person deceased, of which he was disseised actually and not colourably, at the time of his death, are not made liable for the payment of his debts. The land in question, if it ever belonged to the intestate, being thus circumstanced, it results that the license ob-

tained by the administratrix of *William Molyneaux* did not extend to this land; and that the demandant could derive no title under her deed.

By the deed to *William Molyneaux*, it is recited that the standing committee of the *Twenty Associates*, at a meeting holden on the thirty-first of *October* 1785, agreed to accept the offer of the said *William*, and to sell to him all the *unappropriated* lands on *Beauchamp Neck;* and it is further recited that at another meeting of the same committee, the said *William* having complied with the conditions on his part to be performed, the committee, referring to their agreement before mentioned, voted that the clerk of the propriety should make out a good and sufficient deed to the said *William* of the said *Beauchamp Neck*, according to the usual forms. The tenant offered to prove that at and before the date of that deed, *Robert Thorndike* was in possession of the demanded premises by distinct metes and bounds, fences and actual improvements, under a contract from the *Twenty Associates* for the purchase of the same. This contract, and the actual possession of *Thorndike* under it, must be considered as an appropriation of this land, within the true intent and meaning of the agreement recited. Of this appropriation neither the *Twenty Associates* nor *William Molyneaux*, from the nature of *Thorndike's* possession, could be ignorant. It could not have been understood, by either of the parties, that the vote of the committee extended to the sale of this land which, if made, would deprive the propriety of the power to fulfil their contract with *Thorndike;* and thus render themselves liable to answer in damages to him for its violation. To appropriate, is to consign or set apart to a particular use or destination. This was virtually done by the contract with *Thorndike*, who had thereupon entered into the actual possession and enjoyment of the land in question; his title to which was to become consummate and indefeasible, upon the performance of certain conditions on his part.

But it is contended that the tract conveyed, being bounded on *Robert Thorndike's* land, this must be construed to mean the fifty acres which he actually owned, and not that which he had only contracted for; and the case of *Crosby v. Parker*, 4 *Mass.* 110, is cited to support this position. *Crosby* was there

bounded by *Joseph Wilson's* land. *Wilson* owned one piece and had contracted for, and was in possession of, another adjoining; and the Court held that *Crosby's* title extended to the former. One of the reasons assigned by the Court for their opinion is, that *Wilson's* first purchase was "all the land of which he had "any title on record, by which the tenant could ascertain the "boundaries." In the case before us it appears that *Thorndike's* deed of the fifty acres, was not recorded until some years after the execution of the deed in question. But the most material difference between the two cases is, that the committee of the *Twenty Associates* agreed to sell only the unappropriated land. By construing the "land of *Robert Thorndike*," as expressed in the deed, to mean as well that which he occupied and possessed under contract to purchase, as that which had actually been conveyed to him, the unappropriated land alone passed, in conformity with the manifest intention of the parties. But if, by this boundary, we are to understand the fifty acres, it would embrace land which the grantors had before appropriated, by their contract with *Thorndike*. By the former construction every part of the deed is consistent; and embraces all which the parties could have contemplated.

That the grantee thus understood it, if any further evidence were necessary, the tenant offered to prove that after the execution of the deed, he fraudulently inserted therein after the words "land of *Robert Thorndike*," the words "containing fifty acres;" thereby plainly indicating his consciousness that his title could not extend to *Thorndike's* fifty acres, without these additional words.

We are, for these reasons, of opinion that the evidence rejected, tending to shew what was meant by *Robert Thorndike's* land, ought to have been admitted; and upon this ground as well as from the want of authority in *Mary Molyneaux* to sell this land, for the reasons before stated, the verdict is set aside, and a

New trial granted.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

KENNEBEC.

JUNE TERM,

1823.

THE CASE OF PARCHER & AL.

The Court of Common Pleas has no jurisdiction of an offence created by statute, unless it is expressly made cognizable in that Court.

THE defendants were indicted in the Court below upon *Stat.* 1821, *ch.* 168, for taking, carrying away, and converting to their own use two logs lying upon the bank or shore of a stream called *Dead river;* this offence being made penal by that statute, and punishable by indictment *in any Court of competent jurisdiction.* Being convicted in this Court, to which they had appealed, they moved that the judgment be arrested, assigning divers causes, one of which was that the Court of Common Pleas had no jurisdiction of the offence.

The *Attorney General* and *H. W. Fuller*, being called upon by the Court to support the verdict against this objection, contended that the act was a misdemeanor at common law, to which the statute only affixed a specific penalty;—and that the Court of Common Pleas had jurisdiction over offences of this sort, deducible from the old Court of quarter sessions, through the late Court of General Sessions of the peace. And they cited *Commonwealth v. Holmes*, 17 *Mass.* 337.

Sprague, on the other side, was stopped by the Court.

Per Curiam. It is very clear that the act charged in the indictment was no offence at common law, but was merely a trespass;

and it falls within the principle of *Commonwealth v. Knowlton*, 2 *Mass.* 530. and for the reasons there given the judgment in this case must be arrested. The jurisdiction does not belong to the Court below, unless expressly given; which in the present instance has not been done.

WELLS' CASE.

A writ of review cannot be granted in a *criminal* case, under any of the provisions of *Stat.* 1821. *ch.* 57.

WELLS having been convicted in the year 1819 on an indictment for selling unwholesome provisions, now presented a petition for review, founded on the subsequent discovery of material evidence, by witnesses who were absent from the United States at the time of trial, and had recently returned.

THE COURT, however, said that the statute regulating reviews applied only to civil cases;—and the power to grant new trials at common law being confined to motions filed before judgment, the petitioner took nothing by his petition.

VOSE *v.* HANDY.

Where several particulars are named, descriptive of the land intended to be conveyed in a deed, if some are false or inconsistent, and the true are sufficient to designate the land, those which are false and inconsistent will be rejected.

If it appears that a debt secured by mortgage has been paid, the mortgagee, in a writ of entry upon his deed, cannot have judgment for possession of the land.

In this State the assignment of a mortgage must be by deed.

A bond may be assigned by delivery only, for a full and valuable consideration.

THIS was a writ of entry on the demandant's own seisin in fee and in mortgage, in which he demanded possession of "a "parcel of land in *China*," [formerly *Harlem*] "part of lot No. "29, according to a survey and plan made by *John Jones*, and

" bounded as follows, beginning on the east side of twelve-mile-
" pond at the *south-west* corner of said lot, thence running east
" south-east one mile, thence northerly fifty rods, thence wester-
" ly, parallel with the south line one mile to said pond, and
" thence southerly by said pond to the bound first mentioned,
" containing one hundred acres more or less."

At the trial, which was upon the general issue, it appeared on the part of the demandant that *June* 30, 1803, *Dan Read* conveyed to *Nathan Dexter* " a certain tract of land in *Harlem*
" bounded on lot No. 30, at the pond, thence running east-south-
" east 320 rods, thence northerly fifty rods, thence west-north-
" west to the pond, thence southerly to the first mentioned
" bounds, it being the south half of lot No. 29, agreeably to
" *John Jones'* plan, containing one hundred acres, more or less."

It further appeared that *Dexter*, *September* 17, 1804, conveyed to one *Fowle* " a certain tract of land in said *Harlem* being lot
" No. 29 of the range of lots adjoining the eastern side of
" twelve-mile-pond according to *John Jones'* plan of said town
" of *Harlem*, and bounded as follows, beginning on the easterly
" side of said pond, at the *south-west* corner of said lot number
" 29, and running easterly one mile, thence northerly fifty rods,
" and thence westerly one mile to said pond, thence to the
" bounds first mentioned, containing 100 acres, more or less."

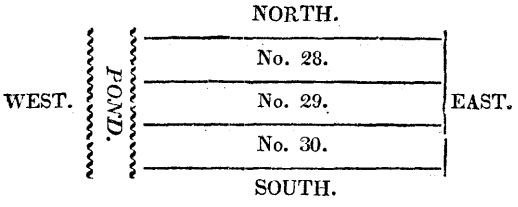
At this time *Dexter* lived on the south half of lot No. 29, between which *lot* and the lot No. 28, there was an eight-rod range-way. Another man dwelt on the *north* half of lot No. 29, claiming title, and a third person dwelt on the south half of lot No. 28, who also claimed *that* land. *Fowle* entered under his deed from *Dexter*, and continued in the actual occupancy of the land till the year 1816.

It further appeared that *Fowle*, *September* 26, 1805, mortgaged to the President, Directors and Company of the *Hallowell* and *Augusta* Bank, *incorporated March* 4, 1804, to secure the payment of his bond of that date for 500 dollars and interest,—
" a certain piece of land in *China*, formerly *Harlem*, being lot
" No. 29, adjoining the eastern side of twelve-mile-pond accord-
" ing to *John Jones'* plan, and bounded as follows, to wit, begin-
" ning on the easterly side of said pond at the *north-west* corner
" of said lot, and running easterly one mile, thence northerly

"fifty rods, thence westerly one mile to said pond, and thence "to the first mentioned bounds, containing 100 acres, more or "less."

It further appeared that the demandant at the Court of Common Pleas, *April* term, 1822, recovered judgment against that corporation, and by virtue of a writ of execution duly issued thereon and agreeably to *Stat.* 1821. *ch.* 60. all their right and title in the said debt and land mortgaged to them was sold at public auction by the sheriff to the demandant, *June* 8, 1822, he being the highest bidder, and a deed thereof duly made to him and recorded the following day, describing the land as in the mortgage deed, adding the words "or however otherwise bounded."

The lots on *Jones'* plan contain each 200 acres, and are thus situated:—



The tenant, to support the issue on his part, proved that the bond and mortgage *February* 1, 1814, were *delivered* by the *old* corporation to the President, Directors and Company of the *Hallowell* and *Augusta* Bank, *incorporated June* 1812, and that the latter corporation thereupon paid to the former the whole money due thereon, in full for said bond and mortgage.

He also proved that the latter corporation brought an action against *Fowle* on the mortgage deed at the Court of Common Pleas *April* term 1815, setting forth *an assignment thereof by deed* from the former corporation to them, bearing date *December* 1814;—that judgment was rendered therein for possession at the *August* term following, upon default;—and that the writ of possession thereon was executed *January* 10, 1816, on which day the demandants in *that* suit made a lease of the premises to *Fowle* for three years. The bond and mortgage were both filed in that case, but without any written transfer or assignment thereon.

He also proved that *Fowle* by his deed dated *December* 20, 1816, conveyed to the tenant all his right and title to "a tract "of land—being lot No. 29—bounded, beginning on the easter- "ly side of said pond *at the north-west corner of said lot No.* 29, "and running easterly one mile, thence southerly fifty rods, "thence westerly one mile to said pond, thence by said pond "to the point begun at, containing 100 acres, more or less";— and that thereupon *Fowle* removed from that town, and the tenant entered under his deed, and has ever since continued to occupy the *south half of lot No.* 29.

He also proved that the corporation to whom the bond and mortgage were delivered as aforesaid, released to the tenant *July* 22, 1820 all their right in the mortgaged premises on payment by him of the money due on the bond.

There was no evidence that the corporation against whom the demandant recovered his said judgment, or the members thereof, ever assented to the act passed *June* 19, 1819 for continuing the existence of certain bodies corporate of which that corporation was one, for certain purposes therein specified.

Upon this evidence a verdict was taken for the demandant, subject to the opinion of the Court upon the general question whether, upon the whole matter, the action was sustainable; the parties agreeing that if the Court should not be of opinion with the demandant, a new trial should be granted.

Bond, for the tenant, argued against the verdict, taking the following points.

1. The charter of the old bank having expired by its own limitation long before the passage of the statute of *June* 19, 1819, that corporation was dissolved. The legislature cannot compel one to become a corporator without his assent; nor impose a new charter on an existing corporation without its acceptance. But here was no acceptance of the statute of *June* 1819, and so no corporation in existence in *April* 1822, against which the demandant could recover a judgment. *Ellis v. Marshall*, 2 *Mass.* 269. 4 *Wheat.* 675. *Lincoln and Kennebec Bank v. Richardson*, 1 *Greenl.* 79. *That* judgment therefore was merely void; and there being no party to bring a writ of error for its reversal, it may be avoided by plea. 3 *Com. Dig. Error. D.* And where a corporation is extinct, its funds be-

come the private property of the corporators, and its lands revert to the grantors. 1 *Bl. Com.* 484. 1 *Lev.* 237. *Co. Lit.* 13 *b.*

2. The boundaries in the deed to the demandant do not include the land demanded, but describe a tract lying north of it. And when the description of land in a deed has a well known place of beginning, that must govern, and the grant be confined to boundaries. 17 *Johns.* 146.

3. At the time of the demandant's judgment against the old bank in *April* 1822, nothing was "due" to that corporation from *Fowle—vid. Stat.* 1821, *ch.* 60—and so nothing passed to the demandant by the sheriff's deed. The *debt* was the principal thing, without which the land could not be affected. But here the bond and mortgage had long since been assigned from the old bank to the new. And the *actual delivery* of a bond and mortgage to another is a valid transfer of both, determining the interest of the assignor in them both. 1 *Johns. Ca.* 580. 11 *Johns.* 534. 17 *Johns.* 284. 2 *Burr.* 978. 11 *Mass.* 134.

4. If the assignment of the mortgage is not effectual without deed, here is evidence of such assignment;—for in the writ by the new bank against *Fowle* it is recited that the mortgage was assigned by deed, which is admitted by *Fowle's* appearance and default.

5. And if this is not sufficient, yet here is a legal assignment of the *bond* by *delivery* from the old to the new bank, for a full and valuable consideration, of which *Fowle* had notice by the suit against him, so that no payment by him to the old bank could have been valid. If this assignment is entitled to the protection of law, the old bank had no "debt" due from *Fowle.* 12 *Mass.* 281. 13 *Mass.* 304. 15 *Mass.* 481.

6. If neither the bond nor the mortgage were legally *assigned*, yet the bond was *paid* in *July* 1820 to the officers of the new bank, with whom it was *deposited for collection;* and this payment whether before or after breach, is a discharge of the mortgage.

7. The *Stat.* 1821. *ch.* 39. *sec.* 3. provides that the judgment in an action like the present, on a mortgage, shall be *conditional*, that if the tenant shall within two months pay the money due on the bond, no writ of possession shall be issued. But here

nothing is due. To what purpose then can a judgment be rendered for the demandant?

Orr and *R. Williams*, for the demandant, contended—1. that the deeds should be so construed as to effectuate the intention of the parties; and that an erroneous description shall not avoid that which is otherwise sufficiently certain. 5 *East.* 51. 3 *Bac. Abr. Grant, H.* 1. *note.* 1 *Caines*, 493.

2. As to the right of the legislature to revive and continue in force the charter of the old bank, they cited *Foster v. The Essex Bank*, 16 *Mass.* 245. But the objection that the demandant's judgment was against a corporation not *in esse* is not open to the tenant, because he does not claim under *that* corporation, but under the *new* bank.

3. By the *Stat.* 1821. *ch.* 60. a copy of the mortgage deed is made *prima facie* evidence of a "debt due" to the bank.

4. The debt thus due was never *paid*, nor was the bond or the mortgage ever legally assigned to the new bank. The payment of money by the tenant to the new bank was no payment or discharge of the bond, because it was not so intended, and because he had no authority from the obligor. Nor had he a right to redeem the land. The interest of the *mortgagor* was not conveyed to him;—the deed of the new bank to him was not of the land mortgaged.

As to the *assignment*.—The case finds a delivery from the old to the new bank. This, being an act *in pais*, must be proved by shewing some *authority* to do it, for a corporation cannot act by *parol*. 7 *Mass.* 102. 8 *Mass.* 292. But if it might, yet the delivery here would be of no effect, because the interest of a mortgagee in lands cannot be transferred by delivery over of the deed. *Powell on mort.* 23—4, 225—6, 247, 271—2, 1127—8. 5 *Bac. Abr. Mortg. C. E.* 8 *Mass.* 554. 3 *Mass.* 559. 11 *Mass.* 125. 17 *Mass.* 419. It is not assignable at law. 6 *Mass.* 239. Being an interest in lands, it can only pass by deed, by the statute of frauds. *Warden v. Adams*, 15 *Mass.* 233. If the delivery over in this case were a good assignment, then the new bank might have an estate in mortgage, and afterwards in fee, *without deed.*

Neither was the *bond* assigned. The bond and mortgage being parts of one entire contract, one part could not be assigned without the same solemnity which would be necessary to transfer the other; and the mortgage being assignable only by deed, the bond must pass by deed also. *Perkins v. Parker*, 1 *Mass.* 123. 2 *Mass.* 96. 3 *Mass.* 558. 4 *Mass.* 450. 11 *Mass.* 488. 12 *Mass.* 193. The *New-York* decisions to the contrary have never been recognized here as law.

MELLEN C. J. at the succeeding term in *Cumberland*, the action having been continued *nisi* for advisement, delivered the opinion of the Court as follows.

We have listened with much pleasure to the able arguments which have been urged by the counsel on both sides; and carefully examined and considered the principles and cases that have been relied upon.

Both parties claim under the mortgage-deed made on the 26*th* of *April* 1805, by *Daniel Fowle* to the bank incorporated in 1804. In speaking of *this bank*, for brevity's sake, we call it the *old bank*; and the other, which was incorporated in 1812, we shall call the *new bank*.

The premises demanded are not bounded and described in the mortgage in the same manner as in the declaration; but this will be more particularly noticed hereafter. The *demandant's* title, as he has disclosed it, is under a judgment recovered by him at the Court of Common Pleas, *April* term 1822, against the *old bank* for $2833,42, on which execution duly issued; by virtue of which, on the 3*d* of *June* 1822, *Kimball*, a deputy sheriff, sold at public auction all the right and title of the *old bank* acquired by said mortgage deed, and to the debt, to secure which the deed of mortgage was made, to the *demandant* who purchased the same; and the officer on the same day gave a deed of the premises, so sold to him; which deed, on the next day, was duly registered. It has been contended that, independent of the facts disclosed in the defence, the *demandant* is entitled to recover upon those which he himself has proved.

The *first* objection is that the charter of the old bank had expired long before the judgment abovementioned was recovered, *viz.* in *October* 1812. And though it was continued for

certain purposes by the act of *June* 24, 1812, to *October* 1816; and by the act of *December* 14, 1816, for three years longer; and afterwards by the act of *June* 19, 1819, for three years longer; still it has been contended that the old bank never *assented* to this extension; and that *without such assent*, those extending acts never were binding on them; because such extending is in the nature of a *new charter;*—and that no charter can ever bind those to whom it is granted, without their acceptance of it. It is very questionable whether it is competent for *third persons* to make this objection; and not only so, but in so doing, to impeach the *merits of a judgment* in this collateral manner. But we do not proceed on this ground, nor is it necessary; because we consider the case of *Foster v. Essex Bank*, 16 *Mass.* 245, and *Lincoln and Ken. Bank v. Richardson*, 1 *Greenl.* 79, as deciding the merits of this objection.—The counsel for the tenant has relied upon an apparent discrepancy between these two cases as to the necessity of the *acceptance* of an act *continuing* a charter of a bank. There is perhaps a want of clearness, perhaps some inaccuracy of expression, in that part of the opinion in the *latter* case, which relates to this point. But it will be seen that the Court in that case, declared themselves perfectly satisfied with the reasoning and conclusion of the Court in *Foster v. Essex Bank*, and that the same principles ought to govern *both* cases. The C. *J.* of this Court stated that the same principle of law applied to an act, *continuing* a charter beyond its original term, as to an act, which *granted* the charter; that in both cases, the *grant* or *chartered powers* must be *accepted.* The above remarks were made in a case where a bank was *plaintiff* and the language used had reference to *chartered powers*, not *corporate liabilities.* The question of *liabilities* had been settled on sound principles in *Foster v. Essex Bank;* the opinion in that case had been approved and adopted by this Court; and in *both cases* those *liabilities* related to debts contracted *prior* to the expiration of the *original charter.* Hence it appears that the expression *thus limited* and understood, does not, nor was it intended to convey an idea at variance with the opinion in the case last mentioned. This objection therefore we overrule.

The *second* objection, founded on the defects in the *demandant's own proof*, is, that the land sold by the officer, and conveyed to him is not the *land demanded;* inasmuch as the description in the deed of the officer, though agreeing with that in the mortgage, varies essentially from that in the declaration; and in fact embraces *no part* of lot *No.* 29, but the southerly half of lot *No.* 28 on *Jones'* plan. There certainly is a mistake; and it arose from the circumstance of using the word "northwest" instead of "southwest" in commencing the description of the land intended to be conveyed, both by the mortgagor and the officer, which was the *south half of lot No.* 29. It may again be observed that both parties claim under the same mortgage deed; and in the deed from *Fowle* to the tenant, executed on the 16*th* of *December* 1816, and conveying all his right, we find the same erroneous description, occasioned by the substitution of the word "northwest" for "southwest."

Our attention is then directed to the following facts, viz. that *Dexter* the *grantor* of *Fowle*, lived on *the south half of No.* 29, when he conveyed to *Fowle*, and *Fowle* went into possession of *that half* of *No.* 29, under *Dexter's* deed; and continued thereon until 1816, when he sold his right to the tenant as before stated; that another man at the time lived on the *north half* of lot *No.* 29, claiming it as his own; and the *south half* of No. 28, was occupied by a person *then* and ever since residing thereon; there being also an eight rod range-way between *Nos.* 28 and 29. Besides, the mortgage and the officer's deed both purport to convey a part of lot *No.* 29.

With all these facts before us, we must collect the intention of the parties concerned, and give effect to the deeds according to such intention, if legal principles do not forbid it. Where several particulars are named, descriptive of the premises conveyed, if some are false or inconsistent, and the *true* be sufficient of themselves, they will be retained, and the others rejected, in giving a construction to the deed; as in case of *Worthington & al. Ex'rs. v. Hylyer*, 4 *Mass.* 196. See also *Jackson v. Clark*, 1 *Johns.* 217. The land described as conveyed, in the case before us, is part of *lot.* 29; which it *cannot be*, on the supposition that the word "northwest" was used intentionally and without any mistake; but if we compare the description in the

deeds with the facts above stated, as to the ownership and occupation of the *north half of No.* 29, and the *south half* of *No.* 28; and the constant possession of the *south half of No.* 29, by *Dexter* and *Fowle*, the intention seems clear; and for the purpose of giving effect to the deeds we ought to reject the word "northwest" altogether. The description then will be sufficiently explicit; it will include the *south* half of the lot mentioned, *viz. No.* 29, and cannot include any other; and conform also to the ownership and possession of *that half* and of the adjoining land. If it were necessary to decide the cause on *this* point, we incline to the opinion that such would be our construction. But our decision is founded on certain facts which have been disclosed and relied on in the defence. Some of those facts we proceed to mention.

It appears that on the *first* of *February*, 1814, the said mortgage deed and the bond, to secure the payment of which, the mortgage was given, were delivered by the *old bank* to the President, Directors and Company of the *new bank*, who thereupon paid to the *old bank* the sum of $590, being the *whole amount due* on the bond and mortgage. There was no written transfer or assignment *thereon;* nor does it appear by any testimony in the case, that there was any assignment whatever *in writing*, of either of them. The transaction however, such as it was, between the *old bank* and the *new bank*, in relation to the bond and mortgage, it is contended by the counsel for the tenant, amounts to a legal assignment of them *both;* but, if not of *both*, at least, of the *bond* and the *debt* thereby secured; and that, of course, there was no interest, in the *old bank*, in the bond, debt or mortgage, which could have been legally sold and conveyed to the demandant by virtue of the Statute of 1821, *ch.* 60. The provisions of that statute relating to the subject, are contained in the *fourteenth* and *fifteenth* sections. They deserve particular consideration, as they are peculiar in their nature, and form exceptions to the general law relative to this species of property.—The *fourteenth* section is in these words, viz.: "That all "the right, title, claim and interest of any bank now incorpor- "ated, or which hereafter may be incorporated by law, in any "lands, tenements or hereditaments, which has been or shall "be mortgaged for security of any debt due or assigned to such

"bank, shall be liable to be seized on any writ of execution "issued on any judgment rendered, or which may hereafter be "rendered by any Court in this State, and sold at public auc- "tion in the same manner as is prescribed for the sale and con- "veyance of the real estates of such banks in this act." The provisions of the 15th section, so far as necessary to be examined upon this point, are in these words, viz. "That any "debts secured by *such* mortgage and *due to such bank at the* "*time of the sale of such mortgage*, shall pass by the deed of "conveyance, executed by the officer who shall serve such "writ of execution, and be completely, and to all intents and "purposes transferred to, and vested in such purchaser; and "such purchaser or his legal representative may, in his "own name, maintain any action proper to recover *such debt*, "or to obtain possession of *such lands*, *tenements*, or *heredita-* "*ments*, which might have been maintained in the name of such "bank, *had no such sale been had.*" From a view of these provisions, it is evident that the cases provided for, are those in which a bank is either *mortgagee or assignee* of a mortgage, and the *debt*, secured by such mortgage, is *due to such bank* at the time of seizure and sale on execution.—The last member of the sentence above quoted plainly shews this; as it gives the *purchaser* the same right to *recover the debt*, and obtain possession of the *premises*, as the bank would have had, if there had been no sale.—The law is founded on the idea that the *real* and the *personal* security are both holden and owned by the bank; because the provision is special and particular that a *sale of the mortgage* shall operate to pass and convey to the purchaser any *debt* secured by such mortgage and then due to the bank; and this is reasonable; because the bond need not be recorded, but the mortgage usually is. Hence a *copy* of the deed is by statute made *prima facie* evidence of the *deed* and of the *bond* or *note* on which the mortgage is founded. The provision seems also conformed to the principle and practice which requires that a mortgagee, in a suit on the mortgage deed, before he can obtain his conditional judgment, must file or produce in Court the bond or note on which the mortgage is founded; that the Court may know what payments have been made, and how much is due in equity and good conscience: for *such sum only*,

can the conditional judgment be rendered; and if *all* the debt has been paid by the mortgagor or his representatives or assigns; or if the mortgagee has assigned the *bond* or note for a *full consideration paid to him*, there is no reason in law or justice why he should have *any* judgment whatever in his favour, though he never has assigned the mortgage.

We have now arrived at the principal inquiry in the cause, which is, whether any property or interest passed to the demandant, by *Kimball's* sale on the execution; or in other words, whether prior to that time, the *old bank* had divested itself of all title and right in and to the demanded premises, by the alleged assignment to the new bank in 1814, as before stated.

It was intimated by the counsel for the tenant that there was proof of an assignment of the mortgage by deed to the new bank; because that averment is contained in the declaration in the suit by the *new bank* against *Fowle* wherein judgment was rendered on default, at *August* term, 1815. But though this judgment might estop *Fowle*, it cannot have any such effect in respect to the demandant—a stranger to that suit.

Several cases have been cited from *Johnson's Reports* by the counsel for the tenant, to show that a mortgage may be assigned by parol or by delivery merely. Those from 1 & 11 *Johns.* are strong in favour of the tenant, and go very far towards supporting the position of the counsel. But we are well satisfied that the principles of law upon this point have never been carried so far in *Massachusetts* or in this State. Our statute of 1821, *ch.* 36. seems decisive of this question; and to require that the assignment of a mortgage should be made by deed.—The form of declaring in an action by the assignee of a mortgage against a mortgagor shows this; it is always alleged that by virtue of the deed of mortgage, the mortgagee became *seized in fee;* this very averment shews that *such* an estate cannot be conveyed to the assignee but by *deed.* The case of *Martin v. Mowlin*, 2 *Burr.* 970, has so long been the subject of critical animadversion by Judge *Trowbridge* and many learned Judges since his time, that it cannot be deemed an authority. Indeed the cases of *Gould v. Newman*, 6 *Mass.* 239. *Warden v. Adams*, 15 *Mass.* 233, and *Parsons v. Welles*, 17 *Mass.* 419, render a further examination, on our part, of this point in the defence wholly unnecessary.

The only question then remaining is, whether the delivery of the bond accompanied, as it was, by the mortgage deed, by the old bank to the new bank, and the receipt from them of the whole amount due on the bond and mortgage, amounts in law to an assignment of the bond and the debt due thereby; for if so, then the sale by *Kimball* was wholly ineffectual, and the verdict must be set aside.

We had occasion, in the case of *Clark v. Rogers* [*ante p.* 143.] to remark that for many years Courts of Justice had been gradually becoming more and more inclined to protect equitable interests; that less form is necessary now than formerly, as to the mode of creating such interests; that the object has been to ascertain that it *was* an interest founded in *equity and justice*, and on *good* and *adequate* consideration. A series of cases decided in *Massachusetts* prior to our separation, will show the correctness of the above remark. In *Perkins v. Parker*, 1 *Mass.* 123. the Court doubted whether an assignment must not be *by deed*. In *Quiner v. Marblehead Social Insurance Company*, 10 *Mass.* 476. it was decided that an assignment *need not be by deed;* but that the delivery of the certificate with an indorsement upon it for a valuable consideration, was a sufficient transfer of the right to become a stockholder. In *Brown v. Maine Bank*, 11 *Mass.* 153. an assignment of a judgment and execution by a writing on the back of the execution, for valuable consideration, was holden to be good. In *Mowry v. Todd*, 12 *Mass.* 281. the Court held that an assignment on the back of a contract *written* but not *signed*, and the contract *handed over* to the alleged assignee, was a valid assignment, if assented to by the person who was bound by the original contract. In *Jones v. Witter*, 13 *Mass.* 304. a negotiable promissory note, for an adequate consideration, was assigned by *delivery only*, and held good. The *Chief Justice* says, "There are cases in the old books which shew "that debts and even deeds may be assigned by parol, and we "are satisfied there is no sensible ground upon which, a writing "shall be held necessary to prove an *assignment of a contract*, "which assignment has been executed by *delivery* any more "than in the assignment of a personal chattel."

In the case of *Dunn v. Snell*, 15 *Mass.* 181. the Court went farther still, and decided that a mere *delivery over* of an execu-

tion, was an assignment of it, and of the judgment. And in *Prescott v. Hull*, 17 *Johns.* 284. *Spencer* C. *J.* delivering the opinion of the Court, and speaking of the validity of assignment, says—" I do not consider the want of a seal essential;—" the mere *delivery* of the *chose* in action, upon good and valid " consideration, would be sufficient, *even were it a specialty*. It " ought however to be alleged that the assignment was for a " full and valuable consideration."

The *new bank*, claiming under the assignment from the *old bank*, commenced their action against *Fowle* (in which they declared as assignees of the mortgage) and obtained judgment in *August* 1815;—of course, this amounted to *notice* to *Fowle* of the assignment, and the claim of the *new bank* under it. After this, *Fowle* would not have been justified in paying the debt to the *old bank*. The *new bank* had the custody of the bond, and might legally cancel it, or release the debt; and if the *new bank* had commenced an action on the bond in the name of the *old bank*, after the assignment was made, the Court would not have suffered the *old bank* to become nonsuit or discharge the action.

On the whole, we are satisfied, after a long and laborious investigation, that the action cannot be maintained; and accordingly the

Verdict is set aside, and a new trial granted.

JEWETT, PLAINTIFF IN ERROR *v.* HODGDON.

PRACTICE. In a writ of error *coram vobis* the regular authentication of the record under the hand of the Judge and seal of the Court below cannot be dispensed with, even by consent of parties.

ON reading the record in this case, which was a writ of error to the Court of Common Pleas, it appeared that on account of the distance of the Judge's residence, the parties had agreed to dispense with the formality of his signature, and use copies of record certified by the Clerk.

But THE COURT said that this was irregular. It is not like the case of process to bring in parties, who may waive their rights; but it is an ulterior proceeding to bring up a record, the mode of authenticating which is well settled by law. And it is also due in comity to the Judge of the Court below, that no proceedings be had, tending to reverse his decision, until the whole grounds of it be first certified under his own hand. And for this purpose the cause was continued to the next term.

COBURN, PLAINTIFF IN ERROR *v.* MURRAY.

PRACTICE. Consent of parties cannot be received to give validity to a bill of exceptions, unless it is certified by the Judge to be conformable to the truth of the case.

THIS was a writ of error to reverse the judgment of a Justice of the peace in a military case. It appeared that the bill of exceptions was not filed at the trial, the counsel agreeing that it might be filed at a subsequent day, which was done, at which time the Justice could only certify that he *believed* it was conformable to the truth of the case, but not that it *actually* was so, having no minutes of the trial.

But THE COURT refused to sustain the writ, observing that they could not take jurisdiction of a record made up by agreement of parties, and without the regular authentication of the Judge or magistrate who tried the cause, and before whom the record still remains.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

SOMERSET.

JUNE TERM,

1823.

WYMAN & AL. *v.* HOOK.

Assumpsit will not lie against a judgment debtor for the use and occupation of land set off on execution against him, where he contests the regularity of the proceedings, unless an express contract be proved.

PRACTICE. At the hearing of summary exceptions under *Stat.* 1822, *ch.* 193, the argument regularly should be confined to the points taken at the trial, and stated in the bill.

THIS was *assumpsit* for the use and occupation of a tenement in *Canaan*, and came before this Court upon exceptions filed in a summary manner in the Common Pleas.

It appeared that the plaintiffs, being judgment creditors of the defendant, had extended their execution on divers rooms, being part of his dwelling house, and the land on which that part stood;—that his *wife* had chosen one of the appraisers, he being absent out of the State;—that the plaintiffs had no possession of the premises, other than the formal livery of seisin made by the sheriff;—that the defendant continued to occupy the house as before;—and there was no evidence that he had ever made any agreement with the plaintiffs for the occupation of the tenement, or engaged to pay rent, or acknowledged in any manner that he held under them.

Upon this evidence the counsel for the defendant objected, 1st, that the return was illegal, for want of authority in the wife

to choose an appraiser, and because it shewed an inconvenient and ruinous division of a dwelling house;—and 2d, that here was no contract upon which *assumpsit* could be maintained. But the Court below overruled the objections.

Boutelle, for the defendant, at the argument which was had at the last term in this county, maintained the objections to the return which were taken in the Court below: and offered to take another point which was not stated in the bill of exceptions. But *the Court* observed that in these cases the regular course of practice required that counsel should confine themselves to the points made at the trial and stated in the exceptions. Upon the *second* objection he argued that this form of action for use and occupation lies only upon an express promise, made at the time of the demise;—that it will never lie for a stranger for the purpose of trying his title;—and that here the defendant had remained in possession, always refusing to admit any title in the plaintiff under the extent. *Lawes on Plead. in assumpsit*, 492—6. *Smith v. Stewart*, 6 *Johns.* 46. *Codman v. Jenkins*, 14 *Mass.* 93.

Rice, for the plaintiff, denied that in this case there was any difference between an express and an implied promise; and contended that this action will lie against one holding by *implied* permission; and that the contract was found by the verdict below. 2 *Phil. Ev.* 68. *note.* 13 *Johns.* 240. *Dean, &c. of Rochester v. Pierce*, 1 *Campb.* 466. 8 *D. & E.* 327. *Cummings & al. v. Noyes*, 10 *Mass.* 433.

Mellen C. J. at this term delivered the opinion of the Court.

It is not necessary to give any opinion upon the objections taken to the legality of the extent; because we are of opinion that if it be in all respects conformable to the provisions of the statute relating to that subject, the action cannot be maintained upon the facts stated in the exceptions. *Assumpsit* will not lie for use and occupation of land, unless upon some contract between the plaintiff and defendant. It may be express, or implied;—but unless it be one or the other, the relation of landlord and tenant cannot exist,—as we had occasion lately to ob-

serve in the case of *Little v. Libby*. [*ante* p. 242.] In the present case no express contract is pretended; and the case shows that no evidence was offered that the defendant in any manner acknowledged himself as holding the tenements under the plaintiffs. No fact appears on the exceptions from which such tenancy may be implied. On the contrary the defendant is objecting to the levy as irregular, and as having passed no estate to the plaintiffs. And notwithstanding the decision in *Cummings & al. v. Noyes*, we do not perceive on what principle the present action can be supported. The plaintiff must seek some other remedy.

Exceptions overruled and Judgment affirmed.

JEWETT *v.* FELKER.

Where the right in equity of redeeming lands was sold on execution by the sheriff, and the purchaser forthwith brought his action against the mortgagor to have possession of the lands; and afterwards, and within the year, the mortgagor tendered to the demandant the purchase-money and interest, pursuant to the statute, but did not offer to pay the costs of the suit,—it was holden that under the laws of this State the tender was no bar to the action, unless it included the costs also.

But in such case, the Court, on payment of the money and costs, will stay farther proceedings.

In a writ of entry upon the demandant's own seisin, tried upon the general issue, it appeared that the tenant, having mortgaged his lands to a stranger, and being a judgment debtor, his creditor had caused the right in equity of redemption to be seised on execution and sold; and the demandant, having become the assignee of the purchaser's title, brought this action to obtain possession of the lands. Afterwards, and within a year from the sale, the tenant tendered to the demandant the amount of the money for which his right in equity was sold, and the interest thereon, but did not tender the costs of this action. Hereupon a verdict was returned for the demandant, subject to the opinion of the Court upon the sufficiency of this tender to redeem the lands and defeat this action.

W. W. Fuller, for the demandant, insisted that the tender was insufficient without payment of the costs of this suit, as it went to defeat an action regularly commenced, and this too by the mere act *in pais* of the party. But if the sum had been sufficient, yet it could only be shewn under a special plea, both by the acknowledged rules of pleading a tender, and because it was evidence of a title gained by the tenant after the commencement of the action. *Andrews v. Hooper*, 13 *Mass.* 472. *Morris v. Phelps*, 5 *Johns.* 49.

Preston, for the tenant, relied on the language of the statute, giving the right of redemption *at any time* within a year after the sale, on payment of the sum the land sold for and costs.

Mellen C. J. As between the mortgagor and the mortgagee, the *latter* is considered as seised of the legal estate;—but as between the mortgagor and all *other* persons, *he* is regarded as still continuing seised, and accordingly may convey in fee. The demandant in the present case, by the sale of the right of *Felker* on the execution to *Fuller*, and *Fuller's* conveyance to him, had an immediate right of entry on the land thus purchased, in the same manner as though *Felker* had made a voluntary and direct conveyance to the demandant. As then it became necessary for him to commence an action against the tenant, in order to obtain possession of the lands he had purchased, and to hold them, subject to the tenant's right of redemption, the demandant must be considered in such proceeding as in the right, and the tenant, in withholding the possession, as in the wrong.

The action being rightly commenced, the demandant cannot be deprived of his costs of the suit without his own consent, or by means of his own act; because they are incident to the lawful prosecution of his legal rights. It is a well settled principle that a tenant cannot defeat a demandant's action by purchasing in a title after the commencement of the action, unless such purchase be made of the demandant, or with his concurrence or consent. The cases cited for the demandant are authorities to this point. Now it is perfectly clear that the tenant, by his tender within a year, completely divested the title of the de-

mandant, by redeeming the estate on the terms prescribed by the statute. So far the tender is effectual,—but it cannot be a bar to this action. No tender is good at common law after the commencement of the action;—and by our *Stat.* 1822, *ch.* 182, a tender after the commencement of the action is not good unless all costs up to that time are also tendered. If the tenant has reduced himself to an unpleasant situation, it is owing, in the first place, to his own indiscretion in not yielding up the possession to the demandant without a suit; and secondly in not tendering the costs of suit when he tendered the price of the land and interest.

But though the tender which was proved in the manner above mentioned could not, strictly speaking, form a legal defence to the action, either on the general issue or under a special plea; yet considering the peculiar circumstances of this case, the Court would, on payment of all costs by the tenant, stay further proceedings, so as to protect the rights of all concerned.

Verdict set aside and a new trial granted.

NORTON *v.* SOULE.

If a surety pays the money due from his principal, it is no extinguishment of the security, but he succeeds to all the rights of the creditor against the principal.

Thus where the principal had executed a mortgage to the creditor, conditioned for the payment of the debt *by him*, and the surety paid the debt, and took an assignment of the mortgage, it was holden that the surety might enter and hold the land in mortgage for the debt.

In a case stated by the parties, it appeared that they had both signed a joint and several note to one *Abbot*, for the proper debt of *Soule* only, *Norton* being in fact his surety, though not named in that character in the note; that *Soule*, to secure the payment of the debt, mortgaged his land to *Abbot*, the deed to be void on *his* payment of the note;—that *Abbot* on the same day indorsed the note to *Mr. Bond*, to whom *Soule* paid part of the debt;—and that *Soule* being afterwards sued for the bal-

ance, was taken in execution and discharged upon taking the poor debtor's oath. After this, *Norton* agreed with *Bond* to pay him the amount of his judgment, if he would assign that and the execution to him, which was done accordingly;—and having also obtained of *Abbot* an assignment of the mortgage, he now brought his writ of entry as assignee, to have possession of the land, against *Soule*, who had always remained in possession, no entry having been made for breach of the condition. Hereupon the general question was, whether the action could be maintained?

Boutelle, for the tenant, being called upon by the Court, resisted the action on the ground that the debt was *paid* to *Abbot* by *Bond* at the indorsement of the note; and that the pledge and the note being thus disunited, the lien on the land was gone. But if not *thus paid*, yet it was fully discharged, by the payment made by *Norton* to *Bond* of the amount of the judgment recovered; and this being made by one joint debtor enures to the benefit of all. After this, the remedy of the plaintiff was only by an action for money laid out and expended. 2 *Saund.* 48, *a. note* 1. *Hammett v. Wyman & al.* 9 *Mass.* 138. *Brackett v. Winslow*, 17 *Mass.* 153. *Tuckerman v. Newhall*, 17 *Mass.* 581.

And this payment, though made after breach of the condition, yet being before entry by the mortgagee, may be shewn in bar of any action upon the mortgage. If not, the tenant might instantly re-possess himself of the land by bill in equity. But to turn him round to this remedy would be to encourage circuity of action, which is against the policy of the law. The remedy by bill in equity is useful only where the mortgagee has made repairs, or has received rents and profits of which an account is to be taken. *Perkins & al. v. Pitts*, 11 *Mass.* 134. *Gould v. Newman*, 6 *Mass.* 239. *Inches v. Leonard & al.* 12 *Mass.* 379. *Pomeroy v. Winship*, 12 *Mass.* 518.

H. Belcher, for the plaintiff, replied that *Norton* being no party to the judgment, the payment to *Bond* could not operate, *proprio vigore*, to discharge it; but must be taken according to the intendment of the parties, as expressed in the deed and in the

instrument of assignment to *Norton*. This intent manifestly was that the land should stand pledged for the debt, until payment *by Soule the real debtor*, and that *Norton* should stand in the place of the mortgagee. *Parsons v. Welles*, 17 *Mass.* 419. Indeed as it respected the *costs* of the judgment *Norton* could in no event be liable, but was strictly an assignee of the security against *Soule*. *Allen v. Holden*, 9 *Mass.* 133.

Mellen C. J. delivered the judgment of the Court at the ensuing term in *Penobscot*, as follows.

On the ground of equity and justice the demandant, upon the facts before us, seems clearly entitled to judgment.—He is a mere surety for the tenant, seeking to obtain indemnity by means of an arrangement made for the very purpose of securing it to him; and his claim is resisted by the man who has been befriended by him, and upon the principle that the abovementioned arrangement ought to have and must have, according to strict law, an operation directly contrary to that which was intended.

As *Norton* was only the surety of *Soule* on the note made to *Abbot*, it is reasonable to presume that he the more readily became such in consequence of the collateral security given to *Abbot* by the mortgage deed of *Soule*; because, as *Norton* was no party to *that* instrument, he probably contemplated, what was afterwards effected, that is, an assignment of the mortgage to him by *Abbot* for his eventual indemnity; and if *Abbot*, at the same time, had assigned to him the *personal* security also, no case has been shewn which decides that *such* a mode of indemnity would have been ineffectual.

In England questions relating to suretyship and to rights growing out of it, were formerly settled in the Court of Chancery; and for many purposes it is now necessary to resort to that Court for effectual security to a surety; such as to obtain an assignment of judgments, liens, &c.—The same course of proceeding is pursued in the Court of Chancery in New-York.—See *Clason & al. v. Morris*, 10 *Johns.* 524.—It has however, for a long time been the practice in England for *one* surety to resort to the Courts of common law, to compel a *co-surety* to contribute; and this is done by an action of *assumpsit*. Such also is the law with us; and as we have no Court of Chancery, we

certainly should not be rigid in the application of *common law principles*, when such application will produce manifest injustice; but rather give effect to *equitable* principles, where the common law does not clearly forbid it.—In the abovementioned case of *Clason & al. v. Morris & al.* which was a chancery proceeding, the facts were these:—*Clason* and *Stanly* indorsed a note, (given by *Sands* and payable to them or order) to *Low*.—In thus indorsing the note, *Clason* and *Stanly* acted merely as the friends and sureties of *Sands*.—*Low* obtained a judgment against *Sands*, and afterwards another judgment against *Clason* and *Stanly*, who paid the amount of the debt to *Low* and took an assignment of the judgment against *Sands;* and it was held that they stood in the place of *Low*, and might avail themselves of the judgment to recover the money paid by them for *Sands*.

The defence in the present action is that the debt, to secure which the mortgage deed declared on was given, has been paid.—The condition of the deed is that the debt shall be paid by *Soule;* but it appears that he has only paid a part of it; and that the residue has been paid by *Norton*, the demandant, to *Bond*, to whom *Abbot* had previously indorsed the note; and this was *after* the condition of the mortgage was broken.—Still it is contended that the payment thus made by *Norton*, was in due season, inasmuch as there has never been any entry to foreclose, made either by *Abbot* or the demandant as assignee of the mortgage; and that such payment must be considered as having *satisfied* and *extinguished* the original debt, and of course extinguished the *mortgage* and completely defeated the estate now claimed in virtue of it.

As to the *first* proposition it would seem that, if the payment by *Norton* to *Bond* of the amount of his judgment against *Soule*, was an effectual satisfaction and extinguishment of the debt, it was made in due season, and amounts to a good defence in this action; according to the opinion intimated in the case of *Winship v. Pomeroy*, 12 *Mass.* 514. and yet this principle appears to be in some manner overruled by the case of *Parsons v. Welles*, 17 *Mass.* 419. though in this *last* case, the mortgagee had entered and taken possession.—The *only* question, then remaining, is, whether the payment of *Bond's* judgment against

Soule, in the peculiar circumstances of this case, has extinguished the debt secured originally by the joint and several note of *Norton* and *Soule*, and by *Soule's* mortgage.—The cases which have been cited in support of the affirmative of the question, differ, in some particulars which we deem important, from the case under consideration.—In *Hammett v. Wyman*, the debt was due from *Hammett and Jones:* They were both *principal debtors*. Again, in that case they were both *judgment debtors; Peterson*, the creditor, having obtained judgment and execution against them *both.—Tuckerman v. Newhall*, has no immediate bearing on the present case; it only decides on the effect of a release to *one* of *two* joint and several debtors.—In *Brackett v. Winslow* a *joint* judgment had been recovered against *two debtors;* they appear to have both been *principals;* neither was *surety* for the other. In the present case it appears that *Norton* was never sued by *Bond;* he was not a purchaser of a *judgment against himself;* (as in *Hammett v. Wyman* and *Bracket v. Winslow* was *virtually* the case:) but a judgment against *Soule only*. A *part* of the judgment so assigned by *Bond* to *Norton* consisted of the *costs of the action;* and for these *costs Bond* had no claim on *Norton*. Indeed no case has been cited or found which goes the length of establishing the principle that a payment by a *surety*, in circumstances like those before us, must necessarily have the effect to extinguish the original demand, when the arrangement was made for the express purpose of affording protection to the demandant from all danger in consequence of his suretyship. It is by no means a new principle, that a contract may receive a construction, by means of which it may have a legal operation, though in a form different from that which the parties expressed. Thus a deed which cannot take effect as a conveyance of *one* kind, may be valid and effectual as one of *another* kind. This is a common principle, adopted for the purpose of giving substantial effect to the intentions of all concerned. In the case of *Allen v. Holden*, cited by the demandant's counsel the Court seem to have gone, in some measure, on this ground. *Allen* obtained judgment against *Holden;*—sued execution and delivered it to *Wyman* a deputy under *Bridge* the sheriff. *Wyman*, by his omission to collect the contents of the execution, became liable

to *Allen* for his neglect. *Allen* sued the sheriff—and thereupon *Wyman* stepped forward and *paid to Allen the amount of his judgment against Holden*, and took an *assignment* of it, and then sued *Holden* in an action of debt on this *satisfied judgment* in *Allen's* name. The Court sustained the action. It is true that in giving the opinion, the Chief Justice considers the sum paid by *Wyman* as *damages for his neglect;* but, in truth he paid neither more nor less than the full amount of the judgment. The Court, by considering the sum paid as *damages*, and looking to the *object* of *Wyman* and *Allen* in that transaction, decided that, for the purpose of maintaining the action for the benefit of *Wyman*, the judgment might be thus viewed as unsatisfied. This seems to be a fair inference from the facts in that case. Surely if such an action was maintainable in favour or rather for the express use of a person who had been guilty of official neglect, it would seem that a fair and innocent surety—who has done no wrong—should find equal protection in a Court of common law, when we have no Court of chancery which can furnish specific guards and securities, as is done in England and in those of the United States where such a Court exists.

The case of *Popkin v. Bumstead*, 8 *Mass.* 491. is a strong one to shew how far a Court will go in giving a construction to the acts of parties, so as to effectuate their fair intentions and preserve their rights. *Mary Popkin* commenced her action of Dower against *Bumstead*. By the pleadings in the case it appeared that the demandant's husband had mortgaged the estate, whereof Dower was claimed, to *Capen;* and the demandant by the deed of mortgage *released to Capen her Dower in the premises*—after the husband's death, his administrator sold the equity of redemption and the tenant purchased it; and then paid to *Capen* the whole sum due on the mortgage: and he thereupon acknowledged satisfaction on the margin of the record of said mortgage deed. On these facts it was contended by the demandant, that though her release barred her as respected the *mortgage*, and *so long* as the mortgage deed remained in force; yet as the conveyance by her husband was *conditional*, so was the *release of her Dower;*—and as the debt was fully paid, and the mortgage discharged, such discharge restored all concerned to their *original rights* and of course

restored her to her right of Dower. But the Court were of a different opinion, and said—"It would be singular if, when the "tenant paid the money due on the mortgage, and *supposed* "that he had *thus* perfected his title by extinguishing the only "incumbrance he knew to exist upon it, he should *by that very* "*act* revive the claim of the demandant, which she had before "solemnly renounced under hand and seal. When the tenant "purchased the equity of redemption, it belonged to him to "pay the money due on the mortgage, and thus rid the estate "of incumbrance. Having all the equitable interest in him-"self, when he paid the money due on the mortgage, the *legal* "*estate followed the equitable interest* and he became seized of "the whole in fee simple. If this *were not* the plain legal ope-"ration of the transaction, the law would *construe* the *discharge* "of the mortgage by the mortgagee, to be a *release of the legal* "*estate by him to the tenant*, rather than such a mischief should "follow."

By the condition of the deed, *Soule* was bound to pay the *whole note*. He has never done it. In *strictness* he has broken the condition of the mortgage and stands liable to the usual conditional judgment in cases of mortgage;—and as we do not find any decided case which forbids our giving to the payment of *Bond's* judgment by *Norton* the *intended effect* of it, for the indemnity of an honest surety; and considering also the liberality of construction in the cases on which we have been commenting, we are disposed to *give* it that effect. Accordingly there must be judgment for the demandant for possession of the demanded premises, unless within two months, the tenant pay the sum of eighty-five dollars and interest thereon from the time of entering up this judgment.

HEALD, PLAINTIFF IN ERROR, *v.* WESTON.

In an action for a penalty under the act for organizing and governing the militia the declaration must allege the offence to have been committed "against the form of the statute in that case made and provided."

THIS was an action of debt to recover a penalty against the now plaintiff in error, "for neglecting to attend military duty, "*whereby he has by statute forfeited the sum of one dollar and fifty* "*cents*," &c. The magistrate who tried the cause having rendered judgment against the original defendant, he sued out this writ of error to reverse it; assigning divers errors, among which was this—that there is no allegation in the writ that the offence was committed *against the form of the statute* in such case made and provided. And for this cause the judgment was reversed.

MELLEN C. J. The only error we can notice on this record appears on the declaration. The averment is "that said *Heald* "did not attend the said exercises on said day, but neglected "the same, whereby he has by statute forfeited the sum of one "dollar and fifty cents, and an action hath arisen by statute, to "the plaintiff, as clerk as aforesaid, to have and recover the "same of the said *Heald*." In *Commonwealth v. Springfield*, 7 *Mass.* 9. it is decided that an indictment for an offence created by statute must conclude *contra formam statuti*. We have reversed several judgments in civil actions where such an averment was wanting. In *Lee v. Clark*, 2 *East.* 333. which was an action for a penalty on the game laws, the declaration concluded—"whereby and by force of the statute in that case made "and provided an action hath accrued." After verdict for the plaintiff the judgment was arrested, because it was not distinctly and explicitly alleged against the form of the statute. In that case the averment was much stronger than in the case at bar. See also *Commonwealth v. Stockbridge*, 11 *Mass.* 279. *Sears*, in error, *v. The United States*, 1 *Gal.* 258. *Cross*, in error, *v. The United States*, 1 *Gal.* 26. 1 *Saund.* 135. *n.* 1 *Chitty's Pl.* 356. 12 *Mod.* 52.

Preston, for the plaintiff in error.

Boutelle, for the defendant in error.

PITTS, PLAINTIFF IN ERROR, *v.* WESTON.

In an action for a penalty incurred by neglect of military duty, under the act for organizing and governing the militia, it is competent for the defendant, at the trial, to show that by reason of *permanent* bodily disability he was not liable to be enrolled as a soldier.

In such case it is not necessary for the defendant to produce the certificate of the surgeon, nor to offer his excuse within eight days; these regulations applying only to cases of *temporary* disability.

In the original action, which was debt for a penalty for neglect of military duty, the plaintiff proved that the defendant was regularly enrolled in the company of which the plaintiff was clerk,—that being duly notified, he neglected to appear at any company training,—that he did not offer his excuse within the eight days prescribed in the statute,—that he was not prevented from so doing by reason of extreme sickness,—and that during a part of the summer he laboured in his saw-mill.

The defendant on his part produced divers witnesses, and among them a reputable physician, who testified that for several years the defendant had been afflicted with the disease called phthisic, which he considered a permanent disorder,—that "when the fit was on him" he was rendered incapable of labour,—and that this was produced by fatigue, or exposure to heat or cold.

The magistrate who tried the cause, upon this evidence ruled that the defendant was not liable to be enrolled as a soldier, by reason of permanent disability, and thereupon rendered judgment against the plaintiff, to reverse which this action was brought.

Greenleaf and *Deering*, for the plaintiff in error, relied on the provisions of the *Stat.* 1821. *ch.* 164. *sec.* 35. that "*no* private "shall be exempted from military duty *on account of bodily in-* "*firmity*, unless he shall obtain from the surgeon —— a certi- "ficate"—&c. which, they contended, included all infirmities, as well permanent as temporary. And this construction, they insisted, was fortified by reference to the subsequent language of the same section, limiting the operation of the certificate to one year; in order, doubtless, that the nature of the infirmity complained of might pass under an annual revision, that the captain might have the benefit of the surgeon's opinion of the

case, and that none might avoid military duty who were able to perform it.

But they denied that the disability in this case was any other than a temporary and curable affection.

Kidder, for the defendant in error, argued that the disability mentioned in *sec.* 35. was to be considered as a temporary disease; and hence the certificate was inoperative after a year;—but that any cause which rendered the party not liable to enrolment, and so not subject to the militia-law, might be shewn at all times by parol testimony in bar of any claim for a penalty against him, without the aid of the surgeon. *Commonwealth v. Fitz*, 11 *Mass.* 540. *Howe v. Gregory*, 1 *Mass.* 81.

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

This case comes before us on exceptions filed by the plaintiff to the decision of the justice before whom the cause was tried, by which certain parol testimony was admitted to shew the bodily infirmity of the defendant, as proof of the issue on his part. The first section of the act of Congress of *May* 8, 1792, provides that "each and every free *able-bodied* white male citi-"zen of the respective states resident therein" (with certain exceptions) "shall severally and respectively be enroled in the "militia by the captain or commanding officer of the company "within whose bounds such citizen shall reside,"—&c. The defendant was regularly enroled, if liable to enrolment, but neglected to attend to do military duty, as alleged in the writ; and it is admitted that he never obtained a certificate from the surgeon of the regiment to which he belonged, according to the provisions of the *Stat.* 1821. *ch.* 164. *sec.* 35.—It is contended by the counsel for the defendant that the words of that section must be considered as having no reference to that species of bodily infirmity which is of such a character as to exempt the person from all liability to *enrolment;* but only to relate to those disabilities which in their nature are temporary; and that therefore the testimony was properly admitted, as it went to prove the defendant to be subject to a permanent disease. The case of *Howe v. Gregory*, cited in support of this position, was founded on the act of *March* 4, 1800, the twelfth section of

which was then under consideration; and which, in all essential particulars, is like the thirty-fifth section of our statute of 1821. In the case of *Commonwealth v. Fitz*, which has been relied on for the same purpose, the Chief Justice observes—"we are satisfied that the construction adopted by the Court of a *similar* "*provision* in the statute of 1793. *ch.* 14. was right, and is equally applicable now. Indeed the case of *Howe v. Gregory*, cited "for the respondent, has settled the law upon this point." Again he says—"We think it could never have been the intention of "the legislature to prevent a party complained of from shewing "on his trial that he had committed no offence, notwithstanding "he had not obtained a previous exemption." The whole train of reasoning by the Court in this case is designed to fortify the opinions above expressed. The case of *Commonwealth v. Fitz* was founded on the act of *March* 6, 1810. It is true that the thirty-second article of the thirty-fourth section of that act is not so explicit and positive in its requirements as the thirty-second article of the forty-fifth section of our own *Stat.* 1821. *ch.* 164. Both seem to contemplate cases of temporary disability, or occasional absence from duty, on account of some cause requiring an "*excuse.*"—and such excuse must be made within eight days. But the thirty-fifth section of the latter act, and the corresponding provisions in the acts of 1800 and 1810 have regard to *exemption* from military duty on account of bodily infirmity and permanent disability. In such circumstances the cases of *Howe v. Gregory* and *Commonwealth v. Fitz* both seem to be direct authorities; but so far as the *latter* case has reference to *excuses merely*, it is not so.

On the whole therefore, viewing the case of the defendant as one of bodily infirmity and permanent disability, we consider that the proof to establish that fact was properly admitted by the Justice, and of course there is no error in the record and proceedings before us; and the judgment is affirmed, with costs.

THE PROPRIETORS OF THE KENNEBEC PURCHASE *v.* DAVIS.

An offer made by the tenant in a real action under *Stat.* 1821. *ch.* 47. *sec.* 4. cannot afterwards be withdrawn by him, it being in its nature an admission on his part, of the value of the estate.

Where such an offer was made in the Court below, and the demandant proceeded to trial, and the jury having estimated the land lower, and the improvements at a higher sum than the tenant offered, the demandant appealed to this Court;—it was holden that the proceedings below being nullified by the appeal, the demandants' right to accept the offer still continued, and might be exercised in this Court.

But whether he may accept such offer after proceeding to verdict in a *final* trial, *quære.*

THIS case, which was a writ of entry on the seisin of the demandant, came up by appeal from the Court of Common Pleas, and was presented to this Court upon a statement of facts agreed by the parties.

It appeared that at the first term in the Court below, at which time the action was tried, the tenant requested that the jury might find the increased value of the demanded premises by reason of his buildings and improvements, and also estimate the value of the land without them;—that on the second day of the term he made and filed in Court an offer in writing pursuant, to the statute, consenting that the land should be estimated at two hundred dollars, and his improvements made thereon at six hundred dollars; which offer was not in fact known to the demandants' counsel till it was produced at the trial on the fourth day of the term;—and that the jury returned a verdict for the demandants, estimating the buildings and improvements made by the tenant at *six hundred and sixty-eight dollars*, and the land at *one hundred and seventy-five dollars.* Judgment being rendered upon this verdict, the demandants appealed to this Court, and entered their appeal at the present term;—and now they would accept the offer made by the tenant in the Court below, and elect to abandon the land to him at the offered price of two hundred dollars, pursuant to *Stat.* 1821. *ch.* 47.

And the question submitted to the Court was, whether the demandants, at this term, have a right to accept the offer made by the tenant in the Court below?

Allen, for the demandants.

The verdict and judgment in the Common Pleas having been rendered null and void by the appeal, the question presented to this Court stands upon the same basis as if the offer had been made here, at a prior term. And the question then is, whether a demandant is obliged to accept the offer of a tenant the instant it is made, or lose his right to it forever? The statute on this subject, *Stat.* 1821. *ch.* 47. *sec.* 4. prescribes no period within which the offer must be accepted; but merely provides that when the tenant in open Court shall offer a certain sum as the value of the land, and does the like as to the improvements, if the demandant shall not consent to the offer, but will proceed in the suit, and the jury shall not estimate the land at a greater sum, nor the improvements at less than the tenant offered, the demandant shall have no costs after the time of making the offer, but the tenant shall recover his costs. The design of the provision doubtless was to protect the tenant from the expense and vexation of a trial by jury, in every case where he is willing to give the fair value of the land, or take a reasonable price for his buildings and improvements. But this offer the tenant may make "in any stage of the process;"—and common justice requires that the demandant should have reasonable time to deliberate whether he will accept it or not;—at least he should have *personal* notice of its existence. Otherwise, every demandant must be always personally present in Court, or be at the expense and trouble of instructing his counsel as to contingencies which may never happen. As the tenant may make his offer at any time before the cause is committed to the jury upon a *final* trial, the rule to be reciprocal, demands that the demandant should have *till that time* to make his election, especially as the peril of costs is wholly his own.

As the statute provision is wholly novel, no other aid than that of analogy can be drawn from adjudged cases; but so far as this argument is of weight, the case may be likened to the bringing of money into Court, which is an admission of the cause of action, and that so much is due to the plaintiff, which he may always take out in his own time, without leave of the defendant. *Boyden v. Moore*, 5 *Mass.* 365. *Watkins v. Towers*, 2 *D. & E.* 275. *Cox v. Parry*, 1 *D. & E.* 464. *Baillie v. Caz-*

elet, 4 *D. & E.* 579. *Yate v. Willan*, 2 *East.* 128. *Johnston v. Columbian Ins. Comp.* 7 *Johns.* 315.

Cutler, for the tenant.

When the offer of the tenant is made in Court pursuant to the statute, the demandant has his option to accept it, or to take the appraisement of the jury. He cannot do both,—and the election of one, is necessarily a waiver and rejection of the other. In this case the continual existence of the offer on record is not a continuance of the demandants' right to accept. When once made, it is gone from the tenant;—but when refused, it is equally out of the reach of the demandant. The object of the statute was to save the tenant from vexation as well as from expense;—but this object will be defeated, if the demandant may still detain the tenant in Court, till he shall have derived the benefit of a full investigation by the jury, and be permitted afterwards to recur to the offer.

If, however, the demandants' right to accept the offer continues unimpaired till the final trial, equal justice demands that the tenant should be permitted to withdraw it and substitute a new offer at any time during the same period. But as the statute recognizes no such right in the tenant, so no construction can be admitted which shall give it to the demandant, for this would destroy the principle of reciprocity which the statute has adopted. It was manifestly never intended that he should turn round and accept the offer, after trying his chance of a verdict. If common justice requires that he should have time to deliberate upon the offer, this reasonable indulgence can always be obtained of the Court on motion.

The case of money brought into Court in *assumpsit* is not analogous to this, because there the defendant may always know the precise sum due, which he ought to have paid before action brought;—but here the estimated value of the property is a matter of opinion merely, which the tenant must always make at some peril, and which he can never offer till he has been subjected to the costs of a suit.

MELLEN C. J. delivered the opinion of the Court, at the succeeding term in *Oxford.*

That part of the fourth section of the act of 1821, *ch.* 47, on which the question in this case arises, is in these words:— "That in any such action, the tenant or his attorney may, in "any stage of the process, and as often as the writ shall be "amended, as aforesaid, offer and give notice in open Court,— "at what sum he consents that the value of the demanded pre- "mises or such part thereof, as is by him defended, shall be es- "timated without the buildings and improvements; *which notice* "*shall be entered on the record of the Court;* and if the demandant "consent to the same, judgment shall be rendered on said con- "sent of the parties, in the same manner as if the like sums had "been found by the jury in a verdict for the demandant. But if "the demandant *shall not consent* to the said offer, and shall pro- "ceed in the suit, and the jury by their verdict shall not reduce "the value of the buildings and improvements below the said of- "fer, nor increase the value of the demanded premises as afore- "said above it, he shall not recover costs *from and after the first* "*entering of such notice upon the record;* but the tenant shall from "that time recover his costs," &c. At the Court of Common Pleas the tenant made an offer of $200, for the lands demanded. This the demandants refused, and proceeded to trial. The jury estimated the lands at $175. The demandants appealed to this Court, and at this term consent to accept the $200 offered below; and the question is, whether under the circumstances of the case, they have a right so to do, under the statute; having once declined the offer and proceeded to trial and judgment in the Court of Common Pleas. The provisions of the statute are so peculiar, that in giving it a construction, we can have no aid from decided cases. By the appeal the judgment and prior proceedings in the Court below are vacated, and in legal contemplation, have now no existence. Neither party can resort to the verdict or proof on which it was founded, as any rule of proceeding in this Court. The statute does not provide that the tenant may withdraw his offer. In its nature it is an admission on his part. It may in some respects be compared to the practice of bringing money into Court upon the common rule; in which case, though the plaintiff be nonsuited he shall

still be entitled to the money. *Elliot v. Callow*, 2. *Salk.* 597. So in case of a tender pleaded with a *profert in curia* and a replication stating a subsequent demand, *Cox v. Robinson*, 2 *Stra.* 1027. So in case of money brought in on the common rule, and the judgment arrested, 2 *Barn.* 230. So if the plaintiff has proceeded in his suit after the bringing in of the money, 1 *Barn.* 198. 201. See also *Burrough v. Skinner*, 5 *Burr.* 2639. *Cox v. Parry*, 1 *D. & E.* 464. From analogy to these cases, it would seem that the demandants might elect not to proceed any further in the suit, but accept the offer made by the tenant. They certainly are not bound to proceed any further in a course of judicial investigation; they have a right to become nonsuit at any time before the cause be opened to the jury or the trial commenced. *Locke v. Wood*, 16 *Mass.* 317. As the demandants have the right thus to go out of Court, we see no legal or reasonable objection to their remaining in Court, and now accepting the tenant's offer; because the tenant has no vested rights under the verdict and judgment; the appeal has divested them by nullifying the proceedings of the Court below. We are the more satisfied with this construction of the statute, because it cannot be productive of any injury to the tenant, while, at the same time, it gives the demandants all the advantages which the law intended. The demandants, by the general provision of law, are entitled to their costs up to the time of the first entering on record of the notice of the tenant's offer, which in this case was not before the fourth day of the term; if it had then been accepted, no further costs could have arisen; but the demandants did not consent to accept it, but proceeded to trial below, and have pursued the cause into this Court, and now repenting of their perseverance, consent to accept the offer; but they are not entitled to any costs, subsequent to the record of the notice; because all those costs have been incurred by them in making an experiment, which they have found unsuccessful, and this expense they must bear themselves. On the other hand the tenant, according to the language of the statute, must recover his costs from the time of first entering the notice on record; because those costs have been incurred by him, in the defence of the suit, rendered necessary by reason of the non-acceptance of his offer when the same was

made. It will be readily perceived that the opinion we have given, and the reasoning on which it is founded, would not apply in a case where the offer, non-acceptance, and consequent trial, all took place in this Court; or all of them in the Court of Common Pleas; and to a motion made after such a trial, to waive the pleadings and accept the offer. As to such a case we give no opinion.

The result is, that the demandants now have the right to accept the tenant's offer, and to have judgment for $200.

The judgment was entered in the form following.

"And now on motion of the demandants' counsel, and by leave of Court, the pleadings in this case are waived. And thereupon the demandants consent to, and accept the offer made by the tenant, in the Court of Common Pleas that the demanded premises should be appraised at the sum of two hundred dollars, had no buildings or improvements been made thereon.

It is therefore considered by the Court that the demandants recover of the said *James Davis* the sum of two hundred dollars; they having at this term in open Court made their election to abandon the premises to the tenant at the price aforesaid, being said sum of two hundred dollars. And it is further considered by the Court that the demandants recover their legal costs up to the time of the first entering of the notice of the tenant's said offer, viz. the fourth day of said term and no further; and it is also further considered by the Court, that the tenant recover of the demandants his legal costs arising after the record of notice of said offer.

NOTE. In this case PREBLE J. gave no opinion, not having been present at the argument.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

PENOBSCOT.

JUNE TERM,

1823.

STETSON *v.* PATTEN & AL.

A parol ratification is not sufficient to give validity to a *deed* made by an agent not having authority *under seal* to bind his principal.

If one acting as attorney for another, but having no sufficient authority, make a deed in the name of his principal who is not bound thereby,—it does not follow that the *agent* is bound by the deed, unless it contain apt words for that purpose.

THIS was an action of covenant upon an agreement under seal, signed by the defendants, and by "*Simeon Stetson for Amasa Stetson*" the plaintiff, by which the defendants agreed to enter upon certain unimproved lands of the plaintiff in the plantation of *Stetson* in this county, and make two farms thereof, and pay certain monies to the plaintiff with interest annually; in consideration whereof the plaintiff was to make, execute and deliver to them a sufficient warranty-deed of the same lots. In the instrument declared on, the said *Simeon* was not named, except in the signature as above, but the covenants were wholly in the name of the plaintiff.

In a case stated by the parties it was agreed that said *Simeon* had not any authority under the hand and seal of the plaintiff to sign and seal the instrument declared on; but that living in the vicinity of the plaintiff's lands in this county, he had been requested by the plaintiff, who is his brother, to superintend and manage his interests relative to said estate;—and that pursuant to this request he made and executed the deed declared on, in behalf of the plaintiff, who resides in *Massachusetts*, and which

he afterwards delivered to the plaintiff. It was further agreed that another deed of the same tenor and date was made and delivered to the defendants, who in pursuance of the agreement, entered and made improvements upon the land; and that about three years after the date of the agreement they settled an account with the plaintiff, and applied a balance due to them on account towards payment of the interest due on said agreement, which the plaintiff accordingly indorsed thereon.

Hereupon the question was whether the plaintiff was bound by this agreement,—and if not, whether it was obligatory on the defendants?

McGaw, for the plaintiff, argued that though *Simeon Stetson* had no precedent authority sufficient to bind his principal by deed, yet the acceptance of the deed from the hands of the agent, the indorsement of the payment of interest on the back of it by the plaintiff, and the bringing of this action, amounted to an express adoption of the contract as his own. *Clement v. Jones*, 12 *Mass.* 60—65. *Odiorne v. Maxcy*, 13 *Mass.* 178. But if it be not the deed of the plaintiff, yet the defendants are bound; for they might have ascertained the extent of the agent's authority before entering into the covenant; and if he has not bound his principal, then the deed is his own, or at least he is liable to them in damages.

W. D. Williamson, on the other side, contended that the acts of the plaintiff relied on as ratifications of the deed, were of no higher solemnity than a precedent authority *by parol*, which, it is admitted, would not be sufficient to give it validity. The ratification of a deed must be by *deed*. *Milliken v. Coombs*, 1 *Greenl.* 343. The instrument being therefore not the deed of the plaintiff, it is not binding on the defendants for want of reciprocity. In mutual covenants, both are bound, or else neither is bound.

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

It is agreed that *Simeon Stetson* had not any authority under the hand and seal of the plaintiff, to execute the instrument declared on; and it therefore was not the deed of *Amasa Stetson*,

No authorities need be cited to shew that when an instrument under seal is executed by attorney, the attorney must be authorised by deed under the hand and seal of the principal. This is admitted by the counsel for the plaintiff, but he contends that in consequence of certain acts which have been done by the principal since the execution of the instrument, it has been sanctioned and adopted by him, and thereby has become his deed. The circumstances relied on as proof of such ratification are, his acceptance of the indenture from the hands of his brother after its execution, and the indorsement on the back of the instrument of money received from the defendants on account of the contract. With respect to these facts, they cannot amount to any thing more than a sanction and ratification made by parol; and *such* ratification could not be more availing than a parol authority given before the instrument was signed, which, as we have seen, is of no importance. The plaintiff therefore cannot prevail on this ground.

But it is farther contended that though the instrument is not the deed of *Amasa Stetson*, it is the deed of the defendants, and they are bound by it, though the plaintiff is not. On examining the instrument it does not appear that *Simeon Stetson* has in any part of it bound himself personally; and there is therefore no reciprocity in the contract. The defendants have no right of action against any one, upon this contract;—and as the equity of the case seems therefore to be with them, so, we apprehend, is the law also.

In the case of *Soprani & al. v. Skurro*, *Yelv.* 19. it was decided that it must appear in pleading that the *lessor* as well as the *lessee* sealed the indenture of demise; otherwise no interest passes, and the covenants do not bind;—and that a bond given by a stranger for performance of covenants in such indenture, is not forfeited by the lessee's neglect to perform them.

In *Hosier v. Searle*, 2 *Bos. & Pul.* 299. the defence was placed on a similar principle, according to the plea in bar; but the Court considered that the defendant was estopped, by the bond he had given, to deny that he had executed the indenture referred to in the bond and plea. But it is clear that the Court would have adjudged the defence a substantial one, had there been no estoppel in the case.

For these reasons we are of opinion that the action cannot be maintained, and a nonsuit must be entered, pursuant to the agreement of the parties.

BUTMAN, PLAINTIFF IN ERROR, *v.* ABBOT.

Referees need not join in an action brought to recover compensation for their services. *Semble.*

An action by a referee to recover compensation for his services cannot be maintained against the parties to the submission *jointly*, but must be brought against the person or persons making the demand.

If two be sued on a joint promise, and one alone appears, the general issue should be that *he and the other defendant* did not promise, &c.

But if the defendant in such case plead that *he* alone did not promise, upon which issue is taken, and it be found for the plaintiff;—whether the *defendant* can reverse the judgment for this error,—*quære.*

UPON a writ of error brought to reverse a judgment of the Common Pleas in *assumpsit*, the case was thus:—

One *John Smith*, a citizen of *Massachusetts*, having a demand against *Butman*, the plaintiff in error, resident in this county, they referred that and all other demands between them to the arbitration of three men of whom *Abbot* the defendant in error was one, and entered into a rule of submission before a justice, pursuant to the statute. The referees having heard the parties, made their award in writing in favour of *Smith* for a sum in damages with costs of reference, and returned it to the next Court of Common Pleas, where it was set aside because it appeared upon the face of the rule that the party making the demand was not an inhabitant of the county in which the justice, before whom it was entered into, resided.

Abbot, one of the referees, then brought an action of general *indebitatus assumpsit*, for his services as a referee, against *Butman* and *Smith*, and the latter not being found, and having no domicil or agent in this State, the plaintiff proceeded and obtained judgment upon the issue of *non assumpsit*, against *Butman* alone.

The errors assigned upon this record were,—1. that the action was commenced by one referee alone, whereas the under-

taking, if any, was made jointly with all the referees.—2. That the action was brought against *Butman* and *Smith* jointly, when in fact it lay only against *Smith* alone, he being the party plaintiff in the original demand, and in whose favour the award was made, by which he was made liable to pay *to Smith* the costs of reference, including the sum now demanded.—3. That the consideration of the promise declared on in this action, if any originally existed, had wholly failed, the award being set aside as a mere nullity.—4. That the declaration did not disclose sufficient matter for the foundation of the judgment.—5. The general error. The defendant pleaded *in nullo est erratum.*

Wilson, for the plaintiff in error.

Brown, for the defendant in error.

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

On looking into the record in this case we observed an irregularity in the pleadings. In the original action *Abbot* declared on a promise alleged to have been made by *Butman and Smith jointly ;*—and though the writ was served on *Butman* alone, yet in his plea of the general issue he should have met the declaration, and traversed the promise alleged. He should have pleaded that *he and the said Smith* did not promise in manner and form as the plaintiff had declared against them. This would have put in issue the promise set forth. Instead of which *Butman* pleaded that *he* did not promise the plaintiff in manner and form as he had alleged. The jury found that *he* did promise ;—but no joint promise is found by the verdict or confessed on the record ; and it is certainly questionable whether the facts of the case, in this respect, would authorize a judgment in favour of the original plaintiff. The plea is very clearly bad, and might have been demurred to ; but as issue was taken on it, and as the fault was on the part of the plaintiff in error, it may also be a question whether he shall take advantage of it. But we give no opinion on this point, but proceed to consider some of the errors assigned.

The *third* and *fourth* errors we do not view as well founded, or as requiring a particular consideration.

Nor do we mean to give any express decision of the *first* error assigned; though we are inclined to think that the action was rightly commenced by *Abbot* alone. The act of the referees was not such as to render them joint creditors who must sue jointly for their compensation. The compensation of one may be, and often is, much greater than that of another; and there seems to be no principle which should compel them all to join, and thus to empower one to receive the fees of all; and to give an effectual discharge. But we leave this for further consideration.

The *second* error we consider as fatal. It is presented by the exceptions filed to the opinion of the Court, that on the facts proved by the plaintiff, the action was maintainable against *Smith* and *Butman jointly*. It is to be noticed that *Smith* was the party making the demand before the referees. In judicial proceedings the plaintiff is always bound to make the advances of fees to officers, and the jury fees;—he is the *actor*—demanding property of the defendant. In the case of a submission of a demand to referees, like the case before us, the demandant is to make out his claim and sign it, and lodge it with some justice of the peace for the county in which he lives, who is to make out the agreement of submission which is to be signed and acknowledged by the parties. This is an arrangement in place of a suit at law. Each party consents to this special jurisdiction;—but still the demandant must advance in support and proof of his demand. The defendant denies the justice of the claim made upon him. If therefore the referees were to call for their compensation when about to commence the business of their commission, they would naturally make the call upon the demandant, who feels an interest in the prosecution of his cause, and by whose act the proceedings had been originated. And if they do not then make this call on the demandant, they must be considered as consenting to *give him a credit* for the amount of their compensation. When they have made a report, if in favour of the demandant, they have that additional security which arises from their right to withhold the report until the compensation shall have been paid. This right may also be of no small importance if the report should be in favour of the defendant, because, if it were offered to him by the re-

ferees on payment of their compensation, he would at once feel a strong inducement to obtain possession of it on those terms. So that in almost all cases, on either supposition, the compensation would be, and generally has been readily obtained. In some instances this may not be the fact; as where neither party will accept the report and pay the fees, calculating upon a loss if he should do it.

If an action in any case become necessary on the part of a referee to obtain payment for his services, we think it cannot be maintained against the parties to the submission *jointly*, but must be brought against the person or persons making the demand. We have formed this opinion both from the manner in which proceedings of this description are usually conducted, and from a consideration of the inconveniences and perhaps injustice which would be the consequence of adopting any other principle. For instance, why should *Butman* be compelled to pay all or any part of the referees' compensation in the present case? Their report has been set aside, and for an error on the part of *Smith*, or the justice who made out the agreement. In this particular, *Butman* has been in no fault.

The referees, when they make up and sign their report, always know whether their fees have been paid or not. If they award in any case in favour of the party making the demand, they will tax their compensation as a part of the costs against the defendant, whether it has been paid to them by the demandant or not;—and if he has already paid it to them, they must so certify in their report. If they award in favour of the defendant, *and he has paid them their fees*, they should be charged in the report, against the demandant, as part of the costs in the case. But *if he has not paid them*, and they rely on the demandant to whom they gave the credit, of course they will not, in their report, charge the demandant with the amount of their compensation, but leave him liable to *their* several actions, for their respective proportions. In this manner neither party can be in danger of being twice charged. However, if referees withhold their report, for the purpose of obtaining their own fees *from the prevailing party*, in almost every case no suit will be necessary.

Our opinion in the present case is that for the *second* error the judgment must be reversed.

THE CASE OF AMES & AL.

Forgery at common law, may be committed of any writing, which, if genuine, would operate as the foundation of another's liability.

THIS was an indictment at common law for the forgery of a certain writing obligatory or instrument in writing, which purported to be signed by the selectmen of *Sangerville*, and which was set forth in these words:—"We the subscribers do recommend to all persons to whom it may concern, that the bearer "*J. Leland* is a man of responsibility, and is able to satisfy the "demand of five hundred dollars if he agrees to; we understand that he has bought *C. V. Ames'* land in this town, and "is to pay some demands in *Bucksport* for the said *Ames*, and "we should not be afraid to be *Mr. Leland's* bondsmen for two "or three hundred dollars. *Mr. Ames* and *Mr. Leland* have "made a bargain and have requested us to recommend *Mr. Le-*"*land* so that he may satisfy the demands of the said *Ames*"—with intent, &c. Being convicted of the offence charged in the indictment, the defendants now moved in arrest of judgment that the matter set forth did not amount to any offence indictable at common law.

McGaw and *Godfrey* for the defendant contended that the paper was not an instrument upon which forgery at common law could be committed. It was neither a public record, nor a contract between particular individuals, nor a general letter of credit. It did not bind the subscribers to any thing; but taken together it amounts to this—that they should not be *afraid* to become the bondsmen of *Leland*, and had been *requested* to recommend him.

The Attorney General said that the falsely making or altering of any written instrument with intent to deceive and defraud, was a misdemeanor at common law, and was punishable by fine and imprisonment. It was not necessary that the meditated design should be carried into effect,—the crime consisted in the *intent* of the alteration; and *here* the *crimen falsi* was per-

fected. And he cited *Rex v. Ward*, 2 *Ld. Raym.* 1461. *Commonwealth v. Boynton*, 2 *Mass.* 77. 2 *East. P. C.* 862. *Fawcet's case*, 3 *Chitty's Crim. law*, 780—1.

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

The indictment in this case is at common law; and the motion to arrest the judgment is founded on the idea that it is not forgery at common law to counterfeit such an instrument as that which is set forth in the indictment. The first question is whether it is "an obligation in writing" as alleged, and would have bound the selectmen had it been genuine and actually signed by them. On this point we cannot doubt. It would have subjected them to liability either in the form of an action of *assumpsit*, as a letter of credit to the amount of five hundred dollars;—or to an action on the case in the nature of deceit, as a false representation, made with intent to defraud. In either mode it would operate as the *foundation of their liability* if it had been genuine.

The next question is whether forging *such* an obligation be an offence at common law. On this point the case of *Rex v. Ward*, 2 *Ld. Raym.* 1461. seems decisive. It is there settled that the forging of any writing by which a person might be prejudiced, was punishable as forgery at common law. In that case the defendant was prosecuted at common law for falsely making and forging a writing on the back of a certificate in writing signed by one *Newton*. This is considered by *Chitty* in his treatise on Criminal Law as settling all doubts which might have before existed. See also 2 *East. P. C.* 862. and numerous cases cited in *Rex v. Ward*, among which are 5 *Mod.* 137. 1 *Salk.* 342. *Sty.* 12. *Savage's* case for forging letters of credit, 1 *Sid.* 142.

Motion overruled.

BUSSEY v. LUCE.

The report of the commissioner under the resolve of *March* 3, 1803. respecting the townships assigned to Gen. *Knox* and others, is conclusive evidence, against all persons, as to the occupancy by actual settlers, of the lots therein mentioned.

This was a writ of entry in which the demandant counted upon his own seisin within 30 years and a disseisin by the tenant.

The demandant deduced his title from *Gen. Knox;* and read a deed from the Commonwealth of *Massachusetts* to *Knox* dated *July* 20, 1799, *extending and assigning* to him, for himself and all others interested in the *Waldo* patent, "all the lands belonging "to the Commonwealth"—in certain townships—"excepting "however lots occupied by any settler on said assigned lands, "not exceeding 100 acres to each settler, as specified in the re- "solve of *February* 23, 1798."—He also read a deed from *Gen. Knox* and wife to himself dated *October* 16, 1804, conveying two of said townships, in one of which the demanded premises were situated, "excepting out of this conveyance 100 acres to each "settler within said two townships, meaning to except from this "conveyance the lots of the settlers within the aforegranted two "townships, as confirmed to the said settlers by the Honourable "the General Court."

The resolve of *February* 23, 1798, referred to a deficiency in the lands laid off to satisfy the grant to *Beauchamp* and *Leveret*, occasioned by an interference with the elder grant to the *Plymouth* company; and appointed an agent to ascertain the amount of that deficiency, and to survey and assign other adjoining lands to make it up;—but providing "that the lots not "exceeding 100 acres to each settler, which shall be occupied "by any settlers on the additional lands to be assigned by force "of this resolve, shall not be considered as taken to make up "said deficiency, but the said settlers who are not already "quieted by law, shall hereafter be quieted in their settlements "in such manner as the General Court shall direct."

The resolve of *March* 3, 1803, authorised and requested the governor with advice of council "to appoint some "suitable person to repair to said township,"—No. 2—"and

"make a re-examination of the claims of the respective settlers "within the same. And the person so appointed as aforesaid "shall be duly sworn to the faithful and impartial discharge of "his duty. And all evidence touching the validity of the "said claims, shall be by persons under oath, or depositions "duly sworn to; and the said *Knox* or his agent or attorney "shall be duly notified of the time and place of attending said "service; and the person so appointed, after due examination "as aforesaid, shall enter the names of such persons *as he shall* "*find to be properly entitled to their respective lots of land* on the plan "and survey of *Ephraim Ballard*, and shall return the same to the "Hon. *John Reed* and *Peleg Coffin*, Esqs. agents for the Common-"wealth. And the said person appointed as aforesaid shall give "*a certificate to each settler* as aforesaid, under his hand, con-"taining the number and description of his lot: *which certificate* "*shall be considered as evidence of the said settler's title*, and the "said settlers, so certified, shall within two years pay to the "agent of this Commonwealth the sums respectively at which "their several lots were appraised by the said *Ballard;* with "interest from the date of said survey, and shall be entitled to "receive of the said *John Reed* and *Peleg Coffin*, Esquires, *good* "*and sufficient deeds of their respective lots as aforesaid.*"

Under this resolve *Salem Towne* Esquire was appointed, and executed the powers therein given. His return, which was produced by the tenant, was as follows:—"Agreeably to a resolve "of the General Court passed *March* 3, and the appointment of "the governor with advice of council *March* 4, 1803. I have "made a re-examination of the claims of the settlers in township "No. 2."—"and after a due examination find the following per-"sons whose names are under written, properly entitled to their "respective lots, and have entered their several names on the "plan and survey made by Mr. *Ephraim Ballard* agreeably to "the abovesaid resolve, and have given a certificate containing "the number and description, to each of them, of his lot, as di-"rected by the above resolve."—Here followed a list of the settlers, and among them that of *Abel Hardy* for lot numbered *fifteen, which is the land demanded.*

The tenant then proved by Col. *Dutton* that in 1803, he was employed by Gen. *Knox* to appear before Mr. *Towne* and op-

pose the claims of the settlers,—that in doing this he governed himself by the resolve of *March* 3, 1803,—that he collected opposing proof and laid it before the commissioner,—and that Gen. *Knox* paid him for his services.

The tenant deduced his own title by deed of quitclaim from *Hardy* to one *Varnum*, *February* 5, 1806, and a release from *Varnum* to himself in the same year;—and he shewed a deed dated *March* 3, 1807, from the agents of the Commonwealth to *Hardy*, conveying the demanded premises; which deed was procured, and the consideration-money paid, by the tenant himself.

The demandant objected to the admission of the resolve of 1803, the report of Mr. *Towne*, and the testimony of Mr. *Dutton*; but the presiding Judge overruled the objection.

The demandant then offered to prove that at the time of the passage of the resolve of *February* 23, 1798, and at the execution of the deed to Gen. *Knox*, the lot demanded had not been run out, nor occupied, nor improved, nor settled, by any person;—but this the presiding Judge refused, and instructed the jury that if they believed that Gen. *Knox* assented to the resolve of *March* 3, 1803, and the mode therein provided for ascertaining the lots settled and occupied in the township, the return made by Mr. *Towne* was conclusive evidence that the lot demanded was settled and occupied, and the tenant would therefore be entitled to their verdict. And they accordingly returned a verdict for the tenant, which was taken subject to the opinion of the whole Court upon the correctness of the Judge's direction to the jury, and upon the admissibility of the testimony rejected.

R. Williams, for the demandant.

By the deed to Gen. *Knox*, he became seised of all the lands *not in fact occupied at that time by any actual settler*; and they remained his until regularly conveyed by him, in some of the modes appointed by the general laws. This he has never done, except to the demandant. If the lot demanded was not occupied by *Hardy at the time of* the execution of *Knox's* deed, then it became *Knox's* land, over which the Commonwealth could retain no control, and which it could not affect by any subsequent re-

solves. It reserved to itself the *manner of quieting* settlers, *but* not the *right of declaring who* were such. The question of actual occupancy, and the proceedings of Mr. *Towne* were matters *en pais;* and the absence or presence of Gen. *Knox* could be of no more effect than if he, being told that *Hardy* was the occupant of the lot, had verbally but erroneously admitted it to be true. It might shew that he was misinformed of a fact,—but could not operate to alienate land which was once his own.

McGaw, for the tenant, contended that the power of quieting the settlers being reserved to the General Court by the resolve of *February* 23, 1798, and the resolve of *March* 3, 1803 being only a further provision for the attainment of the same object; the appearance of Gen. *Knox* before the commissioner under this latter resolve was in law a submission to his jurisdiction and authority to ascertain who were in fact settlers, within the meaning of the original resolve; and the report of the commissioner upon the matter thus submitted to him was conclusive evidence of the facts reported.

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

We have no doubt that the fee of all the lands described in the deed of *July* 20, 1799, passed to *Knox* and others, excepting the lots occupied by any settler on the tract, not exceeding one hundred acres to each settler, as specified in the resolve of *February* 23, 1798. The fee of *such* lots remained in the Commonwealth, so that the settlers thereon might afterwards "be "quieted in their settlements in such manner as the General "Court" should "direct." The tenant claims under *Abel Hardy*, and under a deed made to him by the agents of the Commonwealth, *March* 3, 1807, on the ground of his having been in the occupancy of the demanded premises as a settler, according to the language and intent of the resolve before mentioned. If such was his occupancy and character, the deed of the agents to him was effectual, his title is good, and the verdict must stand.

The commissioner appointed under the resolve of *March* 3, 1803, pursued its directions,—notified Gen. *Knox* who appeared by his attorney at the time and place appointed, and by witnesses and arguments opposed the claims of the settlers;—after

a full hearing he made return of his proceedings and of the names of those persons who were entitled to their respective lots,—and among others the name of *Hardy*, who, in virtue of this decision and return of the commissioner, received the deed from the agents under which the tenant now claims, and on which he places his defence. It is contended by the counsel for the demandant, that the legislature, in the resolve of *February* 23, 1798, only reserved to themselves the right of prescribing the *manner* in which settlers should be "quieted in their settlements,"—but not the right of deciding themselves, or by any agents of the Commonwealth, *who were in fact settlers* within the meaning of that resolve;—and that of course the proceedings under the resolve of *March* 3, 1803. were never binding on Gen. *Knox* or the demandant, and therefore parol proof ought to have been admitted to shew that *Hardy* never occupied that lot as a settler, according the resolve of *February* 23, 1798.—But in the first place there are strong reasons for believing that Gen. *Knox* solicited or consented to the passing of the resolve of *March* 3, 1803. The preamble states that a former survey had been made *ex parte*, because notice of such survey "*unfortunately was not received by said Knox*," and that some irregularities were *suggested* to have taken place "*in the course of said business*."—In the next place it would seem that the commissioner would have had nothing to decide, unless the *claims* of the occupants were proper subjects for his consideration and decision. In deciding on their claims he must necessarily decide who were settlers occupying, and who were not. He had nothing to do with the *price* of the lands;—*that* had been previously settled by *Ballard*. The provisions of the resolve of 1803 may thus serve to aid us in the construction of that of 1798. But even if there had been no reservation in the resolve of 1798, still, when *Knox* appeared by his attorney before the commissioner, governing himself by the resolve of 1803, urging his own claims, and contesting those of the settlers,—it is too late for him, or those claiming under him, to object to the decision of this equitable jurisdiction. The whole conduct of *Knox* carries proof of an acquiescence in such decision, as it does not appear that he ever after contested the facts on which the decision was founded, or objected to the giving of a

deed by the agent. The language of the last resolve is positive that the *certificate* of the commissioner should be *considered as evidence of the settler's title*, and entitle him to a deed, on payment of the estimated value; which deed he has received, and, as we must presume, in virtue of such certificate. No other tribunal was contemplated, or ought, in such case, to assume jurisdiction. We think the opinion and instructions of the Judge to the jury were correct, and accordingly there must be

Judgment on the verdict.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

HANCOCK.

JUNE TERM,

1823.

UPTON & AL. *v.* GRAY.

If an agent purchase goods on his own credit, without disclosing his principal, to whose use, however, the goods are in fact applied,—the principal, being afterwards discovered, is liable to the seller for the price of the goods.

IN *assumpsit* for goods sold, it was proved that the goods were delivered to one *Lakeman* of *Castine*, who was the authorized agent of the defendant, a citizen of *Boston*, and who was empowered by the defendant to make all contracts on his account relating to his estates in this county;—that the goods were for the defendant's use, and were applied in making improvements on his said estates;—and that all the goods, except a few articles to a small amount, were charged in the plaintiff's books to *Lakeman*. There was no proof that *Lakeman* mentioned any thing to the plaintiffs, at the time of receiving any of the goods, as to the capacity in which he was acting;—but it was proved to be a matter of public notoriety that he was the general agent of the defendant;—that it had been usual for traders and others to charge goods to him, under similar circumstances, till he requested them to do otherwise;—and that he had not charged the goods to *Gray*.

Upon this evidence a verdict was taken for the plaintiff, for the whole amount of his demand, subject to be amended or set aside according to the opinion of the Court upon the foregoing facts in the case.

Orr, for the defendant, contended that the agent having concealed himself and purchased the goods as principal, the credit was given to *him*, and he alone is responsible. No injustice is hereby done to the creditor, since he is only confined to the remedy he originally chose, and seeks his money where he gave the credit. If it were not so, a faithless agent, who had been furnished with funds, might embezzle them and run his principal in debt with impunity.

Abbot, for the plaintiffs, replied that it made no difference whether they knew the character of the agent at the time of sale or not. If the principal is not disclosed when the goods are delivered, yet he is liable as soon as he is known; and this remedy is in no manner affected by the concurrent liability of the agent to whom the credit was originally given. The law of this case rests on the same basis with that which governs the liability of dormant parners. 1 *Comyn on Contr.* 248. *Owen v. Gooch*, 2 *Esp.* 567.

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

The only question is whether the plaintiffs are entitled to retain their verdict for the amount of that part of the goods which were charged to *Lakeman* at the time they were delivered to him.—It does not appear that at *that time Lakeman* stated to the plaintiffs in what capacity he was acting, nor that they knew him to be the authorized agent of *Gray*, though such agency was a matter of public notoriety;—and in the present case we apprehend that these circumstances are not material. The goods when received by *Lakeman* were all applied to the defendant's use. If the plaintiffs *knew* him to be the defendant's agent, and dealt with him *as such*, it seems to be of little consequence whether the charge was made against the agent or the principal. If they *did not* know it, there seems to be no inconsistency in making their claim on the defendant, having discovered, since the delivery of the goods, that he was liable in consequence of his having constituted *Lakeman* his general agent. Suppose that the plaintiffs had ascertained, since the sale, that *Gray* at *that* time was a dormant partner of *Lakeman*; they could surely, in such case, have maintained an action

against them both as partners;—and yet the charges in the plaintiffs' books would not correspond with the allegations in their writ, and would seem to negative the idea that credit was given to any one but *Lakeman*. Still that circumstance would not prejudice their right of action against the newly discovered copartnership;—nor does it impair their rights in this action against *Gray alone*, as it now is apparent that *Lakeman* was authorized to bind him as his principal. *Lakeman* considered himself as contracting in that capacity, because, it is proved, he never charged the goods over to *Gray*.

The opinion and reasoning of the Court in *Williams & al. v. Mitchell*, 17 *Mass.* 98 and the principle of that decision, have a direct bearing on the present case; and the same train of reasoning which led the Court in that case to the opinion they formed, lead us to overrule the motion for a new trial.

Judgment on the verdict.

HUSE *v.* MERRIAM & AL.

If in the assessment of a tax, the assessors exceed the sum voted to be raised and five *per cent.* thereon, though the excess be of a few cents only, the whole is void; and the assessors are liable in *trespass* to the party whose goods have been distrained for the tax.

THIS was an action of trespass *vi et armis* for taking away the plaintiff's horse, and it came up to this Court by exceptions filed pursuant to the statute. The defendants justified as assessors of *Belfast*, proceeding in the discharge of their duty to assess a sum of money voted by the inhabitants of one of the school districts in that town for the erection of a school house; the particulars of which, and the issuing of their warrant to the collector who distrained the horse for non-payment of the tax, were set forth in the brief statement filed in the case. To the regularity of these proceedings various objections were taken, among which was this,—that the sum assessed exceeded the amount voted and five *per cent.* thereon, by the sum of *eighty-*

seven cents; the sum voted being two hundred and fifteen dollars, and the amount of the whole assessment being two hundred and twenty-six dollars and sixty-two cents.

Crosby, for the defendants, resisted this objection on the ground of the smallness of the excess;—and he insisted that if the maxim *de minimis non curat lex* meant any thing, it ought to be received to protect assessors when, in the honest discharge of their duty, they *unintentionally* exceeded the strict legal limit, by so small a trifle. He said that this case differed from *Libby v. Burnham*, 15 *Mass.* 144. where the overlaying was large and was deliberately made; and contended that assessors, for an inadvertent mistake in a matter within their jurisdiction, were not liable as mere trespassers. *Dillingham v. Snow*, 5 *Mass.* 558.

Johnson, on the other side, was stopped by the Court; whose opinion was afterwards delivered by

Mellen C. J. This case comes before us on exceptions to the opinion and direction of the Court of Common Pleas.—That Court decided that the *assessment*, under which the defendants attempted to justify the act complained of by the plaintiff as a trespass, was illegal and void, because they were authorized by the vote of the town of *Belfast* to assess only the sum of $215; and yet did in fact assess $226,62—being $11,62 more than the sum voted; and that, though by statute assessors may add to the sum voted five per cent. on its amount and legally assess the whole, yet in the present case they assessed on the sum voted 87 *cents* over and above the five per cent.—To this opinion exception was taken.—It is contended that this sum of 87 cents is such a trifle as to fall within the range of the maxim *de minimis non curat lex;*—but if not, that still this small excess does not vitiate the assessment.—The maxim is so vague in itself as to form a very uncertain ground of proceeding or judging; and it may be almost as difficult to apply it as a rule in *pecuniary* concerns, as to the *interest* which a *witness* has in the event of a cause;—and in such a case it cannot apply.—*Any* interest excludes him. In *Boyden v. Moore adm'x.* 5 *Mass.*

365. this subject was under consideration.—*Forty-one cents* were not considered a trifle.—The Chief Justice observed that "fractions, not to be expressed in the legal money of account, are "*trifles* and may be rejected."

The only question then is whether the assessment of this unauthorised excess vitiates the assessment? The case of *Dillingham v. Snow*, 5 *Mass.* 547. is different from this.—There some rateable property was omitted which should have been contained in the list of valuations, by which each assessment was increased beyond its due proportion; but no more was assessed than by law the assessors had authority to assess. The case was completely within their jurisdiction, and the Court in giving their opinion expressly recognize and state this distinction. Neither is the case of *Colman & al. v. Anderson*, 10 *Mass.* 105. similar to this. The assessments then under consideration were made *before* the statute was enacted authorizing overlayings of 5 *per cent.*, and at a time when overlayings to any reasonable amount were usual, were deemed proper, and were acquiesced in; but even in that case *Sewall J.* in giving the opinion of the Court, says, "The overlaying, if an irregularity, will not *vacate* "*the warrant to the collector or constable*; he is justified by the "warrant, and the remedy where an injury is sustained, *is* "*against the assessors*,"—the very remedy resorted to in this case. In *Libby v. Burnham*, 15 *Mass.* 144. it was 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."—The same point was also decided by this Court in the case of *Elwell v. Shaw*, 1 *Greenl.* 339.—Although the excess in the case before us is very small, it makes the assessment void.—If the line which the legislature has established be once passed, we know of no boundary to the discretion of assessors.—Accordingly the exception is overruled and

Judgment affirmed.

STUBBS *v.* PAGE.

The covenant usually inserted in a collector's deed—"*that the taxes aforesaid* "*were assessed and published and notice of the intended sale of the said lands* "*given according to law*,"—is a stipulation not only that the taxes were *in fact* assessed, but that the assessment was *legally made*.

Where a deed conveys no seisin, in law or fact, the measure of damages is the consideration-money and interest thereon.

In an action upon the covenants in a deed in which the defendant, in his capacity of collector of taxes for the town of *Frankfort*, undertook to convey to the plaintiff the lands of certain delinquent non-resident owners,—the plaintiff in his declaration alleged that the defendant therein covenanted "that the "taxes for which said land was sold were assessed and pub- "lished and notice of the intended sale of said lands given ac- "cording to law, and that in all respects he the said *Page* had "observed the directions of law, *and that* he had good right "and full power to sell and convey the premises to the plaintiff "to hold as aforesaid;"—and in his averment the plaintiff negatived the words of these covenants, and alleged that by reason of the illegality of said assessment he had been evicted of the lands by the original proprietors in an action commenced against him, in which the demandants recovered, and he had been compelled to pay a large sum in costs, besides the monies expended in his own defence in attempting to establish the legality of the assessment of said taxes, &c.

The covenants in the deed, were in these words,—"that the "taxes aforesaid were assessed and published and notice of "the intended sale of the said lands given according to law, "and that in all respects I have observed the direction of the "law, *whereby* I have good right and full power to sell and con- "vey the premises," &c.—Whereupon the defendant pleaded in bar that the assessors of the town of *Frankfort* "*did assess* "*said non-resident proprietors' land named in said deed*, in the "sum of thirteen dollars, and did publish and commit said as- "sessment to the said *Page* with their warrant for collection;"—and that he duly advertised and posted the same, &c. [specially setting forth all his proceedings] whereby he had good right, &c.

To this plea the plaintiff demurred in law, assigning, among other causes, that the defendant in his plea "only says that the "assessors *did assess* the non-resident proprietors' land named "in said deed, and did publish and commit said assessment to "the said *Page*, without averring in said plea that they *did le-* "*gally assess* said lands," &c.

Hereupon the principal question was—whether the collector, by the words of the deed, had stipulated for the *legality* of the assessment by virtue of which he had sold the lands?

Crosby, for the defendant, said that the rule of *fortius contra proferentem* was a rule only of necessity,—and not to be resorted to where the intent of the parties can be fairly collected from the deed itself. *Here*, the language of the deed being susceptible of two constructions, it ought to receive that interpretation which best accords with the obligations imposed on the defendant, by law, at the time of making the deed. Now he was at that time in the regular discharge of his office of collector of taxes. It was no part of *his* duty to covenant that the assessors had done *theirs*. He had no means of investigating their doings. It was enough for him to know that he had a tax-bill *purporting* to be a legal assessment, committed to him by a legal warrant, under the hands and seals of persons duly chosen, and authorized to issue such a precept,—and that in *his own* official acts he had obeyed the commands of the law. Of course he can be understood to stipulate for no more. Had the terms of this deed been the subject of personal conference between the parties, and the defendant been interrogated respecting the legality of the assessment, he would undoubtedly have replied that the plaintiff's means of judging on this point were equal to his own. This construction relieves a public officer from unreasonable hardship;—and it operates with no unreasonable severity on the *vigilant* landholder, since he may always seek his remedy against the assessors themselves, for any injury sustained by their misconduct. *Sumner v. Williams*, 3 *Mass.* 214. 1 *Saund.* 59. *n.* 1. 2 *Bos. & Pul.* 13. 2 *Saund.* 176. *n.* 6. *Shep. Touchst.* 163.

Wilson, for the plaintiff.

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

The question in this case is presented to us by a special demurrer to the pleas in bar.—The action is covenant broken, founded on certain covenants in the defendant's deed.--That which the plaintiff relies upon is in these words,—"and I do "covenant with the said *Stubbs*, his heirs and assigns, that the "taxes aforesaid were assessed and published and notice "of the intended sale of the said lands given *according to law.*"—The defendant after craving oyer of the deed, pleads to the breach assigned touching the *assessment* and *publishing* of said taxes as follows, viz. "that the assessors of said town of *Frank-* "*fort did assess* said non-resident proprietors' land named in "said deed in the sum of $13,—and did *publish* and commit "said assessment," &c.—To *this* plea there is a demurrer and one cause assigned is that it does not state that the assessors did *legally assess*, &c.—It does not seem necessary for us to notice any of the other pleas, or any of the causes of demurrer.—The counsel for the defendant contends that his *plea is good*, because it is as broad as the *covenant*, though not as broad as the language of the *breach as assigned*;—and as the deed is by the pleadings become a part of the record, the reasoning of the counsel is correct, provided his construction of the covenant in question be correct.—We are thus carried back to the *covenant* before quoted; and the true construction of it must decide the action; because the declaration states that the original proprietors of the land have recovered it from the plaintiff, on account of the illegality in the assessment of said taxes and in the proceedings of the defendant, the collector; and none of these facts have been denied.

The argument of the defendant's counsel is that the concluding words of the covenant, "according to law," ought not to be considered as having any connection with or reference to the *assessment*, but only to the *legality of the notice* of the *intended sale.*—The counsel for the plaintiff contends that they must be applied to all that *precedes* in the same sentence, in the same manner as the word "covenant" in the *beginning* of the sentence must necessarily be considered as applicable to the whole.—The arrangement is such and the language is so express, that we do not feel ourselves warranted in giving to the

covenant the limited construction which is contended for by the defendant.—He was under no obligation to enter into such a covenant, but still he has done it; and he must abide the consequences of his own contract.—It is not the duty of a Court to explain away the plain language of parties, or defeat their expressed intentions by refined distinctions;—but to give a natural construction, presuming that such was expected when the deed was written.—Besides, we are bound to suppose that *all the words* of the deed were inserted for some purpose; and for what purpose was the *assessment* mentioned in the sentence, unless to be embraced in the covenant?—Was it for mere information to the plaintiff? Was it a statement of a *simple truism*, about which no one would ever doubt? The words of a covenant should be construed with reference to the object and design of *all* covenants; which it is well known are entered into for the purpose of conveying some *beneficial rights* to the covenantee—We are therefore satisfied that according to the true construction of the covenant in question it must embrace the *assessment*, as well as the *publishing* of the *taxes* and the *legality of the notice* of the intended sale; and of course the plaintiff is entitled to recover.—As to the question of damages, the rule is well settled.—Where *nothing* passes by the deed; no seisin in *law* or *fact*; the purchaser is entitled to recover the consideration, and interest, and nothing more.—In the case before us, the collector not being *seized himself*, and his deed being void as a conveyance, it passed no estate whatever; it gave no seisin or possession to the plaintiff. Of course he could not be evicted of an estate which he never had; and therefore the expenses incurred by him in defending the action brought by the proprietors, cannot be allowed by way of damages. He should not have entered and exposed himself to a suit. See 2 *Mass. Bickford v. Page*, 455.; and *Cushman v. Blanchard*, *ante*, *p.* 266. and the cases there cited.

Pleas in bar adjudged insufficient.

RYAN v. WATSON, SHERIFF, &c.

A surrender of the principal debtor, to the officer holding the writ of execution against him, is a discharge of the bail-bond.

A special demurrer to a plea because it is double and argumentative, is fatally defective unless it state particularly wherein these defects consist.

THIS was an action of the case against the late sheriff of this county for the neglect of one of his deputies in not delivering over to the plaintiff, upon demand, the bail-bond by him taken in a suit in favour of the present plaintiff,—and in not returning the bond to the clerk's office within a year from the rendition of the final judgment.

There were divers pleas in bar of the action;—the substance of which was—that within a year from the rendition of the judgment, and before the bail-bond was demanded, the original debtor—1—surrendered himself,—2—was surrendered by his bail—to the defendant, who had in his hands the writ of execution which was issued on the judgment; and that the defendant was ready to have committed him; but was directed by the creditor's attorney not to commit him, but to suffer him to depart.

To these pleas the plaintiff demurred, assigning for cause—1st, that the defendant had not alleged that the debtor was ever *taken in execution* in discharge of his bail,—2d, nor that his bail had him in custody, ready to be delivered up, *at all times within a year* from the rendition of final judgment,—nor that he was *surrendered in open Court* before judgment;—and 3d, that the pleas were "double, argumentative, uncertain," &c.

Wilson, in support of the demurrer. The sheriff is not discharged by any thing set forth in the pleas, unless the same matter would be a good defence in an action against the bail. But a surrender of the principal *to the sheriff* is not sufficient to discharge the bail, unless the debtor be taken in execution. *Walker v. Haskell*, 11 *Mass.* 181. *Stevens v. Bigelow*, 12 *Mass.* 434. The obligation on the bail that the debtor shall be found at all times within the year, results from a consideration of the statute and the bond, taken together; for the whole subject be-

ing regulated by the statute, its provisions must be regarded as forming a part of the contract of bail in all cases. The plea therefore is bad, unless it shew that *at all times* within the year the debtor might be found and arrested. The creditor has a right to his lien on the body during that period, that he may choose his own time for making the arrest, with reference to the greatest probability of the debtor's redeeming himself by payment of the debt;—and if at *any time* within the year he is not to be found, the bond is forfeit. That may have been the propitious moment to secure the debt by an arrest. *Cæsar v. Bradford*, 13 *Mass.* 169. *Simmons v. Bradford*, 15 *Mass.* 82. 4 *Bac. Abr.* 464.

Crosby, for defendant. The bail bond became a nullity by the surrender of the debtor. The condition was that he should abide the final judgment, and should not avoid. This he has performed, by surrendering himself to the sheriff, who had the writ of execution against him. It was enough if he was ready to be taken; for this was giving to the creditor the whole benefit of the pledge. *Champion v. Noyes*, 2 *Mass.* 481. The provisions of the statute for a surrender in open Court after *scire facias* brought, are merely for the *further relief* of the bail; but do not affect the principle that a surrender *in pais* is a discharge at common law. 3 *Bl. Com.* 290. *Rice v. Carnes*, 8 *Mass.* 490.

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

It seems to have been conceded in argument, that if the facts in this case, would furnish a good defence in a suit against the bail, they will be a good bar to *this* action; because, if the bail were in law completely discharged, *before* the bail bond was even demanded of *Waters*, then, as it was a dead letter, it was of no value and could be of no use to the plaintiff; and therefore its non-delivery could not be any possible injury to him. In the case of *Champion v. Noyes*, 2 *Mass.* 481.—a leading case on the subject of bail—*Parsons*, *C. J.* says,—"After the "writ is returned, and before final judgment, the bail may sur- "render the principal to the court in which the suit is pending, "and be discharged." By the provisions of our statute respecting bail 1821, *ch.* 62. the bail at any time before judgment is en-

tered against them on the *scire facias* may surrender the principal *in Court*, paying the costs of the *scire facias*. In the case above cited the Chief Justice further states,—"If after issuing "the execution, and before the return, the bail surrender the "principal to the *sheriff holding the execution*, the bond is saved "at law, and the sheriff is obliged to commit him in execution." In *Rice v. Carnes*, 8 *Mass.* 490. the Court in delivering their opinion say, "If *execution* is sued out, the bail *may surrender the* "*principal to the officer having charge of it ;* or he may wait the "return of the *scire facias*, and *then* make the surrender in "Court." In both the foregoing cases, the Court speak of the three several modes of discharge as equally effectual. The case of *Walker v. Haskell*, 11 *Mass.* 181. has been cited and relied on by the plaintiff's counsel as opposing the principles of *Champion v. Noyes* and *Rice v. Carnes*. We have not been able to draw the same conclusions from it which the counsel has drawn. The only point settled is, that the creditor's assurance to the officer holding his execution against his debtor, that he would take no advantage of him, if he would do the best he could, was a good defence to an action brought by the creditor against the officer for not arresting the debtor. There certainly is some obscurity in the case as it stands; for though it appears that the bail had surrendered the principal to *Walker*, the officer holding the execution against *Glidden*, yet the Chief Justice, in reasoning upon the facts, seems to proceed on the idea that the bail continued liable. It may perhaps be explained by the circumstance, that though the fact of the surrender to *Walker* was contained, among a vast many others, in the bill of exceptions, yet the exceptions were taken to *certain directions of the Judge to the jury*, not one of which had any relation to the surrender or the legal effect of it; and, of course *that subject* was not judicially brought before the Court. The only question to which their attention seems to have been directed was, whether the plaintiff could charge the officer with official neglect, and recover damages against him, after the liberal discretion he had allowed him and the assurance he had given him; and these facts would have been equally important to *Walker* in such an action, whether the bail had been discharged or not. At any rate, we do not consider this last case as weakening the author-

ity of the two former; and accordingly are satisfied that the facts stated in the pleas in bar, if correctly pleaded, furnish a good defence. As to the *causes* of demurrer, we would observe, that the view we have taken of this case, shews the *first* cause to be of no importance. The *second* seems to be of the same character, if truly assigned; of which there is much question, because the *second* plea states that the *bail of the original debtor delivered up* and *surrendered him* to the said *Watson;* which averment certainly contains an affirmation of his being in the custody of the bail at the time of so delivering him up; and as we are of opinion that a surrender of the principal to the sheriff holding the execution is a discharge of the bail, he need not be ready at all times after, within the year to surrender him. The *third* cause is not well assigned. The first and second pleas *confess the demand of the bail bond as alleged* (and *this* and the non-delivery of it constituted the gist of the plaintiff's action) and then *avoids* the demand made upon him by disclosing certain new facts anterior to such demand and refusal. The special demurrer is also fatally defective in not *pointing out minutely wherein the pleas are double and argumentative*, if they are so. On the whole we are satisfied that the action cannot be maintained.

Pleas in bar adjudged sufficient.

ALLEY *v.* CARLISLE.

On an appeal from a judgment of the Court of Common Pleas upon an *issue of law*, single costs only are recoverable; *such* issues not being within the provisions of *Stat.* 1822, *ch.* 193, *sec.* 4.

In an action upon contract, in which the *ad damnum* was laid at two hundred dollars, the defendant, in the Court below, demurred generally to the declaration; which being adjudged good, he appealed to this Court, but did not enter his appeal. And the plaintiff having obtained an affirmation of the judgment, upon his complaint here, now moved for the taxation of double costs against the defendant, under *Stat.* 1822, *ch.* 193, *sec.* 4.

But the Court refused the motion. They said that the fourth section of the statute must be considered as relating only to the amount of *damages*, upon issues of *fact*. If the defendant *will* put *that* question a *second* time to the jury without success, he shall pay double the whole costs *accruing after the appeal*, in addition to the costs in the Court below. But the *seventh* section, regarding only the more general question whether the plaintiff has any right to recover at all, seems to leave the parties to their appeal from a judgment rendered upon an *issue of law*, unaffected by the provisions of the fourth section, and unembarrassed by any other peril than the general chance of losing the cause.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE COUNTY OF

OXFORD.

AUGUST TERM,

1823.

STOWELL *v.* PIKE & ALS.

If the mortgagor of land, being in possession, cut down and carry away timber-trees growing thereon, he is liable to the mortgagee, in an action of trespass *quare clausum fregit*, for their value.

If a lot of wild land be purchased, and mortgaged to secure payment of the purchase-money, *quære* whether a general usage and custom in the country for the purchaser in such cases to fell the trees and clear the land, may be considered as amounting to a license from the mortgagee so to do?

IN an action of trespass *quare clausum fregit*, the case was thus:—The plaintiff, by his deed dated *September* 15, 1819, bargained and sold the close described in the writ, to one *Bickford*, in fee, taking from *Bickford* at the same time a mortgage of the same land to secure the payment of the purchase-money, for which *Bickford* also gave his notes of hand to the plaintiff, amounting to three hundred and thirty dollars, payable at different periods in the course of two years and a half, with interest. In the course of the spring following *Bickford* paid his first instalment;—and in *December* 1820 he sold all the timber then standing on the premises, to the value of two hundred and thirty dollars, to the defendant *Pike* and others, who, with the other defendants in their employment, without license from the plaintiff cut it down and converted it to their own use;—for which cutting this action was brought. *Bickford* continued in possession of the premises from the date of his deed till after the cutting of the timber, when the plaintiff entered upon him

for condition broken; the residue of the purchase-money being still due.

Upon these facts the parties submitted the cause to the decision of the Court, the defendants waiving any objection to the form of action.

L. Whitman for the defendants.

This case is distinguishable from *Smith v. Goodwin*, decided lately in *Cumberland* [*ante*, *p.* 173.] in the circumstance of *Bickford's* being in possession of the premises at the time of the supposed trespass, and in his having paid all the purchase-money then due. The decisions in *Massachusetts* are against any action in favour of the mortgagee for an injury to the mortgaged premises while in the possession of the mortgagor, and so situated as to render it doubtful whether the mortgagee will claim to hold the land or rely on his personal security. *Hatch v. Dwight & al.* 17 *Mass.* 289.

In this country the mortgagor, under circumstances like the present, must from the usage of the country, even where no express agreement is proved, be considered as having license from the mortgagee to do the acts for which these defendants are sued. Here the deed and mortgage were of even date,—the land was what is termed a wild lot,—and the acts done by the defendants were such only as are necessary to reduce any similar lot to a state of cultivation and productiveness. It must have been known by the plaintiff that such was the course to be adopted, else no motive can be assigned for the purchase. Such has been the well known and undeviating usage, from the first settlement of this country, respecting lands thus purchased, and it ought not to be disturbed upon light grounds. It is a reasonable practice, favourable to agriculture, and deserving on the score of public policy, of all the encouragement which Courts of justice can give.

Greenleaf and *Lincoln*, for the plaintiff.

The action is substantially by the mortgagee against the mortgagor, for stripping the land of its *timber*. The trees were *fixtures*, and therefore not removeable by the mortgagor;—and this whether erected by him or not. *Elwes v. Maw*, 3 *East.* 38. *Smith v. Goodwin*, *ante p.* 173.

To the objection drawn from the general practice in these cases, and from public policy,—it is answered—1. This was not a *clearing up* of the lot, for the purpose of agriculture, but a *sale* of all the *timber* then standing on it,—and so is not the case supposed.—2. Whatever may be the rule of equity or good policy, the mortgagor is not brought within its principle, because he never applied to the discharge of his debt due for the land, any part of the money obtained by the sale of the timber. Further, the indulgence here claimed amounts to a *license*, which is expressly negatived in the case stated. The mischiefs anticipated by the defendants may always be avoided in practice, by pleading a license, and relying for proof on the general usage, which the jury will determine.

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

If *A.* mortgage lands to *B.* in fee, the *legal estate* is considered to be in *B.* as between him and *A.* and those claiming under *A*:—but as to all the world but *B.*, *A* is considered as seised of the legal estate, and so may convey to *C.* subject, however, to the mortgage. *Blaney v. Bearce*, *ante*, *p.* 132. For this reason *B.* may maintain trespass against *A.* and those claiming under him, because *A's* possession is in submission to *B's* title, and is in fact the possession of *B.* In *Newhall v. Wright*, 3 *Mass.* 138. *Parsons*, *C. J.* delivering the opinion of the Court, says—"It is very clear that when a man, seised of lands in fee, shall "mortgage them, if there be no agreement that the mortgagor "shall retain the possession, the mortgagee may enter immediately—put the mortgagor out of possession, and receive "the profits; and if the mortgagor refuses to quit the possession, the mortgagee may *consider him as a trespasser*, and may "*maintain an action of trespass* against him, or he may in a writ "of entry recover against him as a disseisor." There is nothing then in the relation between mortgagor and mortgagee, inconsistent with the nature of an action of trespass by the latter against the former;—and surely a mortgagor, or one claiming under him, is not less liable for an injury to the mortgagee by cutting down and carrying away timber and wood from the premises, than he would be by merely withholding the possession, and receiving the rents and profits to his own use. *Union Bank v.*

Emerson, 15 *Mass.* 159. *Bro. Tr.* 55, 362. 5 *Rep.* 13. *Cro. Eliz.* 784. We need not however rely on these cases, or decide on the form of action, as the parties have waived all objections to form, if any exist. But on these principles we decided the case of *Smith v. Goodwin*, cited for the plaintiff; and on the same principles we think the action maintainable, unless the alleged usage and general understanding with respect to felling trees and clearing wild lands though mortgaged to secure payment of the purchase-money should be considered as preventing the application of those principles to a case like the present. It was urged by the defendant's counsel that such usage and general tacit understanding are equal to a license from the mortgagee to the mortgagor or his assignee, to do the acts which are charged in this action as a trespass. The facts in the case do not present this question. We have no means of knowing whether any such usage and general understanding exist. The argument of the counsel therefore cannot avail, as it does not apply. If such usage and understanding existed at the time of the transactions of which we have been speaking, and were considered as amounting to a license, and pleadable as such against the deed in question, they should have been disclosed in the form of a special plea, and the question arising thereon left to the decision of the jury. As the case stands the plaintiff must have judgment for the value of the timber and costs, according to the agreement of the parties.

Note.—In this case PREBLE J. gave no opinion.

HOWARD *v.* WITHAM & AL.

In an action on a note of hand given for the price of land conveyed by the plaintiff to the defendant by deed of release and quitclaim without covenants, it is not a good defence that the plaintiff represented his title to be in fee-simple, when in truth it was but an estate for life or for years ;—nothing short of a *total failure* of title being in such case a sufficient defence to the action.

ASSUMPSIT upon two promissory notes. From the exceptions filed in the Court below it appeared that these notes were given

for part of the consideration-money mentioned in a certain *quit-claim* deed of lands in *Brownfield*, given by the plaintiff to *Nahum Witham* one of the defendants. These lands were part of a tract consisting of divers lots of land which the plaintiff in the year 1810 purchased by deed of *quitclaim* from the Rev. *Jacob Rice* who was the first settled minister in *Brownfield;* in which deed the land was described as "all the ministerial and "parsonage right of land in *Brownfield*, it being the land grant-"ed by the government of said Commonwealth to the *first set-*"*tled* minister, I mean all the right I have in consequence of my "being the first settled minister in said *Brownfield*." There were in that town certain lands reserved for the first settled minister, which were known and designated by the inhabitants as the "ministerial lands," and which Mr. *Rice* held in fee. The lot conveyed by the plaintiff to said *Nahum*, was described in the deed as "a certain tract or parcel of land lying, &c.—being "part of the *ministerial* land, as will appear by the Rev. *Jacob* "*Rice's* deed to me dated *May* 25, 1810, bounded," &c—It was proved that the plaintiff repeatedly called this lot *ministerial* land, but sometimes called it *parsonage*, affirmed that he had a good title to it, and at the time of sale told the grantee that his title to it was good, and that he should not convey to him any land but what he owned. It also appeared that the deed from *Rice* to the plaintiff was produced at the time of sale; and that *Nahum Witham* the defendant entered into the land granted to him by the plaintiff's deed, and had ever since continued in the undisturbed possession of it.

The defendants offered to prove that there were other lands in the same town which were reserved for the use of the minister for the time being, and which were known and designated as the *parsonage* lands; which Mr. *Rice* had agreed to relinquish to the town, but had never executed any deed of conveyance;—and that the plaintiff, at the time of making the deed to the defendant and taking the notes declared on, falsely represented and affirmed to *Nahum Witham* the grantee that the land he was then conveying to him was part of the land designated as *ministerial*, which the plaintiff held in fee, whereas in truth it was part of the glebe or *parsonage* land, in which the plaintiff had an estate only during the continuance of Mr. *Rice* in the

ministry in that town;—and that thereupon said *Nahum* received of the plaintiff his deed of quitclaim to the same, and gave the notes declared on, for the full value of a title in fee-simple to the land.

This evidence the presiding Judge in the Court below refused to admit; and a verdict being returned for the plaintiff for the amount of the notes, the defendants filed exceptions pursuant to the statute.

Bradley and *Greenleaf*, in support of the exceptions, argued —1st, that the notes were void, being obtained by representations known by the plaintiff to be false. *Sill v. Rood*, 15 *Johns.* 230. *Taft v. Montague*, 14 *Mass.* 282. *Bliss v. Negus*, 8 *Mass.* 46.—2d. That here was a partial failure of consideration, the notes being given for the price of an estate in fee, when in truth the plaintiff could convey at most but an estate for life. And the deed formed in itself no part of the consideration, because, being merely a quitclaim, it contains no covenants on which a remedy can be had; and so is not within the reason of *Lloyd v. Jewell*, 1 *Greenl.* 352. To this point were cited *Fowler v. Shearer*, 7 *Mass.* 22. *Phelps v. Decker*, 10 *Mass.* 279. *Sanger v. Cleaveland*, *ib.* 417. Upon either of these grounds, it was contended, the evidence offered ought not to have been rejected.

Dana, for the plaintiff, adverted to the fact that the grantee was still in the undisturbed possession and enjoyment of the land; and contended that he ought not to be placed, by his *quit-claim* deed, in any *better* situation than if it was a *warrantee* deed with the usual covenants. But had his deed been of the latter description he could have had no action—certainly nothing but nominal damages—so long as he remained in quiet possession of the land, and so are all the authorities. Perhaps the grantee here will never be disturbed;—and if so, it would surely be unjust to give him both the land and the purchase-money. —As to the allegation of fraud, he replied that this was negatived by the evidence in the case, especially by the fact that the plaintiff's own title-deed from *Mr. Rice* was produced at the time of the conveyance to the defendant, and was especially referred to in the latter deed.

MELLEN C. J. delivered the opinion of the Court at the succeeding term in *Cumberland*, the action having been continued *nisi* for advisement.

The premises described in the deed of the plaintiff were either what were called *ministerial* lands, or in other words lands of which *Mr. Rice* had been seised in fee, and had conveyed to the plaintiff; or else *parsonage* lands, or lands of which he had been seised in right of the town and by virtue of his office, and had also conveyed to the plaintiff. It therefore appears that even if a fee simple estate was not conveyed by the plaintiff's deed, an estate during the continuance of *Mr. Rice's* ministry *was* conveyed; and we apprehend that on this ground the defence must fail.—In the case of *Fowler v. Shearer*, 7 *Mass.* 14. the facts were, that *Mrs. Fowler* undertook to convey her husband's estate, under a power of attorney from him to her; but the deed was so informally executed, that nothing of the husband's estate passed by it. The next question was, whether the deed was effectual to convey any estate which she held in *her own* right, and which also she undertook to convey by the same deed;—but the Court decided that *such* estate did not pass, because her husband did not join with her in the deed. In that case *Parsons C. J.* observed—"If the deed be not *void*, "*if any estate of the wife* passed to the defendant, the execu- "tion of it by the wife may be a *sufficient consideration* for the "note to the husband." But as *no estate whatever* passed by the deed—neither the estate of the husband nor of the wife—the note which was given for the price of the estate was decided to be destitute of consideration, and void; but it would have been holden as given on sufficient consideration, and binding, if *any estate* had passed by the deed, though much less than was intended and expected at the time, by the parties to the contract. So also in *Greenleaf v. Cook*, 2 *Wheat.* 13. which was an action on a note given by the defendant to the plaintiff for lands conveyed to him *without warranty*,—the Court decided that nothing short of a *total failure* of title could constitute a good defence to the action. On this ground we decide the cause, without discussing or deciding the other points which were taken in the argument. The exceptions are overruled, and the judgment of the Court of Common Pleas is affirmed, with additional damages and costs.

HOLDEN *v.* THE FIRST PARISH IN OTISFIELD.

Where divers persons subscribed to a parish fund, giving each one his separate note to the treasurer for the amount subscribed, under an agreement that if any subscriber removed and remained out of town three years his note should be given up;—it was held that a subscriber who had thus removed and remained out of town, was entitled not only to receive his note, but to recover back any monies paid in part of the *principal sum* subscribed.

This was *assumpsit* upon a special agreement dated *October* 15, 1814, by which the plaintiff and several other inhabitants of the first parish in *Otisfield* bound themselves to assist the parish by creating a fund "to support a minister of the gospel of the "congregational denomination and calvinistic doctrine." The terms of the agreement were—that the interest on the amount subscribed by each party should be paid annually, so long as such party should continue to reside in *Otisfield*;—and that if, within seven years then next, any subscriber should remove from that town, and continue to reside in another town for the space of three years together, the note or notes which he might give to the parish treasurer for the amount of his subscription should be given up. The declaration contained also a count for money had and received.

It appeared that the plaintiff subscribed two hundred dollars to the fund, for which sum he gave his promissory note to the parish treasurer;—that in the year 1815 he voluntarily paid one hundred and sixty dollars of the note, by procuring other persons who were indebted to him to give their notes to the treasurer for that amount;—that in *March* 1818 he removed from *Otisfield*, and had never returned thither to reside;—that after the commencement of this suit he paid a small balance of interest due on the note at the time of his removal, which the treasurer received without objection, and without knowledge of the commencement of this suit;—that the original note, and the notes given in part payment thereof, or the money, had been duly demanded by the plaintiff;—and that the defendants were willing to deliver up the original note, on receiving the balance of interest aforesaid, but refused to deliver the others or to refund the money paid to them.

Hereupon a verdict was taken for the plaintiff for the *principal* sum paid, and interest upon it, subject to the opinion of the whole Court upon the effect of the evidence in the case.

Fessenden, for the defendants.

1. Upon a fair construction of the contract it was never intended by the parties to give a right of action to recover back monies *paid;* but only that where the note remained unpaid at the time of removal, its payment should not be enforced.—If the party chose to pay, it was well,—if not, he should never be compelled to pay more than the interest, if he was punctual in this. And this construction is reasonable. The object of the parties was to support the public ministrations of religion, by a permanent fund. But the plaintiff would compel them to pay the money belonging to this fund for notes of which they never have received payment, and perhaps never will be able to collect; and which they never can enforce so long as the interest is paid, and the makers reside in that town. The principle on which this action is founded will oblige the defendants always to keep on hand, and unproductive, all the money voluntarily paid, or at least to preclude them from vesting it in permanent loans, since they must be obliged to refund it upon demand. Further, if the plaintiff is entitled to the money for the amount of the substituted notes, it is because they are his property. If so, his remedy should have been in trover. But the payment of the money, in this manner, upon his own note, is a waiver of so much of his rights under the special contract.

2. The payment was *voluntary*, and so not recoverable back unless paid by mistake or coercion, which the case does not find. *Cartwright v. Rowley*, 2 *Esp.* 723. *Knibbs v. Hall*, 1 *Esp.* 84. 2 *Comyn on Contr.* 41—43. *Brown v. Mc Kinnally*, 1 *Esp.* 279. *Morris v. Tarin*, 1 *Dal.* 147. *Bilbie v. Lumley*, 2 *East.* 469. *Taylor v. Hare*, 1 *New Rep.* 260. *Marriot v. Hampton*, 2 *Esp.* 546. *Hall v. Shultz.* 4 *Johns.* 240.

3. The action is prematurely brought, the interest due on the plaintiff's removal from *Otisfield* not having been then fully paid up. For until such payment of interest, the note was not, by the terms of the contract, to be surrendered.

Howe, for the plaintiff.

Per Curiam. The decision of this case depends on the interpretation of the contract. The subject matter of this contract was the money constituting a productive parish fund. If any subscriber removed out of town, thus ceasing for a time to derive any benefit from the fund, he was only holden to pay the interest *then due*. If his absence continued three years, this seems to have been taken as evidence of a final change of domicil, in which case he was to be entitled to receive back his note. But any subscriber was at liberty to save himself the trouble of an annual recurrence of the payment of interest, by depositing the capital itself in the treasury at once; and it does not seem consistent with the principles of natural justice to place such a subscriber in a worse condition, than one who had never paid any thing to the fund. In the latter case the party would elect to retain the capital in his own hands, paying the interest;—in the former he would only have committed the management to the treasurer;—but in every case where he might reclaim the note, we think he might reclaim the *principal money* paid upon it. This action is therefore maintained.

The objection that this action was prematurely brought, because a small *modicum* of interest remained unpaid at its commencement, we do not think is well founded. The action for money had and received is an equitable action, in which the Court will endeavour, as far as is practicable, to settle the whole matter in dispute. Here the defendants were in possession of one hundred and sixty dollars of the plaintiff's money, out of which, he might well have insisted, they should deduct any balance of interest due to them;—for his claim against them being perfect for the principal in their hands, and theirs against him being equally perfect for the interest due at the time of his removal, the whole case would resolve itself into a comparison of these two sums. But the defendants having received the interest due to them,—no matter whether before or after this action was brought,—there remains no objection to the recovery by the plaintiff of the principal which he has paid into the fund, with interest.

Judgment on the verdict.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE COUNTY OF

LINCOLN.

SEPTEMBER TERM,

1823.

KAVANAGH & AL. PLAINTIFFS IN REVIEW *v.* ASKINS, ORIGINAL PLAINTIFF.

If the plaintiff in review succeeds in correcting an error in the former verdict against him when he was original defendant, he is entitled to a judgment for the costs of the review, as the party prevailing, under *Stat.* 1821. *ch.* 59. *sec.* 17. though the accumulation of *interest* may have rendered the last verdict *larger* than the first.

In this action, which was *assumpsit* for money had and received, a verdict was returned at *September* term 1820, in favour of *Askins* for $2463,23. The defendants then filed a motion for a new trial at common law, under which the cause was continued till *May* term 1822, when the motion was overruled, and interest being added to the verdict up to that term, judgment was then rendered for the original plaintiff for $2709,55, being the amount of the verdict and interest. At that term the defendants preferred a petition for review, which being granted, the cause was again tried upon the review, and a verdict was returned for the original plaintiff at *September* term 1823, for $2557,42. Hereupon each party moved for costs of the review, as the *party prevailing*, under *Stat.* 1821. *ch.* 59. *sec.* 17.

Orr and *Allen*, for the original plaintiff, argued that the addition of interest to the former judgment being the act of the Clerk, probably on the authority of *Vail v. Nickerson*, 6 *Mass.* 262. and without any special order of the Court, it ought not

to be permitted to work injustice. It was in the nature of a penalty on the defendants for unreasonably delaying the plaintiff of his judgment; and therefore could not fairly be computed in the present inquiry, which is properly only a comparison of verdicts. The rule of adding interest was never intended to do injury to the party in whose favour it was made. It is something superadded to the verdict, for the purposes of justice. The only subject of contest between the parties is, the amount of the verdict,—not the interest upon it;—and in this contest the plaintiff is the party prevailing, the latter verdict being larger than the former.

But independent of general principles, this question is considered as settled by *Stat.* 1813. *ch.* 172. *sec.* 2. in which it is enacted that "in all cases of review which may hereafter be "prosecuted, the party *in whose favour judgment may be rendered* "shall be entitled to single or double costs, as the Court before "which such review may be had shall adjudge." This statute, though enacted before the separation of this State from *Massachusetts*, is yet in full force here,—because it is not expressly repealed, and because no other statute has been passed expressly regulating costs in review.

R. Williams and *Greenleaf*, for the plaintiffs in review. The object of this review being to correct an error in the former *judgment*, and that judgment being found erroneous and reversible in part, the plaintiffs in review are the prevailing party within the meaning of the statute. *Billerica v. Carlisle*, 2 *Mass.* 158. *Lincoln v. Goulding*, 3 *Mass.* 234. The *judgment*, and not the *verdict*, is the thing complained of,—as is manifest from an inspection of the writ of review. If this was erroneous, the plaintiff might have released the excess, and retained the residue;—but having chosen to take his judgment for the amount of the former verdict and interest, it is not for him now to protect himself by saying it was a mistake. If the execution had not been stayed, he would have enforced the payment of the whole sum; and it is only through the judgment that any error in the verdict can be corrected. It is also observable that this judgment was entered up at the same term at which the petition for a review was preferred; and the plaintiff was therefore well forewarned not to take a judgment liable to reversal.

But if the judgment is to be disregarded, still it is evident, from a comparison of the two verdicts, that the plaintiffs in review are the prevailing party. The jury were instructed in both cases to compute interest from the date of the writ, on whatever sum they might find to be due. Under this direction they returned a verdict at *September* term 1820, for $2308, and interest from the date of the writ, which was *August* 1819, amounting in the whole to $2463,23;—and again at *September* term 1823, for $2050 and interest from the same date, amounting in the whole to $2557,42. The capital sum being the only subject of dispute, and this sum being found by the last jury to be less by $258 than was estimated by the first, the plaintiffs in review have succeeded in correcting an error to that amount against themselves, and so are the prevailing party in this action.

The argument from *Stat.* 1813. *ch.* 172. is unsound, that statute being not now in force in this State. Though not repealed in express terms, it is so by implication; the whole subject of costs in general, and of reviews, having been revised by our own legislature.

The arguments of the counsel, of which the foregoing is a brief abstract, having been submitted in writing to WESTON J. before whom the cause was tried, and by him communicated to the other Judges, the Court, after deliberation, ordered the Clerk to enter judgment for the plaintiffs in review for their costs of the review, as the "party prevailing."

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

YORK.

APRIL TERM,

1824.

Memorandum.—The continued indisposition of PREBLE J. occasioned his absence at this term.

WITHAM *v.* PERKINS.

Where a tenant by the curtesy of an undivided portion of an estate had abandoned the land for more than forty years, leaving it in the possession of another tenant in common, whose occupancy was no ouster;—it was held that the reversioner of such undivided portion of the estate had no right of entry upon the tenant in possession, during the life of the tenant by the curtesy, his abandonment of the land being no forfeiture of the estate.

THIS was a writ of entry on the demandant's own seisin. She was the grand-daughter of *Eliphalet Perkins*, who died in 1775, leaving six children, of whom the tenant was one, and *Lydia*, the demandant's mother, who afterwards married *David Thompson*, was another. The demandant, who was the issue of this marriage, was born in *December* 1784, eight days before the death of her mother. On the death of *Eliphalet Perkins*, the tenant entered into and took actual possession of his whole estate, of which the demanded premises are a part; and continued to hold it till the commencement of this action; the demandant having made a *formal* entry in 1822, just before the present suit was instituted. It appeared that *David Thompson*, the demandant's father, had never claimed or exercised any right to the premises as tenant by the curtesy, and that he was still living.

At the trial of this cause, before the Chief Justice, the tenant contended that he had held the premises adversely to the title and claim of the demandant for more than forty years, and during that time had disseised the demandant and her mother. The demandant insisted that the tenant's possession was not adverse, but as tenant in common, for the benefit of himself and the other heirs; and thus that no disseisin had been committed until after her entry in 1822. This the Judge left to the jury, with instructions to find for the tenant, if they believed from the evidence that his possession had been *adverse* to the title or claim of the demandant;—but to find for the demandant if they were satisfied that the possession of the tenant had been as tenant in common with the demandant, and for her benefit as well as his own. Under these instructions they returned a verdict for the demandant, which was taken subject to the opinion of the Court upon these questions,—whether the demandant, *during the life of her father*, could lawfully enter upon, and maintain an action for the lands;—and whether the tenant could avail himself of the title of the father, under the foregoing circumstances, as a good defence.

Shepley, for the tenant, maintained the following positions.—1. The verdict having found that the occupancy of the tenant was not *adverse* to the title of the demandant, and of course that it was concurrent with the seisin of her mother, the father of the demandant became tenant by the curtesy on the decease of his wife. No *entry* was necessary to complete his estate;—the law *adjudges* the freehold to be in him. *Cruise's Dig. tit. 5. ch. 2. sec. 30. Jackson ex dim. Beeckman v. Selleck*, 8 *Johns.* 262.—2. The case discloses no facts from which it can be inferred that this tenancy for life has been determined. He has not conveyed a greater estate,—nor claimed a greater,—nor affirmed the estate to be in a stranger. *Co. Lit. 251. b. 252. a.* Nor is it lost by *non-user*. The case of *Wells v. Prince*, 4 *Mass.* 64. and 9 *Mass.* 509. intimates that the reversioner might enter, notwithstanding a lesser estate existing;—but that was the case of a *devised* estate,—and a devisee has no estate till entry by him or for his use. But *here* the law *executes* the estate in the

tenant by the curtesy, on the death of the wife. So in *Wallingford v. Hearl*, 15 *Mass.* 471. it is said that the reversioner may enter before the death of the tenant for life, *if he refuse* to enter. But to reconcile this with other authorities, it must be intended that if the tenant for life refuses to enter, the reversioner may *enter in his name*, and only to secure *his own rights*. *Cruise's Dig. tit.* 35. *ch.* 14. *sec.* 54.——3. The reversioner cannot enter in his own right till the particular estate is determined. He can only be said to be *entitled to*, not *seised of*, the reversion. *Cruise's Dig. tit.* 17. *sec.* 12. 8 *Johns.* 262.——4. No action can be maintained in the case at bar, unless the demandant *has had* a right of entry. A writ of entry only serves to *regain* a possession, which has been lost. 1 *D. & E.* 758. 2 *D. & E.* 695. 3 *Burr.* 1416.

Emery, for the demandant. The old doctrines in favour of a tenant by the curtesy, proceed wholly on the feudal principle of securing the performance of personal services to the lord. And the tenant in such case held of the lord, and not of the heir or reversioner. But this doctrine has now no reason to rest upon, and is obsolete;—it is in derogation of the well settled principle that the right by *descent* is always to be favoured in law. 2 *Inst.* 301. *Sir Tho. Jones*, 182. 9 *Mass.* 508. 15 *Mass.* 471. 4 *Johns.* 390.

It does not follow that because the tenant by the curtesy may forfeit his estate in certain enumerated methods, that he can forfeit it in no other. Here he has omitted to enter for more than twenty years,—until the right of entry was gone. And after this period it is not for a stranger to oppose *his* title against an entry by the reversioner. The neglect of the estate by the tenant by the curtesy, may be considered as a renunciation of it in favour of the heir. It is a *refusal*,—upon which, the authorities are explicit, the reversioner may enter for the protection of the inheritance. His right to make such entry, no mere stranger can limit nor deny. It is a question wholly between the heir and the tenant by the curtesy, or those claiming under the tenant of the particular estate. *Wells v. Prince*, 4 *Mass.* 64. *Wallingford v. Hearl*, 15 *Mass.* 471.

The cause, after argument, being continued *nisi*, the opinion of the Court was delivered at the ensuing term in *Cumberland*, by

Mellen C. J. The demandant is the grand-daughter of *Eliphalet Perkins*, and the tenant is his son, and has been in the open and actual possession of the lands and estate of which the demanded premises are a part, for more than forty years before the commencement of this action. A short time before it was commenced, the demandant made a *formal entry*, and then claimed her share of the estate;—in this action she declares on her own seisin;—and the questions are—whether she had a *right of entry* and a *right of action* when this suit was commenced;—and whether she can have any such right during the life of *David Thompson* her father. The jury have decided that the long continued and actual possession of the tenant has been as *tenant in common* with the other heirs of *Eliphalet Perkins*; and so not an adverse possession, and a disseisin of those heirs. It follows that when *Mrs. Thompson* died in 1784, she died seised, as tenant in common with the other heirs of her father; the tenant's possession being constructively the possession of all his co-tenants. *David Thompson*, on the death of his wife, became seised, *as tenant by the curtesy*, of the share in common, of which his wife died seised; and for the same reason that the actual possession of the tenant has not been adverse to the right and title of the *heirs*, it has not been adverse to the right and title of *Thompson* as tenant by the curtesy;—and hence also it follows that ever since the death of his wife he has been *constructively* in possession as tenant in common with *Perkins* the tenant. This estate of *Thompson* still continues, and his rights have not been impaired by any act on his part, though the tenant has been permitted to occupy and receive the profits of the estate. From this view of the facts of the case, and the application of well known principles to those facts, it plainly results that during the life of *David Thompson* the tenant by the curtesy, the heirs of his wife can have no right of entry upon the lands, whether in the actual or constructive possession of *Thompson* himself, or of any other person. The entry, then, of the demandant, made upon the lands previous to the commencement of this action, was *without right*, and proves no law-

ful seisin sufficient to maintain this action;—and being merely a *formal entry*, she thereby gained no title by wrong, in virtue of which she might maintain a writ of entry against the person on whose possession such formal entry was made. It is competent for the tenant to make this defence, and we are of opinion it is sufficient to bar the plaintiff. Let the verdict be set aside, and a nonsuit be entered.

THE BEAR-CAMP-RIVER-COMPANY *v.* WOODMAN.

Where a statute gave to a corporation the right to "demand and recover" certain tolls on the passage of logs through a river, and to stop and detain such logs till the toll should be paid;—it was held that the corporation might maintain an *action* for the toll; the right to detain being only a *cumulative* remedy.

Assumpsit, as well as debt, lies for tolls.

ASSUMPSIT for tolls upon defendant's logs which had passed down the Bear-Camp-River, in the State of *New Hampshire*, in which State the plaintiffs were erected into a corporation. By the act of incorporation the plaintiffs had the exclusive right to remove from that river all obstacles to the free passage of mill-logs and lumber; and to "demand and recover" of the owners a toll of one cent and a half for each log, &c. and to stop and detain such logs, &c. till the toll should be paid. And the act was to be void at the end of one year, if the river should not, within that time, be cleared of the obstructions then existing.

At the trial in the Court below, the defendant objected that *assumpsit* would not lie for tolls, under this act of incorporation;—but this point the presiding Judge overruled. He then offered to introduce a variety of testimony to shew that the act was obtained by false and fraudulent representations to the legislature,—that the expense of clearing the river had not exceeded thirty dollars, though previously represented at nearly a thousand; while the tolls would amount to not less than a hundred and fifty and perhaps three hundred dollars;—and that the ostensible object of the act was the removal of an obstruction

called the "great jam," which the plaintiffs had never effected; the logs still passing, as before, by another channel. All this evidence the Judge rejected, instructing the jury that if they were satisfied that there was a passage for logs down the river, through which the defendant's logs passed, they ought to find for the plaintiffs; which they accordingly did;—and the defendant removed the cause here by exceptions filed pursuant to the statute.

Shepley, for the defendant. Under the act of incorporation *no action* lies for tolls. The statute gives a remedy by *detention* of the logs; and the rule is universal that where a statute gives a remedy it must be strictly pursued. *Gedney v. Tewksbury*, *Cro. Jac.* 644. 2 *Salk.* 45, 460. 2 *Burr.* 803, 1152. 3 *Mass.* 307. 5 *Mass.* 514. 11 *Mass.* 364. *Respublica v. Decaze*, 2 *Dall.* 118. It is true the statute says the toll may be "demanded and recovered," but this grants no right of action, and *per se* has no legal or technical meaning. The toll may be recovered by detention, as well as by action; and the right of stoppage *in transitu* is generally the more prompt and effectual remedy.

But if *any* action is maintainable, it is *debt*, and not *assumpsit*. *Bigelow v. Camb. and Concord Turnpike Corp.* 7 *Mass.* 202. *Presbyt. Cong. Soc. of Hebron v. Quackenbush*, 10. *Johns.* 217.

Nor have the plaintiffs ever performed the condition of their incorporation. They were to clear the river of obstructions within a year.—To explain what these obstructions were, we may go out of the act; *King v. Hogg*, 1 *D. & E.* 728—for the construction of a private statute is analogous to the interpretation of a deed. *Lafft*, 401, 416. And by the testimony offered it would appear that the principal obstruction, to remove which the toll was in fact granted, had never been removed; and the act therefore expired at the end of the year by its own limitation.

Eaton, for the plaintiffs, in answer to the objection that no action lay for these tolls, adverted to the second section of the act, by which the plaintiff may "hold any estate not exceeding "two thousand dollars in value, for the benefit of the company, "provided the company shall not appropriate logs or timber "to their own use,"—which he insisted precluded them not only

from engaging in the lumber trade, but from disposing of logs for the purpose of collecting the tolls ;—and without such power the right of detention might be useless.

As to the remedy, it is properly sought by *assumpsit*. The statute creates a *contract*, and every person receiving the benefit virtually promises to pay the toll annexed to it. *Seward v. Baker*, 1 *D. & E.* 616. *Mayor of Yarmouth v. Eaton*, 3 *Burr*, 1407. 2 *Wils.* 95. *Ld. Pelham v. Pickersgill*, 1 *D. & E.* 660. 1 *N. Hamp. Rep.* 20. 2 *Burr.* 799. 5 *Johns.* 175. 10 *Johns.* 389.

Nor is the right of toll forfeited by non-performance of the condition. The jury have found that no obstruction existed, which is all that is required. The act does not define the mode of clearing the river; nor is it material whether much or little was expended to effect it. If the plaintiffs have not done this duty, every person injured by their neglect may have his remedy at law. *Riddle v. the propr's of locks, &c. on Merrimac River*, 7 *Mass.* 169.

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

Three objections are urged against the correctness of the opinion and instructions of the Judge who tried this cause in the Court of Common Pleas. The first is, that by the act of incorporation the plaintiffs are not entitled to *any action* for the toll by law established; because the company are authorised to stop and detain logs and lumber till the toll shall have been paid. But the same section provides that the toll may be "demanded and recovered" by said company. The right to detain is only an additional security and remedy. In a vast number of instances a person may have a *lien* on property for his fees or compensation,--but this does not take away his right of action. This objection therefore fails.

The second objection is, that if *any* action will lie, it must be *debt*, and not *assumpsit*. But it does not follow that debt is the *only* proper action; and on examination of the authorities cited to this point by the plaintiffs' counsel, we are well satisfied that *assumpsit* lies. It can make no difference in principle whether the plaintiffs *by their agent* informed the defendant that he might

convey his logs through the passage at the toll fixed; or whether their *act of incorporation* gave him this notice. In either case, when the defendant run his logs through the passage, he must be considered as agreeing to the terms proposed, and assuming to pay the established toll. This objection therefore is not supported.

The third objection is, that the company never cleared the river of obstructions, in the manner prescribed in the act, within one year after it was enacted; and that according to the last section, the act, at the end of the year, became void; and the company therefore have no right to the toll demanded. The act authorized the plaintiffs to remove "all logs, trees, "drift-wood and other things which tend to obstruct the free "passage of mill-logs and lumber of any kind down the river," &c. It does not appear, by any fact in the case, that all this was not done. No complaint is heard from any quarter except from the defendant;—and it is proved that all his logs—about three hundred—passed down the river without having been impeded by any kind or degree of obstruction. Whether the river had been properly cleared or not, was a fact, which, being left to the jury, they have found in the affirmative—that *there was* a free passage for logs down the river. We perceive no incorrectness in the instructions of the Judge on either of the points taken;—and therefore we overrule the exceptions and affirm the judgment of the Court of Common Pleas.

SMITH v. SMITH.

Depositions taken before one who has acted as the agent of the party in the same cause, are inadmissible.

This was a case of alimony. A deposition being offered by the libellant which had been given before ——— *Ayer, Esq.* it was proved by the respondent that this magistrate had on a prior occasion, during the pendency of this cause, acted as the attorney of the libellant at the taking of other depositions before another magistrate, and that he had also been a witness for the libellant at the trial of the libel.

The Court hereupon rejected the deposition, observing that it was evident from these facts that he was not free from bias in the cause, and therefore not a suitable person to take the testimony of witnesses.

HEATH v. RICKER & AL.

By *Stat.* 1821, *ch.* 128, *sec.* 9, the right to *sell* beasts taken damage feasant, is given only in cases where the injury was done to lands "inclosed with a legal and sufficient fence."

Trespass, for taking and carrying away the plaintiff's sheep. This cause coming again before the Court, [*vide ante page* 72] it was agreed, in a case stated by the parties, that they were owners of adjoining closes, between which there was a fence, but not a legal and sufficient fence;—that there never was any legal division of the fence, nor any agreement, nor usage, nor prescription, as to the portions of it to be repaired by the parties respectively; that in this situation of the fence the sheep escaped into the close of the defendant *Ricker*, who took them damage feasant, impounded, and afterwards caused them to be sold according to the forms of law, and legally disposed of the surplus money arising from the sale. Hereupon the question was—whether this action could be maintained?

Goodenow, for the defendants, being called upon by the Court, contended that the plaintiff was bound to keep his sheep on his own close, at his peril; and cited *Low v. Rust*, 6 *Mass.* 90. The statute provides what shall constitute a legal and sufficient fence; and what shall be done when no such fence exists. The owners of adjoining closes may avail themselves of these provisions if they will. If not, they tacitly elect to abide by the common law, which obliges each to look after his own beasts, at his own peril.

Shepley, for the plaintiff. The parties in this case having never exercised the rights given them by the statute to compel each other to make a legal and sufficient fence, it is conceded that the question stands upon the common law. But by the common law the defendant had only the right to *impound;* not to *sell;*—and having sold the plaintiff's sheep, he is a trespasser *ab initio*. *Melody v. Reab*, 4 *Mass.* 471.

The cause having been continued for advisement, the opinion of the Court was delivered at the succeeding term at *Alfred*, as drawn up by

Weston J. In the case of *Rust v. Low & al.* cited in the argument, it is stated by *Parsons C. J.* in delivering the opinion of the Court, that "at common law the tenant of a close was "not obliged to fence against an adjoining close, unless by "force of prescription; but he was at his peril to keep his cattle on his own close, and to prevent them from escaping. "And if they escaped they might be taken, on whatever land "they were found damage feasant, or the owner was liable to "an action of trespass by the party injured." And in another part of the same opinion, he adds, "Every person may distrain "cattle doing damage on his close, or maintain trespass against "the owner of the cattle, unless the owner can protect himself "by the provisions of the statute."

It would seem from the authority of this case, that the defendants were justified in distraining the sheep and lambs damage feasant, although the field of *Ricker*, and of the defendants, where the damage was done, was not inclosed with a legal and sufficient fence.

At common law, goods distrained were only in the nature of a pledge to compel satisfaction; and although the remedy by distress has been greatly enlarged and improved by statute in *England*, yet the common law, unless recently altered, still remains unchanged there, with regard to beasts taken damage feasant. This kind of distress at common law, if the owner continued obstinate, did not produce satisfaction to the party injured. He had no right to sell the distress, and thus reimburse himself for the damage he had sustained. He was not permitted even to work or use a distrained beast. *Cro. Jac.* 148. And if he proceeded irregularly, he was deemed a trespasser *ab initio*. The sale of the sheep and lambs distrained in this case not being warranted at common law, the defendants must fail in their justification, unless they bring themselves within the provisions of *Stat.* 1821. *ch.* 128. By the sixth section, the party injured is authorized to impound cattle doing damage on his lands, "that are inclosed with a legal and sufficient fence." By the ninth section, power is given under certain limitations and restrictions to sell the beasts taken and impounded by virtue of that act. *Ricker's* land not being inclosed with a legal and sufficient fence, the beasts seized by him and the other defendant were not taken by virtue of that act, and could not be sold under it. Their justification therefore failing both under the statute and at common law, according to the agreement of the parties, the defendants must be defaulted.

THE INHABITANTS OF PARSONSFIELD *v.* PERKINS.

Domicil. One may be considered as "*dwelling and having his home*" in a certain town, though he has no particular house there, as the place of his fixed abode.

THIS was an action upon the *Stat.* 1821. *ch.* 122. *sec.* 22, brought to recover the penalty of sixty dollars for bringing into and leaving in the town of *Parsonsfield* one *Isaac Stanton*, a poor and indigent person, he having no legal settlement in that town, the defendant knowing him to be poor and indigent.

At the trial in the Court below before *Whitman C. J.* it appeared that the pauper removed into *Parsonsfield* with a wife and children in the year 1800 or 1801;—that about twelve years ago he removed to *Ossipee*, where he resided a short time, and then returned to *Parsonsfield* where he resided with his family most of the time until within about six years past;—that for the last four years his wife had kept house, with her children, in *Parsonsfield;* except that in the year 1820 she was seven weeks in *Middleton* in *New-Hampshire*, and in the years 1819 and 1820 she was nine months in *Hiram*, and in 1822 was seven weeks in *Brookfield;*—that about six years ago the pauper separted from his wife and family, and had not resided with them since, but yet had lived the greatest part of the time in *Parsonsfield*, going from house to house, occasionally working in that and the neighbouring towns at his trade of bricklayer, and receiving his food wherever he worked;—that he was not out of the town of *Parsonsfield*, except part of one day, from *December* 1820 till the last of *April* 1821;—that he had no particular place of residence within *Parsonsfield*, where he kept his clothes, but went from one house to another as he chanced to find food or employment. It also appeared that the wife and some of the children had been twice removed from *Parsonsfield* to *Middleton* as paupers, that about four years ago the latter town had supported them as such eight months, after which they voluntarily returned to *Parsonsfield.* But it did not appear that *Stanton* or any of his family had received supplies as paupers from any town within one year prior to the passing of the Act for the settlement and relief of the poor.

Upon this evidence the Judge was of opinion, and so instructed the jury, that *Stanton* could not be considered as having a domicil in *Parsonsfield* on the twenty-first of *March* 1821, and therefore gained no settlement there by virtue of the statute; to which opinion the defendant filed exceptions.

Shepley, in support of the exceptions.

Domicil, or home, is "the habitation in any fixed place, with "the intention of always staying there." This intention may be known tacitly, or by express declarations. *Vattel, book* 1, *ch* 19. *sec.* 218.

The presumption arising from his residence is, that he is there *animo manendi*. If it sufficiently appear that the intention of removing was to make a permanent settlement, or for an indefinite time, the right of domicil is acquired by a residence of even a few days. *The Bernon*, 1 *Rob.* 102. *The Venus*, 8 *Cranch* 279. A year's residence is not necessary. *Putnam v. Johnson & als.* 10 *Mass.* 500. A mariner making his home in any town for more than a year, following his profession therefrom, acquired a settlement in such town. *Abington v. Boston*, 4 *Mass.* 312. Nor does he lose his domicil by temporary absences for labour. *Lincoln v. Hapgood*, 11 *Mass.* 530. *Granby v Amherst*, 7 *Mass.* 5.

The husband is not only supposed in law to have his home where his wife and family reside, but if he is actually away from them he will acquire a settlement by their residence, although he may never be with them while acquiring such settlement. *Hardwick v. Raynham*, 14 *Mass.* 363. Having lived in *Parsonsfield* for a long time with his family, as his permanent place of abode, he must have had his *home* in the town, though he might not have gained a *legal settlement* there. Having once acquired a home in *Parsonsfield*, he could change his domicil only by acquiring a new one; but of such new acquisition there is no proof. He was a legal voter in the town of *Parsonsfield* for state and town officers. *Constitution of Maine*, *Art.* 2. *sec.* 1, *Stat.* 1821. *ch.* 114. But he must have his home where he was entitled to vote. *Putnam v. Johnson & als.* 10 *Mass.* 488.

M'Intire, for the plaintiffs.

A *fixed* habitation is essential to the idea of domicil. It is not enough for the person to stop, even a long time, for any temporary purpose. If he have no fixed abode, for an undefined period, he is a sojourner, or a wanderer. All persons who abandon their families to public charity, wandering abroad, lodging in outhouses or in the open air, and not rendering a good account of themselves, are deemed in law to be rogues and vagabonds. *Jacob's Law Dict. art. Vagabond. Vagrant.* They have no *home*. *This* is defined to be, one's own *house*, or private dwelling, the place of his constant residence, to which he returns for his refreshment and rest, when not employed in his regular avocations abroad. A man unsettled in any such habitation, is a vagrant.

The legislature cannot be presumed, in this or any other statute, to use terms and language in any other than their usual, natural and common acceptation, or technical meaning. And if the expression "dwells and has his home" is to be thus understood, then the pauper was not within the meaning of the act at the time of its passage. He was then, in every sense of the term, a *vagrant*. If he had a home for one purpose, he had for every purpose. But in what school district in *Parsonsfield* could he have been taxed? or at what house could a notice or summons be left, as his usual place of abode? Not where his wife and children dwelt, for he never went there;—but in the highways, either in *Parsonsfield*, or the adjoining towns, as he happened to stroll.

The residence of his wife and children in *Parsonsfield* afford only *prima facie* evidence of the residence of the husband; and this presumption arises from what is usually found to be true. But like all other presumptive evidence, this is liable to be controled by positive proof to the contrary; and such proof is afforded in the present case. For six years past, amid all their removals, he had never been with them, but wandered elsewhere. Nor has the residence or settlement of the wife or children ever been held to give one to the husband. They may derive from him,—but he cannot from them. Their residence can, at most, only be considered as indicative of his, where his is not apparent by other evidence.

The position that a domicil, once acquired, continues till exchanged for a new one, is considered unsound. If it were true, there would be no vagrancy. But *Vattel b.* 1. *sec.* 219. after remarking generally that the children of vagabond parents have no country, observes that the country of the vagabond is also the country of his child, while the vagabond is considered as not having *absolutely abandoned* his natural or original domicil;—thus clearly admitting that he may thus abandon it, without a new acquisition.

But the pauper in this case most clearly evinced his intention of abandoning his *home* in *Parsonsfield*, having left it without any intention of returning, and persisted for six years in the life of a vagrant which he had deliberately chosen. And thus not being settled there by a *fixed* residence at the date of the passage of the act, the defendant incurred its penalties by bringing and leaving him within that town.

Mellen C. J. delivered the opinion of the Court as follows, at the succeeding *August* term in *Oxford.*

If according to legal principles, *Isaac Stanton*, the pauper, is to be considered as having *resided*, *dwelt* and *had his home* in *Parsonsfield* on the 21st of *March* 1821, then he gained a *settlement* in that town by virtue of the act passed on that day relating to the settlement and support of the poor.—It appears that from 1800 or 1801 to 1817 he lived with his wife and children in *Parsonsfield*, with the exception of a short time during which he resided in another town about the year 1812---that in 1817 he separated from his wife and family and has never had any connection with them since; though he has continued generally to reside in *Parsonsfield;* sometimes employed in his trade of a mason *there* and in adjoining towns; and sometimes idle—as mentioned in the exceptions.—It appears also, that with the exception of nearly a year, the wife and children have lived and kept house in that town. From these facts what is the legal conclusion as to the domicil of the pauper? It is clear that during all the time that he resided in *Parsonsfield* and lived with his family, he in the strictest sense of the words, *dwelt* and *had his home* in that town.—In this situation he was

in 1817—and *since* that time, he has generally resided *there*, though he has had no particular house in that town as his place of fixed abode. There is no fact in the case tending to shew that he has ever contemplated a residence in any *other* town or has in any manner lost his rights as a townsman, or an elector of State, County or Town officers, so far as *residence* could give or affect such rights. Nor is there any fact by which it appears that he may not return to and live with his family whenever he may incline so to do; or, in a word, that he may not resume his rights as the head of his family and former home at his option.—As he has not become domiciled in any *other* town, and for the other reasons suggested, we are of opinion that his domicil in *Parsonsfield* must be considered as continuing and existing when the act was passed; of course he then gained a legal settlement in that town, and the defendant was not guilty of the violation of any law in bringing the pauper into the town of *Parsonsfield* and leaving him there, as alleged in the writ.—We sustain the exceptions—and the verdict is set aside.

A new trial may be had in this Court.

A TABLE

OF THE PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.

ABATEMENT.

1. If pending a real action brought by husband and wife in her right, the wife die, the husband cannot proceed in that suit for his estate by the curtesy, by *Stat.* 1822. *ch.* 186. but the writ abates. *Ryder & ux. v. Robinson.* 127

See COSTS 1.

ACTION.

1. The remedy against the indorser of a writ in case of the avoidance of the principal, under *Stat.* 1784. *ch.* 28. [*Stat.* 1821. *ch.* 59. *sec.* 8.] is by *scire facias*, and not by action of debt. *Reid v. Blaney.* 128

2. Debt does not lie upon a conditional or collateral undertaking. *ib.*

3. If one of two *joint* promisors have neither domicil nor property in this State, a *separate* action may be maintained here against the other. *Dennett v. Chick.* 191

4. A judgment in another State against one of two joint promisors, without satisfaction, is no bar to an action in this State against the other, upon the original contract. *ib.*

5. If a promissory note be made to the agent or treasurer of a private association by his name, with the addition of his agency or office, he may have an action in his own name on the note, the addition of his character being but *descriptio personæ*. *Clap v. Day.* 305

6. Where money in a bag has been deposited merely for safe keeping, no action lies for it, till after a special demand. *Hosmer v. Clarke.* 308

7. And if the party depositing the money be dead, the usual public notice given by the administrator, of his appointment, calling on all persons indebted to make payment, is not a sufficient demand for that purpose. *ib.*

8. Where a statute gave to a corporation the right to "demand and recover" certain tolls on the passage of logs through a river, and to stop and detain such logs till the toll should be paid;—it was held that the corporation might maintain an *action* for the toll; the right to detain being only a *cumulative* remedy. *Bearcamp river Company v. Woodman.* 404

9. Where divers persons subscribed to a parish fund, giving each one his separate note to the treasurer for the amount subscribed, under an agreement that if any subscriber removed and remained out of town three years his note should be given up;—it was held that a subscriber who had thus removed and remained out of town, was entitled not only to receive his note, but to recover back any monies paid in part of the *principal sum* subscribed. *Holden v. The First Parish in Otisfield.* 394

See BONDS 1.
CONSIDERATION 1.
DAMAGES 4.
PARTIES 1, 2, 3, 4.
WAYS 8.

ACTIONS ON STATUTES.

1. In an action on *Stat.* 1821. *ch.* 161. *sec.* 1. the want of the owner's consent forms a constituent part of the offence, which must be alleged in the declaration, and proved at the trial. *Little v. Thompson.* 228

2. In debt on *Stat.* 1821. *ch.* 168. for the unlawful taking of logs out of a river, &c. it is not necessary to allege that the defendant knew the plaintiff to be the true owner of the logs. *Frost & al. v. Rowse & al.* 130

3. In debt for a penalty given by statute, the wrong-doers may be sued either jointly or severally;—but the plaintiff can have but one satisfaction. *ib.*

See MILITIA 3.

ACTIONS REAL.

1. An offer made by the tenant in a real action under *Stat.* 1821. *ch.* 47. *sec.* 4. cannot afterwards be withdrawn by him, it being in its nature an ad-

mission on his part, of the value of the estate. *Proprietors of the Kennebec Purchase v. Davis.* 352

2. Where such an offer was made in the Court below, and the demandant proceeded to trial, and the jury having estimated the land lower, and the improvements at a higher sum than the tenant offered, the demandant appealed to this Court;—it was holden that the proceedings below being nullified by the appeal, the demandants' right to accept the offer still continued, and might be exercised in this Court. *ib.*

3. But whether he may accept such offer after proceeding to verdict in a *final* trial, *quære.* *ib.*

AGENT AND FACTOR.

1. If an agent purchase goods on his own credit, without disclosing his principal, to whose use, however, the goods are in fact applied,—the principal, being afterwards discovered, is liable to the seller for the price of the goods. *Upton v. Gray.* 373

See ACTION 5.

ALIEN.

See POOR 4.

AMENDMENT.

See PRACTICE 2, 9.
SHERIFF 2.
VERDICT 1.

APPEAL.

1. No appeal lies from an order of the Court of Common Pleas directing the plaintiff to become nonsuit. The remedy for the party aggrieved, is by exceptions pursuant to *Stat.* 1822. *ch.* 193. *Feyler v. Feyler.* 310

ASSESSORS.

See TAXES 3.

ASSIGNMENT.

1. Where two were joint mortgagors of a piece of land, to secure the payment of a joint debt, and one of them to protect the other against his liability for the payment of both moieties of the debt, delivered to him certain notes of hand not negotiable, to be collected, and the proceeds to be paid over to the mortgagee, to which delivery and appropriation the promisor in the notes was assenting;—it was held that the party so depositing and appropriating such notes could not afterwards lawfully receive payment of them from the promisor, nor release the latter from his liability to pay them to the holder. *Clark v. Rogers.* 143

2. In this State the assignment of a mortgage must be by deed. *Vose v. Handy.* 322

3. A bond may be assigned by delivery only, for a full and valuable consideration. *ib.*

See SURETY 2, 3.

ASSUMPSIT.

1. Where one devised lands and bequeathed personal estate to his son, whom he made executor of his will, therein directing him to make certain annual payments to his mother during her life time; and the son, after the death of the testator, assumed the trust, and entered into the lands, and made the annual payments, and then died, leaving minor children who entered into the lands by their guardian;—it was holden that the children were not liable in *assumpsit* during their minority, for the yearly payments accruing after the decease of their father. *Haskell v. Haskell & als.* 156

2. Where one conveyed lands by deed, reserving to himself the use of part of the premises, and half the profits of the residue for life, and the grantee entered, and fulfilled the terms of the reservation, and then died insolvent, leaving children who were minors, and whose guardian entered into the land;—but neglected to perform the terms of the reservation;—it was held that *assumpsit* does not lie against them for the particular reservations in the deed, nor for the use and occupation of the land. *Drinkwater v. Gray & als.* 163

3. *Assumpsit* will not lie against a judgment debtor for the use and occupation of land set off on execution against him, where he contests the regularity of the proceedings unless an express contract be proved. *Wyman v. Hook.* 357

4. *Assumpsit*, as well as debt, lies for tolls. *Bearcamp river Company v. Woodman.* 404

ATTACHMENT.

1. Proof of the issuing of a commission of insolvency is the only competent evidence of the insolvency of a deceased defendant, so as to dissolve an attachment of his estate. *Maxwell v. Pike.* 8

ATTORNEY.

1. Where one residing in a foreign

country authorised an agent here to sell lands and give deeds in his name, such power became *de facto* extinct at the decease of the principal;—and a deed made in his name by the attorney, after the death of the principal, but before intelligence of it arrived here, was holden to be merely void and an action lies against the attorney to recover back the money paid. *Harper & als. v. Little.* 14

2. Nor is the attorney estopped by such deed from claiming the land as heir, the deed being not his own, for want of apt words to bind him. *ib.*

3. If one assume to act as attorney without authority and make a deed in another's name, which is void, the deed is not *therefore* the deed of the attorney, but the remedy against him is by a special action of the case. *ib.*

4. A parol ratification is not sufficient to give validity to a *deed* made by an agent not having authority *under seal* to bind his principal. *Stetson v. Patten.* 358

5. If one acting as attorney for another, but having no sufficient authority, make a deed in the name of his principal who is not bound thereby,—it does not follow that the *agent* is bound by the deed, unless it contain apt words for that purpose. *ib.*

BAIL.

1. A surrender of the principal debtor, to the officer holding the writ of execution against him, is a discharge of the bail-bond. *Ryan v. Watson.* 382

BASTARDY.

1. Under the *Stat.* 1785. *ch.* 66. [*Stat.* 1821. *ch.* 72.] for the support and maintenance of bastard children, a bond is not necessary to give jurisdiction to the Court of Common Pleas, if the defendant appear either in person or by attorney. *Mariner v. Dyer.* 165

2. And the Court may render a judgment of filiation upon default, the provision for a trial by jury being for the defendant's benefit, which he may waive. *ib.*

3. An order on the putative father to pay a sum weekly *till the further order of Court* is warranted by the statute. *ib.*

4. So also is a judgment for costs, such having been the uniform practice under the statute. *ib.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. The legal presumption arising from the fact of drawing a negotiable order or making a negotiable note, which is received by the creditor, is, that it was intended to be, and in fact is, an extinguishment of the original demand or cause of action. But this presumption may be controled or explained by the agreement of the parties, or by proof of usages or circumstances inconsistent with such presumption. *Varner v. Nobleborough.* 121

2. A supercargo cannot, in virtue of that capacity, bind his principals as acceptors of a bill of exchange drawn by himself, without express authority from them to that effect, communicated to, and relied upon at the time, by the party who received the bill. *Scott v. McLellan & al.* 199

3. If the indorser of a note has protected himself from eventual loss by taking collateral *security* of the maker, it is a waiver of his legal right to require proof of demand on the maker, and notice to himself. *Mead v. Small.* 207

4. Nothing but *payment* of a note will destroy its negotiability. Nor will *this* when made by the *last indorser*, or when made by any *prior* indorser, if the *subsequent* indorsements are struck out before it is again put into circulation. *ib.*

5. Where the promisee in a negotiable note, payable in six months, sold it, having made and signed this indorsement on it—"I guaranty the payment of the within note in six months"—this was holden to be an absolute and original undertaking, by which it was the duty of the *guarantor* to see that the maker paid the money within the time specified,—or to take notice of his neglect and pay it himself. *Cobb & al. v. Little.* 261

BONDS.

1. Where one seised of an equity of redemption in land, gave a bond to a stranger, conditioned to convey to him a part of the land in fee with general warranty, on the payment of certain notes given by him for the purchase money, and then died insolvent, the original mortgage being still unpaid;—it was holden that the legal representative of the obligor might recover the amount of the notes, the remedies being mutual and independent. *Read v. Cummings & al.* 82

See ASSIGNMENT 3.

CASES DOUBTED OR DENIED.
Birt v. Kirkshaw, 2 *East*. 458. 205
Cogan v. Ebden, 1 *Burr*. 385. 40
Ilderton v. Atkinson, 7 *D.& E* 480. 204
The King v. Cator, 4 *Esp*. 273. *note a*. 35

CASES COMMENTED ON AND EXPLAINED.
Allen v. Holden, 9 *Mass*. 133. 345
Crosby v. Parker, 4 *Mass*. 110. 319
Haskell v. Walker, 11 *Mass*. 181. 384
Lin. & Ken. Bank v. Richardson, 1 *Greenl*. 79. 329
Lyman v. Estes, 1 *Greenl*. 182. 85
Simmons v. Bradford, 15 *Mass*. 82. 48
Taylor v. Townsend, 8 *Mass*. 411. 175
Ward v. Johnson, 13 *Mass*. 148. 193
Weld v. Bartlett, 10 *Mass*. 470. 48

COLLECTORS OF TAXES.
See CONSTRUCTION 3.
TAXES 1, 2.

CONSIDERATION.
1. In an action on a note of hand given for the price of land conveyed by the plaintiff to the defendant by deed of release and quitclaim without covenants, it is not a good defence that the plaintiff represented his title to be in fee-simple, when in truth it was but an estate for life or for years;—nothing short of a *total failure* of title being in such case a sufficient defence to the action. *Howard v. Witham & al.* 390

See DAMAGES 6.
FRAUDULENT CONVEYANCE 1.
INFANCY 1.

CONSTRUCTION.
1. Where the proprietors of a large tract of land had conveyed a parcel to *R. T.* by metes and bounds, and also contracted to sell him an adjoining parcel, which under that contract, he had entered upon and inclosed within fences,—and afterwards they conveyed to *W. M.* "*all their unappropriated lands*" in the same tract, bounding it in part "*on land of R. T.*" whose deed was not then on record;—it was holden that the lands thus possessed by *R. T.* were "*appropriated*," and did not pass to *W. M.* *Thorndike v. Barrett*. 312

2. Where several particulars are named, descriptive of the land intended to be conveyed in a deed, if some are false or inconsistent, and the true are sufficient to designate the land, those which are false and inconsistent will be rejected. *Vose v. Handy*. 322

3. The covenant usually inserted in a collector's deed—"*that the taxes* "*aforesaid were assessed and published*" *and notice of the intended sale of* "*the said lands given according to law*,"—is a stipulation not only that the taxes were *in fact* assessed, but that the assessment was *legally made*.—*Stubbs v. Page*. 378

CONTRACT.
1. What is reasonable time within which an act is to be performed, when a contract is silent on the subject, is a question of law. *Attwood v. Clark*. 249

CONVEYANCE.
See CONSTRUCTION 2.

CORPORATION.
See TOLLS.

COSTS.
1. If a real action is abated by the death of one of the demandants, the tenant shall not have costs, it being the act of God. *Ryder v. Robinson*. 127

2. If in replevin, a verdict be found for the defendant as to a small part of the goods, of less value than twenty dollars, yet he is entitled to full costs. *Harding v. Harris*. 162

3. On an appeal from a judgment of the Court of Common Pleas upon an *issue of law*, single costs only are recoverable; *such* issues not being within the provisions of *Stat*. 1822. *ch*. 193. *sec*. 4. *Alley v. Carlisle*. 386

4. If the plaintiff in review succeeds in correcting an error in the former verdict against him when he was original defendant, he is entitled to a judgment for the costs of the review, as the party prevailing, under *Stat*. 1821, *ch*. 59. *sec*. 17. though the accumulation of *interest* may have rendered the last verdict *larger* than the first. *Kavanagh & al. v. Askins*. 397

See BASTARDY 4.

COURTS OF COMMON PLEAS.
1. The right to issue a *capias* is incident to the jurisdiction of the Court of Common Pleas in all cases of contempt. *Mariner v. Dyer*. 165

2. The Court of Common Pleas has no jurisdiction of an offence created by statute, unless it is expressly made cognizable in that Court. *Parcher's case*. 321

COVENANT.

1. If there be a contract for the sale of lands, and the bargainor agree to "*make a warrantee-deed, free and clear of all incumbrances*," this agreement is not satisfied by the making of a deed with *covenants* of general warranty and freedom from incumbrances, unless the grantor had the absolute, entire and unincumbered estate in the land at the time of the conveyance. *Porter v. Noyes.* 22

2. And if the bargainee consent to accept a deed not knowing that the land is incumbered, he is not bound by such consent, but may afterwards refuse on discovering the incumbrance. *ib.*

3. An inchoate right of dower is an existing incumbrance on land; and not a mere possibility or contingency. *ib.*

DAMAGES.

1. Where a town clerk inadvertently gave a defendant a false certificate, attested as a copy of record, in order to support his plea of infancy; by reason of which the plaintiff was obliged to obtain a continuance of his cause to the next term, prior to which the debtor died;—it was holden that the town clerk was liable to pay the plaintiff the damages occasioned by the delay and continuance of the action. *Maxwell v. Pike.* 8

2. In an action against an officer, for not serving and returning a writ of execution, he may shew the insolvency of the debtor in mitigation of damages, notwithstanding he does not return the precept nor allege that it is lost. *Varril v. Heald.* 91

3. In such action it is incumbent on the plaintiff to shew that the precept has never been returned. *ib.*

4. Where a ship master received divers casks of lime on freight consigned to him for sales, which had been duly inspected and branded, and were represented by the owner as good lime, and accordingly sold as such by the master,—but in fact were filled with substances of little or no value,—whereupon he was sued by the vendee, and obliged to respond to him in damages;—it was held that he might recover of the owner of the lime the amount of the judgment recovered against himself, with all costs and expenses necessarily incurred in the defence, he having given the owner immediate notice of the commencement of such suit, and having faithfully and prudently defended it. *Henderson v. Sevey.* 139

5. In such action against the owner, a copy of the judgment against the master is admissible evidence, though not conclusive. *ib.*

6. Where a deed conveys no seisin, in law or fact, the measure of damages is the consideration money and interest thereon. *Stubbs v. Page.* 378

DAMAGE FEASANT.

1. By *Stat.* 1821. *ch.* 128. *sec.* 9. the right to *sell* beasts taken damage feasant, is given only in cases where the injury was done to lands "inclosed with a legal and sufficient fence." *Heath v. Ricker & al.* 403

See FENCES 2.

DEBT.

See ACTION 2.
ACTIONS ON STATUTES 2, 3.

DECLARATION.

1. In a writ of entry, if the land be described by the number of the lot as marked on a certain existing plan, it is sufficient, whether the plan be matter of record or not. *Prop'rs of Ken. Purchase v. Lowell.* 149

See MILITIA 3.

DECREE.

1. A decree of the Judge of Probate, not appealed from, in a matter of which he has jurisdiction, is conclusive upon all persons. *Potter v. Webb & als.* 257

See PLEADING 1.

DEED.

See ATTORNEY 1, 2, 3, 4, 5.
CONSTRUCTION 2, 3.
DISSEISIN 2, 3, 4.

DEPOSITIONS.

1. Depositions taken before one who has acted as the agent of the party in the same cause, are inadmissible.—*Smith v. Smith.* 407

DIRECT TAXES.

See TAXES 1, 2.

DISSEISIN.

1. To constitute a disseisin, the possession of the disseisor must have been *adverse to the title of the true owner*, as well as open, notorious, and exclusive. *Little v. Libby.* 242

2. An entry on land under a deed recorded, and payment of taxes, is no evidence of a disseisin of the true owner, unless the person who entered

has continued openly to occupy and improve it. Little v. Megquire. 176

3. In such a case, though the deed may not convey the legal estate, yet the possession of a *part* of the land described in it, under a claim of the *whole*, by the bounds therein expressed, *may* be considered as *possession* of the whole, and as a disseisin of the true owner; and equivalent to an actual and exclusive possession of the whole tract, unless controled by other possessions. *ib.*

4. If a man enter upon land under a deed duly registered, though from one having no legal title to the land, and has a visible possession, occupancy and improvement of only a part of it, such occupation and improvement, unless controled by other facts, is a disseisin of the true owner, as to the whole tract;—because the extent and nature of his claim may be known by inspection of the public registry. *Prop'rs of Ken. Purchase v. Laboree & als.* 273

5. The *Stat.* 1821. *ch.* 62. *sec.* 6. was enacted to abolish the distinction, existing at common law, between a possession under a *deed recorded*, and a possession without such title on record; attaching, as against the demandant, the same legal consequences to both. *ib.*

6. So far as this section is *retrospective*, and has altered the common law, it is unconstitutional, and cannot be carried into effect, because it would impair vested rights. *ib.*

7. The lands of a person deceased, of which he was disseised actually and not colourably at the time of his death, are not liable for the payment of his debts. *Thorndike v. Barrett.* 312

DISTRESS.

See FENCES 2.

DOMICIL.

1. One may be considered as "*dwelling and having his home*" in a certain town, though he has no particular house there, as the place of his fixed abode. *Parsonsfield v. Perkins.* 411

DOWER.

1. In an action of dower, it is not competent for the tenant to shew that the demandant's husband, under whom he claims, was only colourably seised, by virtue of a deed made to defraud the creditors of his grantor. *Kimball v. Kimball.* 226

See COVENANT 3.

ESTOPPEL.

1. If an action against the maker of a note be brought in the name of *one only* of two joint indorsees, and judgment be had therein; they are not thereby estopped to maintain a *joint* action against the indorser, as guarantor of the same note. *Cobb & al. v. Little.* 261

See ATTORNEY 2.
SURETY 1.

EVIDENCE.

1. A witness may testify to his belief of the genuineness of handwriting from his *acquaintance* with the hand-writing of the party; whether this acquamtance were gained by having seen the person write,—or having received letters from him,—or having at any time seen writing either *acknowledged or proved to be his. Hammond's case.* 33

2. And there is no distinction between civil and criminal cases, in the application of this rule. *ib.*

3. The grantee of land is not bound by a judgment in a suit *subsequently* commenced by his own grantor, against *his* immediate grantor, upon the covenants in his deed. *Winslow v. Grindal.* 64

4. The rule that all the declarations of a party, or parts of an instrument, offered in evidence, are to be taken together, does not extend to the records of proprietors at different adjournments of the same meeting. *Pike v. Dyke.* 213

5. The parol declarations of a person in possession of land, are admissible to shew the character and intent of such possession, notwithstanding the statute of frauds. *Little v. Libby.* 242

6. The report of the commissioner under the resolve of *March* 3, 1803, respecting the townships assigned to Gen. *Knox* and others is conclusive evidence, against all persons, as to the occupancy by actual settlers, of the lots therein mentioned. *Bussey v. Luce.* 367

See ATTACHMENT 1.
DAMAGES 5.
DECREE 1.
FENCES 1.
TOWN ORDER 1.
VERDICT 3.

EXCEPTIONS.

See APPEAL 1.
PRACTICE 3, 7.

EXECUTION.

1. After an execution has been regularly issued and returned, it cannot be set aside. *Sturgis v. Read.* 109

2. If the sheriff's return of an extent on land have no date, it will be presumed to refer to the date of the appraisement. *Gorham v. Blazo.* 232

3. If there are inherent defects in the return of an extent on land, or if the land is appraised at too high a price, the creditor may waive the extent, at any time before acceptance of the land. *ib.*

4. But by the acceptance of livery of seisin, from the sheriff, of the lands so taken, the creditor acquires a vested and perfect title to them, *as between him and the debtor*, which he cannot afterwards waive, and resort to debt on his judgment. *ib.*

5. An extent on lands, accepted by the creditor, is a statute purchase of the debtor's estate; and is good against a subsequent purchaser from the debtor, with notice. *Semble. ib.*

EXECUTORS AND ADMINISTRATORS.

1. Upon the death of an administrator without having settled his administration-account, it belongs to *his* representative, and not to the administrator *de bonis non*, to present such account to the Judge of Probate for allowance and settlement. *Nowell v. Nowell.* 75

2. A petition to the Court to enable an administrator to execute a deed, is not an adversary proceeding nor is the power, thus obtained, imperative on the administrator. *Emery v. Sherman.* 93

3. If an administrator of an estate represented insolvent, assume the defence of an action pending against his intestate, and neglect to suggest the insolvency on record and pray a stay of execution, so that execution is issued, and returned *nulla bona*, it is waste, and he is liable to a judgment and execution *de bonis propriis. Sturgis v. Read.* 109

EXTENT.

See EXECUTION, 2, 3, 4, 5.

FENCES.

1. Parol proof of usage in the maintenance and repair of separate portions of a partition fence, is admissible evidence to shew a prescription. *Heath v. Ricker & al.* 72

2. By *Stat.* 1821. *ch.* 128. *sec.* 9. the right to *sell* beasts taken damage feasant, is given only in cases where the injury was done to lands "inclosed with a legal and sufficient fence." *ib.*

FORGERY.

1. Forgery at common law, may be committed of any writing, which, if genuine, would operate as the foundation of another's liability. *Ames' case.* 365

FRAUDULENT CONVEYANCE.

1. The *liability* of the vendee to damage as the surety of the vendor, is not of itself a sufficient consideration to support an *absolute* conveyance of property against creditors. *Gorham v. Herrick.* 87

2. And where the vendee, at the time of such absolute conveyance, executed a bond of defeasance to the vendor, it was holden to be incumbent on the vendee in an action brought by him against an officer attaching the goods so conveyed, at the suit of a creditor of the vendor, to produce such bond, or to shew that upon due diligence its production was out of his power. *ib.*

GRANT.

1. If at a proprietors' meeting a grant of land be made by vote to an individual, by which the estate passes, it is not competent for the proprietors at a subsequent adjournment to resume it. And when the grantee exhibits evidence of the vote on which his title depends, he does not thereby preclude himself from objecting to the admissibility of the doings of the same proprietors at an adjourned meeting, by which they have undertaken to vacate or modify the grant. *Pike v. Dyke.* 213

GUARANTY.

See BILLS OF EXCHANGE, &c. 5.

HANDWRITING.

See EVIDENCE 1. 2.

INCUMBRANCE.

See COVENANT. 1, 2, 3.

INDORSER.

See BILLS OF EXCHANGE, &c. 3, 4.
WRIT, 1.

INFANCY.

1. Where a minor purchased lands, and for the purchase-money two of his friends of full age gave their joint note of hand, which the minor promised he would sign and pay after he should arrive at full age; and afterward, having come to full age, he by a memorandum on the bottom of the note *acknowledged himself holden as co-surety;* —in an action by the payee against him, as on an original promise, it was holden that the plaintiff might well shew by parol that the promise was for the defendant's own debt and not a collateral engagement, and so no new consideration necessary to be proved. *Thompson v Linscott.* 186

See ASSUMPSIT 1, 2.

INSOLVENT ESTATES.

See ATTACHMENT 1.

JUDGMENT.

See ACTION 4.
MORTGAGE 6.

JURISDICTION.

See COURT OF COMMON PLEAS 2.

LAND.

See DISSEISIN 7.

LICENSE.

See MORTGAGE 8.

LIEN.

See SHERIFF 4.

LIMITATION.

1. The three years, limited for the prosecution of a petition for review, are to be computed from the term of which the judgment was entitled. *Leighton v. Lithgow.* 114

MARRIAGE.

1. A marriage solemnized by a minister at his own house, neither of the parties residing in that town, is void under *Stat.* 1786, *ch.* 3. and this statute is not altered in this respect by *Stat.* 1811, *ch.* 6. *Ligonia v. Buxton.* 102

2. The resolve of *March* 19, 1821, does not render valid a marriage solemnized *against* the laws then in force. It only confirms those which, through misapprehension of the law, were defectively solemnized, the minister being not a *stated and ordained minister,* though erroneously supposed to be such. *ib.*

See SETTLEMENT 1.

MILITIA.

1. If the captain of a company of militia be imprisoned for debt, he is nevertheless competent to issue orders for a company training. *Cutter v. Tole.* 181

2. The statute requiring that all excuses for non-appearance at a company training be made *within eight days,* does not apply to one who, though he may have been notified in a manner prescribed by law, yet had no *actual* notice to appear, and who, therefore, could not know that he was under any legal obligation to offer an excuse, nor that he had been guilty of any neglect which required one. *ib.*

3. In an action for a penalty under the act for organizing and governing the militia, the declaration must allege the offence to have been committed "against the form of the statute in that case made and provided." *Heald v. Weston.* 348

4. In an action for a penalty incurred by neglect of military duty, under the act for organizing and governing the militia, it is competent for the defendant, at the trial, to show that by reason of *permanent* bodily disability he was not liable to be enrolled as a soldier. *Pitts v. Weston.* 349

5. In such case it is not necessary for the defendant to produce the certificate of the surgeon, nor to offer his excuse within eight days; these regulations applying only to cases of *temporary* disability. *ib.*

MINISTER OF THE GOSPEL.

1. A minister ordained over an unincorporated religious society, composed of members belonging to different towns, is not a *stated and ordained minister of the gospel,* within the meaning of *Stat.* 1786. *ch.* 3. *Ligonia v. Buxton.* 102

See MARRIAGE 1, 2.

MONUMENT.

1. Where lots have been granted, designated by number, according to a plan referred to, which has resulted from an *actual* survey, the lines and corners made and fixed by that survey are to be respected, as determining the extent and bounds of the respective lots. *Pike v. Dyke.* 213

MORTGAGE.

1. As between the mortgagor, and *mortgagee*, the fee of the estate passes to the mortgagee at the execution of the deed; and he may enter immediately, or have a writ of entry against the mortgagor; unless there be an agreement in writing between them that the mortgagor shall retain the possession and receive the profits. *Blaney v. Bearce.* 132

2. But as between the mortgagor and *other persons*, he is considered as still having the legal estate in himself, and the power of conveying it to a third person subject to the incumbrance of the mortgage. *ib.*

3. Where an absolute deed of real estate is given, on a bond executed by the grantee *at the same time*, though bearing a *subsequent date*, to convey the same land to the grantor, upon payment of a certain sum, the two instruments are to be taken as constituting a mortgage. *Semble.* *ib.*

4. Whether the mortgagee, after he has lawfully entered into the mortgaged premises, has a right to cut down and carry away, for the purpose of sale, any timber or other trees growing thereon—*quære.* *ib.*

5. If the assignee of the mortgagor remove fixtures from the land, though erected by him after the execution of the mortgage, the assignee of the mortgagee may have an action of trespass against him for their value. *Smith v. Goodwin.* 173

6. If it appears that a debt secured by mortgage has been paid, the mortgagee, in a writ of entry upon his deed, cannot have judgment for possession of the land. *Vose v. Handy.* 322

7. If the mortgagor of land, being in possession, cut down and carry away timber-trees growing thereon, he is liable to the mortgagee, in an action of trespass *quare clausum fregit*, for their value. *Stowell v. Pike.* 387

8. If a lot of wild land be purchased, and mortgaged to secure payment of the purchase-money, *quære* whether a general usage and custom in the country for the purchaser in such cases to fell the trees and clear the land, may be considered as amounting to a license from the mortgagee so to do? *Ib.*

See Assignment 1. 2.
Surety 3.

NONSUIT.

1. Where, upon trial of a cause, there is no proof except what is offered by the plaintiff, and this is insufficient to warrant a verdict for him, the course is to direct a nonsuit. *Sanford v. Emery.* 5

NOTICE.

See Action 7.
Poor 1.
Town Order 1.

NUNCUPATIVE WILL.

1. Of the evidence to establish a nuncupative will. *Parsons v. Parsons.* 298

PARISH.

1. By the law as it stood prior to *Stat.* 1821. *ch.* 135 every person resident within the limits of a territorial parish, if otherwise qualified, was *ipso facto* a member of the same, unless he was regularly united as a member to some poll-parish. And on ceasing to be a member of such poll-parish, he became forthwith a member of the territorial parish within which he resided, unless such secession was colourable and fraudulent. *Lord v. Chamberlain.* 67

2. But by *Stat.* 1821. *ch.* 135. it seems that no person can become a member of any religious society without first obtaining its consent. *ib.*

PARTIES.

1. If the goods of one of several joint debtors be taken in execution and wasted, the remedy should be sought by the owner of the goods alone, and not by all the debtors jointly. *Ulmer v. Cunningham* 117

2 So if the officer extorsively demand and receive of one of the debtors illegal fees. *ib.*

3. Referees need not join in an action brought to recover compensation for their services. *Semble. Butman v. Abbot.* 361

4. An action by a referee to recover compensation for his services cannot be maintained against the parties to the submission *jointly*, but must be brought against the person or persons making the demand. *ib.*

PEJEPSCOT CLAIM.

1. Construction of the Indian deed of the 'Pejepscot claim," and its boundary on the east side of the great falls at *Lewiston.* *Pejepscot Prop's v. Cushman.* 94

PLEADING.

1. In a *scire facias* brought to have further execution of a judgment rendered upon a Probate bond, for the amount of a dividend decreed since the judgment, a plea by the sureties in the bond that the decree was obtained by fraud and collusion, without naming the parties to the fraud, was held bad. *Potter v. Webb & als.* 257

2. A special demurrer to a plea because it is double and argumentative, is fatally defective unless it state particularly wherein these defects consist. *Ryan v. Watson.* 382

3. If two be sued on a joint promise, and one alone appears, the general issue should be that *he and the other defendant* did not promise, &c. *Butman v. Abbot.* 361

4. But if the defendant in such case plead that *he* alone did not promise, upon which issue is taken, and it be found for the plaintiff;—whether the *defendant* can reverse the judgment for this error,—*quære.* *ib.*

PLYMOUTH PATENT.

1. The line of the *Plymouth* patent, as run and marked by *Ballard* in 1795, is conclusive upon the Commonwealth, and upon the patentees, and all persons claiming under them. *Prop'rs of Ken. Purchase v. Lowell.* 149

POOR.

1. If a notice, to a town chargeable with the support of paupers, be defective in not being signed by the overseers in their official capacity, or in not describing the paupers with sufficient precision; yet if it be understood and answered without any objections on account of its insufficiency, such objections are thereby waived. *York v. Penobscot.* 1

2. In an action upon *Stat.* 1793. *ch.* 59. *sec.* 15. [*Revised Stat. ch.* 122. *sec.* 22.] for bringing into and leaving a pauper in a town where he has not a legal settlement, the *intent* of the defendant is a fact to be found by the jury. *Sanford v. Emery.* 5

3. And it is the *unlawfulness of the intention* which constitutes the offence against the statute. *ib.*

4. The *wife* of an alien, having her lawful settlement in this State, together with their *children*, being paupers, are to be supported by the town where that settlement may be;—though the husband, and of course the family, may require and receive relief as paupers in the first instance from another town, in which they happen to reside, under *Stat.* 1821, *ch.* 122, *sec.* 18. *Sanford v. Hollis.* 194

PRACTICE.

1. Where the defendants in an action of trespass, plead severally, and have several judgments in the Court below, from which the plaintiff appeals, but neglects to enter and prosecute his appeal in the Court above; each defendant is entitled, upon his separate complaint, to affirmation of his own judgment, independent of his co-defendant. *Cook v. Bennet.* 13

2. In a writ of entry the Court refused leave to amend by striking out the name of one of the demandants which had been improvidently inserted. *Treat & al. v. McMahon.* 120

3. The *Stat.* 1822, *ch.* 193. authorising the filing of exceptions in a summary manner to any decision of the Court of Common Pleas, does not apply to causes brought there by appeal from the judgment of justices of the peace. *Witham v. Pray.* 198

4. The defendant, in an action in the Court of Common Pleas of which it has not final jurisdiction, is not bound to disclose the matter of his defence, but is entitled to have a verdict returned, and to appeal. *Frothingham v. Dutton & als.* 255

5. The power of the Court, in an action of which it has final jurisdiction, to order the entry of a default, is derived from the consent of the party. *ib.*

6. In a writ of error *coram vobis* the regular authentication of the record under the hand of the Judge and seal of the Court below cannot be dispensed with, even by consent of parties. *Jewett v. Hodgdon.* 335

7. Consent of parties cannot be received to give validity to a bill of exceptions, unless it is certified by the Judge to be conformable to the truth of the case. *Coburn v. Murray.* 336

8. At the hearing of summary exceptions under *Stat.* 1822, *ch.* 193, the argument regularly should be confined to the points taken at the trial, and stated in the bill. *Wyman v. Hook.* 337

9. Whether the plaintiff may file a new writ, the original being lost, *quære*. *Feyler v. Feyler*. 310

See TENDER 2.

PRESUMPTION.

See BILLS OF EXCHANGE, &c. 1.
EXECUTION 2.
VERDICT 4.

PRESCRIPTION.

See FENCES 1.

PROMISSORY NOTES.

See BILLS OF EXCHANGE & PROMISSORY NOTES.

REAL ACTIONS.

See ACTIONS REAL.

RECOGNIZANCE.

1. A recognizance for the appearance of the party in a criminal prosecution should state in substance all the proceedings which shew the authority of the magistrate or Court to take it. *The State v. Smith*. 62

2. In a *scire facias* upon a recognizance taken by a Justice of the peace in a criminal case, it must appear that the recognizance has been returned to the Court having jurisdiction of the matter. *ib.*

3. A recognizance to appear and prosecute an appeal made to a higher Court, and abide the order of said Court thereon, and not depart without license, is not forfeited by a default at a *subsequent* term in the Court appealed to, the appeal having been duly entered at the first term, and the process continued. *The State v. Richardson*. 115

REFEREES.

See PARTIES 3, 4.

REMAINDER AND REVERSION.

See TENANT BY THE CURTESY.

REVIEW.

1. A writ of review cannot be granted in a *criminal* case, under any of the provisions of *Stat.* 1821. *ch.* 57. *Wells' case*. 322

See LIMITATION 1.

SCIRE FACIAS.

See ACTION 1.
PLEADING 1.
RECOGNIZANCE 2.

SEISIN.

See TRESPASS 1.

SETTLEMENT.

1. Where the marriage of a female pauper was rendered valid by the operation of the *Resolve* of *March* 19, 1821, it was holden that her derivative settlement, thus gained, could not operate to oblige the town, thus newly charged with her support, to pay for supplies furnished prior to the passage of the Resolve. *Brunswick v. Litchfield*. 28

See DOMICIL.

SHERIFF.

1. In an action of the case against a sheriff for returning bail to the action, when no bail was taken, the sheriff may be admitted to shew the insolvency of the debtor; and this fact being proved, the creditor is entitled to none but nominal damages. *Eaton v. Ogier*. 46

2. In such case the Court refused to permit the plaintiff to amend his writ, by inserting a count for not delivering up the bail bond mentioned in the officer's return. *ib.*

3. Where an officer is charged by the original debtor with having lost or wasted a portion of the goods which he had attached, it is competent for him to excuse himself from liability by shewing that he has applied the amount to the use of the plaintiff, by paying with it the expenses of keeping the goods. *Twombly v. Hunewell*. 221

4. The expense of the safe custody of goods attached on mesne process, is a lien on the goods; and it is not affected by the allowance of a sum for that purpose by the Court in the taxation of costs for the original plaintiff. *ib.*

5. In this State a deputy sheriff acquires a special property to himself in goods by him attached, which the sheriff can neither divest nor control; his character essentially differing from that of a sheriff's servant or deputy in *England*. *Walker v. Foxcroft.* 270.

6. If one deputy sheriff attach goods, and another deputy of the same sheriff attach and take the same goods out of his possession by virtue of another precept against the same debtor, the deputy who made the first attachment may have trespass *vi et armis* for this injury, against the sheriff himself. *ib.*

See DAMAGES 2, 3.
PARTIES 1, 2.

STATUTES.

1. The statutes of *Massachusetts* incorporating banks in *Maine* and in force at the time of the separation, being recognized in the public statutes of *Maine* for the regulation of banking corporations, are thereby become public statutes and may be proved by a printed copy. *Case of James M. Rogers.* 301

2. If a statute contains provisions of a private nature, as, to incorporate a bank, &c., yet if it contains also provisions for the forfeiture of penalties to the State, or for the punishment of public offences in relation to such bank, it is a public statute. *Case of Charles Rogers.* 303.

3. The statute incorporating the Bank of the United States is a public statute. *ib.*

STATUTES CITED OR EXPOUNDED.

ENGLISH STATUTE.

18 *Eliz. cap.* 3.—(bastardy) 171.

STATUTES OF MASSACHUSETTS.

Stat.
1783 ch. 24.—(nuncupative will) 298
1785 ch. 66. (bastardy) 165
1786 ch. 3. (marriage) 102
—— ch. 67. (ways) 54
1793 ch. 59. (paupers) 5
1809 ch. (militia) 351
1811 ch. 6. (parishes) 70, 102

STATUTES OF MAINE.

Resolve.
March 19. 1821 (marriages) 23, 102

Stat.
1821 ch. 36. (mortgages) 333
—— ch. 38. (nuncupative wills) 298
—— ch. 44. (fences) 72
—— ch. 47. (real actions) 355
—— ch. 51. (probate bonds) 241
—— ch. 52. (administrators) 112
—— ch. 57. (reviews) 322
—— ch. 59. (costs) 397
—— ch. 60. sec 32. (attachment) 12
—— *ib.* sec 14. 15. (banks) 331
—— ch. 62. (disseisin) 275
—— ch. 72. (bastardy) 165
—— ch. 118. (ways) 54, 55
—— ch. 122. (paupers) 7, 194
—— ch. 123. (damage feasant) 72
—— ch. 135. (parishes) 67
—— ch. 143, 144, 145, 146. (banks) 302
—— ch. 164. (militia) 182, 349
—— ch. 168. (logs) 130, 321
1822. ch. 182. (tender) 341
—— ch. 186. (amendment) 127
—— *ib.* (replevin) 162
—— ch. 193. (costs) 386

SURETY.

1. Where a lease was made to two, one of whom was sole occupant of the premises, which he held over the term, and debt for the rent of the whole period of actual occupancy was brought against both;—it was holden that the other lessee was not estopped to shew that he signed the lease only in the character of *surety*, for the term specified, without having in fact occupied the premises at any time; and that *he* was not liable for rent after the time mentioned in the writing, the holding over being, *as to him*, no continuance of the lease.—*Kennebec Bank v. Turner & al.* 42

2. If a surety pays the money due from his principal, it is no extinguishment of the security, but he succeeds to all the rights of the creditor against the principal. *Norton v. Soule.* 341

3. Thus where the principal had executed a mortgage to the creditor, conditioned for the payment of the debt *by him*, and the surety paid the debt, and took an assignment of the mortgage, it was holden that the surety might enter and hold the land in mortgage for the debt. *ib.*

See INFANCY 1.

TAXES.

1. It is not necessary for the purchaser of lands sold for non-payment

of the direct tax of the year 1813, in an action between him and the original owner of the land, to shew that the collector had given *bond* for the faithful performance of his duty; this being intended only for the security of the United States. *Hale v. Cushing.* 218

2. In such action the administration of the oath of office to the assistant assessor may be proved by parol;—the statute requiring a certificate of the oath to be filed in the collector's office being merely directory. See *Stat. U. S. July* 22, 1813, *sec.* 3. *ib.*

3. If in the assessment of a tax, the assessors exceed the sum voted to be raised and five *per cent.* thereon, though the excess be of a few cents only, the whole is void; and the assessors are liable in *trespass* to the party whose goods have been distrained for the tax. *Huse v. Merriam.* 375

TENANT BY THE CURTESY.

1. Where a tenant by the curtesy of an undivided portion of an estate had abandoned the land for more than forty years, leaving it in the possession of another tenant in common, whose occupancy was no ouster;—it was held that the reversioner of such undivided portion of the estate had no right of entry upon the tenant in possession, during the life of the tenant by the curtesy, his abandonment of the land being no forfeiture of the estate. *Wilham v. Perkins.* 100

TENDER.

1. Where the right in equity of redeeming lands was sold on execution by the sheriff, and the purchaser forthwith brought his action against the mortgagor to have possession of the lands; and afterwards, and within the year, the mortgagor tendered to the demandant the purchase-money and interest, pursuant to the statute, but did not offer to pay the costs of the suit,—it was holden that under the laws of this State the tender was no bar to the action, unless it included the costs also. *Jewett v. Felker.* 339

2. But in such case, the Court, on payment of the money and costs, will stay farther proceedings. *ib.*

TOLLS.

See ACTION 8.
ASSUMPSIT 4.

TOWN OFFICERS.

See TAXES 3.

TOWN ORDER.

1. A town order, drawn by the selectmen on the treasurer, must be presented to the treasurer for payment, before any action can be sustained on it, in the same manner as a note for the payment of money at a particular place. But no notice need be given to the selectmen, of non-acceptance or non-payment by the treasurer. *Varner v. Nobleborough.* 121

2. Such a town order is good evidence to support a count on an *insimul computassent.* *ib.*

TRESPASS.

1. Where one conveyed lands in fee with general warranty, and a stranger at the same time was seised in fact of part of the same land by an elder and better title, the entry of the grantee under his deed gives him seisin only of that part of which his grantor was seised;—but as to the stranger, the entry of the grantee is a mere trespass. *Cushman v. Blanchard & als.* 266

2. If, in such case, the stranger sue the grantee in trespass, and recover damages and costs against him, yet the grantee can only recover of his grantor the proportion of the consideration-money and interest;—the damages and costs being recoverable only when incurred in defending the seisin, which a grantee actually gained by conveyance from one who was seised in fact. *ib.*

See MORTGAGE 7.
SHERIFF 6.

VERDICT.

1. Where the finding of the jury, or the record of it, is defective or erroneous in a matter of form, having no connexion with the merits of the case, nor affecting the rights of the parties, the Court will amend it, and render the verdict and record pursuant to the issue. *Little v. Larrabee.* 37

2. But where the jury themselves have erred in matter of substance, as by returning a verdict for the wrong

party, or for a larger or smaller sum than they intended, and thereupon have separated, the Court will not amend the verdict, but will set it aside. *ib.*

3. To *such* mistakes the affidavit of the jurors is admissible. *ib.*

4. After verdict, those facts *only* are presumed to have been proved, which are either alleged in the declaration, or are so connected with the facts alleged, as that the latter could not have been proved without proving the others also. *Little v. Thompson.* 228

WAYS.

1. Under *Statute* 1786, *ch.* 67, it was competent for the Court of Sessions, in the exercise of a sound discretion, to impose as a condition on granting the prayer of a petition for a new highway, that the expense of its location should be borne by the petitioners. *Partridge v. Ballard & al.* 50

2. The petitioners in such case are not bound to cause the road to be laid out; but if they do, they assent to the condition imposed, which they are therefore bound to perform. *ib.*

3. If, pending such petition, it be altered in a part not affecting the general object sought by the petitioners, such alteration will not discharge their liability. *ib.*

4. The effect of such alteration upon the road prayed for being a question of fact, and not of construction, is to be determined by the jury. *ib.*

5. A town is not liable in any form, for the deficiency of a road, unless, by regular legal proceedings, or by *user* and acquiescence for a sufficient term of time, they have acquired the right to enter upon the land, and make and repair the road. *Todd v. Rome.* 55

6. Such use and acquiescence for twenty years, and perhaps for a shorter period, may be considered sufficient to give the town a *right*, and subject them to *liabitity* to repair, and to its legal consequences. *ib.*

7. No *certiorari* lies to set aside the doings of a town respecting the location and acceptance of a *town* way. If they are not legal, they are *merely void.* *ib.*

8. If a county road be laid out and accepted over land of a private citizen, to whom damages are awarded for the easement, which are paid by the town, and the road is afterwards discontinued without having been opened, the town cannot recover back the money thus paid. *Westbrook v. North.* 179

9. The discontinuance of a road by the Court of Sessions is no reversal of the proceedings respecting its location. *ib.*

WASTE.

See EXECUTORS and ADMINISTRATORS 3.

WITNESS.

1. It is not the *amount* of interest which determines the question of the competency of a witness. Any *direct* interest, however small, is sufficient to exclude him, even if it be only in the costs of the suit. *Scott v. M'Lellan & al.* 199

2. The drawer of a bill of exchange is not a competent witness for the indorsee, in an action against the acceptor, because of his liability to damages, interest, and costs, if the party calling him should not prevail. *ib.*

WRIT.

1. If in an action on a probate-bond, the writ, besides the usual indorsement of the attorney's name, be also indorsed with the name of the person who is entitled *in any capacity* to receive the money sued for, it is a sufficient compliance with *Stat.* 1821. *ch.* 51. *sec.* 70. though the party have only an *equitable* interest in the subject of the suit. *Potter v. Mayo.* 239

APPENDIX.

STATE OF MAINE.

EXECUTIVE DEPARTMENT,

AUGUST 28, 1822.

To the Hon. Justices of the Supreme Judicial Court of the State of Maine.

GENTLEMEN:

IN conformity to the third section of the sixth article of the Constitution of said State, I request your opinion upon the following questions of law, arising upon the construction of said Constitution; they being questions which it is now particularly important to the Militia of this State to have finally settled by the highest authority.

1st. Are Division Inspectors, Division Quartermasters, Brigade Majors, Brigade Quartermasters, and Adjutants and Quartermasters of Regiments and Battalions, Staff Officers, within the meaning of the third section of the seventh article of the Constitution of this State; and if so, do the persons holding those offices cease to be Staff Officers in consequence of the resignation, promotion, or removal of the officers who appointed them?

2d. Upon the resignation of a Major General, does the third section of the seventh article of the Constitution authorize his successor to make new appointments of Division Inspector and Division Quartermaster, to the exclusion of the officers who held those commissions at the time of the resignation of the Major General?

An early reply will greatly oblige

Your humble servant,

[Signed] ALBION K. PARRIS.

AUGUSTA, SEPTEMBER 18, 1822.

SIR:

YOUR letter of the 28th *August* last, proposing certain questions to the Justices of the Supreme Judicial Court, relating to the tenure of certain offices in the Militia, has received all that consideration, which the pressure of official duty, during the fall circuit we are now holding, will admit.

In answer to the questions propounded by you, we have the honour to state, that we are of opinion, Division Inspectors, Division Quartermasters, Brigade Majors, Brigade Quartermasters, and Adjutants and Quartermasters of Regiments and Battalions, are Staff Officers, within the meaning of the third section of the seventh article of the Constitution of this State. By analogy to the sixth section of the ninth article of the Constitution, as well as from general principles, we are satisfied, that with regard to that class of Staff Officers, denominated "*Aids*," the tenure of their office is, during the pleasure of the officer for the time being, in whom the power of appointment to said office is vested by the Constitution. And this pleasure, by a well-known and established military usage, the existence of which is recognised by the Legislature, in the statute of *March* 21, 1821, chapter 164, section 2, is considered as determined by the promotion, resignation, or removal of the particular officer, by whom the appointment was made. Nor are we aware of any legal principle, or statute provision, prescribing a different tenure of office from that of during pleasure, to other classes of staff officers, appointed and commissioned in the same manner with Aids. Such is the tenure of office of the highest Staff officer, the Adjutant General, not expressly by the statute regulating the Militia, but by the general provision of the Constitution. But in these cases, the promotion, resignation, or removal of the officer, making such appointments, does not operate to render vacant the several staff offices, with the power of appointing to which, he was vested. Nor is it believed to be in accordance with military usage, to dismiss such Staff Officers without any alleged misconduct on their part, or without hearing or trial before a court of inquiry, or court-martial.

With great respect, we have the honour to be, sir,

Your most obedient servants,

[Signed] PRENTISS MELLEN,
WILLIAM PITT PREBLE,
NATHAN WESTON, JR.

THE GOVERNOR OF MAINE.