REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE.

BY SIMON GREENLEAF,
COUNSELLOR AT LAW.

VOLUME III.

Containing the Cases from May term 1824 in Cumberland, inclusive, to the end of the year 1825.

Portland:
Printed and Published by JAMES ADAMS, JUN.
....1826....

DISTRICT OF MAINE.....ss.

BE IT REMEMBERED, That on the thirtieth day of June, in the year of our Lord one thousand eight hundred and twenty six, and the fiftieth year (L.S.) of the Independence of the United States of America, SIMON GREENLEAF, Esquire, of the District of Maine, has deposited in this office the the title of a book, the right whereof he claims as Proprietor, in the words following, viz. :

"Reports of Cases argued and determined in the Supreme Judicial Court of the "State of Maine—By Simon Greenleaf, Counsellor at Law. Volume III. Con- "taining the Cases from May Term 1824, in Cumberland, inclusive, to the end of "the year 1825. Portland, Printed and Published by James Adams, Jun. 1826."

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

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

JUDGES

OF THE

SUPREME JUDICIAL COURT

OF THE STATE OF MAINE, DURING THE PERIOD OF THESE REPORTS.

The Hon. **PRENTISS MELLEN**, L.L.D. *Chief Justice.*

The Hon. **WILLIAM P. PREBLE**,
The Hon. **NATHAN WESTON, JR.** } *Justices.*

Attorney General, **ERASTUS FOOTE**, ESQ.

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OF THE CASES REPORTED IN THIS VOLUME.

ERRATA.—Page 17, *l.* 34, and *p.* 18, *l.* 2, 5, for 1825, read 1815—*p.* 62, *l.* 20, for *unacquainted* read *acquainted*—*p.* 155, *l.* 19, for *indorsers* read *indorsees* —*p.* 219, *l.* 12, for *direction* read *discretion*—*p.* 220, *l.* 20 and last, for 25 read 21—*p.* 248, *l.* 32, for *already* read *clearly*—*p.* 307, *l.* 32, for *defendant* read *plaintiff*—*p.* 339, *l.* 3, after 9 *Mass.* insert 185.

In VOL. 2, *p.* v. *l.* 6, for 141 read 181—*p.* vi. table of cases—insert *Kavanagh v. Askins* 397—*p.* 339, dele line 12, in italicks.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE COUNTY OF

CUMBERLAND.

MAY TERM,

1824.

Memorandum. PREBLE J. by reason of continued indisposition did not attend at this nor any of the succeeding terms on the spring circuit.

BLANCHARD *vs.* BUCKNAM & AL.

Where a vessel was chartered "for a voyage to be made from *Portland* to sea, "and take a cargo from on board the British brig *Fountain*, and proceed with the "same to one or more ports in the *West Indies*, and from thence to *Portland*," this was holden to be one entire voyage.

But seamen's wages in such case are due at the port of destination in the *West Indies*, though the payment of the charter-money was expressly made to depend on the safe arrival of the vessel in *Portland*, to which place she never returned, being lost while lying at her outward port.

COVENANT on a charter party, by which the defendants hired the plaintiff's brig *Paymaster*, "for a voyage to be made from "*Portland* to sea, and take a cargo from on board the British brig "*Fountain*, and proceed with the same to one or more ports in "the West Indies, and from thence to *Portland*, where she is to "be discharged, the dangers of the seas excepted." The plaintiff covenanted to victual and man the vessel, for which the defendants "agreed to pay two hundred and twenty-six dollars per month." The defendants covenanted to pay "for the freight "or hire of the said brig and appurtenances, the sum of two hun- "dred and twenty-four dollars per calendar month, and so in "proportion for a less time, as the said brig shall be continued in "the aforesaid service, in thirty days after her return to *Portland*."

The defendant, after oyer, pleaded—1st. That the brig never returned to *Portland* ;—to which the plaintiff replied that she arrived at *St. Bartholomews* and earned freight ;—and the defendant rejoined, traversing the earning of freight, on which issue was taken.—2d. As to the covenant for victualling and manning,—that the voyage was one entire voyage, to take a cargo at sea, proceed with it to the West Indies, clear it for exportation, and return with it to *Portland* ; and the money was not payable till thirty days after her arrival at *Portland*, which event had never happened ;—and the covenant of the plaintiff, being a condition precedent, the defendants ought not to be bound till the plaintiff had performed ;—to which the plaintiff replied generally that he had performed his covenants, on which issue was joined.—3d. As to the covenant for payment of the charter money,—that the brig never returned to *Portland*, but was totally lost at *St. Bartholomews* by perils of the sea ;—to which the plaintiff demurred specially.—The 4th plea, as to the covenant to victual and man, was an issue to the country upon the discharge of the outward bound cargo at *St. Bartholomews* ;—and the 5th plea was a similar issue as to the covenant for payment of the charter money.

At the trial of these issues it appeared that the brig proceeded to sea, took a cargo of West India produce from the British brig *Fountain*, thence proceeded to *St. Bartholomews*, where the cargo was entered at the custom house, and was all landed except a few hogsheads of molasses, and several hogsheads of sugar which were shattered and unfit to be removed ;—that the same cargo was then reshipped and cleared for exportation, and the vessel nearly ready for sea, when a gale came on, in which the vessel and cargo were totally lost. Hereupon the Judge directed a verdict *pro forma* for the plaintiff, for the amount of the money stipulated per month for freight, and also for victualling and manning, up to the time of the loss, with interest from the date of the writ ;—which was to be amended, and judgment to be entered, conformably to the opinion of the whole Court.

Orr and *Greenleaf*, for the plaintiff, contended—1st. That the voyage was not one, but two, outward and homeward ; and that the outward voyage being complete by breaking bulk at *St. Bartholomews*, this entitled the seamen to wages, and consequently

perfected the right of the owners to freight. *Lock v. Swan* 13 *Mass.* 76. *Swift v. Clark* 15. *Masss.* 173. *Mackerell v. Simonds & Hankey, Abbot* 362. [317.]—2d. That the covenant for victualling and manning is independent of the covenant for freight; and that on this ground, at least, the plaintiffs were entitled to recover. *Havelock v. Geddes* 10 *East*, 555.

Emery, for the defendants, maintained the following positions:— 1st. If the plaintiff can mantain any action, it can only be for the victualling, and the month's advance paid to the seamen. *Coffin v. Storer* 5 *Mass.* 252. *Kimball v. Tucker* 10 *Mass.* 192.—2d. But the whole is one entire covenant, and the performance of the whole voyage is a condition precedent to the plaintiff's right to recover any thing. *Smith v. Wilson* 8 *East* 437. *Gibbon v. Mender* 2 *Barn. & Ald.* 17. *Brown v. Hunt* 11 *Mass.* 45. 15 *Johns.* 332. *Burrill v. Cleman* 17 *Johns.* 72. 3 *Johns.* 154. 10 *East* 378. *Bright v. Cooper.* 1 *Brownl.* 21. *Cook v. Jennings* 7 *D. & E.* 381. *Osgood v. Groning* 2 *Camp.* 466. *Post v. Robertson* 1 *Johns.* 24. *Liddard v. Lopez* 10 *East* 526.— 3. The plaintiff has put his whole case upon the fact that the vessel discharged her outward cargo, which is contradicted by the evidence. 1 *Peters' adm.* 86, 154, 253. *Laws of Wisbuy, art.* 54, 56. *Stat. U. S. July* 20, 1790, *sec.* 6.

Weston J. delivered the opinion of the Court.

This is an action of covenant broken on a charter party, brought to recover the money covenanted to be paid, for the victualling and manning and for the freight of the brig *Paymaster*. To this the defendants have pleaded five several pleas. Upon the fourth and fifth pleas, issue has been joined by the plaintiff. To the first plea, the plaintiff has replied, and the defendants, in their rejoinder thereto, have traversed the matter alleged in the replication; and upon this traverse, issue has been joined. The plaintiff, in his replication to the second plea, has also tendered an issue, which has been joined by the defendants. To the third plea the plaintiff has demurred specially; and the defendants have joined in demurrer. Upon the issues to the country, a verdict has been returned for the plaintiff, subject to the opinion of the Court.

If any one of the issues may not appear to be supported by the evidence on the part of the plaintiff, the verdict will not be set aside for that cause, but sustained as it stands, or as it may be amended, if upon the merits the plaintiff ought to recover ; as upon examination we do not perceive that any issue could have been found for the defendants, which would have been decisive of the case, so as to entitle them to judgment.

As to the freight, stipulated to be paid by the charter party, we are satisfied, from the authorities cited, and others which might be adduced, that none is due ; that the whole voyage is to be regarded as one, and not susceptible, according to the terms of the contract, of the division into two, outward and homeward, contended for by the plaintiff.

To the claim for victualling and manning, it is urged that the return of the vessel to *Portland* is made a condition precedent to its payment ; and that it was not to be paid until thirty days after such return—But, upon inspecting the charter party, the agreement to pay a certain sum monthly for the victualling and manning appears to be a distinct and independent stipulation on the part of the defendants, and is not, from its terms, or upon a fair construction of the whole instrument, made to depend upon the prosperous termination of the voyage. There seems, therefore, to be no well founded objection to the plaintiff's right to recover for the victualling.

With regard to the manning, it is insisted that the plaintiff's claim, if he is entitled to any thing, should be limited to one month's advance to the seamen ; inasmuch as their right to wages is made by the marine law to depend upon the earning of freight ; and as in the present case none was earned. By the charter party, as between the owners and the defendants, the right of the plaintiff to demand freight depended upon the completion of the voyage. But the right of the seamen to their wages is not affected by this condition, unless they have assented to it, by express stipulation. *Abbot*, 431. 1 *Peters adm.* 186, there referring to the decisions of Judge *Winchester*. In *Coffin v. Storer*, 5 *Mass.* 552, cited by the counsel for the defendants, the voyage to *Surinam* and a market and back to *Biddeford*, was held to be one voyage ; and, as it was not completed, it was further held that

no hire of the vessel was recoverable by force of the charter party. But by the same instrument, the defendant was to pay a quarter of the outfits, wages, and expenses. And *Parsons, C. J.* says, " it seems very clear that he must pay one fourth of the " outfits and expenses, and also of the wages, until the outward " cargo was landed at *Demarara.*"

By the custom of merchants, seamen's wages become due at every delivering port ; although by a law of the United States, only a third part of what may be due at each delivering port is there to be paid, unless it has been otherwise expressly stipulated ; the payment of the residue being, from motives of public policy, postponed until the voyage is ended. In the case before us, is *St. Bartholomews* to be regarded as a delivering port, so as to entitle the seamen to wages, within the true intent and meaning of the marine laws ? In certain cases, says Judge *Peters*, in reference to seamen's wages, in the case of *Giles* and others, mariners *vs.* the brig *Cynthia*, 1 *Peters adm.* 203, a port of destination " is the same as a port of actual delivery ; and it matters " not," he adds, " that the vessel did not carry thither any goods, " but went in ballast. She earns her freight and the wages are " due out of it, as much in legal contemplation, as if she had been " fully laden." And in his opinion, the same rule applies, where a vessel is sent to a designated port for a cargo, and, being unable to procure one, returns without any.

In the present case, every thing appears to have been done at *St. Bartholomews*, which the defendants contemplated, or the master, acting in pursuance of their instructions, deemed necessary. A part of the cargo was actually landed and re-shipped, and the whole was entered and cleared at the custom house in that island, and the duties thereon paid. The defendants probably proposed to themselves some benefit or advantage, from this course of proceeding. They thought proper to direct the outward cargo to be returned, giving it the form of an original shipment there ; and there seems to be no ground in reason or justice why, as to the seamen, that port should not be regarded as a delivering port, so as to entitle them to their wages, as in other cases. They faithfully performed their duty ; the vessel arrived at the port of destination in safety ; and every thing was there done

in relation to the cargo, which was required by the defendants or the master. We are therefore of opinion that the plaintiff is entitled to recover for the victualling and manning, from the date of the charter party to the arrival of the brig in *St. Bartholomews*, and for half the time she remained there ; with interest thereon from the date of the writ.

With regard to the demurrer and joinder to the third plea, if that was intended to apply to the whole declaration, it would be clearly bad ; as it leaves one of the breaches unanswered. But it professes only to answer the breach assigned, for the nonpayment of freight. As we have determined that the plaintiff's claim for freight is unsupported by the evidence, it has become unnecessary to consider the effect of the exceptions taken to this plea.

After the verdict has been amended, in conformity with this opinion, judgment is to be rendered thereon.

Little *vs.* Palister.

If one enter upon land in the possession of a tenant at will, and tread down the grass, and throw down a fence erected by the tenant for his own convenience, the landlord shall not have an action for this wrong ; but the remedy belongs to the tenant, the injury being wholly to *his* rights, and not to any permanent rights of the landlord.

Trespass *quare clausum fregit.* At the trial of this cause, which was at *November* term 1822, upon the general issue, it appeared that the plaintiff had good title to the *locus in quo* ;—that early in the year 1816, one *McKenney* entered into possession of the land by verbal permission of the plaintiff, without any written lease, and for no specified time ; intending to purchase the land ; which, however, he never did ;—that he agreed to pay the plaintiff an annual rent, equal to the interest of the money, until he should purchase it ;—and that this occupancy by *McKenney* continued till the commencement of this action.

It was also admitted or proved that the only act of trespass done by the defendant, was the tearing or throwing down some

parts of the fence which had been built by *McKenney* for his own use, for the purpose of inclosing the land in his own possession. For *this act* the presiding Judge instructed the jury that the plaintiff could not by law maintain this action ; and a verdict was thereupon taken for the defendant, subject to the opinion of the whole Court upon the correctness of those instructions.

Longfellow, for the plaintiff.

The title being admitted to be in the plaintiff, the legal inference is that the possession also was his, unless the contrary appear. Every entry, therefore, inconsistent with his rights, was a trespass. The occupancy of the land by *McKenney* does not alter the case ; for he was merely a tenant at will, or by sufferance ; his possession was that of his landlord, and the fences by him erected were annexed to the freehold, and belonged to the lessor. If the suit were for the title to the land, and the controversy related to the length of time and extent of actual possession ; the possession of the plaintiff, and its extent and duration would be ascertained by the time of *McKenney's* entry, and the location of his fence. And if this action had been brought by *McKenney*, the damages awarded to him could have been only nominal, the injury being to the freehold of the plaintiff. *Starr v. Jackson* 11 *Mass.* 519. *Danforth v. Sargent & al.* 14 *Mass.* 491.

Fessenden, for the defendant.

The case of *Starr v. Jackson* does not apply here, because *McKenney* was not tenant at will, but for years, or from year to year. He entered under an agreement to pay an *annual rent.*

But if he were tenant at will, yet trespass does not lie for the lessor, for an injury done to any erection made by a tenant at will. *Tobey v. Webster* 3 *Johns.* 461. *Wells v. Banister* 4 *Mass.* 514. *Taylor v. Townsend* 8 *Mass.* 411. *Fitzherbert v. Shaw* 1 *H. Bl.* 258. The fences were erected by the tenant, for his own convenience, and were removable at his pleasure ; and if the defendant is made answerable for their value to the lessor, yet the judgment will be no bar to a future action by the tenant himself.

But trespass *vi et armis* does not lie for a *lessor*. The case of *Starr v. Jackson* to this point is not supported by authorities, nor by the principles of the common law. The remedy should have been sought by an action of the case.

Orr, on the same side, argued against the authority of the case of *Starr v. Jackson*, to the following effect :

The subject before the Court in the present case exhibits a question of practice, not of abstract principle ; for as to this there is no dispute. It is agreed that both tenant and landlord have a remedy at law, if an injury be done to the possession of the one, or to the estate of the other. The remedy of the tenant is by an action of trespass *quare clausum fregit*, and if so, the question is, whether the same kind of action can be maintained by the plaintiff, who is the owner in fee. The injury done to the tenant is direct and immediate, and is against the peace ; it is a disturbance of his possession,—his right of quiet enjoyment ; and therefore his right of action accrues for every forcible or unauthorized entry however slight the injury may be to his possession.

But to the owner, the very foundation of this kind of action is wanting. His writ is untrue in a material part ; the *locus in quo* was not his close, but the close of his tenant ; and therefore his remedy for an injury done to the estate is by an action of trespass on the case. This distinction is material to the purposes of justice ; for an essential injury may be done to the tenant, which would be no injury whatever to the owner ; as by entering his house and beating him, or injuring his chattels. In such a case, according to the argument for the plaintiff, if the tenant could maintain this action for the actual injury done him, the owner might have the same kind of action for nominal damages, and in both cases full costs would be recovered by statute. Or in case of a slight injury, each might have the same kind of action for nominal damages. Now the liability to double costs, is alone sufficient to show that the distinction in the form of action is material to the interests of the defendant, for in an action on the *case*, nominal damages would not be a foundation for costs. And hence there would be justice done by the one form of action, and injustice by the other.

But the case at bar does not depend on reasoning from inconvenience ; it is founded on established principles of practice. As it regards the rights of the tenant against a wrong doer, it is quite immaterial by what kind of tenure he holds. This is settled in the case of *Graham v. Peat* 1 *East* 244. And on the other hand, it is equally immaterial to the rights of the owner whether the injury be done upon the land, or an act be done elsewhere, if it occasion an injury ; his remedy is the same in either event. The case of *Jesser v. Gifford* goes to support this position. 4 *Burr.* 2141. There the principal case is to be taken in connection with the one cited by *Ashton* J. which is *Tomlinson v. Brown*, *H.* 28. *Geo.* 2. This latter case was for obstructing the plaintiff's lights, *and breaking his wall*, and his remedy was by any action on the case. It is expressly said by Justice *Lawrence* in *Rex v. Watson* 5 *East* 487, that trespass can only be maintained by those who are possessed of the land. At the same time the owner may always maintain an action on the case, against a wrong doer, if the land be possessed by his tenant. 1 *Taunt.* 193, 4. *Astersoll v. Stevens.* And it has been further decided that trespass by the owner is a wrong form of action. *Wyndham v. Way* 4 *Taunt.* 316.

In answer to these authorities we are met by the case of *Starr v. Jackson* 11 *Mass.* 519. Upon this alone the plaintiff seems principally to rely ; and necessarily, for it is a case that stands alone. In that case the ancient meaning of the word "trespass" is applied to modern practice, and in this manner the action was sustained. Through the whole range of cases cited in support of that case, there is not one of them that was decided since the difference between trespass and case has been finally settled by judicial decisions ; and it is going a great way to say that trespass and case are in any instance synonimous terms in practice, because they were so in the reign of *Henry* VI. It is apparent from *Fitzherbert de natura Brevium* and Lord *Hale's* notes to that work, that torts done to real estate were blended, and passed under the general denomination of trespass.—It was so in many instances in relation to personal property. Breaking a pool whereby the stream overflowed the plaintiff's fish pond and the fish escaped ; adulterating wine, by a carrier entrusted with the

care of it; chasing sheep with a dog, whereby they were injured; filling a ditch, which caused the plaintiff's land to be overflowed; were laid in trespass *vi et armis*; and with some of such causes of action might be joined a direct injury to the plaintiff's soil and possession. *Fitz. De. Nat. Brev.* 199, *L. F.*—203, *L. M.* And the same practice prevailed in some degree till the days of Lord *Raymond*. In the case of *Tyffin v. Wingfield* the old practice is clearly preserved. *Cro. Car.* 325. The action was trespass *vi et armis* for driving the plaintiff's cattle into the close of *J. S.* who took them damage feasant, whereby the plaintiff was obliged to pay damages to redeem them. It was moved in arrest of judgment that the declaration did not conclude *contra pacem*. But it was adjudged that the action being laid in trespass did not make it trespass *only*, but it might answer for an action of trespass on the case. The case of *Dent v. Oliver* is of the same cast, and and serves to illustrate the convertible characters of case and trespass, in the practice of that age. *Cro. Jac.* 122. At a still later period the same obstacle is presented to so extensive an application of the word "trespass" as ancient authorities authorized, and the case of *Starr v. Jackson* has admitted. In the case of *Courtney v. Collet* 1 Ld. *Raym.* 272, trespass *vi et armis* was held to lie for diverting a water course on the defendant's own soil, by which the adjoining close was injured. And it will be found to be doubtful whether Ld. *Raymond* ever settled in his own mind the distinction as now understood, between trespass and case, till the decision in the case of *Reynolds v. Clark* 1 *Str.* 634, where it was held that trespass would not lie for erecting a water spout which injured the adjoining close.

It may further be observed that the language of the ancient law is the same in relation to tenant at will as to a mere stranger. And yet it has never been decided that an action of trespass *quare clausum fregit* can be maintained against tenant at will for an act done during the tenancy. Lord *Coke* says "that if tenant "at will cutteth down timber trees, or voluntarily pull down and "prostrate houses, the lessor shall have an action of trespass "against him *quare vi et armis*." *Coke Lit. p.* 57, *Sec.* 71. (g). This is substantially the same law as laid down by *Rolle* in relation to a stranger, which was relied on in support of the action of

Starr v. Jackson. There is a very recent illustration of the law advanced by Lord *Coke* in relation to landlord and tenant. He says that trespass *vi et armis* will lie. But by the practice of the courts in England it is an action of trespass on the case. *The Provost of Queen's College v. Hallet*, 14 *East.* 490.—If then the language of the law be the same in relation to a stranger, as to a tenant at will, it is difficult to conceive how the practice can be different.

But the case cited from *Rolle* in *Starr v. Jackson* is easily reconciled with a different conclusion from that which is drawn from it. The lessee at will may have one trespass and the lessor another trespass; that is to say, one may have one kind of trespass, and the other another kind. That this is the meaning may be fairly deduced from a precedent in *Fitzherbert* and his comment upon it. 200. *E.* "There is another form of this writ "(trespass) thus, wherefore with arms &c. he filled a certain "ditch in *L.* with earth and mud, that the water issuing from "the ditch aforesaid overflowed the corn of him the said W. "being in sheaves in his barn there, by which his corn aforesaid "to the value of one hundred shillings, was putrified; and "plucked up by the roots his trees there lately growing to the "value of forty shillings, and with certain beasts fed, trod down "and consumed his corn there lately growing, to the value of "forty shillings," &c.

On this he observes, that "by the first of these writs" (that is, by the first part of this kind of writs) "appeareth that *that* is "an action of *trespass of the case*, and the residue a *common action* "*of trespass.*" When the law in *Rolle* is taken in the sense now contended for, it is consistent with established practice; in the sense contended for by the plaintiff, if it should prevail, the practice would be subverted. Indeed the case of *Starr v. Jackson* professes to overrule the opinions of English Judges and compilers, and the decisions of the Supreme Court of *New-York*, on the authority of the common law. But it has been seen, from the authorities cited in the present case, that the term "trespass" was for ages a broad expression, almost sinonimous with "tort," in its general acceptation; it is therefore inadmissible in this character of antiquity, notwithstanding its adoption in the case of *Starr v. Jackson.*

It has been further argued for the plaintiff that a mere tenancy at will is not a dispossession of the owner : or rather *that the possession of the tenant is the possession of the owner*, and it is so said in *Comyn* ; but this language is metaphorical, and is not true in fact. The possession of tenant at will is his own possession *only* as between him and his landlord, or a trespasser. He has a right to hold from year to year unless a shorter time be agreed on ; his tenancy is not to be terminated abruptly ; he must have precise notice and sufficient time to quit the premises, and the owner has not even the right of possession, or of an action for possession, but upon these conditions. 1. *D. & E.* 159 *Flower v. Darby.* 8. *D. & E.* 3. *Clayton v. Blakey.* 1. *Hen. Bl.* 311. *Ward v. Willingale.* 2 *Bl. Com.* 146, 47 and *Christian's* notes. These are the general principles in relation to tenants at will ; but to these there may be exceptions, in which the maxim in *Comyn* might apply, as in the case of *Warren v. Fearnside* 1. *Wils.* 176, where justice and policy required that the possession of the tenant should have no other effect than the possession of the owner, in order that the estate might be protected from forfeiture to the crown, for treason in the tenant. But the facts in the case at bar offer no exception in favor of the plaintiff. No possession in him is deducible from them ; neither justice or policy requires the aid of fiction to decide that the possession of his tenant was his own possession, in opposition, or as an exception to general principles. On the contrary it appears that the tenancy was in fact from year to year at a stipulated rent ; it appears also that the injury done was to the possession only and not to the estate. It can therefore in no legal sense be said that the *locus in quo* was the close of the plaintiff at the time of the trespass, or that he ought to recover damages in any form of action.

But a maxim in law opposed by a current of authorities, on questions similar to the present from the nature and object of the cases, ought to be taken as an exception to the general rule ; and in this way the dictum in *Comyn*, and the case of *Warren vs. Fearnside* may be reconciled with the rights of tenants at will as defined in *Flower v. Darby* and similar cases, and with the rights of owners as defined by the authorities before referred to on this

subject. The protection of an estate from forfeiture, or any similar object, and the recovery of damages against a wrong doer, are so different in their natures, that they may well admit the application of different maxims in practice, without affording a reason for imputing inconsistency to the law.

There is nothing in the case of *Danforth v. Sargent & al.* that controverts the authorities cited for the defendant. In that case the lease was for one year ; there was notice to the tenant to quit the premises, and it is to be presumed it was legal notice. Neither is the statute declaring tenants by parol to be tenants at will availing to the plaintiff ; for it furnishes no definition of the rights of tenant at will ; they are therefore to be deduced from the common law. Besides, it would not seem to be a reasonable construction of the statute to say that it places the tenants in the same condition as a mortgagor or his tenant in possession, and renders him liable to an action without notice, as in the case of *Warne v. Hall & al. Doug.* 21. which furnishes another exception to the general rule of law.

Now the decision in *Starr v. Jackson* goes on the general ground that a tenancy at will may be terminated at any moment ; from which it would follow, if this doctrine is to be received in its full extent, that a tenant who sows with the consent of the owner, and occupies at an annual rent, would be a trespasser, if he should reap against the will of the owner. Where then would be the remedy of the tenant ? He is left to a suit at law for the non-performance of a promise which the owner was under no obligation specifically to perform. But it is respectfully submitted, that this ought not to be received as a principle binding on this Court : and if in the views of the common law which have been suggested on the present occasion, there has been no misconception of its import, the decisions of the Supreme Court of *New-York* are to be respected as well founded authorities. 1 *Johns.* 511. 3 *Johns.* 468.

Longfellow, in reply, said he did not expect the authority of the case of *Starr v. Jackson* to be questioned ; and the view he had taken of the present case rendered it unnecessary to reply to the arguments to this point from the other side.

By our *Stat.* 1821, *ch.* 53, all uncertain tenures, not created by writing, are reduced to estates *at will* only ;—and thus the doctrine raised as to tenancies from year to year is destroyed by statute. Whatever right to *notice* tenant at will may have in *England*, is founded wholly on statute provisions which have never been adopted here. In this State, his rights stand upon the common law, which leaves him entirely at the mercy of the landlord. The cases to this point cited by the other side are therefore inapplicable.

The right of the tenant to remove fixtures by him erected, though recognized in *England* in some cases, is rigidly restricted to erections made for the purposes of *trade*. *Elwes v. Maw* 3. *East* 54. In this case it was expressly refused to a tenant for purposes of *agriculture*. The same right was denied in this Court, in the case of a mortgagor who had removed buildings erected by him after the execution of the mortgage. *Smith v. Goodwin* 2. *Greenl.* 173. *McKenney*, therefore, being but tenant at will, had no permanent interest in the fences, and could have no remedy for their value, when taken away.

Wherever trespass *vi et armis* lies, *case* also lies ;—and so an action of the case might well have been sustained, in the instances cited by *Mr. Orr*. Hence the existence of such precedents in the books proves nothing. It only shews that this form of remedy may generally have been preferred,—but not that *trespass* would not have been equally good.

After this argument, which was had at *May* term 1823, the cause was continued for advisement, and now the opinion of the Court was delivered as follows, by

MELLEN C. J. Notwithstanding the wide range which the counsel have taken in this cause, and the elaborate investigation which it has undergone, we are satisfied from a more particular examination of the plaintiff's declaration, and the facts on which the Judge's instructions to the jury, were founded, that the question reserved for our decision is narrower and more simple, than has been imagined, and capable of an easy solution.

The allegation in the writ is, that the defendant, with force and arms, broke and entered the plaintiff's close, and carried

away fifty cords of wood,—broke down the plaintiff's fence, subverted and broke down the plaintiff's grass,—tore in pieces the buildings, and expelled from the dwelling house one *Hannaford*, a tenant of the plaintiff.

By the report it appears that no part of the alleged trespass was proved, except the breaking and entering the close, or in other words going into it, and tearing or throwing down some parts of the fence on the land, which had been built by *McKenney*, during the tenancy at will, by his own labour, at his own expense, and for his own use. There was no proof that he had destroyed, or carried away, or appropriated, any part of it. The Judge instructed the jury, that on those facts the action was not maintainable. The counsel for the plaintiff, in support of his motion for a new trial, has relied on the decision in the case of *Starr & al. v. Jackson* 11 *Mass.* 519, as establishing the principle that an action of trespass *quare clausum fregit* lies for the owner of land in the possession of his tenant at will, where the injury affects the permanent value of the property ; and that that decision is applicable to the case before us. The counsel for the defendant denies that the tenancy of *McKenney* was a tenancy at will, and contends that it was a tenancy from year to year, and so not within the principle of *Starr & al. v. Jackson* ; and insists further that that case ought not to be received and respected by this Court as an authority.

With respect to the tenancy, we are of opinion it must be considered as a tenancy at will. By the express terms of our statute, and that of *Massachusetts*, of which ours is a transcript, all parol leases are leases at will only. This same question has also been decided in *Massachusetts*. With respect to the case of *Starr & al. v. Jackson*, we apprehend that the facts before us do not require that we should call in question the correctness of the principle laid down by the Court in that case ; nor is it necessary for us to intimate any opinion in relation to the principal point of the decision. The present case is different from that as it regards the nature of the trespass committed, and we may safely rely on some of the undoubted principles of that case to shew that we ought to arrive at a different conclusion in the decision of this. The question there was whether the action should not

have been *case* and not *trespass*, as the wrong committed was injurious to the permanent estate, such as destroying a building, ploughing and subverting the soil, &c. during the possession of the tenant at will. The Chief Justice, in pronouncing the opinion of the Court, says "There seems to be no doubt but that a tenant "at will, and his landlord, may both maintain actions for injuries "done to the soil, or to buildings upon it. They are both injured; "but in different degrees;—the tenant in the interruption to his "estate, and the diminution of his profits;—and the landlord in the "more permanent injury to his property. If a house, occupied "by a tenant at will, or for years, should be demolished; or if "the fruit or forest trees of a farm so occupied should be cut "down, it is obvious that the tenant ought not to recover in dam-"ages the value of the thing destroyed; and it is equally obvious "that the landlord would be entitled upon common principles of "justice to recover indemnification for the injury done to his "freehold. And there would be no difficulty in separating the "damages, by the verdict of a jury, according to the respective "interests of the several parties." By keeping the above distinction in view, and the facts proved against the defendant, it will be seen that the wrong he committed was not a violation of any of the rights of the plaintiff, or injury to his freehold, but of the rights of the tenant at will; and was an injury to *him*, impairing his *profits*, &c.—an injury for which *he only* has a right to demand damages,—not the plaintiff. His want of actual possession need not then be resorted to as a ground of defence. Hence we see the case of *Starr & al. v. Jackson* does not apply to the point for which it was cited. *McKenney*, a tenant at will, had a right to erect such fences, and in such places on the land, as suited his convenience; and of course he had a right to *take them down*, and *remove* them from one place to another on the land, according to his own pleasure, and without consulting his landlord. It does not appear, as we have before stated, that the defendant *destroyed* or carried away or in any manner *appropriated* the fence to his own use. What he did was an injury to *McKenney* the lessee, for which he might recover damages; but it was no kind of prejudice to the plaintiff. It was the *lessee's* fence which was thrown down. This wrong might and did injure his rights, and

impair his profits, by exposing his fields ; but why should the plaintiff complain, or have reason to, any more than if the lessee himself had thrown down the fences ; which he certainly might have lawfully done as often as his judgment or caprice should dictate ? The *nominal*, *technical* trespass, committed by entering the close, was no injury to the plaintiff ; the soil was not subverted or damaged ; and though the grass might have been trodden down, and injured, this grass was the *property*, and part of the *profits*, of the lessee ; he only was injured ; he only can claim damages for this *particle* of wrong. It is not necessary to decide the cause therefore on the broad ground on which it was placed by the arguments of the counsel ; nor whether a tenant for years or at will has a right to take down, carry away, or dispose of, at the end of his term, any fences which he may have erected on the premises during the continuance of his lease. As the facts do not require a decision of either of these questions we give no opinion respecting them. For the reasons above assigned we are of opinion that the motion for a new trial must be over-ruled.

Judgment on the Verdict.

PARKMAN *vs.* OSGOOD & ALS. EX'RS.

To a plea of the statute of limitations by an executor of an estate represented insolvent, it is not a sufficient answer to say that the estate is solvent, and that *after* the lapse of four years a further time was allowed by the Judge of Probate for creditors to exhibit and prove their claims, under which the demand in suit was duly proved.

Whether an *application* to the Judge of Probate *within* four years from the granting of letters of administration, for further time for creditors to exhibit and prove their claims, is equivalent to *a suit*, so as to prevent the operation of the statute of limitations, the new commission not issuing till *after* the four years ;—*quære.*

Assumpsit on a promissory note made by the defendants' testator to the plaintiff. The defendants pleaded—*first*, the general issue ;—*second*, that more than four years before the commencement of the action, viz. *Jan.* 25, 1825, they were duly appointed executors, accepted that trust, and gave notice thereof as the

law requires. To this the plaintiff replied that afterwards, *Feb.* 1, 1825, the defendants represented the estate of their testator to be insolvent,—that thereupon the Judge of Probate appointed commissioners, who were duly qualified to receive and examine the claims of creditors,—that *Aug.* 1, 1825, the commissioners made to the Judge of Probate their report of the claims allowed against the estate, amounting to $1712,47,—that on the 14th of *April* 1815, the defendants returned to the Judge of Probate an inventory of the estate, amounting to $29,540,34;—that on the first day of *August* 1820, the plaintiff preferred to the Judge of Probate his petition that the commission might be again opened, and a reasonable further time allowed him to exhibit and prove his claim, which the Judge refused,—from which decree the plaintiff appealed to this Court, where the decree was reversed, and the petition remanded to the Judge of Probate, who thereupon, *April* 23, 1822, allowed the further time of three months for that purpose;—that the plaintiff afterwards proved his claim before the commissioners, amounting to $432,52 which they allowed, and made their report thereof to the Judge, as the only claim presented to them;—and that within twenty days afterwards the defendants gave notice in writing at the Probate Office, and also to the plaintiff, that they were dissatisfied with the allowance of his claim;—and this &c. To this replication the defendants demurred generally.

In the *third* plea it was alleged that the defendants were duly appointed executors and accepted that trust,—as before;—that *Feb.* 1, 1815, they represented the estate insolvent;—that commissioners were duly appointed, qualified, gave notice, and made their report, which the Judge of Probate accepted;—but that the plaintiff never presented his claim to the commissioners at any time within eighteen months next after the issuing of the commission. To this the plaintiff replied by setting forth the ulterior proceedings as before;—and the defendants answered by a general demurrer.

Greenleaf, in support of the demurrers, cited and relied on *Brown v. Anderson & al.* 13 *Mass.* 301, as decisive of the case at bar.

Orr and *Bradley*, for the plaintiff, contended that the statute rendering the lapse of four years an absolute bar to actions against executors and administrators, was never intended to apply to estates represented insolvent. The mischiefs it was enacted to prevent are stated in the preamble, which may always be looked into in order to ascertain the meaning of the legislature. These mischiefs are the great loss and trouble occasioned to executors and administrators, by demands brought against them *after they have closed their accounts of administration*, and *after settlement of the estates they have administered is made among the heirs and devisees.* These, and these only, are the cases to which this statute was designed to extend. Where no account has been settled, and no distribution made, as in the present case, the reason of the law ceases, and therefore its provisions ought not to apply. *Guild v. Hale* 15 *Mass.* 455. And the Court may well give the statute this construction in the exercise of the equity powers conferred on it by *Stat.* 1821 *ch.* 50, in all cases of trust arising in the settlement of estates.

Upon any other construction creditors may be defrauded of their just debts. For if an estate be represented insolvent and a commission duly issued *before* the end of the four years, no action can afterwards be sustained against the executor. And if the commissioners do not meet to receive claims till after that period is expired, the claims are barred, because the presentment of the claim to the commissioners is made equivalent to the commencement of an action. Thus the creditor would be deprived of the benefit of the whole period within which to bring his suit, and the statutes, instead of being a shield for the protection of the honest executor, would become the instruments of injustice and fraud.

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

By the *Stat.* 1791 *ch.* 28, it is enacted that "no executor or "administrator who has been appointed since the passing of the "aforesaid act, [*Stat.* 1788 *ch.* 66] or who shall *hereafter* be "appointed, shall be held to answer to any suit that shall be "commenced against him in that capacity, unless the same shall "be commenced within the term of four years from the time of his "accepting that trust," &c. And in the last mentioned statute

it is enacted that " the filing a claim with the commissioners " upon an estate *represented insolvent*"—shall be—" esteemed " equivalent to originating *a suit* against executors or administra- " tors within the meaning of this act."

When an estate is not represented insolvent, any creditor, after the lapse of one year next after the executor or administrator has accepted his trust, may institute a suit for the recovery of his demand ; but he must commence it within four years, or he will be barred. If the estate should at any time within the four years be represented insolvent, then the statute bar will be avoided by filing his claim with the commissioners at any time within that period. If an estate is represented insolvent by the executor or administrator *immediately* on his acceptance of that trust, and only a portion of the *eighteen months* which a Judge of Probate *may* by law allow to creditors to bring in and prove their claims before commissioners has *in fact* been allowed,—suppose six months, as in the case before us,—the creditor must prove his claim within the six months, or obtain the allowance of further time, by applying to the Judge of Probate for that purpose, and filing his claim *within the four years.* Whether *such application only* would save his claim from the operation of the statute of limitations, need not be decided or examined in the present case, inasmuch as *five* years had elapsed between the time when the defendants accepted the trust and gave notice of it, and the time when the plaintiff petitioned the Judge to open the commission and allow further time to creditors to present and prove their claims.

In the case before us, the defendants, in their *second* plea, say that the suit was not commenced within four years next after they accepted the trust of executors. In the *third* plea they state that they represented the estate insolvent on the first day of *Feb.* 1815,—that six months were allowed to creditors to exhibit and prove their claims,—and that the commissioners made their return on the first day of *August* following,—and that the plaintiff never filed his claim before them at any time within eighteen months next after the issuing of the commission. These pleas contain averments of all those facts necessary to bring the defendants within the protection of the provisions before recited,

unless they are avoided by the facts disclosed in the replications—for none of the facts *pleaded* are traversed. The two replications are similar ; and the only facts they aver are that the estate is abundantly solvent ; and that on the first of *August* 1820, more than five years after the defendants accepted the trust of executors, they applied to the Judge of Probate to open the commission,—that he decreed against the petitioner,—who appealed to the Supreme Court of Probate, where the decree was reversed, and the Judge directed to allow further time,—that thereupon three months more were allowed, within which time the plaintiff filed his claim, and that upon its allowance by the commissioners and objection thereto by the defendants, the present action is prosecuted. On demurrer to these replications the question is, whether they avoid the pleas in bar. The case of *Brown v. Anderson* 13 *Mass.* 201 seems to be a strong case against the plaintiff. There the replication attempted to avoid the plea in bar by a promise on the part of the *administratrix* to pay the debt. The Court considered the statute bar as in no degree removed or affected by such a promise,—that the statute was made for the benefit of those concerned in the estate, and that no act of the administratrix would subject it to liability, when already relieved from it by the limitation of the statute. In that case the promise was made within the four years, though the action was commenced after that period had elapsed. *Here* all the facts relied on by the plaintiff took place after the end of the four years. *There* the defendant had professed her willingness to pay. *Here* the defendants deny and refuse. On principle, however, both cases seem to stand on the same legal ground. Our decision may operate hardly on the plaintiff ; but we cannot alter the law. The defence may seem unconscionable ; but it is one which by law the defendants may make. The plaintiff, by more vigilance, might have procured the opening of the commission and the allowance of his claim within the four years ; but he omitted to take any measures for his own benefit until it was too late. We cannot perceive any legal ground on which the action can be supported. And it will be recollected that this difficulty was strongly intimated by the Court to the plaintiff's counsel, when at his urgent request they reversed the decree and opened the commission.

Replications adjudged insufficient.

TOWLE *vs.* MARRETT.

The Statute establishing the Maine Medical Society is a virtual repeal of the Statutes of 1817 *ch.* 131, and 1818 *ch.* 113, so far as they relate to this State.

Wherever the Legislature of this State appear to have revised the subject matter of any Statutes of *Massachusetts* and enacted such provisions as they deemed suitable to the wants of the people of this State, the former Statutes are to be considered as no longer in force here, though not expressly repealed.

IN a writ of Error *coram vobis* to reverse a judgment of the Court of Common Pleas, the question was, whether a licensed physician might now maintain *assumpsit* for his fees, without having deposited a copy of his license with the town clerk of the town in which he resided, agreeably to *Stat.* 1817 *ch.* 131 ?

The Statutes on this subject were as follows.

By *Stat.* 1817, *ch.* 131, it was required that persons commencing the practice of medicine after *July* 1, 1818, should first be licensed by some medical society, or college of physicians, or by three fellows of the Massachusetts Medical Society ; or have received a medical degree at some college ;—and by *Sec.* 3. it was enacted that *any person who might be thereafter licensed to practice physic should deposit a copy of his license with the clerk of the town where he might come to reside ;—on pain of being debarred the benefit of law to recover his fees.*

By *Stat.* 1818, *ch.* 113, persons commencing the practice after *July* 1, 1819, were first to be licensed by the Massachusetts Medical Society, or to receive the degree of doctor of medicine at Harvard University ;—the counsellors of the Massachusetts Medical Society were directed to appoint five examiners in each District ;—the State was divided into five districts, *Maine* being one ;—and all matters and clauses in the former act, "*which are contrary to the provisions of this act*," were repealed.

By *Stat.* 1819, *ch.* 161, separating Maine from Massachusetts, all the laws which should be in force in Maine on the fifteenth of *March* 1820, were to remain in force,—"such parts only excepted "as may be *inconsistent with the situation and condition of said new* "*State*, or repugnant to the constitution thereof."

By the Statute of Maine, passed *March* 8, 1821, [Private Statutes *ch.* 56.] the Medical Society of Maine was established,

with power to examine students in medicine, and to license all who should be approved ; which examination should not be refused to any candidate under the penalty of a sum not exceeding one hundred dollars, to his use.

And by *Stat.* 1821, *ch.* 180, [passed *March* 21,] the laws of Massachusetts which had been revised, or re-enacted, were repealed so far as it respects this State ; but among the acts thus repealed, the titles of which are all recited in the repealing act, the above mentioned Statutes were not enumerated.

The plaintiff in error, who was also original plaintiff, was licensed by the *New-Hampshire* Medical Society in *September* 1819, soon after which he came to reside in this State, but did not deposit a copy of his license with any town clerk ; and was never licensed by any other society, nor received the degree of doctor of medicine. The services were performed in *April* 1822.

Fessenden and *Deblois*, for the plaintiff in error, contended that the *Stat.* 1817, *ch.* 131, was repealed. Its first sections, they said, were clearly embraced in the provisions of the law of 1818 ; —and the third was repealed by implication, in subsequent enactments. The *Massachusetts* Medical Society never appointed censors in *Maine*, under the latter statute, because the period of separation was at hand, and a just respect for the profession in this State prohibited this exercise of their authority. And *after* the separation, it was not consistent, nor to be tolerated, that a corporation of *another* State, over which our tribunals could have no control, should exert its influence over our own citizens and within our own territory. If no society *then* could grant licenses, no copies need or could be left ;—and if there was any one period in which the act could not operate here, it was wholly *functus officio* as to Maine, and could never be revived but by a new statute.

But if it was not repealed by the separation, yet it was in fact repealed by the statute incorporating the Maine Medical Society ; for by this statute the legislature have in general terms regulated the whole practice of physic and surgery within this State, and

provided all the sanctions which they have thought necessary, either for the purity of the profession, or for the safeguard of the people.

Greenleaf, *e contra*, argued that the *third* section of that statute was not repealed.—1. Because the subsequent statute of 1818, *ch.* 113, does not expressly repeal it ; but only repeals all matters and things which are *contrary* to its provisions ; and this language applies only to the first two sections.—2. Because the second statute contains nothing *repugnant* to the section referred to. 11 *Co.* 63. 64. 5 *Com. Dig. tit. Parliament R.* 9. *Capen v. Glover*, 4 *Mass.* 305. *Pease v. Whitney*, 5 *Mass.* 382. —3. Because the second act is not a revisal of the whole subject matter of the first. The subsequent statutes only regulate the *mode of obtaining* the license. What should *be done with it when obtained*, remains fixed by the first statute alone. *Bartlett v. King*, 12 *Mass.* 545. *Rex v. Cator*, 4 *Burr.* 2026. *Goodenow v. Buttrick*, 7 *Mass.* 143.—4. The separation act does not repeal it, because it was not " inconsistent with the situation " and condition of the new State." A candidate might be licensed in *any county* of Massachusetts, *after* as well as *before* the separation ; and it could never be derogatory to this State to avail itself of the aid of a respectable society in the parent State, till it could create one of its own.—5. Nor is this section abrogated by the act establishing the Maine Medical Society, which only regulates the mode of obtaining a license, and inflicts a large penalty on the refusal to examine a candidate ; thus shewing that the license was a document of essential importance to the practitioner.—6. The legislature, having omitted to enumerate these statutes in the *general repealing act*, have thus expressed their opinion that they were yet in force.—And with good reason ;— because the section in question is the only effectual barrier against quackery. It constitutes that essential difference, which the legislature have for years been laboring to establish, between the mere empiric and the regularly educated physician, and is all that gives vitality to the other provisions of the statutes.

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

The statute of 1817, *ch.* 131, denies the right of action to *no* surgeon or physician if licensed by *any* medical society. The *Stat.* 1818, *ch.* 113, denies such right to *all* not licensed by the Massachusetts Medical Society, or honored with the degree of Doctor of Medicine from Harvard University ; and repeals the provisions on this subject in the former act ; but does not in terms repeal the *third* section of it, which requires a copy of the diploma to be recorded in the office of the clerk of the town in which such surgeon or physician shall reside. This latter act went into operation from and after *July* 1, 1819. The plaintiff's diploma bears date *September* 1819 ; and therefore it gave him no right to practice as a physician or surgeon in any part of Massachusetts, and enjoy the benefit of legal process to recover his fees or compensation for his services. Hence it follows that it is of no consequence whether the diploma or a copy of it was ever recorded in the office of the town clerk or not ; nor whether the *third* section of the former statute is repealed or not ; unless, if in force, it has relation to diplomas or letters testimonial granted by the Maine Medical Society, which will presently be considered. If the act of 1818 *ch.* 113, is now, or at the time the plaintiff's services were performed, was in force, then this action cannot be supported. It is not repealed by the general repealing act of 1821, *ch.* 180. If it remained in force after the 15th of *March* 1820, it was in consequence of the provisions in the *sixth* section of the act of separation. It is contended that it did not, and could not, after this State became independent, because one of the five medical districts, created by the third section of that act, was composed of those counties of Massachusetts which now form the State of Maine. This objection seems to admit of no satisfactory answer. But supposing it did so remain in force after the 15th of *March* 1820 ; was it in force when the plaintiff's services were performed in 1822, or at any time after *March* 8, 1821, when the Maine Medical Society was incorporated ? In deciding this question, it is necessary to consider the reasons which occasioned the introduction of the before mentioned provisions into the act of separation. It was evidently designed to prevent the confusion consequent upon a suspension of law, and

the injury which would thereby result to the community and individuals. It was for the purpose of giving time to the legislature of this State to re-enact, modify, or repeal those laws as, on consideration, they should determine most for the interest and best adapted to the situation of the State. Therefore any act of our own legislature, relating to the same subject with a statute of Massachusetts continued in force here by the act of separation, but expressive of sentiments different from those of the legislature of Massachusetts, establishing different principles, and containing provisions deemed better suited to our habits, views, and situation, ought to be considered as a *virtual* repeal of such act of Massachusetts ; and such an alteration or repeal as was intended in the saving clause in the act of separation alluded to. In this manner and on these principles we must construe the act establishing the Maine Medical Society. It was evidently intended to regulate and improve the practice of physic and surgery in this State ; and with this view to establish certain principles and rules to be observed in medical education, as preliminaries to the obtaining of the letters testimonial of the Society, or a degree of bachelor or doctor of medicine in Bowdoin College. In short, it was designed to supersede all legislative provisions which had been enacted in Massachusetts on the subject, and to place it on ground of our own. All its provisions lead to this conclusion. It contains no clause requiring a copy of the letters testimonial to be recorded in the town clerk's office ; nor does it attach any legal disabilities to a practitioner who has never obtained a license, or never recorded it, if obtained, in the manner required by the two acts of Massachusetts. This being a distinct and full expression of the public mind on this interesting subject, we are bound to consider all the pre-existing laws and regulations in relation to it as superseded and at an end. Hence the position of the defendant's counsel, that the third section of the *Stat.* 1817, *ch.* 131, is now in force in this State, and that the letters testimonial granted by our own Medical Society must be recorded in the town clerk's office, to entitle the licentiate to the benefit of legal process for the recovery of compensation for his professional services, cannot be admitted to have any foundation. The whole spirit of the act incorporating our own Medical Society forbids

us to admit the principle contended for. Besides, the very terms of the *third section* relied on, do not embrace the present case. It speaks only of those licensed to practice in the *Commonwealth of Massachusetts* ; and the meaning must have been,—licensed by some of the authorities described in *that act*, or the subsequent statute of 1818, *ch.* 113.

For these reasons we are satisfied that the judgment is erroneous, and must be reversed ; and a new trial may be had at the bar of this Court.

DAVIS *vs.* MCARTHUR.

If an original writ be indorsed with the name of the plaintiff "*by A. B. his attorney*," the attorney is personally liable for the costs, under *Stat.* 1821, *ch.* 59. *sec.* 8.

The reference, by rule of Court, of an action pending, does not affect the liability of the indorser of the original writ.

THIS was a writ of *scire facias* against the defendant as indorser of an original writ in favor of one *Wentworth* against the present plaintiff. It was indorsed thus ;—" *George Wentworth*, by *Arthur McArthur* his Attorney." The original action, while pending, was submitted to a referee, upon whose report judgment was rendered in favor of *Davis*, the now plaintiff.

The defendant pleaded that he never indorsed the writ as alleged ; and a verdict was taken for the plaintiff in the Court below, and exceptions filed *pro forma*, that the effect of such an indorsement might be settled in this Court.

Greenleaf, in support of the exceptions, contended that the indorsement was that of *Wentworth*, by his agent *McArthur*. It was in the form in which every agent should subscribe the name of his principal, and could not be distinguished from the other cases of the execution of delegated authority. *Long v. Colburn* 11 *Mass.* 97. *White v. Cuyler* 6 *D. & E.* 176. *Stinchfield v. Little* 1 *Greenl.* 231. The only question is, whether the defendant was sufficiently authorized to indorse his client's name on the original

writ ;—and this, it was argued, came as fairly within the scope of his powers, as the signing of any other paper in the regular course of legal proceedings.

But if the attorney was originally liable by this form of indorsement, yet this liability cannot reasonably be extended to cases not prosecuted according to the course of the common law. And such was the present case. It was taken from the legal tribunal, and committed to one of enlarged equitable jurisdiction, to which the indorser never intended to become a party, and by which transfer he ought to be discharged, at least of all costs subsequently accrued.

Morgan, for the plaintiff, cited and relied on the case of the *Middlesex turnpike corporation v. Tufts* 8 *Mass.* 266, as decisive of the liability of the attorney ;—and he contended that the costs of reference could not now be separated from those accruing in Court, they being all involved in one sum in the judgment, which fixed the amount for which the indorser was conditionally responsible.

Weston J. delivered the opinion of the Court.

The statute of 1821, *ch.* 59. *sec.* 8. prescribes that original writs shall be indorsed by the plaintiff or plaintiffs, or one of them, " if he or they are inhabitants of this State, or by his or their agent or attorney, being an inhabitant thereof." And the plaintiff's agent or attorney, thus indorsing, in the case of the avoidance or inability of the plaintiff, is made liable to pay the defendant all such costs as he may recover, and all prison charges ; where the plaintiff shall not support his action. In the case before us the original writ was indorsed, " *George Wentworth*, by *Arthur McArthur*, his attorney." The term agent or attorney supposes and implies a principal, acting by substitution. The attorney, by naming his principal, and professing to act for him, does not exonerate himself from the conditional liability, which the statute imposes. He is presumed to know the law and the obligation he assumes, by indorsing the original writ, in the character of attorney. The defendant thereby acquires the right ultimately to look to him, if he should fail of his remedy against the plaintiff.

The defendant in the present case, having put his name upon the writ as attorney to the original plaintiff, has, in the opinion of the Court, made himself liable as indorser. The case of *Middlesex turnpike corporation v. Tufts* 8 *Mass.* 266, cannot be distinguished in principle from the one before us.

The reference of actions pending, by agreement of the parties, under a rule of Court, has become a very common practice in judicial proceedings. It is usually attended with less expense to the parties litigant. A hearing may be had in the neighborhood of the parties and witnesses, and the attendance of the latter is seldom required for more than a single day ; although where a cause is to be submitted to a jury, the time when it may come on for trial being uncertain, their attendance for many days is not unfrequently necessary. The indorser is liable for costs generally ; and such as arise under a rule of Court are regularly taxable, in favor of the prevailing party, unless the referees otherwise adjudge.

The exceptions in this case are overruled ; and judgment is to be rendered for the plaintiff.

SAWYER *vs.* BAKER.

If the Clerk omit to affix the seal of the Court to an execution, it may be amended, even after the execution has been extended on lands, and the extent recorded.

AT a former term of this Court judgment was rendered for the plaintiff in a suit between these parties, and execution was duly issued ; and extended on the debtor's real estate. After the extent was recorded, and the execution returned to the clerk's office, it was discovered that the clerk had accidentally omitted to affix the seal of the Court to the execution.

And now *Greenleaf* and *Fessenden* for the plaintiff moved the Court for an order to the clerk to amend the execution, by affixing the seal, and cited the following cases to shew that *all* misprisions of the clerk in *judicial* writs may be amended, by *Stat.* 8 *H.* 6. *cap.* 12. 5 *Co.* 35. *b.* 1 *Com. Dig. Amendment, W. Campbell*

v. Stiles 9 *Mass.* 217. *Burrell v. Burrell* 10 *Mass.* 221. *Young v. Hosmer* 11 *Mass.* 89. *Suydam v. McCoon, Coleman's Cas.* 59. *Phelps v. Ball Colem. Ca.* 66. 1 *Johns. Ca.* 31. *McIntire v Rowan* 3 *Johns.* 144. *White v. Lovejoy* 3 *Johns.* 448. *Buck v. Barnard* 4 *Johns.* 309. *Bissel v. Kip* 5 *Johns.* 89. *Cramer v. Van Alstine* 9 *Johns.* 386. *Pepoon v. Jenkins Colem. Ca.* 55. *Seaman v. Drake* 1 *Caines* 9. *Close v. Gillesbey* 3 *Johns.* 526. *Holmes v. Williams* 3 *Caines* 98.

Emery for the defendant.

PER CURIAM. The execution may be amended by having the seal of the Court now affixed. The cases cited by the counsel clearly shew the power of Courts in the correction of errors committed by their clerks in judicial writs.

And it was accordingly amended.

NORTON *vs.* YOUNG.

If in the exchange of goods one party defrauds the other, who elects, for that cause, to rescind the contract ; it is not enough for the injured party to *give notice* to the other, and call on *him* to come and *receive* his goods,—but he must himself return them back to the party defrauding him, before any right of action accrues.

Assumpsit for goods sold. At the trial of this cause before *Weston J.* upon the general issue, it appeared that in *June* 1820, the defendant came to the plaintiff's store in *Portland*, and offered him a recognizance of debt signed by one *Procter*, in exchange for its amount in goods ;—that *Procter* at this time was in the country, getting lumber for the plaintiff, but was in doubtful circumstances, *paying only such debts as he chose to pay* ;—that the plaintiff expressed strong doubts about the posibility of enforcing payment, but at last consented to take it, *provided Procter or his wife wished him so to do* ; *otherwise, he would have nothing to do with it* ;—that the defendant then went away, and returned the next day or the day following, pretending to the plaintiff that he had

been to *Procter's* house, which was some miles distant, and that his wife wished the plaintiff to let the defendant have the amount in goods, and take the recognizance ; and that she had sent her son into town to inform him of the same ;—all which, it appeared, was false ;—and that the plaintiff, giving credit to this false statement, delivered to the defendant the goods, and took the recognizance.

It further appeared that the plaintiff, a few days after the delivery of the goods, having discovered the fraud which had been practised upon him, wrote to the defendant, stating that he had defrauded him by such false affirmation, and that he would have nothing to do with the recognizance ; and that the defendant must come and pay for the goods or the plaintiff would sue him ;—but it was not proved that this letter came to the hands of the defendant, nor in what manner it was conveyed.

It was also proved that soon after, in the same month, the defendant sent a written order to the plaintiff to deliver a hogshead of molasses, being part of the goods which he had not taken away with the others ; which the plaintiff refused to deliver, requesting the messenger to tell the defendant that he had deceived the plaintiff, and that the plaintiff *would sue him for the goods already delivered, if he did not come and pay for them* ; which message was duly delivered to the defendant at his house in *Paris.*

About eleven months after the goods were delivered, *Procter* absconded ;—and in *May* 1821, the plaintiff sent back the recognizance to the defendant, by the officer, who immediately afterwards served the writ.

The Judge being of opinion that the plaintiff, in order to rescind the contract on the ground of fraud, and to entitle himself to recover in this action for goods sold and delivered, was bound to return the recognizance to the defendant within a reasonable time, which time he thought had elapsed,—he directed a nonsuit, with leave for the plaintiff to move to set it aside.

Greenleaf, for the plaintiff.

As *Procter* was in doubtful circumstances, and paid only such debts as he chose to pay, the recognizance was a useless paper,

unless the debtor would *consent* to pay it to the plaintiff, and thus make it the subject of a new contract between them. Hence its value depended wholly on the truth of the defendant's affirmation; which was wilfully false. Of course the plaintiff was at liberty to *renounce the contract*; which he did forthwith in a letter to the defendant, which, as the case finds it was sent, must be presumed to have reached him, unless the contrary appear. This renunciation was repeated soon after, by the messenger sent with the defendant's order for the residue of the goods.

The plaintiff then having been grossly cheated, how has he forfeited his right to reclaim his goods? It is said that he should have *carried back* the recognizance forthwith. But to this it is replied, it was sufficient if he gave notice to the defendant that the contract was ended, requiring *him to come and take away* the paper which he had palmed upon the plaintiff. And this was substantially done. In the words of the Court in *Conner v. Henderson* 15 *Mass.* 322, it was enough if he "put the defendant in the same situation he was in before the delivery";—by which is understood merely that the *legal property* in the article should be revested in the defendant by renunciation of the contract,—but not that the party cheated should go to the expense of *carrying it back* to his *actual* possession. So in *Hunt v. Silk* 5 *East* 449, it is said that the parties should be put in *statu quo*, which can only be reasonably intended as to rights. If the article be cumbrous, and transported to a great distance, requiring the party injured to be at the expense and risk of a re-transportation of the goods, is virtually denying him any remedy at all.

Fessenden and *Willis* for the defendant.

The distinction taken by the counsel for the plaintiff is not supported by authorities, the absence of which clearly shews that such was never understood to be the law. On the contrary all the cases on this subject concur that if the party would rescind the contract, he must *not keep*, but must promptly *return* the article delivered. And the plaintiff well knew that this was his duty, as appears by his sending back the recognizance by the officer who served the writ. This he might as well have done

by the person who came, soon after the contract, with an order for the residue of the goods; and failing to do this, he has lost his remedy, if any ever existed, by his own neglect. *Hunt v. Silk* 5 *East* 452. *Kimball v. Cunningham* 4 *Mass.* 502. *Conner v. Henderson* 15 *Mass.* 319. *Young v. Adams* 6 *Mass.* 182. *McNeven & al. v. Livingston & al.* 17 *Johns.* 437.

But here was *no fraud*. The allegation of the defendant was only that *Procter assented* to the assignment. Now this was wholly immaterial. His assent did not affect the security, nor the plaintiff's right in it. The plaintiff accepted the recognizance, in payment for the goods, on the credit of the party bound by it. It was then due, and payment might have been enforced by execution immediately. Having accepted it in payment for the goods, he took on himself the risk of its being paid, 7 *D. & E.* 66.

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

It appears in this case that the recognizance was committed to the care of the officer who served the writ on the defendant, to be delivered to him; and that immediately after it was so delivered, the writ was served. From these facts it is evident that the writ was drawn, and the action commenced, before the recognizance was returned to the defendant. This would seem to be an objection to the maintenance of *this* action, even if it had been returned and the action commenced within one month after the right to rescind the contract had accrued. But in answer to this objection it is urged that a *return* of this document to the defendant was not necessary to vest a right of action in the plaintiff; but that as soon as he had given him *notice* that he meant to rescind the contract on account of the defendant's misrepresentations, he had done all the law required, and it was the duty of the defendant to come and receive or send for the recognizance; and that such offer to abandon the contract, accompanied by such notice was sufficient. The cases which have been cited do not appear to support this position. In *Kimball v. Cunningham* 5 *Mass.* 502. *Parsons C. J.* says—"If he "(the plaintiff) chooses to consider the contract as void, he must

"*return the horse* within a reasonable time.—If he had *exchanged* "horses and given money as boot, he may not only maintain that "action for his money, but also trover for the horse he parted "with in exchange ; but he ought not to *retain* any part of the "consideration he received upon the sale or exchange ;—as, if "in the exchange he received money in boot, he ought to *return* "not only the unsound horse, but also the money received." The case of *Conner v. Henderson* 15 *Mass.* 319, proceeds on the same principle. The Court decided that it was the duty of the plaintiff to *return the casks* to the defendant, before a right of action could accrue ;—and this must have been done in a reasonable time. The same doctrine is recognized in the other two cases cited by the defendant's counsel. It does not appear to have been contended in argument that the return of the recognizance to the defendant after the lapse of more than a year was within a *reasonable* time. These cases shew what is meant by placing things in *statu quo*, in order to enable a party to *rescind* a contract.

On the facts before us we are of opinion that the action cannot be maintained.

Plaintiff nonsuit.

POTTER, JUDGE &c. *vs.* MAYO & ALS.

An attorney's lien on the cause for his fees, does not exist till judgment is entered.

Therefore where, in a case reserved, after the opinion of the Court was pronounced in favor of the plaintiff, he forthwith assigned his interest in the judgment, and the defendant, during the term, and before judgment was actually entered, paid the whole amount to the assignee ; it was holden that the attorney's lien was thereby defeated.

DEBT on an administration bond. The defendants having answered over, agreeably to the order of the Court, *ante Vol. 2, p.* 239, the cause came on for trial at the last *November* term before the Chief Justice, when the only question of *fact* upon the special pleadings, was, whether *Mayo*, the defendant, had notice

before *May* 28, 1813, of the lien of the plaintiff's attorney for his costs upon a judgment rendered in the Supreme Judicial Court of *Massachusetts* in this county at *May* term 1813, in the case of *Martin v. Mayo Ex'r.* [*Vid.* 10 *Mass.* 137.]

In this latter case a verdict had been returned for the plaintiff, subject to the opinion of the whole Court, which was pronounced in favor of the plaintiff at an early day in the *May* term above mentioned. The next day after the opinion was delivered, *Martin* executed to one *Curry* a regular assignment of his judgment against *Mayo* ; but the judgment was not in fact entered up till *May* 29th under the general order of the Court of that date. Before the judgment was entered, viz. on the 28th of *May*, *Mayo* had notice of the assignment to *Curry*, and afterwards paid him the amount, and obtained a discharge. And the object of the present suit, which was brought for the benefit of the attorney of *Martin*, was to compel *Mayo* to pay the amount of his *lien*, on the ground that the payment to *Curry*, being made with notice of the existence of that *lien*, was no protection against it.

The same gentleman was attorney for the defendant in that case, and in this. Upon this evidence, which was all that appeared in the case, a verdict was returned for the defendants, subject to the opinion of the Court upon this question, whether if the actual entry of judgment were necessary to perfect the lien of the attorney, any notice after that time could, by relation, avail the plaintiff to maintain the issue on his part ?

Emery, of counsel for the plaintiff, argued—1st. that the lien of the attorney was entitled to favor and protection from the Court ; and that the situation of parties litigant was such as that they are to be presumed to have knowledge of all equitable claims upon the subject in controversy. *Swain v. Sennett* 2 *New Rep.* 131. *Ormrod v. Tate* 1 *East* 463. *Welch v. Hole Doug.* 238. *Reed v. Duppa* 6 *D. & E.* 361. *Randall v. Fuller* 6 *D. & E.* 456. 3 *Atk.* 720. *Kinkman v. Shawcross* 6 *D. & E.* 14.—2d. That the instant the judgment was entered, so as to give effect to the assignment, the same instant the right of the attorney also was perfected ; and so the lien attached without notice. *Green v. Farmer* 1 *Bl.* 651. *Kidlock v. Crague* 3 *D. & E.* 119. *Martin v. Hawks* 15 *Johns* 405. *Baker v. Cook* 11 *Mass.* 238.

Hopkins, for the defendants, did not deny that liens were to be favored ; but insisted that the true question was, whether the Court could *create* a lien which did not exist by law ? The whole extent of the law on this subject, as found in *Montague on lien* 59—63 is only this—that an attorney has a general lien, *against his client*, on all the *papers* with which he is entrusted ; and upon *money* in his hands, or upon a *judgment recovered by him* ;—and that the attorney's lien must first be satisfied, before any offset can be made by the opposite party.

Without a particular notice of the authorities cited for the plaintiff, which, however, do not support the points to which they are cited ; the law of this case is conclusively settled in *Getchel v. Clark* 5 *Mass.* 309, in which it is declared that the plaintiff may settle an action before judgment, and discharge the defendant, with or without the consent of his attorney, who has no lien on the cause for his fees; and that if after judgment the plaintiff release to the defendant, his attorney has no remedy for his fees, but an action against his client. The *Stat.* 1810 *ch.* 84 is merely a legislative declaration that the attorney may have a lien upon a judgment, which shall not be defeated by any offset of cross executions. *Dunklee v. Locke* 13 *Mass.* 526.

Upon these authorities the law is clear that the lien of the attorney is only upon *the judgment when rendered* ;—and it cannot be extended by relation to defeat the rights of the assignee, which were already vested and perfect by the notice of the assignment.

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

In the course of the pleadings the parties have lost sight of the assignment of *McLellan*, and issue is taken on the single question whether *Mayo* had notice of the attorney's lien before payment was made to *Curry* on the 28th of *May* 1813. The judgment in the suit of *Martin v. Mayo* was entered *May* 29. The inquiry then is, whether the lien existed or became perfect till judgment, so that notice of it could be given before that time, as alleged in the surrejoinder.

In the case of *Getchel v. Clark* 5 *Mass.* 309, the Court in giving their opinion said that " *before* judgment, it was very clear that

" the plaintiff might settle the action and discharge the defendant " without or against the consent of his attorney, *who had no lien* " *on the cause for his fees*;—that *after* judgment, if the plaintiff " released the judgment to the defendant, *the law had provided no* " *remedy for him* but an action for his fees *against his client.*" Whatever rules or principles may have been adopted in the English Courts, it seems that at common law an attorney has no lien for his costs, as the Court also decided in *Baker v. Cook* 11 *Mass.* 236. That Court considered, and so do we, that whatever lien he has is created by the act of *Massachusetts* of 1811, *ch.* 84, directing officers in the levy of executions, wherein the creditor in one is debtor in the other, to cause one execution to answer and satisfy the other, so far as the same will extend. The act contains this *proviso*,—" that nothing in this act shall be construed " to affect or discharge the lien which any attorney has or may " have upon any judgments or executions for his fees and disburse- " ments." The *proviso* also protects *bona fide* assignments of judgments, executions, and causes of action. The same provision is re-enacted in this State in the fourth section of *Stat.* 1821, *ch.* 60. By the terms of the law, the lien which is created is upon the judgment and execution; and the provision just quoted is for the purpose of protecting that interest which an attorney has in such judgment, or execution, on account of his fees and disbursements, and preventing the judgment creditor from discharging such judgment or execution, or enforcing the collection of the amount due, to the prejudice of such attorney's rights and lien. According to the language of the statute, then, it appears that an attorney's lien does not exist until judgment. The lien is upon that, and on the execution issued on such judgment. If we attend to the design and object of the provision, we shall arrive at the same conclusion. As we have above stated, the intention of the legislature was to protect the attorney's interest from the control of his client;—it was to give to him the security of the judgment debtor, in addition to the original responsibility of his client. Now it is perfectly clear that until a judgment is rendered, such additional security cannot exist, because until then no coercive power is given to the creditor, and it was against *this* power that the statute provision was intended as a guard. For these reasons

we think the lien of the attorney in the present case never had a legal existence till judgment, which was on the 29th day of *May*; of course no legal notice of such lien could be given till *after* such judgment was rendered, and therefore it was too late to destroy the effect of the payment of the judgment by *Mayo* to *Curry*, on the day preceding, which payment is admitted by the pleadings. In this view of the subject it would be contrary to justice and fairness, as well as to legal principles of construction, to give to the judgment a retrospective operation relative to the attorney's lien; for by so doing it would over-reach a payment by the defendant *Mayo* honestly made, and without notice of the attorney's rights, to a person authorized to receive the money; and we should thereby compel the defendants, or *Mayo* the principal, to pay the debt a second time.

Judgment on the Verdict.

CUTTER *vs.* TOLE.

If the standing clerk of a militia company be absent, and another be appointed "*pro tempore*," this is a sufficient specification of the term of his office, within the *Stat.* 1821, *ch.* 164, *sec.* 16, it being understood to continue during the absence of the standing clerk.

If a captain of militia remove without the territorial limits of the company, he is still its commanding officer; and he alone is to receive and judge of the sufficiency of soldiers' excuses for non-appearance.

This action, which was debt for the non-appearance of the defendant at a militia training, being tried at the last *November* term before the Chief Justice at the bar of this Court, agreeably to the order in the same case *ante*, *Vol.* 2, *p.* 181,—it appeared that the plaintiff prosecuted as clerk *pro tempore* of the company. To prove his appointment as such, the plaintiff called the captain of the company, who being objected to on the ground of his interest in the penalty sued for, executed and offered to the defendant a release of his right therein, *but expressing no consideration* for such release; and was thereupon admitted as a witness, and testified that the permanent clerk being absent on the day of training, he appointed the plaintiff as clerk during his absence. The plaintiff

then produced his sergeant's warrant, on the back of which was the following indorsement;—" *Westbrook*, *May* 7, 1822. This " may certify that the within named *Abiel Cutter* has been duly " appointed clerk *pro tem.* of the company under my command. " *Charles Alden*, *Capt.*"—and a further certificate of his taking the necessary oath on the same day.

The defendant then produced and read the certificate of the surgeon of the regiment, dated *May* 4, 1822, certifying in legal form that the defendant was unfit for military duty and ought to be exempted; but it did not appear to have been presented to the captain for his signature.

He also proved that he was duly summoned to attend this Court as a witness at *May* term 1822, which commenced on the same day with the company training; and that he accordingly attended on that and the eight first days of the term, and testified in the cause in which he was summoned.

It also appeared that the captain, early in the year 1821, removed with his family from *Westbrook* to *Portland*, a distance of six miles from the place of company parade, where he had ever since resided; but that he usually attended the company trainings in *Westbrook*, as before, and actually attended at the training in question, returning to *Portland* on the same day;—and that within eight days after the training, the defendant presented to the lieutenant, who resided within the limits of the company, the certificate of the surgeon, and stated that, and his attendance at Court, as the reasons of his absence from training, which the lieutenant accepted as satisfactory, and excused him.

Hereupon the Judge instructed the jury that the law was with the plaintiff, for whom they accordingly returned a verdict; to which the defendant filed exceptions, pursuant to the statute.

Fitch, for the defedant, objected 1st. that the captain's incompetency as a witness was not removed by the release, because it expressed no valuable consideration.—2d. That there was no legal evidence of the appointment of the plaintiff as clerk *pro tempore*, the certificates not comporting with the provisions of the *Stat.* 1821, *ch.* 164, *sec.* 12, 16. The appointment also is void, because the time for which it was made is not expressed. The

clerk *pro tem.* is to exercise the powers of the regular clerk "for the time expressed in his appointment;"—*sec.* 16.—which indicates sufficiently that his appointment should have been for a specified time.—3d. But if he were legally appointed, it was for that day only. The regular clerk is removable only for *misconduct. Sec.* 45. *art.* 26. Yet if a clerk *pro tem.* may be appointed for a longer period than the actual absence of the stated clerk from duty, it will effect his removal or suspension by a mode not contemplated by law. The temporary clerk could do no act in that office after the day of training, Consequently he cannot sustain this action, the right to which did not accrue till eight days afterwards; that period being allowed by law to offer excuses for delinquency.—4th. The defendant's attendance in Court, or his laboring under bodily infirmity, entitled him to exemption from military duty on that day. The law directs him to offer his excuse to the *commanding officer*;—and who is he, but the senior officer residing within the limits of the company? If not, then every soldier, prevented by misfortune from training, must at his peril find the captain of the company, and offer him personally his excuse, or be punished for an inevitable calamity.—Suppose the captain should depart on a long journey on the morning after training;—or should have removed his residence to a great distance, coming within the bounds of his company only on the days of training;—or should be pursuing his avocations in a distant town for some months in the year;—surely no reasonable construction of the law would oblige an unfortunate soldier to pursue and find him. But if he is obliged to go beyond the bounds of the company at all, there is no limit beyond which he may not be compelled to go. The lieutenant, therefore, was the officer authorized in this case to receive and judge of the sufficiency of the defendant's excuse and his acceptance of it was conclusive.

Morgan, for the plaintiff, contended that the term of his appointment was sufficiently explicit, it being plainly intended to continue during the absence of the regular clerk, who, for aught that appeared, was still absent from duty;—that if the plaintiff had no power to prosecute, the fines for delinquency at that training could not be collected, since one fourth part of them

accrued to him only; and he was by law authorised to exercise "all the powers, and be subject to all the duties, and be liable to all the penalties of the clerk in whose place he is put;"—and that while the captain was well known to reside within a reasonable distance from the defendant's dwelling, he alone was authorized to receive and decide upon the sufficiency of excuses for non-appearance.

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

Several objections are made to the verdict in this case;—first that the release of the interest of *Charles Alden*, the captain, who was admitted as a witness, was insufficient; no consideration being expressed in the release. But every deed imports in itself a consideration, and no contract or agreement made by deed is ever regarded as *nudum pactum*. *Plowden* 309.

It is further urged that it does not appear that the plaintiff was duly appointed or sworn, as clerk *pro tem.* The certificate of his appointment, bearing date *May seventh* 1822, on the back of the plaintiff's warrant as sergeant, is expressed in the past tense; but in our opinion sufficiently indicates that he was then appointed and sworn, and that the law has been substantially pursued. It is insisted that by law the time should be distinctly expressed for which he was appointed, but this may be considered as done by the use of the words *pro tem.* by which his authority is continued only during the inability or absence of the standing clerk.

Another objection taken is, that the plaintiff cannot maintain this action; as his authority had ceased prior to its commencement. This fact does not appear in the case; the captain testified that the standing clerk was absent on the day of the training; but there is no evidence that he has ever yet returned.

The surgeon's certificate, read at the trial, clearly constituted no defence, not being conformable to the requirement of the revised statutes *chap.* 164, *sec.* 35, it neither stating the nature of the infirmity, nor having been allowed and signed by the commanding officer of the company, or countersigned by the commanding officer of the regiment or battallion.

It is lastly contended that the defendant, having a sufficient excuse, seasonably made it to the lieutenant, and was by him lawfully excused. If the lieutenant was competent to excuse, this point would be decisive in favor of the defendant. By the 32d article of the 45th section of the militia law before cited, the commanding officers of their respective companies may excuse any non commissioned officer or private for non appearance, upon satisfactory evidence of his inability to appear; provided the excuse be made within the time limited. The sixteenth section of the same law provides, among other things, that whenever the office of captain shall be vacant, the officer next in grade and in commission shall exercise the command. But the office of captain was not vacant, that officer being in the full exercise of his authority. He had removed his residence out of the bounds of his command, but that did not even entitle him to his discharge, unless he had removed to such a distance that, in the opinion of the Major General, it would be inconvenient for him to discharge the duties of his office. *Sec.* 45, *art.* 9, of the law before cited. The lieutenant therefore, at the time the excuse was made and allowed by him, cannot be regarded as the commanding officer of the company; and unless he was, his allowance of the excuse cannot avail the defendant.

The exceptions in this case are overruled, and there must be

Judgment on the verdict.

LEIGHTON *vs.* BOODY, & AL.

If in the Common Pleas there be verdict and judgment for the defendant, from which the plaintiff appeals, and in this Court recovers less than a hundred dollars, he can have only his costs in the Court below, and the defendant recovers his costs since the appeal.

AT the trial of this cause in the Court below, which was *assumpsit*, a verdict was returned for the defendants and judgment rendered thereon, from which the plaintiff appealed, and in this Court at the last term obtained a verdict for forty five dollars.

Greenleaf, for the defendants, thereupon moved for judgment for their costs since the appeal, and that none might be taxed for the plaintiff, pursuant to *Stat.* 1822, *ch.* 193. *sec.* 4.

Fessenden and *Deblois* opposed the motion, on the ground that the case was not within the terms of the statute, and it would be unreasonable to punish the plaintiff for coming into this Court to obtain his debt, which was *wholly* denied him in the Court below.

PER CURIAM. The amount of the verdict in this Court shews clearly that the cause belonged to the jurisdiction of the Court of Common Pleas, and ought there to have been finally settled. The plaintiff therefore can have only the costs accruing in that Court; and the defendants must be allowed their costs since the appeal, according to the statute.

MESERVE *vs.* ELWELL, & UX.

If the defendant appeal from a judgment of the Court of Common Pleas in any of the cases mentioned in *Stat.* 1822, *ch.* 193, *sec.* 4, and suffer judgment in this Court by default, he must pay double costs, the debt or damages recovered in the Court below not being reduced.

IN *assumpsit* on a promissory note, the *ad damnum* in the writ was laid at 300 dollars, and a verdict being returned for the plaintiff, and judgment thereon in the Court below for more than a hundred dollars, the defendant appealed to this Court and entered his appeal, but afterwards was defaulted.

Orr, for the plaintiff, at the last term moved for the taxation of double costs since the appeal, pursuant to *Stat.* 1822, *ch.* 193, *sec.* 4, which was opposed by *Fessenden & Deblois* for the defendants.

PER CURIAM. The object of the statute was to confine to the Court of Common Pleas the decision of all cases where the value in dispute did not exceed a hundred dollars. This value is ultimately ascertained by the verdict. *Apparent* jurisdiction may be given to this Court by laying the *ad damnum* at more than a hundred

dollars, in which case either party may appeal. But if the plaintiff appeals, and in this Court recovers less than that sum, it is thereby manifest that the final jurisdiction of the cause belonged to the Common Pleas; and the plaintiff who has drawn it from that jurisdiction is amerced in costs. And if the defendant appeals, and does not reduce the verdict, he also is punished by double costs for unreasonably delaying the plaintiff. This delay is as injurious to the plaintiff where the defendant is defaulted in this Court, as where judgment is rendered upon verdict; and the present case being within the rule, he is liable to double costs since the appeal.

BREWER & AL. *vs.* SMITH.

Where one contracted to burn a kiln of bricks, for which he was to receive ten thousand of them when burnt, and he performed his part of the contract;—it was held that he had no vested interest in the bricks, which his creditor could attach, till actual or constructive delivery.

Trespass against the defendant, a deputy sheriff, for taking and carrying away 10,000 bricks from the plaintiffs' kiln. At the trial of this cause in the Court below, before *Whitman C. J.*, the defendant, in a brief statement, justified the taking of the bricks as the property of one *Thomes*, against whom he had in his hands a writ of attachment;—and read in evidence an agreement of the following tenor.—"Articles of agreement between *D. & D. Brewer*, of, &c. and *Benjamin Thomes*, of, &c. witnesseth—viz.—I the said *Benjamin Thomes* will take said *Brewers'* kiln of brick situated in *Westbrook*, in its present situation, and put it in the best order to burn, put fire to it, and burn the brick in the best manner, said *Brewers* finding what more wood that is necessary than is now alongside said kiln. And we the said *Brewers* on our part do agree with said *Thomes*, if he the said *Thomes* does burn said brick in the manner aforesaid, we will deliver the said *Thomes*, at the kiln, after they are burnt, ten thousand good hard-burnt bricks, suitable for the outside of a

" brick store or house, which is to be in full for the said *Thomes'* " services for burning said brick".—Which was signed by the parties.

The defendant then proved that previous to the time of the attachment, the bricks had been fully burnt and finished;—that he gave notice to the plaintiffs that he was about to attach the bricks belonging to *Thomes*, and requested them to be present and set out his part, which they declined to do, and forbid him to do it;—and that in removing the bricks he did the least possible damage, carefully replacing the other bricks.

Upon this evidence the Judge was of opinion that *Thomes* had no vested interest in the bricks, attachable by law; and directed a verdict for the plaintiffs. To which the defendant excepted.

Adams, for the defendant.

In this case the defendant represents the vendee, and therefore the law as between vender and vendee must govern the action. Now it is clear that where nothing remains to be done by the purchaser of goods, the property vests in him. *Montagu on Lien p.* 18. 1 *Dane's Abr.* 234. But here *Thomes* had performed his part of the contract, and was entitled to take to himself his portion of the bricks. The goods being cumbrous, no manucaption or actual delivery was necessary. *Jewett v. Warren* 12 *Mass.* 300. Nor is it necessary in any case, between vendor and vendee. *Lampheare v. Sumner* 17 *Mass.* 110. *Meacher v. Wilson* 1 *Gal.* 419. *Chapman v. Rogers* 1 *East* 192.

The objection that the bricks were mingled in common with the plaintiffs' cannot avail. *Thomes* was entitled to *any* ten thousand in the kiln. *Whitehouse v. Frost* 12 *East* 614. And if the plaintiffs can recover in this action, yet they must instantly deliver over the bricks to *Thomes*, and the defendant may instantly seize them.

Hopkins, on the other side, relied on the want of actual delivery, which he contended was necessary to constitute a vested interest in the bricks, in favor of the debtor. Until that was done, he had only a right of action against the plaintiffs, who might have been summoned as his trustees. This, in truth, was the

only remedy suited to the case; as the plaintiffs then could avail themselves of any payments they had made to *Thomes* for his services in burning the bricks, of which his creditors, by attaching the bricks, would seek to deprive them.

WESTON J. delivered the opinion of the Court.

The validity of the defence in this case will depend upon the question whether *Benjamin Thomes*, at the time of the attachment of the bricks as his property, had therein a vested interest. The kiln originally belonged to the plaintiffs, who also furnished the wood to burn it. *Thomes* was to burn the bricks, for which service the plaintiffs agreed to deliver him ten thousand of the same bricks, after they should be burnt. *Thomes* performed the service ; but it does not appear that the bricks have been delivered to him, as by the plaintiffs' contract they engaged to do ; nor did they assent to the attachment, but forbade it. Until delivery, actual or constructive, the claim of *Thomes* rested in contract, for the breach of which his remedy was by action. There is no evidence in the case from which a constructive delivery can be inferred. The plaintiffs have done no act, except that of entering into the contract. It was not agreed that upon the performance of the service, *Thomes* was to take the bricks;— but they were to be delivered to him by the plaintiffs.

If, after the bricks were burnt, *Thomes* had demanded his ten thousand, and had been told by the plaintiffs to take them ; or if any thing had been said or done by the plaintiffs, expressive of their assent that he should take them ; that might have been sufficient, in an article of this description, to have vested the property in *Thomes*, so as to have rendered it liable to be taken at the suit of his creditor. But nothing of this kind appears.

We have examined the cases cited by the counsel for the defendant, and find them to have been cases of sale, supported by a diversity of proof as to delivery, actual or constructive. But this is not a case of sale ; but of a contract to deliver, unattended with the circumstances from which a delivery can be presumed. The exceptions to the opinion of the Court below are overruled, and the

Judgment affirmed.

RUNDLET *vs.* JORDAN & TRUSTEES.

In a foreign attachment against several trustees, the disclosures cannot be taken in aid or explanation of each other ; but each trustee is to be held liable or discharged on his own disclosure only.

A note deposited in another's hands, and not collected, is not the subject of a foreign attachment, even though a judgment has been recovered on it in the name of the trustee.

Only goods deposited, or a debt due and not contingent, can be the subjects of this statutory process,

The question in this case was—whether *J. & E. Hoole* were liable as the trustees of *Morrell Jordan* ?

It appeared from their disclosure, that *Morrell Jordan*, being indebted to them in the sum of $230, indorsed and delivered to them a negotiable promissory note against his son *Isaiah Jordan* for $640, taking their receipt for the same, in which they promised to account for the proceeds of the note when collected, and to pay him the balance, after deducting their debt ;—that they commenced a suit upon the note thus assigned, and attached all *Isaiah Jordan's* interest in the farm he occupied, one half of which he had previously conveyed to a stranger, and the other half was mortgaged to another creditor ;—that after recovering judgment and taking out execution, they wrote to *Morrell Jordan* informing him that they should not extend the execution on real estate, nor accept it in payment of their debt, and requesting him to pay or secure the debt due to them, and take an assignment of the judgment and execution for his own benefit ;—that this not being done, they caused the execution to be levied on the debtor's right in equity of redeeming the lands attached, which produced only the sum of sixteen dollars and fifty three cents in part satisfaction of the execution ;—that they afterwards seized certain goods supposed to be the property of *Isaiah*, but being satisfied they were not his they released them ;—that they had never arrested the debtor ;—and that except the small sum collected by sale of the right in equity, their debt still remained wholly unpaid.

Isaiah Jordan, and another son of the debtor, were also summoned as trustees, but had not disclosed.

Daveis, for the plaintiff, contended that this judgment was a trusteeable interest or property,—a chattel, effect, or credit,—within the principle of *N. Eng. Mar. Insurance Co. v. Chandler & trustee* 16 *Mass.* 275;—and that the trustees were liable for its value. This value is the nominal amount of the judgment, until it is regularly shewn to be less, by commitment of the debtor, and his discharge as an insolvent. And this course was indicated as peculiarly proper, by the circumstances of the present case, the conveyance being of a valuable farm, from an insolvent father to his son, accompanied with strong badges of legal fraud. The trustees having neglected to adopt this method, have left the judgment to be treated as worth its nominal amount, and in some respects, so far as regards other creditors, identified themselves with the *Jordans*.

But if the conveyance to the son was *bona fide*, yet the trustees have been guilty of laches in not using legal means to enforce collection of the execution, and thus have rendered themselves liable to *Morrell Jordan* for its amount.

If the whole facts are not yet fully developed, the decision of this question ought to be suspended till the other trustees have disclosed the nature of the trust between them and their father. *Russell v. Lewis* 15 *Mass.* 127. We are only confined to the answers of the trustees when they are perfectly sufficient for their discharge. By statute, when an assignment is disclosed, the supposed assignee may be summoned at any time. Under an *equitable* construction of this provision, or rather a liberal application of *its principle*, the disclosures of other trustees may be looked into, to ascertain facts imperfectly exhibited, in a particular disclosure. This may be for the benefit of such *particular trustees*, to enable them to make their answer sufficiently complete for their own discharge. The whole circumstances are so interwoven, that they cannot be considered separately without rendering it impossible to reach the property at all.

W. Storer, for the trustees, replied that the judgment was but a *chose in action*, or evidence of a debt due; and therefore was not "goods, effects, or credits" in their hands liable to the process of foreign attachment, within the meaning of the statute. *Perry v. Coates & trustee* 9 *Mass.* 537.

And if it were otherwise, yet they could not be liable to the principal debtor, and consequently not liable to his creditors, until after demand on them for the surplus, beyond the amount of their own debt, which, by the contract, they were entitled to retain. But here has been no demand. *Stevens v. Bell* 6 *Mass.* 339. *Maine F. & M. Insurance Co. v. Weeks & trustee* 7 *Mass.* 438.

Nor ought they, even after demand, to be liable for any more than the surplus *actually* received. Yet the case shews that after using the utmost diligence, they have not been able even to pay themselves.

The case cited from 16 *Mass.* 275, is a case of *corporate stock*, liable by statute to be attached, or seized and sold on execution; and so is not applicable to the present case.

MELLEN C. J. after stating the facts in the case, delivered the opinion of the Court as follows.

The question as to the liability of the *Messrs. Hooles* must be answered by examination of the facts stated in their disclosure, and those only ;—and those facts must be taken to be true. If any fraud exists between the principal and the two other trustees who have not yet disclosed, that fact, should it appear, can only affect those who may be implicated in it ; but not the *Hooles*. Delay, therefore, is not necessary with respect to a decision on the disclosure before us.

It is urged that the judgment against *Israel Jordan* is a *credit*, and attachable under this process ; but it is no more a credit than the note was before judgment,—and it could not be, till collected according to the agreement of the parties. The note was only evidence of a debt ; and the judgment, while unsatisfied, is nothing more. The case of the *New England Insurance Company v. Chandler & trustee* differs widely from this. There, certain personal, attachable property was *pledged* to the trustee, to secure a debt ; and he was surely a trustee for the surplus, after his debt was paid. Here was no *property* deposited, pledged, or received ; but only the *evidence* of a debt due to the principal ;—and a mere trifle only has been collected ;—not a tenth part of the sum due them.

There is nothing on the face of the disclosure indicative of fraud, or concealment of the property of the principal, to defraud his creditors ; and we cannot presume it. On these facts, the principal could not maintain any action for the amount of the judgment, founded on the agreement which the *Hooles* made with him, for the surplus of the judgment has not been demanded by the principal ; *Maine Fire & Marine Ins. Co. v. Weeks* 7 *Mass.* 438,—and of course his creditor cannot, on such facts, charge them as his trustees. But it is said that the *Hooles* have not used due diligence to collect the amount of the judgment, and by reason of this misconduct have made themselves liable to the principal. There seems no proof of this negligence ; and even if they were liable to the principal in a special action on the case for such negligence or fraud, this *mere liability* is not a *credit* within the meaning of the statute ;—no *debt* can exist till damages are ascertained by judgment in such action. A man may be liable to an action for slander, assault and battery, or any other *tort*, in which heavy damages would be given ; but such a *liability* would not render him a trustee ;—only goods deposited, or a debt due and not contingent, can be the subjects of this statutory process. We perceive no grounds therefore on which *these* trustees can be held liable, and accordingly they are discharged. *See* 2 *Mass.* 96. 4 *Mass.* 85. 11 *Mass.* 90. 4 *Mass.* 272. 5 *Mass.* 49. 9 *Mass.* 537. 6 *Mass.* 339.

Ex parte Thomes.

A feme covert cannot bind herself, by an executory contract, to convey her own lands, even though her husband join with her in the obligation.

Nor can her administrator be empowered, under *Stat.* 1821, *ch.* 52, *sec.* 13, to carry such contract into effect by executing a deed.

Mrs. Mahan and her husband, in her life time, entered into a contract with the petitioner *Thomes*, to convey to him certain lands belonging to her, upon payment of a certain sum of money ; which being paid, and she having since deceased, he now prefer-

red his petition to this Court, stating these facts, and thereupon praying that her administrator might be empowered to execute a deed, pursuant to *Stat.* 1821, *ch.* 52, *sec.* 13.

But THE COURT said that the contract being executory, it was not binding on the wife, she being a feme covert ;—and that therefore they could not, under the statute, grant any authority to her administrator to convey the estate. The administrator can be empowered only in those cases where the intestate was legally bound. So the petitioner took nothing by his petition.

CUMMINGS' CASE.

If in a complaint of larceny, made to a Justice of the Peace, the goods alleged to have been stolen are described in a schedule annexed to the complaint, and not in the body of the complaint, it is bad.

THE record of a conviction of *Cummings* of the crime of larceny before a Justice of the Peace, being brought into this Court by *certiorari*, it appeared that in the complaint he was charged with having stolen "*the goods in the schedule hereunto annexed* ;" and no schedule came up with the record.

PER CURIAM. If the reference to a schedule were *good*, yet there being none in this case, the record must be quashed. But the practice of referring to a schedule annexed is too loose, and without precedent to support it. The description of the goods alleged to have been stolen should be contained in the body of the complaint. The schedule may be lost, or detached ; and then no certainty can exist as to the nature of the charge ;—and in the present case the defendant could not have pleaded the conviction in bar of a second prosecution.

Morgan for the defendant.

CODMAN *vs.* LOWELL & AL.

Under *Stat.* 1822, *ch.* 209, the Court of Sessions may lawfully extend the debtors' limits to the exterior bounds of the county.

And the sheriff has no control over the body of a debtor, after he has given bond for the liberty of the yard, except in the cases specified in that statute.

The Justices of the Sessions, in fixing the prison limits, perform a ministerial office only; in which any peculiar benefit thereby derived to one of them, does not disqualify him to act.

Debt on a bond dated *Oct.* 28, 1822, conditioned that the defendant *Lowell*, who was a debtor committed in execution, should "continue a true prisoner within the limits of the gaol-yard, until "he shall be lawfully discharged, and shall not depart without "the exterior bounds of said gaol-yard, until lawfully discharged "from said imprisonment, and commit no manner of escape."

The defendants, after oyer, pleaded generally a performance of the condition;—to which the plaintiff replied that the debtor, "at a place called *Standish*," in this county, "departed without "the exterior bounds of said gaol-yard, as the same were then "fixed and established by law;—which was traversed, and issue joined thereon.

The extent and limits of the gaol-yard, or debtors' liberties, was the only subject in controversy in this cause.

By an order of the Court of Sessions passed in *Oct.* 1798, and confirmed by subsequent statutes, these limits were established to include the town of *Portland* only, exclusive of the islands.

This order was founded on *Stat.* 1784, *ch.* 41, providing that "the Court of General Sessions of the peace shall fix and deter- "mine the boundaries of the gaol-yards to the several gaols "appertaining, in their respective counties, as soon as may be "after the publication of this act."

By the *Stat.* 1822, *ch.* 209, which is a revision of the laws relative to poor debtors, the Courts of Sessions are authorized "to "fix and determine the boundaries of the gaol-yards to the sever- "al gaols in their respective counties, and the same to change "and alter from time to time as to them shall appear proper."

Under the authority of this last act the Court of Sessions of this county, consisting of five Justices, by an order in *September* 1822, enlarged and fixed the prison limits, so as to "extend over "the whole territory within the county, and to the exterior limits "thereof." Against this order two of the Justices dissented, and entered their dissent on the record of their Court.

At the trial of this cause in the Court below, before *Whitman C. J.* the plaintiff offered to prove that Justice *Hasty* of *Scarborough*, one of the three Justices who made the last order, was at that time a prisoner within the debtors' limits, and had a direct interest in passing the order, to effect his own enlargement ;—which evidence the Judge refused to admit. The plaintiff further objected that the Court of Sessions, in making the order, had transcended their constitutional powers ;—but the Judge overruled this objection, and directed a nonsuit, to which the plaintiff excepted, pursuant to the statute.

Longfellow, for the plaintiff, insisted that the order of 1822, was in truth the act of two Justices only, and therefore of no force ; Justice *Hasty* being directly interested, and so disqualified to act in the case. And he cited *Baxter v. Taber* 4 *Mass.* 361, to shew that the Justices, in making the order, exercised an office purely ministerial, and which might therefore be examined in this collateral manner. But he further contended that the order was an assumption of powers not conferred by the constitution. Its effect would be to give the sheriff a paramount authority over every man's freehold in the county, constituting it a part of the prison ; and thus taking the property of the citizen for public uses, without compensation.

Adams, for the defendants, replied that if Justice *Hasty* had been interested in the subject of the prison limits, the argument from that fact would prove too much ;—for the act of deciding in that case would be a misfeasance deserving impeachment ; and the conduct and motives of a respectable magistrate ought not to be tried and adjudicated upon in this manner, without the possibility of hearing his defence.—And he denied that a debtor committed any escape by entering upon private property within the

limits ; or that the authority of the sheriff over such property was in any respect enlarged, by including it within the debtors' liberties.

After this argument, which was had at May term 1823, the cause being continued for advisement, the opinion of the Court was delivered at the *August* term, 1824, in *Oxford*, by

MELLEN, C. J. In support of the exceptions taken to the opinions and judgment of the Court below, two objections have been urged by the counsel for the plaintiff; viz.—1. That when the supposed order of the Court of Sessions, extending the limits of the prison to the exterior limits of the county, was passed, two of the Justices of said Court (which consists of five) opposed and protested against it ; and a third, as the plaintiff offered to prove, was disqualified to sit and give an opinion on the question, for the reason assigned in the exception ; and that therefore no order was passed ; there being on that occasion no competent Court to pass it ;—and 2. That even if the Court had been unanimous in passing the same, it is void, for want of legal authority in the Court of Sessions to pass such an order.

1. As to the first objection.—Was the proof which was offered to shew the imprisonment of *William Hasty*, one of the Justices of said Court, at the time the supposed order was passed, properly rejected ? If the Justices of the Court of Sessions are to be considered, when fixing and determining the boundaries of gaol yards, as acting in a judicial capacity, and the order is to be considered a judicial act ; then it seems to be conceded that it cannot be impeached on account of the reason assigned. It would certainly be dangerous to declare a judgment of Court void, because the Judges who rendered it acted from corrupt motives in making their decision. On proof of such a charge they might be punished by removal from office ; but the merits of the judgment could not be affected by the offence of the Judges. Aware of this principle, the plaintiff's counsel contends that such an order of the Court of Sessions is not a judicial, but merely a ministerial act ; and that the Justices, in passing such an order, are only executing the powers vested in them by law as ministerial agents of the county ; in the same manner as when they purchase lands,

erect court houses and gaols, make contracts, allow accounts, &c. on behalf of the county; according to the opinion of the Court in *Baxter v. Taber* 4 *Mass.* 361.—This argument seems to prove too much, because it is no objection to an agent that he has a personal interest in the act he performs in virtue of the power given him. If three of the Justices of the Court of Sessions were owners of a lot of ground suitable to erect a gaol upon; would there be any illegality or impropriety, should the Court purchase it for the use of the County ? and if they should purchase it, would the sale be void, because the three Justices who owned the land, and sold it in their private capacity, had an interest in the sale, and a strong inclination for it ? Cannot the Court of Sessions allow and certify their own accounts, for their own attendance and travel ? Is it any disqualification of a Justice of the Court of Sessions that he has the strongest desire that a particular road should be laid out, which will give him peculiar and great facilities ? Can he not legally join his brethren on the bench in causing such a road to be laid out, provided he has no direct pecuniary interest in the case ? We do not perceive that there was any thing erroneous in the opinion of the Court of Common Pleas in rejecting the proof offered with a view of shewing the disqualification of *William Hasty* to act in passing the order in question.

In support of the second objection, the plaintiff's counsel relies upon the decision in the case of *Baxter v. Taber* above mentioned. The order of the Court of Sessions, the validity of which was then under consideration, was passed under the supposed authority of the *Stat.* 1784, *ch.* 41. At the time of that decision the language of the condition of the bond given by a debtor, imprisoned on execution, to obtain the liberty of the yard, was different from the condition of such a bond as now by law established. A part of the condition of the bond required, prior to the 29th of *February*, 1812, was that the debtor should continue a true prisoner in the custody of the gaoler within the limits of the prison. But by the act of *February* 29th 1812, the condition of such bond is required to be, that such prisoner will not depart without the exterior bounds of the debtors' liberties, until lawfully discharged.—Much of the reasoning of *Parsons C. J.* in the case of *Baxter v. Taber*, is founded on the language of the act of 1784, both in relation to the nature

of a gaol yard, and the nature and extent of the liberties intended to be granted to poor debtors, who should give the bond required. And from this peculiarity of language he seems to draw many of his conclusions respecting the power delegated to the then Court of General Sessions of the Peace, as to fixing and determining the boundaries of gaol yards. If the laws upon this subject had then been as they are now, we apprehend a different course of reasoning would have been pursued, and that it would have led to a different result. In the act of 1822, instead of the words "Debtors' liberties," the words "gaol yard" are used;—in the act of *Massachusetts*, *June 26th* 1811, the words of the condition of such a bond are required to be "the exterior bounds of the gaol yard or debtors' liberties." Both expressions seem to have been considered as synonymous.—Again, in the above case the Chief Justice says,—"There cannot be a doubt that the yard is a part "of the prison; for the ninth section of the last act, meaning the "act of 1784, allows to debtors the liberty of the yard, but not "to pass without the limits of the prison." As the act of 1822, above cited contains none of this ambiguous language; alludes to no confinement to the limits of the prison; nor the debtor's continuance as a true prisoner, in the custody of the gaoler; and as the language is general, which is employed in the grant of power to the Court of Sessions to fix and determine the boundaries of gaol yards, and change and alter them from time to time as to them may seem proper; we are led to the conclusion that the decision in *Baxter v. Taber*, so far from having settled the question depending in this cause, cannot be considered as in any essential particular resembling it. And even if it be conceded that the decision in that case rests on sound principles of construction according to the laws then in existence, it cannot be viewed as having any important influence on the decision of the case before us, depending on laws of a very different character; evidently indicating an intention to grant greater indulgence than formerly to the debtor, and to extend the liberties of the yard beyond the line which the Court in the above case considered as bounding them.

Independently, then, of authorities, what are the objections to the defence which has been made, and the decision of the Court

below? It is urged that it is impolitic to sanction the order of the Court of Sessions. The answer is, the legislature has given to that Court the power to fix the boundaries as to them may seem proper. *They* have the discretionary power, not this Court. And though we may be of opinion, that the order in question shews an unusual and extraordinary exercise of this discretionary power, it by no means follows that this Court is bound or authorized to pronounce it illegal and void on that account. The language of the statute by which the authority to establish the limits of the gaol yard to the several gaols in the State is given is as general as that by which the power is given to the Court of Sessions to lay out and establish highways. That Court may abuse that power by laying out roads which are wholly unnecessary and unreasonable, and burthensome to those who are bound to make and repair them. The Court in this county for instance, have power to lay out a new highway from this town to Bowdoin College, parallel to and forty rods distant from the present county road. Now supposing they should do this, has this Court power to pronounce the adjudication as to expediency, and the location of the road, void, and refuse to sustain an indictment against any town through which the road passed, for neglecting to repair it? It is evident that a great change has taken place in public opinion on the subject of imprisonment for debt; and a disposition is becoming more and more manifest, if not to abolish it, at least to render it as little irksome as possible; in fact, to render it scarcely a privation of liberty. In proof of this we might mention among other things, the recent statute of this State in relation to imprisonment for debt on execution. But without indicating any idea of our own as to the wisdom and policy of legislating in conformity to these opinions; still, considering their existence, and increasing prevalence; and considering also the difficulties and doubts which attend the construction of the statute relating to the powers of the Court of Sessions, as contended for by the counsel for the plaintiff;—the present case seems to be a proper one, in which to look to the consequences of the decision of the Court; one of which will be, the unexpected prosecution, liability and suffering, of hundreds of innocent sureties on prison bonds, who may be

involved in ruin in consequence of those acts of their principals, which have been almost universally deemed lawful. In common cases, where the principles of law are clear and settled, the Court ought never so far to regard consequences as to hesitate in pronouncing the law distinctly; but, on the contrary, where doubt and uncertainty attend the construction of a statute, and the application of a new principle may disturb titles, or impair rights, create dangerous responsibilities, or produce consequences extensively injurious, the more safe and proper course seems to be, for a Court to incline to that decision which will sanction proceedings and contracts as they were understood and intended when made or adopted, and be least prejudicial to the community. Should the legislature be of opinion that, in any of the counties, the Court of Sessions has given too broad a construction of their discretionary powers, in relation to the establishment of the boundaries of gaol yards, they can easily correct the evil, and introduce something like uniformity upon the subject, by declaring by law that the gaol yard shall not, in any county, be so established as to contain more than a certain number of acres or rods. But this is a subject over which this Court has no control; and with which of course, it will not interfere.

But it has been urged that if the above mentioned order of the Court of Sessions should be sanctioned, every man's house in the county is at once placed under the supervision and command of the Sheriff; who may at all hours enter it according to his will and pleasure. This is not true. He has no such power. If a prisoner shall have escaped from prison or from actual custody, and concealed himself in another man's house in the county, the Sheriff may enter the house to retake him; because the owner of the house cannot make it a *castle for others*; though the law for certain purposes considers it as his own castle. But the Sheriff would have the same right of recaption in the cases above stated if the limits of the gaol yard included only the land belonging to the county and adjoining the prison. If a person has given bond according to laws in force in this state, and obtained the liberty of the yard, the Sheriff has no kind of control over his person, except what is given by the *Stat.* 1822, *ch.* 209; he cannot touch him, and of course he cannot pursue him into the houses or

possessions of any persons in this county ; neither does the debtor, after having given bond according to law, and obtained the liberty of the yard, acquire thereby any right as against third persons. He cannot thereby gain a right to go into the house of any man, without his express or implied permission. If he should, he will be a trespasser. The act of 1822 only provides in the eighth section, " that nothing shall be considered a breach of any bond " which has been or may be given to obtain the liberty of the gaol " yard, except the passing over and beyond the exterior limits and " bounds thereof, as by law established, or neglecting to surren- " der himself to the gaol keeper as required in the 25th section " of this act." Thus all the anticipated danger to the property, liberty, and independence of the citizens in the county vanishes in a moment.

Without dwelling any longer upon the cause, we are satisfied, that the opinions and judgment of the Court of Common Pleas to which the exception was filed, are correct; and accordingly the

Judgment is affirmed.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE COUNTY OF

LINCOLN.

MAY TERM,

1824.

PARSONS *vs.* HALL, EX'R.

Where a demand against the estate of a deceased testator was submitted to referees, who made an award in favor of the creditor; after which the executor found among the testator's papers a receipt from the creditor to him, dated a short time previous to his decease, but subsequent to the origin of the debt, and being in full of all demands;—in *assumpsit* on the award it was holden that the executor might shew this receipt in bar of the action.

THE plaintiff in this action, which was *assumpsit*, having a demand against the defendant's testator, they mutually agreed, by a memorandum in writing, without seal, to submit it to the determination of three referees, and to abide by their award. The defendant appeared at the hearing before the referees, and after remaining a short time, went away, observing that he had no doubt but they would do right. The award was in favor of the plaintiff for the amount of his demand, and the defendant refusing to perform it, this action was brought upon the agreement.

At the trial of this cause, which was before the Chief Justice at *May term* 1823, the defendant produced a paper purporting to be a receipt signed by the plaintiff, in full of all demands against the testator, and bearing date a short time before his decease; which the defendant offered to prove to be a genuine receipt, that he had found it among the testator's papers since the making of the award, and that he had no previous knowledge of its existence. It was admitted at the same time, that the referees were not

guilty of any fraud, corruption, or partiality in making their award.

The Chief Justice refused to admit the evidence thus offered, but saved the point for the consideration of the whole Court, and directed a verdict for the plaintiff accordingly.

Orr and *E. Smith* for the defendant, argued from the nature of the action, it being *assumpsit*, and not *debt*, that the defendant was entitled to set up any equitable defence he might have; and that therefore the receipt should have been admitted. They insisted, moreover, that the party who has not exhibited any particular demand to referees, may always have an action on it afterwards, notwithstanding the award;—and *a fortiori* may shew it in answer to a suit on the award, because this avoids circuity of action. So if the award is founded in mistake, or manifest injustice, it may be corrected. *Ravee v. Farmer* 4 *D. & E.* 146. *Seddon v. Tutop* 6 *D. & E.* 607. *Webster v. Lee* 5 *Mass.* 334. *Hodges v. Hodges* 9 *Mass.* 320.

Greenleaf and *Ruggles*, on the other side, cited the following authorities to shew that the defendant was not entitled to go behind the award for any matter of defence which could have been shewn to the referees. *Sheppard v. Watrous* 3 *Caines* 166. *Kyd on Awards* 242. 1 *Esp.* 378. *Phil. Evid.* 305. *Newland v. Douglas* 2 *Johns.* 62. *Barlow v. Todd* 3 *Johns.* 367. *Cranston v. Kenney* 9 *Johns.* 212. 14 *Johns.* 96. 8 *East.* 344. *Perkins v. Wing* 10 *Johns.* 143. *Wheeler v. Van Houten* 12 *Johns.* 311. And they contended that for aught appearing in the case, the existence and loss of the receipt may have been proved before the referees, and the whole matter adjudicated upon by them;—but if not, it was the laches of the defendant.

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

In an action upon an award, or on the bond given for the performance of it, the general principle of law is that the *merits* of the award cannot be examined, nor can it be *impeached*, except for the corruption, partiality or misconduct of one or more of the arbitrators, or on account of some fraudulent concealment of facts

by one of the parties. These positions are supported by the following cases. 1 *Saund.* 327. *note d.* 2 *Burr.* 701. *Kleine v. Catara* 2 *Gall.* 61. 2 *Vesey Jr.* 15. *Newbury Port Mar. Ins. C. v. Oliver & al.* 8 *Mass.* 402. *Homes v. Aery* 12 *Mass.* 134. The receipt which was offered in evidence and rejected, if genuine and actually given at the time it bears date, viz—a short time before the decease of the testator, must in all human probability have been in the recollection of the plaintiff, at the time of the hearing before the arbitrators, and yet might have been wholly unknown to the defendant, as was alleged to be the fact. —The defendant, being an executor, and no party to the receipt, cannot be presumed to have known of its existence, till he found it among the papers of the deceased; and might have had no just ground to believe that the claim, which the plaintiff exhibited, had been paid and satisfied, until he examined the terms of the receipt. —The plaintiff and defendant stood on very different grounds before the arbitrators;—the one in his *own right*;—the other in his *representative capacity*; the *defendant* a stranger to the concerns of the estate, except so far as he was informed by *others*, on examination of books and papers;—the *plaintiff*, perfectly unacquainted with all the facts relating to his own claim against the estate, and the claim made against him.—Now, under these circumstances, if the receipt was really given by the plaintiff to the deceased at the time mentioned, in consequence of the payment of the claim which he presented to the arbitrators, and which was allowed by them, there is very strong ground to believe that he *fraudulently concealed* this fact from the arbitrators, for purposes wholly unjustifiable. If such was *the fact*, the award ought not to be sanctioned.—Upon consideration of the peculiar circumstances of this case, we are of opinion that the verdict ought to be set aside and a new trial granted, that the facts in relation to the receipt,—its genuineness, and the alleged payment, upon which it purports to have been given; and also the question of concealment, may all be investigated by the Jury.

Verdict set aside and a new trial granted.

Rowe *vs.* Hamilton.

A feme covert cannot bar her right of dower by any release made to the husband during the coverture.

Dower, unde nihil habet. The tenant pleaded in bar, that he was one of the lawful heirs of *John Rowe*, the demandant's husband, and claimed a portion of the lands by descent ;—and that by a certain deed indented between the husband in his life time, and the wife, they mutually agreed to live separate and apart ; and the husband therein agreed to pay and did pay her four hundred dollars for her own separate use and maintenance ;—and acquitted to her the right of dower which she had in the estate of her former husband ;—and released to her his right, by virtue of the marriage, to any estate of her late farther ;—and covenanted that he would not revoke a letter of attorney he had given to her to receive her share in her father's estate to her own use ;—and that she might at all times thereafter live separate and apart from him ;—wholly renouncing his marital rights to her person and society, and to any estate she might afterwards acquire ;—and further covenanted that neither he nor his executors or administrators should ever intermeddle with such estate, or interrupt any disposition she might make of it ;—in consideration whereof the demandant on her part covenanted and agreed with the husband to accept and take the same in full satisfaction for her support and maintenance, and also all alimony whatever, during her coverture ; and also in full satisfaction of her right of dower in her husband's estate ;—and averred that the husband in his life time, and his executors and administrators, had faithfully kept and performed all the covenants on his part to be performed, &c.

To this the demandant replied, that at the time of making and sealing the said instrument she was covert of the said *John Rowe*, her husband, and so continued to the time of his death. Whereupon the tenant demurred in law.

Orr, for the tenant, relied on the colonial ordinance of 1641, *Antient Char. p.* 99, which provides that all wives shall be

endowed of the estate of which the husband was seised, unless released by the feme *by deed acknowledged before a magistrate.* This ordinance, he contended, expressly recognised the power in a feme covert, to release her claim to dower by deed acknowledged ; and it did not expire with the first charter as is said in *Fowler v. Shearer* 7 *Mass.* 20—but was expressly revived by the first acts of the provincial legislature under the charter of William and Mary. *An. Char.* 213, 229. And the law to be deduced from these statutes is, that a feme covert, by her own deed, may estop herself from claiming dower in the estate of her husband ; and such deed is thus made equivalent to a fine levied by her. *Eare v. Snow & al.* 1 *Plowd.* 514. 2 *Bac. Abr.* 139, 140. 2 *Rol. Abr.* 395. 10 *Co.* 43. 1 *Dane's Abr.* 94.

Longfellow for the demandant.

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

The plea in bar discloses an agreement under the hands and seals of the demandant and her late husband, made during the coverture, whereby for certain valuable considerations therein expressed, she covenanted not to demand dower in any of his estate ; and the question is, whether the plea is a good bar to the action ; or, in other words, whether the agreement or covenant is legal and valid.

It seems to be a well settled principle of the common law that a *husband* cannot by deed convey lands to his *wife* during the coverture. This principle is recognised and adopted by this Court in the case of *Martin v. Martin* 1 *Greenl.* 394 ;—and it would seem *as* clear, and perhaps *more so*, that a *wife* cannot by deed convey her own lands to her *husband* during the marriage.—Whatever decisions may have taken place in the Courts of Chancery, extending the powers of a feme covert in certain cases, over her own property, or sanctioning contracts between baron and feme, the common law, by which we must be governed in our decision, considers the husband and wife so far *one person*, as to disallow such conveyances and declare them to be void. These principles are founded upon what have been considered reasons of sound policy. Neither can the wife convey her own lands to a

stranger, unless the husband joins with her in the deed. Such is her legal incapacity in these particulars. The principles of law applicable to cases of this nature are fully and clearly stated by the Court in the case of *Fowler v. Shearer*, cited in the argument. The only instance in which she can *at law* affect her own interest in real estate by *her own separate deed*, is by a release of her right of dower to the grantee of her husband. In this case by the usage or common law of New England, such release, made in consideration of the husband's conveyance, may be considered as effectual as though she had *joined* with him in his conveyance, and thereby released her right. The principles of the common law of *England*, as adopted in this State and *Massachusetts*, seem not to be contested by the counsel for the tenant ; neither does he contend that he has any defence, provided the case of *Fowler v. Shearer* is to be received by this Court as an authority, and founded on correct principles. But it is urged, that though the covenant of the demandant, which is pleaded in bar in the nature of a release of dower, may not be good at common law, still it is good and effectual in virtue of the ordinance of the Colony of *Massachusetts Bay* passed in 1641, as *revived* and *continued* by certain provincial statutes, which were not noticed or considered by the Court in the decision of *Fowler v. Shearer*. This renders it necessary for us to examine those statutes and compare them with each other and with *that* decision.

The abovementioned ordinance secured to the wife her dower, unless she had barred herself by *some act* or *consent*, signified by *writing under her hand*, and acknowledged before some magistrate. This ordinance expired with the first charter. But by a provincial statute passed in *June* 1692, it was enacted that all the local laws respectively ordered and made by the then late government and company of the *Massachusetts Bay*, and the then late government of *New Plymouth*, should remain and continue in force until the tenth of *November* of that year. Before that day a second act was passed, by which the preceding act of *June* was continued in force " until the general assembly should take *further order*." No *further order* was taken by the assembly until the year 1697, when the statute was passed, entitled " an act for registering

deeds and conveyances." The *first* section of this statute prescribes how deeds shall be executed, acknowledged and recorded; and their effect when *not so* acknowledged and recorded. The *second* section prescribes the proceedings which are to be had for proving a deed when a grantor shall refuse to acknowledge it; and declares that the "grantee or vendee filing a copy "of his deed so proved, in the Register's office, shall thereby "secure his title in the mean time, and the same shall be ac- "counted sufficient caution to every other person or persons "against purchasing the estate in such deed mentioned to be "granted." Then follows this proviso—"Provided that nothing "in this act shall be construed, deemed or extended to bar any "widow of *any vendor* or *mortgagor* of lands or tenements from "her dower or right in or to *such* lands or tenements, who did not "*legally join with her husband* in such sale or mortgage; or other- "wise *lawfully* bar or exclude herself from such her dower or "right." It is true that *Parsons C. J.* in delivering the opinion of the Court in *Fowler v. Shearer* did not take any notice of the two provincial statutes of 1696, *reviving* and *continuing* the ordinance of 1641 in force; and the reason probably is that he considered them as superseded and virtually repealed by the abovementioned statute of 1697. But it is not important to inquire into the *reasons* of the omission, because we consider the *omission itself* as unimportant. The *writing under the hand of the wife*, mentioned in the ordinance of 1641, is described to be one "which shall bar her from any right or interest in such estate,"—thus leaving it to be decided by the principles of the common law, *what* "writing under her hand" shall be deemed sufficient for that purpose. Therefore, unless a release by the *wife* to the *husband*, is a "writing" of that description, according to the principles of the common law, the ordinance of 1641, even if in force *now*, will not avail the tenant in the present action.

But we consider the statute of 1697, as superseding all anterior statutes and provisions in relation to the question under consideration. The language of that statute, so far as is contained in the proviso, and the meaning of the legislature in using it, we apprehend cannot easily be misunderstood. The whole act has relation to deeds of sale and mortgage;—the mode of their exe-

cution, acknowledgement, proof, registry, and their effect ;—and the deed or instrument by which dower is to be barred, is a deed or instrument by which a wife extinguishes her right of dower in lands *so conveyed by her husband.* It has reference to nothing else but a release of dower to the *grantee* of the husband. It does not contemplate a release *by* the *wife to* the *husband.* Besides, the statute speaks of her barring herself by *legally joining with her husband* in such sale or mortgage ; or otherwise *lawfully* barring herself ;—leaving it to the common law to determine what *is a lawful bar* or release of her dower. This review of the ordinance of 1641 and the several subsequent provincial statutes, clearly shews that the Court, in the decision of *Fowler v. Shearer,* examined every principle of common or statute law which had any bearing upon the cause. We are satisfied with the principles on which that decision is founded ; and are of opinion that the plea in bar is bad and insufficient in law ; and the tenant is entitled to judgment.

THATCHER *vs.* YOUNG & AL.

Where in an action by a judgment creditor against a sheriff, the writ contained an allegation of the misconduct of one of the defendant's deputies who served the original writ on the plaintiff's debtor, and wasted the goods attached ; and of another deputy in not serving and collecting the execution ; and the jury found the *latter* deputy guilty ; and afterwards an action was brought, for the benefit of the latter deputy, in the name of the sheriff, upon the bond of the deputy who served the writ ;—it was holden that it was not competent for the plaintiff to shew, against the record of the former judgment against him, that the nonfeasance of the deputy who had the execution, was caused by the prior misconduct of him who served the writ.

THIS was an action of debt, brought by the late sheriff of this county against one of his deputies, on his bond of office ; to which, after oyer, the defendant pleaded generally that the condition was performed. The plaintiff replied that one *Dorr* commenced an action against one *Hilton*, and delivered his writ for service to the defendant *Young*, who attached personal property of *Hilton*,

and made return of the writ;—that judgment was recovered against *Hilton*, and the execution thereon delivered to one *Bowman*, another of the plaintiff's deputies, to be served;—that neither the sheriff nor either of the said deputies kept said property;—that *Bowman* committed *Hilton* to prison, but nothing was ever obtained of him;—that thereupon the plaintiff was sued by *Dorr* for the alleged misconduct of the plaintiff and his said deputies, in not satisfying the execution out of the property attached, and for suffering the same to be wasted and lost;—and that in said action *Dorr* recovered against the plaintiff the amount of his debt against *Hilton*, and costs, which the plaintiff had paid.

The defendants rejoined that the recovery against the plaintiff was not had for the fault or neglect of *Young* in his said office. And the plaintiff rejoined that the recovery against him was for the official misfeasance and malfeasance of *Young*.

At the trial before the Chief Justice, the plaintiff read in evidence a copy of the writ and judgment in the case of *Dorr* against him, in which it appeared that the sheriff pleaded that neither he nor either of his said deputies were guilty, &c. and the jury found that the said *Bowman* was guilty, and assessed damages for the plaintiff *Dorr* to the amount of his debt and costs. The plaintiff then offered parol proof to shew that the judgment was in fact recovered for the negligence and misfeasance of *Young*, *prior* to the misfeasance of *Bowman* with respect to the property so attached and the proceedings under the execution. But the Judge excluded the evidence, and nonsuited the plaintiff, reserving the question for the consideration of the whole Court.

The cause being called up at this term for argument, *Allen* for the plaintiff, moved the Court for leave to replead and file a new surrejoinder, alleging that the judgment against him was for the misconduct of *Bowman*, *occasioned* by the *prior misconduct* of *Young*, in not keeping the property attached, but suffering it to go back into the hands of *Hilton* the debtor;—and to shew that this motion was within the power of the Court, and the practice in similar cases, he cited *Perkins v. Burbank* 2 *Mass.* 81. *Makepeace v. Boyce* 2 *Mass.* 430. *Aiken v. Sanford* 5 *Mass.* 499.

Parkinson v. Wentworth 11 *Mass.* 26. *Limerick Academy v. Davis* 11 *Mass.* 118. *Brock v. Hutchinson* 11 *Mass.* 124. *Phillips v. Bridge* 11 *Mass.* 242. *Langdon v. Potter* 11 *Mass.* 316. *Ames v. Savage* 14 *Mass.* 425. *Conner v. Henderson* 15 *Mass.* 319. 12 *Mass.* 513. 15 *Mass.* 494.

R. Williams, on the other side, denied the application of these cases ; and contended that no motion to replead could be heard till the nonsuit was first set aside ; and *this* question must be disposed of, according to the facts stated in the Judge's report.

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

Though the plaintiff's motion is somewhat novel in this stage of the cause, this not being the point reserved ; yet though we deny the motion, we do not do it on that account, but because we think it would not avail the plaintiff, nor change the nature of his claim. We have been furnished with the new surrejoinder which he has moved for leave to file. It seems to be a departure from the replication, and directly at variance with the verdict and judgment therein set forth, and which he offered in evidence at the trial ;—and as this motion is addressed to our discretion, we look to the whole cause, and decide upon the usefulness of such a surrejoinder. Besides, he does not deny the correctness of the charges made against *Bowman*, of negligence and omission, nor the correctness of the verdict as to him ; but would now allege in the proposed surrejoinder that such negligence and omission on the part of *Bowman* were occasioned and produced by the negligence and misconduct of *Young*, in not keeping the property by him attached, but suffering it to go back into the hands of *Hilton* the debtor. This is only an indirect mode of contradicting the verdict and judgment, neither of which is liable to impeachment in this manner. Besides, the wrong of *Bowman* is none the less because occasioned and produced by *Young* ; at least so far as relates to the present action. It is not easy to perceive how such could be the fact ; each deputy acting independently of all others. The present action is understood to be brought for the use of *Bowman* ; but if the facts now offered could ever have

availed him, they should have been urged in the defence of the action by *Dorr* against the present plaintiff.

Then as the pleadings in the case now stand, it appears that the point in issue was whether the judgment recovered by *Dorr* was for the misfeasance or neglect of *Young*. The rejoinder denied,—the surrejoinder affirmed it. The plaintiff on the trial read in evidence a copy of the record of the case *Dorr v. Thatcher*, by which it appeared that the declaration charged both the deputies, *Young* and *Bowman*, with official negligence and misconduct; and *Thatcher*, the sheriff, pleaded that neither he nor either of his deputies was guilty. The jury by their verdict found the said *Bowman* guilty, and him only. The proof offered and rejected by the Judge who sat in the trial of the cause, was intended to shew that the judgment was not recovered against the present plaintiff for the negligence and misconduct of *Bowman*, but "for "the negligence and misfeasance of said *Young*, *prior* to the mis- "feasance of said *Bowman* with respect to the property so "attached, and the proceedings in said execution ;"—and the question is whether it was properly rejected. It does not appear by the *record* that *Young* was *ever* guilty, either before or after *Bowman* was ;--but if he was, the only mode of proving that a judgment was recovered for *his* misconduct is by the *record* of such judgment, and the record in the present instance expressly negatives that fact. It is evident that the jury, on examination of the evidence, found it applicable to the charge against *Bowman* only, and accordingly found him guilty. The effect of the rejected proof, if admitted, would have been to contradict the record of the verdict and of the judgment thereon rendered ; and of course it was properly rejected, and the nonsuit is accordingly confirmed.

CATE *vs.* THAYER.

The line of the town of *Dresden* being described, in the act of incorporation, as running a north-north-east course, *including the whole of a certain farm*, when in truth *that* course would *not* include the whole farm ;—it was resolved that the line of the farm should prevail, as being the more certain monument, and more evidently intended by the legislature.

This was a writ of entry for possession of certain lands described as lying within the town of *Alna*. The tenant claimed the premises under a sale by the collector of the town of *Alna*, for non-payment of taxes ; and the demandant claimed them as lying within the town of *Dresden*, and being part of the estate of the late *Dr. Gardiner*.

In a case stated by the parties, it was agreed that the premises were part of the land formerly belonging to the estate of *Dr. Gardiner* ;—and that by the act incorporating the town of *Dresden*, the line of that town was described as "beginning on the "easterly side of *Kennebec* river, on the line that divides the town "of *Pownalborough* from the town of *Woolwich* ; from thence "running upon the said line three miles ; from thence upon a "straight line to the middle of the great bridge on the county "road leading from *Sheepscut* river to *Kennebec* river, erected "over *Dr. Gardiner's* mill-brook, so called ; *from thence on a* "*north-north-east course* to the northern line of said town, *including* "*the whole of the farm or land there belonging to the estate of the said* "*Dr. Gardiner* ; from thence by the said northern line to *Kenne-*"*bec* river, thence down the said river to the first mentioned "bounds," &c. It was further agreed that a line running from said bridge *a due north-north-east course*, would leave the premises in the town of *Alna* ;—but that a line running from said bridge to the northerly line of said town *so as to include the whole of the land belonging to the estate of Dr. Gardiner at the time of the incorporation*, would leave the demanded premises in *Dresden*. These two parts of the description of the line in the act of incorporation being inconsistent with each other, the question was, which of them should prevail ? The line had never been agreed on between the towns, both of them claiming the land in dispute ; but

it was agreed that the estate of *Dr. Gardiner* was surveyed, and its limits well known, long before the incorporation.

This question was submitted without argument, by *Sheppard* for the demandant, and *Allen* for the tenant;—the latter only referring to *Howe v. Bass* 2 *Mass.* 380. *Pernam v. Wead* 6 *Mass.* 131. *Aiken v. Sanford* 6 *Mass.* 494.

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

It appears that long before the town of *Dresden* was incorporated, *Dr. Gardiner's* farm or tract of land had been run out and located; but the division line between *Alna* and *Dresden* had never been agreed upon; but, on the contrary, the towns have been constantly disputing respecting its true position. By the terms of the act incorporating *Dresden*, it seems very clear that the legislature intended that the *Gardiner* farm or land should all be included in that town;—and it seems also from the language of the act that they must have supposed and believed that a line running north-north-east from the bridge to the north line of the town would include it. It now appears, however, that it will not; but that such a line leaves the demanded premises in *Alna*. What then is the construction to be given to the grant to *Dr. Gardiner* ? The first directory is the manifest intention of the legislature, that the *Gardiner farm* should be included in *Dresden*. The second is that rule of construction which requires that what is *more* certain should prevail over that which is *less* certain, where there is any disagreement between different descriptive expressions employed in a deed;—or, to use more simple language,—that where the *length* or *course* of a descriptive line will not agree with a known and fixed monument which is named in the deed, then the inaccuracy of the line must give way to the certainty and truth of the monument. This is a perfectly familiar principle of construction, applicable in all cases, excepting, perhaps, those wherein the disagreement or contradiction is unusual and extravagant. It is needless to cite authorities in support of this position. We do not see why this rule of construction is not applicable in the case before us. *Both parts* of the descriptive character of the line from the bridge to the north line of the town

cannot be true, because they are at variance. The given course of the line does not include the whole of the *Gardiner* farm or land, but only a part of it. In the present case the *Gardiner* farm or land is a known and immoveable monument. And as the course of the line varies from this monument, it must, so far as it varies from it, give place to the monument; in the same manner as though the line from the bridge had been stated to run a course north-north-east by the margin of a certain river, to the north line of the town. In such a case, if there be a variance either way, the course of the line must give place to the course of the river, as the more certain description;—but there could be no mistake as to the margin of the river. In the case at bar, instead of the words " including the whole farm," &c. we must read—" or so as to include the whole farm," &c. There is no other mode of effectuating the intentions of the legislature, and of preserving a consistent course of construction. It is our opinion that the action cannot be maintained. The plaintiff must be called, according to the agreement of the parties.

MARR *vs.* PLUMMER.

Where a note was indorsed and delivered to one person, for the use of another who was absent, the indorsee paying no consideration for the transfer; and an action was commenced against the maker, the indorsee being still absent, and having no knowledge of the facts;—but after his return he supported the suit, and claimed the note as his own;—it was holden that this subsequent assent was a ratification of the prior transactions; and that the objection that the plaintiff had no interest in the note, at the commencement of the suit, could not be sustained.

Assumpsit by the indorsee against the maker of a promissory note, dated *May* 26, 1818, payable to *James Marr*, the father of the plaintiff, or his order, in three years from the date with interest.

It appeared at the trial of this action before *Weston J.* that soon after the note was dated it was indorsed by the payee in

blank, and delivered to *R. W.* to secure a debt due to the proprietors of the Kennebec purchase;—that soon after the note became due, the debt for which it was pledged having been otherwise adjusted, the wife of the payee, he being absent, and having authorized her to act for him in his absence, particularly in reference to this note, sent for the note, having a written order from her husband therefor, and directed a suit to be brought upon it in the name of her son the plaintiff, who also was then absent, having no knowledge at that time of what was done;—but on his return he supported the suit, and was present at the trial, claiming title to the note. The suit was commenced soon after the plaintiff attained the age of twenty-one years, and it did not appear that he had paid his father any consideration for the transfer of the note. It was also proved that the payee was in embarrassed circumstances, and that he had conveyed to the plaintiff other property to a considerable amount.

The claim of the plaintiff was resisted on two grounds;—first, that the note was obtained originally by fraud; to which point evidence was offered, but the jury found it for the plaintiff;—second, that at the commencement of the suit the plaintiff had no legal title to the note, and the action was brought without his direction or knowledge.

But the Judge ruled, and so instructed the jury, that the plaintiff having ratified and approved the act of his attorney, the note having been delivered to the latter indorsed in blank, and the suit directed in the name of the plaintiff, by the agent of the holder and proprietor, the plaintiff avowing the suit, and claiming an interest in the note, he had made out a sufficient title thereto, to authorize him to sustain the action in his own name. A verdict was thereupon returned for the plaintiff, which was taken subject to the opinion of the whole Court upon the correctness of the Judge's instructions to the jury.

Stebbins, for the defendant, contended that when the action was commenced, the plaintiff had no interest in the note, and so no cause of action; and there is no honest reason to be given why a party should be permitted to sue in another's name, when the case would admit a suit in his own. A transfer is a contract; to

which it is essential that there should be *parties*, and a *delivery* of the thing sold. Yet here, the son was absent in a distant region, having no knowledge of the transaction, paying no consideration whatever, and having no agent, general or special, to act for him. Can he thus be made the owner of the note without his knowledge or consent, and this, too, by *contract*? No delivery having been made to the plaintiff, the note was never *transferred* to him. *Chitty on Bills*, 91, 116. *Grant v. Vaughan* 3 *Burr.* 1516. If the *bearer* of a note, which he did not fairly come by, can sustain no action upon it; neither can an indorsee, in circumstances like the present. *Miller v. Race* 1 *Burr.* 460. *Hilton's case* 2 *Show.* 235. *Bowman v. Wood* 15 *Mass.* 534.—To cause a suit to be instituted in the name of a person having no interest in the demand, is by our law an indictable offence; and such was this suit when commenced. The plaintiff's claim therefore originates *ex turpi*, and it is against the policy of the law to enforce it.

R. Williams, for the plaintiff, answered that it was enough if the person holding a note had power to discharge it. It is not material whether the plaintiff held the note absolutely, or in trust; —if he could discharge the maker it was sufficient. And this any one may do, who becomes possessed of a negotiable note without fraud. *Little v. O'Brien* 9 *Mass.* 423. The indorsee is never required to shew a consideration for the indorsement. 3 *Cranch* 208.

MELLEN C. J. delivered the opinion of the Court at the ensuing term at *Augusta*.

By the report it appears that the note in question was duly indorsed by the payee in blank, and afterwards put in suit in the name of the plaintiff, by the special direction of the authorized agent of the payee;—and that though the plaintiff was absent when the action was commenced, he was present when it was tried,—maintaining it in person, and claiming an interest in the note. It is urged that the note was never *delivered* to the plaintiff, and so no interest vested in him prior to the commencement of the action. A *formal* delivery was not necessary. It is true

the suit was instituted without the plaintiff's knowledge; but there is no proof that it was done with any corrupt or improper motive; and as the plaintiff pursued the action, claiming the benefit of it, this sanctions it from the beginning, and it therefore is not open to objection by the defendant on this account.

We do not perceive any weight in the circumstance of the payee's embarrassment, or the want of proof of the plaintiff's having paid a full consideration for it. In an action founded on a note payable to bearer, the plaintiff is not holden, except in suspicious cases, to prove how he came to the possession of it. The possession and production of it in court, is *prima facie* proof of his title to it. *Chitty on Bills*, 51. In an action by an indorsee against the maker of a promissory note, the plaintiff has only to prove the handwriting of the promissor, when formally denied, and the handwriting of the indorser. On these facts he is entitled to recover, without proving or even alleging in the declaration that the indorsement was made for a valuable consideration. This is a fact of no importance to the maker, unless he has a defence which would be good as between him and the promissor only, and not against an indorsee for a valuable consideration, without notice. See *Little v. O'Brien* 9 *Mass.* 423. 3 *Cranch* 208. *Chitty on Bills* 51, 59, 60, 63. 175 *in notis*. *Tyler v. Binney* 7 *Mass.* 479. *Bowman v. Wood* 15 *Mass.* 534. *Lovell v. Everton* 11 *Johns.* 52.

It seems that the defendant was permitted to introduce proof for the purpose of impeaching the note on the alleged ground of fraud, as fully as though the action had been in the name of the original promissee; but he failed in the attempt. After this we do not perceive any reason for him to complain. The judgment in this action will protect him against any other on the note; and the plaintiff's discharge of the judgment will be good and effectual. The motion to set aside the verdict is overruled, and there must be judgment thereon for the plaintiff.

KEEN *vs.* SPRAGUE.

Where a minor, at a great distance from his father, entered into a contract of labor for another, which he performed; and the party afterwards refused payment, insisting that he acted only as the agent of a third person, with whom the minor was induced, by his own destitute situation, to settle, taking his negotiable note payable at a distant day for the balance due;—it was holden that the father was not concluded by these proceedings, but might instantly maintain an action for the wages of the son, against the party with whom he originally contracted.

A new trial will not be granted for the purpose of discrediting a witness by shewing contradictory testimony from his own deposition given at an early stage of the same cause; the deposition being on the files of the Court, but accidentally omitted to be read.

Assumpsit for wages earned by the plaintiff's son, a minor in the service of the defendant, at a place in the British province of New Brunswick, called *Miramichi*. At the trial at the last term before *Weston J.* the plaintiff's son being admitted a witness, though objected to by the defendant, testified that in *May* 1820, he went from his father's house in this county, *without* his consent, to *Miramichi*, in company with the defendant;—that he was then little more than nineteen years of age;—that after seeking employment elsewhere, he agreed to work for the defendant at twenty dollars per month;—that he was set to work with a company of men who were said to be in the employment of the defendant and of *Eli Sprague* and *Ambrose Snow*, and usually denominated *Eli's* gang, to distinguish them from another company of men who were called the defendant *Nathaniel's* gang;—that the defendant in two or three instances gave him directions about the work, and once attempted to reduce his wages; but refusing to work for a less sum, the defendant told him to continue his labor as before;—that during the time he was thus employed, which was about a year, he received at a store, which appeared to be under the direction of said *Eli* and *Ambrose*, divers goods;—that on applying to the defendant for the balance of his wages the defendant denied that he owed him or had employed him, and referred him to said *Eli* and *Ambrose*;—that he at first refused to apply to them, insisting on payment from the defendant; but afterwards, having no money to bear his expenses home, he did go to *Snow*, who made no ob-

jection to paying him, and did pay him twenty dollars in money, and gave his negotiable note for the balance, deducting the amount of the goods charged to him on the books of the store;—which note his father, on his return, refused to receive in payment for his wages, and which still remained in his or his father's hands; —and that this settlement was made only in consequence of his necessities, the defendant refusing to pay him, and he having no other means to raise money to return to his friends.

The plaintiff proved by other witnesses that his son was hired by the defendant, at the price stated, as the defendant told them; —that they also were hired by him, and labored, in the same manner;—and that *Snow* was reputed insolvent.

The defendant proved by two witnesses that he, and *Eli Sprague*, and *Snow* his partner, transacted business at *Miramichi*, their workmen sometimes being together, and the plaintiff's son being generally employed in what was called *Eli's* gang;—that the son had said that he had labored a year for *Eli* and *Snow*, for whom he also said the defendant had hired him to work; and that he had taken *Snow's* note, which he preferred to *Eli's*, and with which he was perfectly satisfied.

It also appeared that *Eli Sprague*, *Ambrose Snow*, and the defendant all lived in the same house; where all the workmen also boarded when not at work in the woods. And it did not appear whether the lumber which the two gangs got out and prepared for market, was kept separate or together. *Snow's* note was made payable in a year, and was not yet due.

Hereupon the Judge instructed the jury, that if they were satisfied from the evidence, that the defendant hired the son of the plaintiff, without communicating to him his connection with *Eli Sprague* and *Ambrose Snow*, if he was in fact their agent, the defendant was responsible for his wages, notwithstanding he might think proper to direct him to labor with men employed by said *Eli* and *Ambrose*;—that it was the duty of the son to labor according to the direction of his employer;—and that the connection between the latter and the other persons did not impair the plaintiff's claim upon him, provided the defendant hired his son, and did not inform him, until after the labor was performed, that he had any other person to look to but himself;—that if this were

the fact, it was a violation of his contract to refuse payment, and turn the son over to *Snow*;—and that his subsequent settlement with *Snow*, and the note taken by him for the balance, did not exonerate the defendant, founded, as it was, in necessity on the one part, and imposition upon a minor on the other.—Under this direction the jury returned a verdict for the plaintiff; which was to be set aside if the son ought not to have been admitted a witness, or if the Judge's directions to the jury were erroneous; or if the verdict was against evidence, or greatly against the weight of evidence; a motion being filed by the defendant for these two latter causes, at common law.

At this term the defendant was permitted to file a further motion for a new trial, grounded on the fact that the plaintiff's son had formerly given a deposition in the cause; which was on file, and should have been read to the jury here; in which he testified that his father *did* consent to his going to *Miramichi* ;—and that the defendant being absent at the trial, and his counsel also being absent by reason of indisposition, the gentleman who conducted the cause on his part, on that emergency, had no knowledge of the existence of the deposition.

Orr, for the plaintiff, opposed this motion on the ground that the evidence was not necessarily contradictory ; and that the deposition was on the files, and within the knowledge of the defendant ;—and might have been used on the trial, with proper vigilance. The whole case, he said, addressed itself not to the Court, but to the jury, by whom it had been correctly settled.

Allen, for the defendant, contended that his client was merely the agent of *Sprague* and *Snow* ; and that his principals being sufficiently disclosed by the facts in the case, which the son, who was the plaintiff's agent, could not have misunderstood, the defendant was not personally liable. He also objected that a negotiable note having been given in payment, the verbal contract was thereby extinguished ; and that the father, having adopted the agency of the son in entering into the contract, was bound by all his acts relating to it, and consequently by the settlement. Lastly he insisted that if the plaintiff would avoid the settlement,

he must first give up the note which had been received under it, especially as it was negotiable, and not yet dishonored. *Tobey v. Barber* 7 *Johns.* 71. *Badger v. Phinney* 15 *Mass.* 359. *Reeve's Dom. Rel.* 244.

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

The case on the report presents three questions.

1. Was the plaintiff's son properly admitted as a witness ?
2. Were the instructions of the Judge to the jury correct ?
3. Is the verdict against evidence or the weight of evidence ?

As to the *first* question, we see no reason to doubt the correctness of the decision, and this point has not been urged in the argument. The father never consented that his son, the witness, should labor for the defendant on his own account, and for his own benefit ;—and as this action is prosecuted by the father, who claims his son's wages, it is clear that if the witness, *had any interest* or *bias* on his mind, it must have been *against* that interest or bias that he testified. Of course this objection fails.

As to the *second* question—it appears that the fact was properly left to the jury, whether the defendant hired the plaintiff's son *without communicating to him his connection with others*, if there was any such connection ; and the jury have found *that he did*. They have thus found that the labor was done on the credit of the defendant, and in reliance on his promise to pay for it ;—they have found that if the defendant was in fact the *agent* of others in making the contract, he did not *act as such*, or make his agency known until after the labor was performed. In such cases the promise binds the man who makes the contract. *Sumner Adm'r. v. Williams* 8 *Mass.* 198. *Mauri v. Heffernan* 13 *Johns* 58. *Rathbon v. Budlong* 15 *Johns.* 1.

With respect to the *note* given by *Snow*, it seems it was made payable to the plaintiff's *minor son*, for the balance due for his labor ; according to the settlement made between them. This adjustment was made and the note received by the *son* without any authority from the *father* ; and on the son's return, the *father absolutely refused to receive it* ; and it seems *Snow* is considered as insolvent. Under these circumstances it is clear the note never

was sanctioned by the father ; and as he never *received* it, he is not to suffer because it has not been *returned* to *Snow* ; and if the *son* has *retained* it improperly, the father is no more answerable for *that neglect*, than he was for his conduct in undertaking to discharge the original demand by *taking* the note of a man unable to pay it.

In addition to this, all the evidence which was offered to shew that the defendant took an undue advantage of the situation of the son—a stranger in a strange land—at a great distance from his home and his friends, has been considered by the jury, who had a right to consider it, and, if they thought proper, to pronounce the defendant's proceedings an imposition. Their verdict is satisfactory proof that in their opinion the note was given for the purpose of imposition, and that the plaintiff's son was induced to receive it under the influence of that imposition. It is a satisfaction to us to find the *law* and *equity* of the case so perfectly agreed. The motion to set aside the verdict on account of the decision and instructions of the Judge cannot be sustained.

As to the motion for a new trial, at common law, on account of the verdict being *against evidence*, or *greatly* against the *weight of evidence*, as alleged ; we need only say that the facts reported, do not, in our opinion, present any foundation on which such a motion can be supported—and the Judge who tried the cause has not certified to us any dissatisfaction with the verdict.

Neither do we feel disposed to disturb the verdict for the reasons alleged in the motion filed at the present term. The deposition of the witness varies only in one particular from his testimony on the stand ; in all others it is entirely consistent ; and is moreover supported by other witnesses who testified in the cause, and the whole was left to the jury. Besides, the counsel for the defendant knew of the existence and contents of the deposition, which was also on the files of the Court ; and in communicating the facts of the cause to the gentleman who argued it for him to the jury, it was incumbent on him to have stated this also.

Judgment on the verdict.

WHITTIER *vs.* GRAFFAM.

If the maker of a promissory note be absent at the time it falls due, the demand of payment should be made *at his domicil*, if he have any ;—otherwise, diligent search for him will be sufficient.

Notice of the non-acceptance or non-payment of a promissory note or bill of exchange may be given through the post office ;—*aliter* of a *demand of payment*, unless by express consent of the maker or drawer, or by known usage regulating the contract.

IN this action, which was *assumpsit*, the defendant was charged in the first count as indorser of a note of hand, duly presented for payment at its maturity, and notice given ;—in the second count, the plaintiff alleged diligent but ineffectual search for the maker; and due notice to the defendant ;—the third count charged him as guarantor of the note ;—and the others were the common money counts. The note was in these words,—"*Portland*, *Sept.* "28, 1819. For value received I promise to pay to *Jacob* "*Graffam*, or *John Whittier*, or *Joseph Pilsbury*, the sum of one "hundred and fifty dollars in twelve months from this date. "*Wm. Wallace.*"

At the trial, which was before the *Chief Justice*, it appeared that *Graffam*, *Whittier*, and *Pilsbury* bought a schooner of one *Francis*, and gave a note for the purchase money, which came into the hands of one *Foster*. Afterwards *Graffam* being at *Portland*, exchanged the schooner, of which he was master, with *Wallace*, for a small sloop, taking, for the difference, the note in question, and another of about the same amount payable in six months. On the return of *Graffam*, this latter note was indorsed in blank by *Whittier*, and delivered by him to *Foster* in payment of the balance due on the note originally given to *Francis* for the schooner ; but *Wallace* being called on, and failing to pay it when due, *Whittier* was sued as indorser, and compelled to pay the note.

It further appeared that *Graffam* indorsed and delivered the note in controversy to the plaintiff, in consideration of a written engagement given at the same time by the plaintiff to him, of the following tenor :—"*Thomaston*, *Nov.* 1, 1819. Received of "*Jacob Graffam* two hundred and ten dollars, in consideration

"whereof I hereby agree to pay a certain note of hand, dated "*April* 16, 1819, for one hundred and forty seven dollars and sev- "enty two cents, given by said *Graffam*, myself, and *Joseph* "*Pilsbury* to *William Francis*, payable in six months from date "thereof with interest, and I hereby agree to indemnify and save "harmless the said *Graffam* from said note and all expenses which "may arise thereon. *John Whittier.*"

When this note became due, *Wallace* was absent at sea. He belonged to *Portland*, where he had a family residing ; but was then a man of no property.

The plaintiff's agent, on the day the note became due, put into the post office at *Thomaston*, a letter addressed to *Wallace*, at *Portland*, demanding payment of the note ; and on the same day another to the defendant at *Camden*, giving him notice that it was dishonored.

Upon this evidence a nonsuit was entered by consent of the parties, subject to the opinion of the whole Court upon the question whether the action could be maintained.

Thayer, for the plaintiff, contended that he had used all the diligence necessary for him, in order to charge the defendant as indorser of the note ;—and that it was not incumbent on him to have sent the note to the maker's residence, he being absent from home, without having left any agent, or property to pay it. Any thing more than was actually done would have been but an unmeaning ceremony. And he cited 4 *Mass.* 44. 8 *Mass.* 260. and 11 *Mass.* 436. But he further insisted that if the defendant was not liable by his indorsement, yet he ought to be holden on the common counts, the note having proved to be of no value, and the plaintiff having indemnified him against the joint note given to *Francis*. *Chitty on Bills* 97. *Kyd* 91, 198.

Wheeler, for the defendant, said that he was not chargeable as indorser, under any circumstances, because he had put his name on the note merely for the purpose of transferring his interest in it to the plaintiff, and not to create any new obligation. *Griffin v. Goff* 12 *Johns.* 423. *Anderson v. Drake* 11 *Johns.* 114. But if it was not so, yet the plaintiff had not entitled himself to this

remedy, because he had not *presented* the note for payment, at the *residence* of the maker. *Freeman v. Boynton* 7 *Mass.* 483.

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

It has been in *Massachusetts* the immemorial usage for indorsees of notes not negotiable to declare against the *indorsers* as on a negotiable note. *Jones v. Fales* 4 *Mass.* 245. The same principle will apply in this State. The *first* and *second* counts are on the supposed liability of the defendant as indorser. The *third* count charges the defendant as *guarantor* of the note ; and the *fourth* count is for monies had and received, laid out and expended. We are of opinion that the action cannot be maintained upon the *first* or *second* cannot. As *Wallace* lived in *Portland* at the time the note became due, having there a home, wife and family, the note should have been presented to him *there* for payment ; or a demand of payment made or left at his dwelling house. The absence of *Wallace* at sea, cannot be considered as an excuse for the plaintiff's omission in the present instance ; nor can his poverty. Diligent inquiry and search would have been sufficient, had *Wallace* absconded before the note became due ; leaving no agent, or family or home where a demand could be made ; but, it seems his home was known to be at *Portland* ; because the letter which was sent by mail, and which is relied on as a legal demand of payment, was directed to *Wallace* at that place. *Notice* of *non-acceptance* or *non-payment*, may be given to a drawer or indorser through the post-office ; but a *demand of payment* cannot be made in this manner, unless by consent of the person on whom the demand is to be made. Such consent may be *express*, or be *implied* from a settled usage well known to him. Numerous cases might be cited to these points. Several have been mentioned by the defendant's counsel; but we only state the cases of *Freeman v. Boynton* 7 *Mass.* 483, and *Lincoln & Kennebec Bank v. Page* 9 *Mass.* 155, and *Lincoln & Kennebec Bank v. Hammond* 9 *Mass.* 159. These cases shew the *general rule*, and the exceptions from it.

As to the *third* count, there is not a fact in the case tending to shew that the defendant ever *guarantied* the payment of the note

at all events ; or made any other stipulation except what was created by indorsing his name *in blank* ; and there being nothing done by him beyond this, *the law* determines the nature of the liability which this indorsement imposed ; and in the case of *Josselyn v. Ames* 3 *Mass.* 274, it was decided that a man cannot himself warrant to a third person the payment of a note made payable to himself, and not negotiable. But it is contended that the action may be maintained on the *fourth* count, though the defendant may not in any manner be bound by his indorsement, on the ground that the note, so indorsed, was of no value and that the plaintiff has derived no advantage therefrom, and has yet been compelled to pay to *Foster* the amount of the note, against which he engaged to indemnify the defendant, and several authorities have been cited in support of this position. We do not consider them as applicable to the case before us. In the cases cited, the person receiving the bill or note in payment, did not take the security of the indorsement of the person from whom he received it ; but trusted to the responsibility of the person who drew the bill or made the note, which proved of no value ; but in the present case the plaintiff took the security of the defendant's indorsement ; and as he has lost the benefit of the defendant's *conditional* liability by his own negligence, he must not now convert this liability into an *absolute* one, by charging the defendant on the fourth count.

Judgment for the defendant.

WOODBURY *vs.* NORTHY.

After an arbitrator has made and published his award, he cannot re-examine the merits of the case, even to correct an error, without consent of the parties.

An arbitrator is admissible as a witness to testify the time when, and the circumstances in which, he made his award.

THIS was *assumpsit* on an award made *April* 7, 1823, under a parol submission of all demands, entered into Jan. 12, 1822 ; and was tried upon the general issue before *Smith*, J. in the Court below, from which it came up by exceptions taken by the plaintiff to a nonsuit ordered, *pro forma*, by the Judge.

The arbitrator, being admitted a witness for the defendant, though objected to, testified that he met and heard the parties *March* 4, 1822, and on the same day made and published his award, which he delivered to the plaintiff, and of which he addressed a letter of notice to the defendant, but did not know whether it reached him or not ;—that he awarded to the plaintiff $18,55 debt, and costs taxed at $41,50, which last sum included both the costs of arbitration, and the costs of a former suit mentioned in the submission ;—that in *March* 1823, the plaintiff's counsel handed him back the award, requesting him to give the parties a further hearing, and observing that the Court did not allow costs ;—that thereupon he notified the parties to attend at a further hearing ; but the defendant not attending, and the plaintiff introducing no new evidence, he made the award declared on, in which he awarded for the plaintiff the sum of $68,05, *as damages*, being the amount of the former damages and costs, with eight dollars added for costs of arbitration subsequent to the former award ;—and that after making the first award, supposing his authority determined, he conversed freely respecting it, with the plaintiff and his counsel, and told them he thought the defendant in the wrong. It also appeared that the plaintiff had commenced a suit on the first award at *August* term 1822, which he discontinued for want of proof of notice to the defendant, though such proof was afterwards discovered to exist.

Allen, for the plaintiff, now moved that the nonsuit be set aside; and he contended,—1st. That the authority of the arbitrator continued till revoked ; for which he cited 16 *Johns.* 205 ;—and 2d. That the costs were within a reasonable construction of the power of the arbitrator, this mode of terminating controversies being to be favored, and entitled to a liberal exposition, for the public good. The better authorities are in favor of the allowance of costs ;—*Cutter v. Whittemore* 10 *Mass.* 442. *Kyd* 152. 14 *Johns.* 161—and this Court being confined by no decisions to the contrary, he contended that this enlarged construction of the power of arbitrators was most consonant with the maxim *interest reipublicæ ut sit finis litium.*

Stebbins for the defendant, rested his argument on the position that the arbitrator's office ceased with the publication of the first award ; after which all the proceedings were *coram non judice* ; and that the submission was a private contract, involving no power to award costs. The *dicta* in the books which seem to the contrary, relate wholly to rules at *nisi prius*. 1 *Com. Dig. Arbitrement E.* 1, 2.

MELLEN C. J. at the succeeding term at *Augusta*, delivered the opinion of the Court.

In this, as in other actions of *assumpsit*, the general issue is a denial of all the material facts stated in the declaration, and renders it necessary for the plaintiff to prove them. On this issue, then, the defendant may contest the fact of submission,—of making the award, and of notice thereof prior to the commencement of the action; because all these facts are necessary to create an obligation on the part of the defendant to pay to the plaintiff the sum awarded. Hence it was competent for the defendant to prove any fact tending to shew that the arbitrator was not authorized to make the award in question, although the submission had been proved as alleged; and for this reason the objection to the testimony of the arbitrator cannot be sustained, at least so far as it related to the time when, and the circumstances in which, the award was made. The question is whether the arbitrator had any authority to make the award declared on, bearing date *April* 7, 1823. It appears that pursuant to the submission bearing date *Jan.* 12, 1822, the arbitrator made an award on the 4th of *March*, 1822, delivered it to the plaintiff's counsel, and addressed notice of it to the defendant, though there is no proof that it was ever received; that the arbitrator considered himself discharged of all further trust, and conversed with the plaintiff and his counsel freely on the subject; and as he thinks, expressed his opinion that the defendant was in the wrong.

It further appears that the plaintiff considered the arbitrator as having made his final award, because he commenced an action on the award of *March* 4, 1822, at the *August* term of the Court of Common Pleas next following; and it was admitted by the par-

ties during the argument, that for want of proof of notice to the defendant of the award thus made, the suit was discontinued.—After all this, the submission was handed back to the arbitrator in *March* 1823, who, after having given notice to the parties, proceeded, in the absence of the defendant, to re-examine the cause, and made the award on which this action is founded, and therein awarded eight dollars more to the plaintiff than the amount of the former award, being for costs of the second trial. On these facts, it is difficult to conceive what authority the arbitrator had to make any further decision respecting the questions submitted to him, after he had completed his first award, and delivered it to the plaintiff's counsel. No consent of parties has ever been given for the continuance and exercise of his authority after that time. The authorities on this subject appear to leave no room for doubt. *Cro. Jac.* 584. 4 *East* 584. 6 *East* 309. 8 *East* 53, and *Kyd on Awards* 118—125. On this ground, without noticing any other objection, we are of opinion, that the last award is void, and of course this action cannot be maintained.

The exceptions are overruled, and the judgment of the Court below is affirmed.

The Inhabitants of Alna *vs.* Plummer.

It is within the ordinary powers and duties of towns in this State, in which no distinct and separate parish or religious society is established, to provide for religious instruction; and for this purpose they may raise and assess money to support ministers, and to build and repair meeting houses.

Rights accruing to towns in their parochial and others in their municipal capacity, may well be vindicated in the same action.

In this action, which was *assumpsit*, the writ contained two principal counts;—one being for monies paid for the support of the defendant's wife as a pauper, she being found in *Alna*, in want of immediate relief, and for monies paid to the town of *Dresden*, for a judgment rendered against the plaintiffs for the like cause; —and the other being for the price of a pew in a meeting house

erected by the plaintiffs, which was struck off at vendue to the defendant, averring the tender of a sufficient deed of the pew, with warranty, &c.

The defendant pleaded in abatement that these counts were improperly joined, the first cause of action accruing to the inhabitants " in their corporate or political capacity, including all the inhabitants of the town,"—and the other accruing to them " in their parochial capacity," the pew being in a house of religious worship; and divers inhabitants of the town, naming them, not being " members of the religious society or parish composed of " the inhabitants of Alna in their said parochial capacity."

The plaintiffs replied that the meeting house was built on a certain described lot of land, of which, and of the house and pew, they were seized in fee simple " as a body politic and corporate." To which the defendant demurred, because the plaintiffs had not shewn whether the second cause of action accrued to them in their political or their parochial capacity.

Stebbins, in support of the demurrer, adverted to the fact existing from the earliest settlement of the country, that every town, when incorporated, has parochial, as well as municipal powers, and becomes in fact a parish, as well as a town. Yet it is not one and the same, but two distinct corporations; and in the affairs of the parish none but parishioners can vote. The estates also, of the parish, are subject to different rules of alienation, some being inalienable without the consent of the minister, and the seisin being in him in *jure parochiæ*. *Austin v. Thomas* 14 *Mass.* 338. 4 *Mass.* 573. 1 *Greenl.* 364. 13 *Mass.* 192. 3. *Mass.* 296. 10 *Mass.* 430. 1 *Mass.* 190. *Minot v. Curtis* 7 *Mass.* 441.

Being thus distinct corporations, they cannot join in this suit. It is not enough for the plaintiffs to say that they as a town own the ground on which the building stands; for it does not necessarily follow that the owner of the soil is owner also of the house erected on it. And if it were otherwise, yet it exceeds the power of the town, *as such*, to hold a house for religious worship; and any real estate purchased for that purpose, must be regarded as parochial property. *Baker v. Fales* 16 *Mass.* 488.

Orrr and *Allen*, *e contra*, contended that the objection was not well taken in this form, as it put the ownership of the property in issue in a plea in abatement; which is not allowable, it being to the merits of the action. *Baker v. Jewell* 6 *Mass.* 460. *Hart v. Fitzgerald* 2 *Mass.* 509. *Converse v. Symmes* 10 *Mass.* 377. *Thompson v. Hoskins* 11 *Mass.* 419. The plea that there is a parish in *Alna*, distinct from the town, or that there ever has been any separation of the town and parish, is also bad in form.

But the objection cannot be sustained in any form. It goes to the utter inability of the town to convey any estate in fee, on which a meeting house may have been erected. But though the town may, in some cases, discharge parochial duties, and hold property applicable to parish purposes, yet it is not therefore divided into two distinct corporations; but it merely controls a particular portion of property, as trustee for whom it may concern. For any injury to this property, the town alone can sue, although the damages recovered might enure to the benefit of a part only of the citizens.

WESTON J. delivered the opinion of the Court at the ensuing term at *Augusta*, as follows.

It is not averred by the plea in abatement, that the inhabitants of *Alna* no longer have capacity to act as a town in matters of a parochial nature, by the formation therein of a separate and distinct parish; but it is alleged that, at the time of the commencement of this suit, certain persons, citizens of *Alna* in its political capacity, had ceased to be members of the religious society, composed of the inhabitants of that town. And by *chap.* 114, *sect.* 1, of the revised statutes of this State, such persons are excluded from voting, "whenever the inhabitants of any town are "legally assembled to act on any subject, relating exclusively to "parishes." But their corporate character and capacity, as a town, remains unchanged. The inhabitants assemble and act as a town; and every inhabitant, as such, qualified as the law directs, has a right to vote; unless he has, by his own act, withdrawn himself from them as a religious society, and from the obligations which they may assume in that capacity.

It is, and long has been, within the ordinary powers and duties of towns, in which no distinct and separate parish or religious society has been established, to provide for religious instruction. To this end they may vote and assess money for the erection and repair of meeting houses; and for the support and maintenance of ministers. And, in furtherance of these objects, they may enter into contracts, for the violation of which they may sue and be sued. If the two causes of action united in this writ, had been made the foundation of two suits, instead of one, the plaintiffs in each must have sued by the same name. The inhabitants of the town of *Alna* have but one name, and constitute but one corporation. But it is said that their parochial capacity is distinguishable from their muncipal; and that their rights in the one must be vindicated in a separate action, and cannot be combined with claims in the other.

The case is not analogous to one, in which a plaintiff might attempt to unite in the same action a claim in his own right with one, which he prosecutes *en autre droit*. When the inhabitants of a town, in which there is no separate parish make provision for religious instruction, by the erection of a meeting house, or by voting and assessing money for the maintenance of a minister, they are as beneficially interested in these objects, as when they vote and assess money for the support of schools. Funds raised for all these purposes, are paid into the common treasury, from which they are drawn and appropriated, under the authority of the town. When the town ceases to have parochial rights and duties, by the establishment therein of a separate parish, it is succeeded by a new corporation, having a distinct organization and separate officers; and the town as such can no longer make or enforce any contracts of a parochial nature. But until that event takes place, we are not aware that there exists any legal objection to the joinder of the two causes of action, set forth in the plaintiff's declaration.

We are, therefore, of opinion that the plea in abatement is bad; which renders it unnecessary to consider the objections made to the replication.

Judgment of respondeat ouster.

HASKELL, *petitioner*, *vs.* BECKET.

The Court, in the exercise of its dicretion, will not grant a review on petition, where the object is merely to discredict a witness who testified at the trial;—nor because one of the jury was not impartial, or was hostile in his feelings to the petitioner, if this fact was known to the petitioner before the trial;—nor because a juror had expressed a general opinion of the cause before the trial, if it appear that he had formed no judgment of the merits, and stood indifferent between the parties.

On such an application the juror ought to be called, to explain his own feelings and declarations, and he may be examined generally in support of the verdict.

The petitioner in this case prayed for a review of a suit heretofore decided between him and the respondent; in which he represented that the verdict was improperly returned against him, because one of the jurors did not stand impartial between the parties, but had, before the trial, formed and expressed a decided opinion against the petitioner's right to recover; and had also manifested and expressed sentiments of prejudice and hostility against the petitioner, inconsistent with that fairness and impartiality which by law is required of jurors ; and that one of the defendant's witnesses had, since the trial, confessed that his knowledge of the facts he swore to was derived wholly from the statements of the party who called him.

At the hearing of this petition it was proved by the petitioner that the juror alluded to had said, prior to the trial, that *Haskell* had better settle the action, for he thought he would lose it; and at the same time complained of *Haskell's* having wronged him in some former dealings between them.

The juror himself, being called by the respondent, testified that before the trial he had heard both parties speak of the matter in dispute a number of times,—that there had been much conversation on the subject,—and that he had entertained an impression that if the facts generally stated were true, the cause would be decided against the petitioner; which impression he had stated to the witness called on the other side. But he said he had not formed any opinion of his own upon the merits of the cause, but came to the trial without any bias or prejudice in his mind, and with the determination to decide according to the evidence

which might be given in Court. He admitted that two or three years ago there had been a misunderstanding between him and the petitioner, to whom he expressed his dissatisfaction at the time, but that the excitement of his feelings on that occasion had long since subsided.

He also testified, as did another juror, that on going into their room the jury very soon agreed on a verdict for the defendant, and that he was one of the last to give his opinion.

Some attempt was made to ascertain from this juror some facts tending to impeach the verdict, but the inquiry was stopped by the Court, who said that to *such* facts it was not the pratice to permit jurors to be interrogated; though they might be examined generally in support of the verdict.

PER CURIAM. The legislature has repealed the law granting reviews of right, because of the temptation it afforded to the crime of perjury; but for the advancement of justice it has referred the same subject to the general discretion of this Court. In the exercise of this discretion the Court will endeavor on the one hand to prevent the mischiefs which existed under the old law, and on the other to preserve in all its purity the trial by jury.

It is alleged by the petitioner that the trial of his cause was not a fair one, because one of the jurors entertained feelings of hostility against him, resulting from supposed injuries which the petitioner had offered him. How far this fact, if unexplained, might go, it is not necessary now to determine; yet of itself it might probably induce the Court to send the cause to another jury. But it seems to have been as well known to the petitioner before the trial, as now; and if he would object to the juror for this cause, the objection should have been taken at the trial. Not being taken then, it is waived.

It is also stated by the petitioner that the juror had formed and expressed an opinion unfavorable to his cause. But this is explained in a satisfactory manner by the juror himself, who is very properly called for this purpose. Indeed whenever the verdict is impeached for any cause of this sort, the jurors implicated ought to be permitted to explain. Here the juror had heard much conversation respecting the cause, and upon the state-

ments made by the different parties, if they should prove to be true, he anticipated a certain result. But of the truth of these statements he does not seem to have entertained any distinct opinion, much less to have formed any judgment of the merits of the cause, or to have attempted to weigh them. It does not appear therefore that he stood any otherwise than indifferent between the parties.

As to the other ground stated in the petition, it cannot be sustained. It is not the practice of this Court to grant a review on petition, where the object is merely to impeach the credibility of a witness who testified at the trial.

Petition dismissed, without costs.

SNOW & AL. *vs.* HALL.

Where a count in trespass, *quare clausum fregit*, and a count *de bonis asportatis* were joined in one writ, and in the Court below judgment was rendered upon a verdict for the defendant, from which the plaintiff appealed to this Court, in which a verdict was returned for the defendant upon the first count, and for the plaintiffs upon the second, and their damages assessed at less than a hundred dollars ;—it was holden that this was not an action of trespass *quare clausum fregit*, within the meaning of *Stat.* 1822, *ch.* 193, *sec.* 4 ; and that the defendant was entitled to his costs accruing since the appeal.

IN this action, which was tried before the Chief Justice at the sittings after this term, a question was moved by *Orr* for the defendant, respecting his right to costs since the appeal ; and *Allen*, for the plaintiffs opposing the claim of costs, the Chief Justice reserved the point for consultation, and in the following term at *Augusta* the opinion of the Court was given and the case stated as follows, by

WESTON J. By the statute of 1822, *ch.* 193, establishing the Court of Common Pleas, *sec.* 4, it is provided that any party, aggrieved, at the judgment of any Court of Common Pleas, in any personal action, wherein any issue has been joined, in which

the debt or damage demanded shall exceed one hundred dollars, and in any action of replevin, or action of trespass, *quare clausum fregit*, ejectment or real action, may appeal therefrom to the Supreme Judicial Court. And when any such appeal in any personal action, except actions of trespass *quare clausum fregit*, and actions of replevin, wherein the value of the property replevied shall, by the finding of the jury, exceed one hundred dollars, shall be made by any plaintiff, and he shall not recover more than one hundred dollars debt or damage, he shall not recover any costs after such appeal; but the defendant shall recover his costs on such appeal, against the plaintiff, and shall have a separate judgment therefor. The first count in this declaration is *quare clausum fregit*; the second, *de bonis asportatis*. The jury have found for the defendant upon the first count, and for the plaintiffs upon the second; and have assessed their damage at less than one hundred dollars. It is stated by the Judge, who tried the cause, that, as to one of the plaintiffs, there was no pretence whatever of title in the *locus in quo*. The plaintiffs appealed from the judgment of the Court of Common Pleas; and the defendant now moves the Court to allow him his costs, after the appeal. The plaintiffs resist this motion; and claim to be allowed their costs in this Court, on the ground that their action is trespass, *quare clausum fregit*.

No restriction is imposed by law upon appeals to this Court, in all cases where the title to real estate may come in question. And access to this Court is further facilitated, by allowing actions of this description to be brought directly here, without passing through the Court of Common Pleas. But is this an action of trespass *quare clausum fregit*, within the true intent and meaning of the law? To give it this name alone, would give but an imperfect idea of what it is in fact. Prior to the finding of the verdict, it might, with quite as much propriety, have been denominated an action of trespass *de bonis asportatis*; and it is only as such that it has been sustained by the verdict; which negatives the cause of action, set forth in the first count. We cannot, therefore, regard this as an action of trespass *quare clausum*, within the meaning of the law under consideration. To do so,

would be virtually placing actions of trespass *de bonis asportatis*, upon the same ground as to appeals, which the legislature certainly did not intend with actions *quare clausum* ; because the restriction in regard to the former species of action might always be evaded by joining a formal count in *quare clausum*, not intended to be supported. And in the same manner, and upon the same principle, both these classes of actions might be brought here by original process, returnable to this Court. The motion of the defendant is sustained ; and the plaintiffs are to be restricted to their costs in the Court below.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE COUNTY OF

KENNEBEC.

JUNE TERM,

1824.

PERLEY *vs.* LITTLE.

Where, upon trial of an issue of fact, the evidence offered by the plaintiff, and not controverted by the defendant, is deemed insufficient to maintain the action, the Court may *order* a nonsuit; and this is no infringement of the *Declaration of Rights, sec.* 20, which secures the privilege of trial by jury.

Nor does the ordering of a nonsuit, in such case, in the Court below, abridge the right of appeal secured by *Stat.* 1822, *ch.* 193, *sec.* 4, such order being subject to revision in this Court by bill of exceptions in the nature of appeal, by the same statute *sec.* 5.

Proof that the defendant said—"*If I owe you any thing, I will pay you; but I owe you nothing*,"—is not sufficient evidence of a new promise to avoid the bar of the statute of limitations.

IN *assumpsit* for fees as attorney at law, the defendant pleaded the statute of limitations in bar of the action. At the trial in the Court below, before *Whitman C. J.* the plaintiff proved a letter received from the defendant after the services performed, but more than six years since, in which he promised to pay for the services claimed in this suit; and also proved that within six years past the defendant said to him, "*If I owe you any thing on that claim I will pay you;—but I owe you nothing.*" On this evidence the Judge directed a nonsuit, on the ground that it was not sufficient to take the case out of the statute; to which the plain-

tiff filed exceptions, alleging that the evidence was sufficient, and that the Judge had no authority to order a nonsuit without consent of the plaintiff, but should have submitted the evidence to the jury.

Clark, for the plaintiff, now contended that a nonsuit could be entered only by request of the defendant, as he only had a right to demand the plaintiff. And the plaintiff is in no case compelled to become nonsuit after appearance, even in a Court of final jurisdiction. 2 *Tidd's Pr.* 797, 798. 2 *Bl. Rep.* 239. *Watkins v. Towers.* 2 *D. & E.* 279, 281. 3 *D. & E.* 662. 1 *Burr.* 358. *Cowp.* 483. 1 *Stra.* 267. 2 *Stra.* 1117. 3 *Bl. Com.* 316, 376. *Const. of Maine*, *Decl. Rights*, *sec.* 20. *Macbeath v. Haldimand* 1 *D & E.* 176.

In this State, where the right of appeal to a higher tribunal depends upon the rendition of a judgment upon verdict or demurrer, if it were in the power of the Court below to order a peremptory nonsuit, the plaintiff might be deprived of his right of appeal at its pleasure. It is necessary, therefore, for the preservation of this right, that when the party joins an issue to the jury, it should be found for or against him, under the direction of the Court.

To the point that the evidence was sufficient to prove a new promise, he cited *Cowp.* 548. *Bicknell v. Keppell* 1 *New Rep.* 19. *Bryan v. Horseman* 4 *East* 599. *Baillie v. Inchiquin* 1 *Esp.* 435. *Clark v. Bradshaw* 3 *Esp.* 155. *Lawrence v. Worall Peake's Ca.* 93. *Leaper v. Tatton* 16 *East* 420. *Sluby v. Champlin* 4 *Johns.* 469. *Lloyd v. Maund* 2 *D. & E.* 670. 5 *Maule & Selw.* 75. 2 *Barnw. & Ald.* 760. *Danforth v. Fowler* 11 *Johns.* 146.

Little, *pro se*, said he had given no attention to the first point, because he supposed the nonsuit consented to;—but if it was not, yet as the case does not shew that the plaintiff was nonsuit against his consent to that mode of deciding the cause, it is to be presumed that he had no objection to it.

As to the matter pleaded in bar, he referred the Court to *Lawrence v. Hopkins* 13 *Johns.* 288. 11 *Johns.* 146. 15 *Johns* 511.

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

It has been objected by the plaintiff's counsel that the nonsuit ordered by the Court of Common Pleas in this case was irregular and without legal authority; and that for this reason, we ought to set it aside, as an exception was filed against this decision or order. It appears that no proof had been introduced, except by the plaintiff; and as this was deemed incompetent to maintain the action, admitting it to be true, the Court considered it useless and improper to permit the cause to proceed; because there were no facts for the jury to try, or evidence to compare and weigh, as in cases where proof has been produced on *both sides*. In a case *like the present*, we think that Court has a right to order a nonsuit; because if its opinion of the law is mistaken, and upon the facts proved by the plaintiff, the action is maintainable, the error may be corrected and the plaintiff be restored to his rights by filing an exception to the order and decision of the Court, as was done in the present instance. The provision in the declaration of rights alluded to by the plaintiff's counsel, is in no way violated or affected by such a proceeding. There is no privilege in a trial by jury to establish facts which are admitted by all concerned to be true. The case, however, is very different as to the right of that Court to enter a default and judgment against a defendant, who answers and claims to have a trial by the jury; as we have decided in the case of *Frothingham v. Dutton* 2 *Greenl.* 255. We refer to that case for the reasons of the distinction. We are therefore of opinion that the Court below had a legal authority, in the exercise of its judicial functions, to order a nonsuit; subject to the revision of this Court as to the correctness of the legal principles on which it was ordered, on exceptions filed by the plaintiff.

The next question is whether, upon the facts proved, the opinion excepted against was correct; if so, the judgment must be affirmed; if not, it must be reversed, the nonsuit set aside, and the cause must stand for trial. It cannot be necessary to examine the long catalogue of decisions upon the question, what words amount to an acknowledgment of a debt, or a new promise, sufficient to take a case out of the statute of limitations. The

cases are in many instances contradictory ; often presenting distinctions which *now* appear to be more nice than wise ; more ingenious than substantial. They discover plainly on the part of the Court a disposition, as far as possible, to give such a construction to the language made use of by the defendant, as to save the plaintiff's demand from the operation of the statute ; as though its provisions were prejudicial to the community, and of course, that it was the duty of Judges to stand as centinels to watch critically against the approach of danger to the rights of those, who are extremely inattentive to those rights themselves. Less refinement would have left the law upon the subject more certain ; and more effectually produced the beneficial consequences anticipated to result from such a statute. In the construction of contracts the Courts are always desirous of ascertaining the *meaning of the parties* ; and, if consistent with legal principles, of carrying that meaning into effect : and it is not easy to perceive why so plain a rule should have been departed from, in many instances, in the construction of those expressions, relied upon as amounting to a new promise or an acknowledgement of a debt. Yet such has certainly been the case ; but it is equally true that a more rational and consistent construction has been gradually introduced, and has received high judicial sanctions. We will notice a few cases to shew the correctness of the foregoing observations. In *Trueman v. Fenton Cowp.* 548, Lord *Mansfield* says that these words, " I am ready to account, but nothing is due to you,"—and much slighter acknowledgments, will take a debt out of the statute. This seems only a *dictum* of Lord *Mansfield* ; as the case itself did not involve any question depending on the statute of limitations. In *Bryan v. Horseman* 4 *East* 599, there was an explicit acknowledgment on the part of the defendant that 26*l.* of the plaintiff's demand *then* remained due. In *Lawrence v. Worrall Peake's Ca.* 93, these words were held by Lord *Kenyon* sufficient ;—" What an extravagant bill you have delivered me !" In *Rucker v. Hannay*, 4 *East* 604, *note*, these words were considered as proper for the consideration of the jury as an acknowledgment ;—" *since the bill of exchange* (on which the action was founded) *became due*, (which was more than six years before) *no demand for payment*

had been made on him." In *Peters v. Brown*, also cited by the plaintiff, 4 *Esp.* 46, there was an express admission of the debt. The defendant said to the witness, "*I can't pay you*; *I must pay Mr. Peters* (the plaintiff) *first, and then I will pay you.*" In the case *Clark v. Bradshaw* 3 *Esp.* 155, Lord *Kenyon* held that, because the defendant acknowledged "the plaintiff had paid money for "him twelve or thirteen years before, but that he, the defendant "had since become a bankrupt, by which he was discharged as "well by *law* as equity, from the length of time," these words took the case out of the statute. In *Bailie v. Inchiquin* 1 *Esp.* 435, the defendant, by his letter, clearly recognised the justice and existence of the plaintiff's demand and his own liability. In the case of *Leaper v. Tatton* 16 *East* 420, the Court considered the debt as taken out of the statute by this language of the defendant,—that *he had* been liable, but *was not then*, because it was out of date, and that he could not pay it. These are the strongest cases cited by the plaintiff's counsel; and there seems to be at least a latitude of construction in some of them. More recent cases, however, in England and in this country, have established, in several instances, more liberal principles in relation to this subject. According to some of these, where the acknowledgment of the debt is accompanied by a declaration of the party that he intends to insist on the benefit of the statute, the case will not be taken out of it. *Danforth v. Culver* 11 *Johns.* 146. *Murray v. Tilby* 5 *Binn.* 576. In *Rowcroft v. Lomas* 4 *M. & S.* 458, the Court stated that "something more must be "proved than a bare acknowledgment that the thing is unsatisfied "to give effect to that which is *per se* destroyed." In that case the defendant confessed he *signed* the note; but added that he *had not* paid it, and *never would*;—that it was *out of date*, and the *law would not compel him to pay it.* In *Clemenston v. Williams* 8 *Cranch* 74, the Court decided that the acknowledgment must be that the debt *remains still due.*

In that case, a debt had been contracted by partners, and one of the partners who was not sued, when applied to, said "that "the account was due, and that he supposed it had been paid by the "defendant, but had not paid it himself and did not know of its "being paid."—The Court did not consider *this* as sufficient to

take the case out of the statute; and *Marshall C. J.* observed that "the statute was not enacted to protect persons from claims "fictitious in their origin; but from ancient claims, whether well "or ill founded, which may have been discharged, but the evi- "dence of discharge may be lost.—It is not sufficient to take "the case out of the act, that the claim should be proved or "acknowledged to have been originally just; the acknowledg- "ment must go to the fact *that it is still due.*" He further observed that the decisions had gone full as far as they ought to be carried, and that the statute of limitations should be respected as other statutes, and not be explained away. This decision is one of high character and importance. In *Sands v. Gelston* 15 *Johns.* 511. *Spencer C. J.* in delivering the opinion of the Court says—"It would be doing violence—to say that there is "evidence from which a promise may be inferred, to pay a de- "mand, the justice and equity of which, as well as the defendant's "liability to pay it, *is utterly denied.*" By these principles we may test the declarations of the defendant. If he had only said, —"if I owe you any thing on the above mentioned claim, I will pay you," the words would take the case out of the statute, *the debt being proved to be due*;—but he added in the same sentence, "but I owe you nothing." This *absolute denial* is at least a balance for the preceding *conditional promise*; and all the sentence, taken together, amounts to nothing, and leaves the original demand just as it stood before. But even without this *express denial*, the *conditional promise* would not avail the plaintiff, for the case presents no *proof* or *offer* of proof that the defendant *did then owe* the plaintiff anything; and yet such proof is necessary in cases of such conditional acknowledgment or promise. Doubts, uncertainties and equivocal expressions, ought not, *by construction*, to be converted into promises or acknowledgments. The plain and fair meaning of the party making use of the expression should be sought for, and then permitted to have its legitimate influence, and nothing further, in the decision of the question.

We are of opinion the nonsuit was proper, and that it must be confirmed.

Judgment for the defendant.

JEWETT & AL. *vs.* HODGDON.

Where, in a petition for a road, the particular courses between the two *termini* were expressly designated at the time of its signature; but afterwards the petition was amended by striking out the intermediate courses, and praying for the location of a road between the same *termini*, in such direction as the locating committee should think expedient; it was held that such alteration absolved from the contract those petitioners whose private interests it might materially affect.

This action, which was *assumpsit* for money laid out and expended, was tried upon the general issue in the Court of Common Pleas before *Smith J.* and came up by writ of error upon exceptions taken to his opinion.

It appeared that in the year 1818, the plaintiffs and defendant, with several other persons, subscribed a petition addressed to the Circuit Court of Common Pleas, which then had the powers of a Court of Sessions, praying for the location of a county road "from *Anthony Bracket's* in *Augusta*, "at the town road leading through "*Sidney* commonly called the middle road, and running northerly" *by certain houses and monuments particularly specified in the petition*, to "*Pullen's* mills in the town of *Waterville*." At a meeting of some of the petitioners, the defendant not being present, it was agreed that the plaintiffs should take charge of the petition and procure the establishment of the road, if practicable. The plaintiffs entered the petition at the next term of the Court to which it was addressed, and paid the expenses of that term;—but the Court, being of opinion that the intermediate courses and direction of the road, as specified in the petition, were not such as it would be for the public interest to adopt, recommended an amendment of the petition, by striking out all the description except the two *termini* of the road, and praying for the location of a road between these *termini, in such a direction as a committee to be appointed by the Court should deem expedient.* Pursuant to this intimation the plaintiffs' attorney amended the petition, and thereupon at *August* term, 1820, obtained the acceptance of a road, located according to the petition as thus amended. In the prosecution of this business, the plaintiffs expended a large sum of money. There was no evidence of any express consent of the defendant that the

plaintiffs should be his or the petitioners' agents, or that the petition should be amended; nor did it appear that he had any knowledge of the amendment.

The plaintiffs, upon this evidence, claimed of the defendant his rateable proportion of all the expenses incurred, or at least of so much as accrued prior to the amendment of the petition;—which the defendant resisted on the ground that it had been altered in a material part without his consent, and greatly against his interest. And the Judge directed the jury that if they believed that the road had been laid out in a different direction or place than was contemplated by the defendant, and if, by its being laid out as it was, the defendant did not derive the advantages from its establishment, which he expected when he signed the petition, they must consider the alteration of the petition as material, so far as he was concerned; and that he was thereby released from all obligation to contribute, unless he expressly constituted the plaintiffs his agents, with authority to make the alteration, or had expressly assented to it when made. The jury, under these instructions, found for the defendant, to which the plaintiffs excepted.

R. Williams, for the plaintiffs, adverted to the usage and practice of the Court of Sessions, as long established and well known in this county, requiring petitioners for roads to bear the expenses of their location; and contended that the undertaking of the petitioners in this case ought to be interpreted by reference to that usage; and that each party must be understood to stipulate for the payment of his proportion of such expenses as were usually paid by petitioners; and to assent that the attorney to whose care the petition might be entrusted, should exercise his own discretion as to the mode of effecting their general design. This was declared by them to be a public enterprise, pursued from public motives, and for the public convenience;—to obtain the location of a road from one *terminus*, by a course *generally* indicated in the petition, to the other. All lawful means to effect this object were within the legitimate range of the agent's powers; and are necessarily to be inferred, from the nature of the original association. *Sproat v. Porter* 9 *Mass.* 300. 12 *Mass.* 190. And as the

amendment tended to facilitate the attainment of this object, the alteration was not material to the defendant; and he was bound by natural justice to bear his proportion of the expense of conducting the joint concern.

Boutelle, for the defendant, admitted the general principle assumed on the other side, but denied its application. He insisted that where the *course* of the road was particularly specified in the petition, and was afterwards altered in a material part without the express assent of the petitioners, they were absolved from the contract. *Middlesex Turnpike Corp. v. Locke* 8 *Mass.* 268. *The same v. Swan* 10 *Mass.* 384. Had the whole undertaking been reduced to writing, and the petition inserted in it as a part of the contract, the alteration would be manifestly within the principle of those cases in which the defendant has been holden discharged. The plaintiffs have voluntarily waived their right of calling on him, by altering the contract into which he entered; and substituting a new petition which he never signed, and which cannot legally be read in evidence in the case. *Masters v. Miller* 4 *D. & E.* 320. *Powell v. Divett* 15 *East* 29. *Hatch v. Hatch* 9 *Mass.* 307. *Barrett v. Thorndike* 1 *Greenl.* 73. *N. Hamp. Rep.* 95.

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

The error assigned consists in the instructions which the Judge of the Court of Common Pleas who tried the cause gave to the jury: in which he stated to them that if they should find certain facts to be true, they must consider the defendant as released from his obligation to contribute towards the payment of the expenses in question; *unless* he *expressly* constituted the plaintiffs his agents, with authority to make the alteration in the petition, or had afterwards *expressly* assented to such alteration. It is contended that these questions should have been left to the jury; so that they might, if they thought proper, infer an *implied* appointment of the plaintiffs as agents, with power to use their sound discretion and make the alteration in the petition, if found necessary or expedient; or an *implied* subsequent assent to such alteration. In this case there was no proof of an *express appointment*,

or *express assent*—or that the defendant *knew* of the alteration or amendment of the petition, until after the commencement of the present action. The jury, therefore, could not presume an *implied assent* to the amendment; because it could not possibly be given without *knowledge* of such amendment. We cannot, for this reason, perceive any incorrectness in the instructions of the Judge in *this* particular. But it is urged that the *signing of the petition* by the defendant and others, must be considered as conconveying an authority to *some* of the petitioners to act as agents for the *others*, in taking those legal measures which they must have known to be necessary to procure an adjudication of the Court of Sessions upon the subject of the petition;—and that therefore, no *express* appointment of the plaintiffs as agents was necessary; and that at any rate, as they were appointed expressly by *some* of the petitioners, though the defendant was not present, he must be considered as assenting to the agency; and that such *implied* assent and agreement to this arrangement was a proper subject for the consideration of the jury, and should have been submitted to them for decision, according to the case of *Sproat v. Porter & al.* Allowing this argument its full force, and that such *implied promise* might have been fairly found by the jury, still it does not follow, that the implied agreement extended any further than to the usual prosecution of the petition which the defendant had signed, and the legal mode of obtaining a decision of the Court of Sessions upon *the prayer* of that petition, *as it was when signed by him.* It was undoubtedly a strong inducement to him to sign the petition, that the contemplated road was essentially to benefit him as an *individual*, in case it should be located according to the prayer of the petition, and in the course therein *specially* described; but by the amendment of the petition, all *intermediate objects* were struck out, and only the *termini* of the contemplated road were left. This change was very material, and has operated to the private disadvantage of the defendant, defeated his expectations, and in all respects disappointed him. Of all this he was ignorant until long after the road was located.—He now says to the plaintiffs " I have never signed such a petition as the Court acted upon;—I have never petitioned for such a road as you have procured to be laid out;—and I never *would have* petitioned for

such an one;—I am *injured* and not *benefitted* as I *expected to be* and *should have been*, had the road been laid out as I requested." The amendment, we think must be considered as a *new petition*, so far as it regards the defendant and *such new petition* he never signed, and of course he is not answerable for any of the expenses incurred *after* the amendment; and as the act of the plaintiffs was not done by the consent or even knowledge of the defendant; as they did not *pursue*, but *relinquished* the object which the defendant had in view; and never attempted to obtain a decision of the Court upon the prayer of the petition as it was when signed; we think they have, by thus abandoning the *original object*, lost *all* claim on the defendants—and accordingly the judgment of the Court of Common Pleas is affirmed with costs.

JEWETT & AL. *vs.* CORNFORTH.

Where a petition for a road was altered after its signature, and one of the petitioners, being sued for his proportion of the expense incurred in prosecuting it, claimed to be absolved from the contract on the ground of the alteration, it is for the jury to determine whether the alteration was *material*.

Where a payment has been made by several, from a joint fund, they may join in an action for reimbursement.

An agreement made pending a suit, that it shall abide the event of another action, cannot be set up as a bar to such suit, if the party afterwards chooses to proceed.

THIS action was similar to the preceding case of *Jewett & al. v. Hodgdon*, being against another of the same body of petitioners, and brought to compel him to contribute his proportion of the expenses of prosecuting the common cause.

At the trial below, before *Smith J.* the same points were taken as before, and ruled in the like manner; the Judge refusing to decide on the *materiality* of the alteration, but leaving it wholly to the jury.

It was further proved that the defendant, when he signed the petition, declared to *another* petitioner, that he wished *Jewett*, one of the plaintiffs, *to take charge of the petition and get it through.*

This, it was contended, only constituted him a special agent to carry the petition forward in its then existing form;—but the Judge considered it as evidence from which the jury *might* infer that *Jewett* was authorized to make the alteration.

It further appeared that the petitioners for the road were charged in divers bills for services and expenses of the committees for viewing and laying out the road, and of the attornies employed about the same; which bills were receipted as paid by *the present plaintiffs*. And hereupon it was contended that the plaintiffs should not have joined in one action, but that each one should have brought his suit for the money by him paid. But this objection the Judge overruled.

The defendant then offered to prove that five several actions, against as many of the petitioners, had been commenced by the present plaintiffs before a Justice of the peace, of which the present action was one;—and that it being supposed that they all rested on the same principles and facts, it was agreed between the defendant and the plaintiff's attorney that this action should be continued in the Justice's Court without costs, and should abide the event of another of the five actions against one *Hallet*, which was carried by appeal to the Court of Common Pleas;—and that the issue of that suit was for the defendant. But this evidence was rejected by the Judge;—and a verdict being returned for the plaintiffs, the defendant filed exceptions at common law.

Boutelle, for the original defendant, maintained the positions assumed at the trial below; and cited *Banorgee v. Hovey* 5 *Mass.* 36. *Graham v. Robinson* 2 *D. & E.* 282. *Brandt & al. v. Boulcott* 3 *Bos. & Pul.* 235.

R. Williams, for the plaintiffs, cited 3 *D. & E.* 779. 2 *Saund.* 116, *note* 2. 5 *East* 225.

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

This case differs in several respects from that of *Jewett & al. v. Hodgdon*, which has just been decided. But in the *present* case, however, as well as in that, a question has been made and urged

in argument, whether the *express* authority given by the original defendant, to the original plaintiffs, to act as agents for him and the other petitioners, *to take charge of the petition and get it through*, (as the parties have expressed it,) authorized them to make the alteration and amendment of the petition which has been mentioned. In the progress of the trial it seems that the Court was requested to decide whether such alteration was *material* as it regarded *Cornforth*; but the Judge was of opinion that this was a question proper for the consideration of the jury; and this opinion we approve. The exceptions disclose nothing further on this point. In the decision of the case before us, we are strictly confined to the *facts* which the exceptions present; and it does not appear that the alteration or amendment of the petition was in any manner *material* to *Cornforth*. Now we have decided in the case of *Patridge v. Ballard* 2 *Greenl.* 50, that the *materiality of the alteration* should be established, in order to release the petitioner from his original engagement; and we have proceeded on the same principle in the before mentioned case of *Jewett & al. v. Hodgdon*. As, therefore, we have no facts before us, shewing the alteration in the present case to be *material* to *Cornforth*, there is no reason for considering him as absolved from his contract *in consequence* of such alteration. This renders it unnecessary for us to decide whether the express authority delegated to the agents, did or did not authorize them to make or consent to it. Thus far we do not discover any error in the opinions of the Judge who tried the cause. It was in the next place urged that the plaintiff could not legally *join* in the action, but should have sued *several* actions. We do not perceive the force of this objection. *Jewett* and his associates were *joint agents*—acting *jointly* in their proceedings; and it seems that the sums paid by them for expenses, &c. were paid by them *jointly*, and receipts given shewing such facts. According to several of the cases cited for the original plaintiffs, when a payment has been made by several from a *joint fund*, they may *join* in an action for reimbursement. There is no error in this opinion. As to the last objection, founded on the special agreement made by the original plaintiffs with *Cornforth*, that *this* action should abide the decision of the action against *Hallet*, we cannot entertain a doubt. The agreement was made

long after the promise on which the action was founded. And there are so many authorities shewing that an *after contract* cannot be pleaded in bar of an action on a *former* one, that we need not cite them. Neither can it furnish a defence on the general issue. If *Cornforth* would avail himself of the contract, he must do it by a cross action against *Jewett* & *al.* on account of its violation. This objection also fails.

The judgment appears to us to be in nothing erroneous, and it is therefore affirmed with costs.

WINTHROP *vs.* CURTIS.

Construction of the limits of the *Plymouth* patent.

A grant of a tract of land extending "*the space of fifteen miles on each side of Kennebec river,*" is to be located in such a manner as that every point in the exterior line shall be exactly fifteen miles from the *nearest* point of the river.

THIS action, which was a writ of right, was in effect a contest between the Proprietors of the *Kennebec* purchase, demandants, and the *Pejepscot* Proprietors, tenants, concerning the western limits of the *Plymouth* patent, so called.

This patent bore date *Jan.* 16, 1629, and was a grant from the Council of *Plymouth* to *William Bradford* and his associates, of "all that tract of land or part of *New England* in *America* afore-"said, within or between, and extendeth itself from the utmost "limits of *Cobbiseconte*, alias *Comaseconte*, which adjoineth to the "river of *Kennebec*, alias *Kennebekike*, towards the western ocean, "and a place called the falls, at *Neguamkike* in *America* afore-"said, *and the space of fifteen English miles on each side of the said* "*river, commonly called the Kennebec river*, and all the said river "called *Kennebec*, that lies within the said limits and bounds "eastward, westward, northward, or southward last abovemen-"tioned, and all lands, grounds, soils, rivers, waters, fishings, "situate, lying and being, arising, happening or accruing in or "within the said limits and bounds, or either of them," &c.

The lower, or foot line of this tract, was established by compact between the *Kennebec* and the *Pejepscot* proprietors by their division-deed dated *Feb.* 20, 1758, to run—"beginning at the "mouth of *Cathance* river, which empties itself into Merry-"meeting-bay, *said line to run a west-north-west course* until it meets "with the western line of the *Kennebec* purchase as it extends "north and south, and which is fifteen miles from *Kennebec* "river," &c.

It appeared that the *Kennebec* proprietors by their grant to *William Vassal*, *Oct.* 9, 1771, conveyed a tract of land on the west side of *Kennebec* river, bounded, "beginning on that branch of "*Cobbeseconte* stream that issues out of the great pond, and at "the east end of the northerly line of lot numbered twenty two, "from thence running on said northerly line *a west-north-west course* "ten miles, or to the western boundary line of the *Kennebec* pur-"chase," &c. It was understood that this ten miles commenced five miles on a course west-north-west from the river, and that the proprietors had laid off their other lots in that direction ;—and that this course was nearly or quite at right angles with the general course of the river.

The *Kennebec* proprietors had also accepted a deed from the agents of the Commonwealth of *Massachusetts* dated *Feb.* 18, 1789, confirming to them the Commonwealth's right to a tract of land, bounded, "beginning at the *Kennebec* river in the north line "of *Woolwich*, thence easterly on that line, and on the same "course fifteen miles, thence northerly *keeping the distance of* "*fifteen miles from the river*, till it meets with a line drawn due "east from the mouth of *Wesserrunset* river, at the distance of "fifteen miles from *Kennebec* river ; thence due west five miles ; "thence north three miles ; thence west thirty miles, crossing "*Kennebec* river, and exclusive of the width thereof ; thence "due south three miles ; thence south forty five degrees east, "until it meets a line on the western side of *Kennebec* river, "*running parallel with the general course thereof and fifteen miles* "*therefrom* ; thence running southerly, *keeping the width of fifteen* "*miles from said river*, to a line drawn from said river at right "angles with the general course thereof, coinciding with and "passing through the utmost limits of *Cobbesconte* towards the

"western ocean; thence in the line last mentioned easterly to "*Kennebec* river; thence in a direct line to the first mentioned "bounds."

There had also been an agreement between the agents of the Commonwealth and those of the *Kennebec* proprietors, *June* 26, 1789, conformably to which agreement instructions were given to *Ephraim Ballard*, a surveyor appointed to run the line, "until you meet a line on the western side of *Kennebec* river "*parallel with the general course of the river last mentioned, and* "*keeping the distance of fifteen miles therefrom.*"

And the line was described in similar language in another agreement between the same parties dated *Feb.* 18, 1799.

A verdict had been taken for the demandant, subject to the opinion of the whole Court as to the construction of the grant. This question was argued at *September* term 1822, and the cause continued under advisement till this term.

Orr and *R. Williams*, for the demandant.

Longfellow, *Greenleaf*, and *Fessenden*, for the tenant.

For the tenant it was argued,—1st. That by the terms of the grant, it was the manifest intent of the parties to grant a tract of land thirty miles wide and no more, one half of which was to lie on each side the river.

2. That there must be a point on the river, above which the grant does not extend; and consequently a *head line* to the grant; and the course of this head line must also be the course of every other line of admeasurement from the river to the exterior boundary of the grant.

3. That the *Kennebec* proprietors had given their own grant a practical construction, having established a boundary and courses with a view of conforming to it, by which they were therefore bound. *Makepeace v. Bancroft* 12 *Mass.* 409. This was proved by the location of their lots;—by the releases between them and the *Pejepscot* proprietors;—by their grant to *Vassal*;—by their deed from the Commonwealth of *Feb.* 18, 1789;—and by their subsequent agreements with the agents of the Commonwealth.

And the lines thus established agree sufficiently with the courses "eastward and westward" mentioned in the grant.

4 That upon any other construction, a line fifteen miles from the mouth of *Wesserunsett* river cannot reach the line claimed by the grantees, by more than a mile. And the line thus claimed, being a curve-line, is impracticable.

5. That the exterior side lines of the grant should therefore be run parallel to the general course of the river, measuring from the river always by a west-north-west and an east-south-east course.

6. That the authorities which seem to countenance an admeasurement of fifteen miles from *every* point of the river, thus giving the grantees a tract of nearly fifty miles wide, instead of thirty,—were cases of grants from the King or Commonwealth, subject to another rule of construction; and not, like the present, a mere deed of conveyance between private persons.

For the demandant it was replied,—1st. That the question had formerly been settled in his favor by the Supreme Judicial Court of *Massachusetts* in case not reported, brought by the *Pejepscot proprietors v. Bishop*, a copy of which was produced and read.

2. That the adoption of a west-north-west course was not binding on the *Kennebec* proprietors, it being arbitrarily assumed for the mere purpose of settling a dispute between them and their neighbors, and not as any limitation of their rights under the grant.

3. That the words of the original grant are as full and ample as could be used, to convey all the land within fifteen miles of *any part* of the river. If the grant *alone* be inspected, it contains no indication of any specific course by which the admeasurement from the river should be made. And if the rule contended for by the tenant is adopted, the words of the original grant will not be satisfied, because the "space" will not be "fifteen English miles on each side the river."

4. So far as the doings of the Commonwealth can affect the question, they are in favor of the demandant. Their agreement with the proprietors, and the instructions to their surveyor were, *to keep the distance of fifteen miles from the river*; which he could

never have done upon the construction contended for on the other side.

And the construction adopted by the demandants is the settled construction in New-York in similar cases. *Jackson v. Williams* 2 *Johns.* 297, and *Williams in error v. Jackson* 5 *Johns.* 489, 504. *Jackson v. Dennis* 2 *Caines* 177.

WESTON J. The demandants in this action move for a new trial on account of a misdirection of the Judge in a matter of law to the jury; by which they were instructed that "if they believ- "ed the demanded premises were within fifteen miles of *Kenne-* "*bec* river, measuring in *any* direction, or on any point of compass "from the river, they ought to find their verdict for the deman- "dants." It appears from the evidence reported by the Judge, that the demanded premises are within fifteen miles of *Kennebec* river, measuring in one direction; but that they are not within fifteen miles of the river, measuring upon a west-north-west course.

It is conceded that the land of the proprietors of the *Kennebec* purchase extends fifteen miles from the river, on each side; and that the determination of this cause will depend upon the course upon which this distance of fifteen miles is to be measured.

The counsel for the demandants contend that it is to be ascertained by measuring in any direction, from any part of the river within their limits. On the other side it is insisted that this distance is to be ascertained by measuring at all points, at right angles with the general course of the river, which, as the counsel for the tenant assume, would require an admeasurement upon a west-north-west course. And they insist that their position is supported by the true construction of the original title of the demandants; by their actual grants and locations; by their deeds of release to the *Pejepscot* proprietors, ascertaining a part of the southerly line of their claim; and by the adjustment made between them and the Commonwealth of *Massachusetts*, by which their title was confirmed within certain limits.

We are met at the threshold of this controversy by a decision of the Supreme Judicial Court of *Massachusetts*, in the case of the *Pejepscot* proprietors, under whom the present tenant claims, and

Zadock Bishop, cited by the demandant's counsel, but not to be found in the reports, which they contend, determines the question in favor of the demandants. Upon examining the case cited, as reported by the Judge who presided at the trial, it appears that the tenant claimed under the proprietors of the *Kennebec* purchase ; that the land in dispute would not be included within their claim, measuring the fifteen miles upon a west-north-west course; but that it was within fifteen miles of the river measuring upon a course at right angles with the river, and probably meaning according to its direction at the place from which the admeasurement was made. The Judge instructed the jury that the proprietors of the *Kennebec* purchase had a right to extend their grant fifteen miles from the river, to be measured on a course at right angles with the river in every part ; and that if they believed that the land in dispute lay within fifteen miles of the river, measuring in any direction, they must find their verdict for the tenant, which they accordingly did. To this opinion and direction of the Judge the demandants excepted, and moved for a new trial on account of a misdirection in a matter of law. This motion having been argued in the county of *Kennebec*, and having been continued *nisi*, the Supreme Judicial Court, at *November* term 1819, in *Middlesex*, directed the clerk of the county of *Kennebec* to enter upon the docket of the preceding term of that county that the motion for a new trial was overruled, and ordered judgment to be rendered upon the verdict.

From the record and proceedings in the case cited, it would seem that the whole Court sustained the opinion given by the Judge to the jury ; but the counsel for the tenant in this action having produced a letter from one of the Judges of that Court, stating that no general principle of construction was settled, or intended to be settled in that cause, I have deemed it suitable and proper to go into a full consideration of the general question raised between these parties.

It may tend to a more satisfactory elucidation of the question, to consider, first, upon what principles the claim of the demandants ought to be settled, independent of any actual locations made, or agreements entered into, by them ;—and secondly, how far their rights may have been affected by such locations or agreements.

The original grant from the council established at *Plymouth*, of the lands now claimed by the proprietors of the *Kennebec* purchase, after fixing the points in *Kennebec* river above and below, to and from which it was limited, extended it for "the space of fifteen English miles on each side of the said "river, commonly called the *Kennebec* river, and all the said "river called the *Kennebec* that lies within the said limits and "bounds, eastward, westward, northward and southward."

The difficulty in ascertaining the extent of the grants on each side of the river, arises from the winding and serpentine course which rivers and streams are uniformly found to pursue.

By measuring the fifteen miles at every point, at right angles with the general course of the river, upon the hypothesis contended for by the counsel for the tenant, the two side lines would very nearly correspond with the particular course of the river in all its parts, and the end lines would be at right angles with the general course, and parallel with each other.

The lines ascertained in this manner would embrace about the same quantity of land which the grantees would have been entitled to, had the river proceeded in a straight line between the points to which their grant is limited ;—and if we assume that the distance between these points in a straight line is twenty miles, but that as the river runs it is twenty five miles ; this rule of construction requires that a given space projected from a meandering line of twenty five miles would embrace no more land than would be included in the same space projected from a straight line of twenty miles. It is demonstrable, however, that if you pass the end of a line of the given space in length, along the meandering base, and, without withdrawing it in any part therefrom, with the opposite end mark an exterior line, keeping the measuring line always upon an inclination which will give such exterior line its greatest extension ; the land embraced will be much more than the same measuring line would include, extended in the same manner along the straight base. And from every point in the exterior line you would reach the winding base in the given distance, and from every point in the same base you would reach the exterior line in the given distance, in some one direction.

The position in favor of the tenant's mode of admeasurement, the force of which I have felt most strongly, is—that every rod in the given base, which is the river, should determine the location of the same space in each of the exterior lines ; the only practicable way of doing which would seem to require his construction. But the land conveyed was to extend the space of fifteen miles on each side of the river, which is equivalent to saying that it is thus to be extended from the whole and every part of each side. If therefore, extended from some points in the river, the line of fifteen miles would not include so much land as if extended from other points ; yet, as all points are equally given, I can perceive nothing which would preclude the grantees from measuring from such points as would be most favorable to them. And upon a full consideration of the question submitted, I am of opinion that the terms of the grant are best satisfied by extending it so as to embrace all the land which can be found within fifteen miles of the river, measuring from any point, in any direction, not above or below the points of limitation.

With regard to the end lines of the grant or patent, it appears to me that they should be formed by an admeasurement at right angles with a straight line extended between the points within which the grant is limited; or, in other words at right angles with the general course of the river. For the grantees are entitled to no land above or below these points of limitation ; and whether land be above or below these points will depend on the direction in which they lie in relation to each other. The general construction before given is supported by the case of the *Pejepscot* proprietors against *Bishop* ; although, for the reasons before stated, I have not considered that case as decisive of the present. I have not been able to find, among the reported cases of *Massachusetts*, any one which has presented a question like that raised between the parties before us. In *New-York*, the true location of grants of a determinate breadth, extending along a river or stream, has frequently been submitted to their judicial tribunals ; and in one instance, the Courts there were called on to determine the construction of a grant extended for a given distance around certain plains, and which was considered as presenting the same question, in principle. In the case of *Jackson*

v. Lunt 2 *Caines* 363, *Staat's* patent was under consideration; which was to run up the *Hudson* as the river runs, from a certain point, two hundred chains; thence up into the woods, north-west, twenty chains, to the mountain; thence along said mountain, parallel with *Hudson's* river, to a certain rivulet, thence down that rivulet to the place of beginning. *Spencer* J. in delivering the opinion of the Court, observed that in running a line parallel with a river, it is only requisite that the distance where that is to control should be such that the river in some one point is not further off than is required. In other words, the west line of *Staats'* patent, without reference to the mountain, if run parallel with the general course of the river, might in some places be at a greater distance than the twenty chains, and yet be correctly run.

In *Williams v. Jackson*, before the Court for the correction of errors, 5 *Johns.* 489, the location of the *Hoosack* patent was in controversy, which extended for two miles on each side of *Hoosack* creek. *De Witt Clinton*, senator, in delivering his opinion, in which a majority of the Court concurred, states that "the mode "now adopted by the State, and considered the only practicable "one in cases like the present, is to run the bounds so that every "point in them shall be exactly the given distance from the point "nearest to it in the creek or river." The same rule prevailed in the location of the *Catskill* patent, 5 *Johns.* 440, which was to extend four English miles from five great plains of an irregular figure. It seems therefore that the construction upon which the demandants rely, and which appears to me to be the true one, is in conformity with that which prevails in *New-York*.

It remains to consider whether the proprietors of the *Kennebec* purchase have done any thing in their locations, or in their agreements with the owners of adjoining tracts, impairing their right to the full benefit of this construction. They have located their lots uniformly, it is said, upon a west-north-west and an east-south-east course; which, it is contended, is at right angles with the general course of the river. As these lines would be parallel with their end lines, there was a manifest propriety and convenience in this location; and I can perceive nothing in it which can have any tendency to curtail their western boundary. Nor

can I discover that their western line was limited or restricted by their deed of release in 1758 to the *Pejepscot* proprietors. By that deed a part of their southern boundary was to run "a west-"north-west course, until it meets with the westerly line of the "*Kennebec* purchase as it extended north and south, and which "is fifteen miles from said *Kennebec* river." In legal construction, this line would run a west-north-west course to the westerly line of the *Kennebec* patent, as a monument, wherever that might be, whether exceeding or falling short of fifteen miles. And although that line is represented as being fifteen miles from the river, yet that representation would be true in fact, if it was found to be so, measuring in any direction.

The adjustment between the proprietors of the *Kennebec* purchase and the Commonwealth of *Massachusetts*, was a matter of compromise and compact ; to which the *Pejepscot* proprietors, under whom the tenant claims, were neither parties nor privies. But if it were otherwise, and we were now called upon to settle the demandant's claim upon the principles of that adjustment, I am not aware that the limits of the *Kennebec* purchase would be curtailed by it. By the release from the *Commonwealth*, the westerly line of the *Kennebec* purchase, within the limits of their original patent, was to keep the distance of fifteen miles from the river, and that, upon a true construction, as we have seen, would not be done, if any point in that line approached nearer than fifteen miles to any point in the river.

Upon the whole, it appears to me that the demandants are entitled to judgment on the verdict ; and I am authorised to say that Judge *Preble* concurs in the result of this opinion.

NOTE. The Chief Justice, having formerly been of counsel for one of the parties, did not sit in this cause.

TINKHAM *vs.* ARNOLD.

The undisturbed enjoyment of any *known legal right*, such as the flowing of lands for the support of mills, &c. for *any* term of time, furnishes no presumptive evidence of a grant.

This presumption arises only in cases where the user or occupancy would otherwise be unlawful.

Where a legal title to hold land is disclosed to the Court, the party shall not be admitted to say that he holds by wrong.

In a case reserved upon the report of the Judge, no point is open to the parties except those which appear in the report.

IN a complaint under the statute for the support and regulation of mills, against the defendant for flowing the lands of the complainant, the defendant, among other things, pleaded that on the first day of *March* 1783, the proprietors of the *Kennebec* purchase, being seised of all the land in question, granted by their deed, which is lost, to *James Bowdoin*, whose estate he has, the right to erect, keep up, and maintain the dam mentioned in the complaint, and to flow the land therein described, free of any claim for damages.

At the trial before the *Chief Justice*, upon a traverse of these facts, it appeared that the *Kennebec* proprietors, at the time mentioned in the plea, were seised in fee of a large tract of land, including a mill-site and land, which on that day they conveyed to *James Bowdoin*, and which came by regular conveyances to the defendant; and that in 1809, the part flowed was conveyed to the complainant by a stranger, and confirmed to him by deed of the proprietors' agents in 1821;—and that at the time of these conveyances, and for about forty years prior to the date of the complaint, the lands therein described had been flowed by the defendant's dam, to the height mentioned in the complaint.

The defendant relied on the undisturbed use and enjoyment of this privilege or easement for that term of time, as presumptive evidence of the grant set forth in his plea;—but the *Chief Justice* ruled it incompetent evidence to go to the jury for that purpose, because the flowing was a lawful act, by the statute; and a verdict being returned for the complainant, this point was reserved for the opinion of the Court.

Bond and *Clark*, for the defendant, were about to open the argument upon a point not raised in the Judge's report; to which *Weston J.* objected, unless the report was first amended, by consent, for that purpose. This the adverse counsel declining, the COURT said that the verdict not being taken subject to their opinion upon the *whole case*, no point was now open to the parties, except those stated in the report.

They then adverted to the policy of the law, encouraging, as it does, the erection and support of mills; and contended that the right to flow lands without payment of damages ought not to be abridged, but rather enlarged, by legal construction. Here the question was whether the enjoyment of this right by the defendant, for so long a term, was adverse to the rights of all other persons, or not; and the whole evidence to this point ought to have been submitted to the jury. For if it was of that character, it was conclusive evidence of an original grant. *Holcroft v. Heel* 1 *Bos. & Pul.* 400. *Campbell v. Wilson* 3 *East* 294. *Bealey v. Shaw* 6 *East* 208. *Weld v. Hornby* 7 *East* 195. 2 *Saund.* 175, *note*. *Story v. Odin* 12 *Mass.* 157. *Gayetty v. Bethune* 14 *Mass.* 49.

The defendant's estate being the same with that of his predecessors, who commenced the flowing forty years ago, the question must be decided by reference to the law *then* in force, viz. *Stat.* 1714, *Ancient Charters*, *ch.* 111, which did not take away the common law remedy by trespass *quare clausum*, because it contained no provision for a trial of the right to flow the land, nor of the complainant's title to the soil; and therefore no occupancy of the land could be considered as in submission either to the rights of the complainant, or to the remedy provided by the statute. The trial of these questions, under this process, was first provided for by the statutes of 1796 and 1798; but the defendant cannot justly be said to have occupied under these statutes, since he took the estate *as* his grantor held it, and merely continued an act whose character was established fifteen years before, by the law then in force.

R. Williams and *A. Belcher*, for the complainant.

The cases where a grant is presumed from *user*, are where the owner of the soil had *knowledge* of the adverse occupancy; otherwise his silence is no evidence of a grant. 1 *Phil. Evid.* 117, 120, 125. 10 *Mass* 72.

The presumption of law is, that every man acts according to his rights. But by *Stat.* 1714, it was made lawful to flow land for the support of mills; and every act of the defendant, offered in evidence, might well consist with his rights by this statute; and was no evidence of a grant, because it was lawful without one. It could not therefore be deemed adverse to the title of the owner of the land. *Bethum v. Turner* 1 *Greenl.* 111. *Ricard v. Williams* 7 *Wheat.* 59. *Cooper v. Barber* 3 *Taunt.* 99.

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

By the report in this case it appears that the only question reserved for the decision of the Court is, whether the opinion of the Judge who presided at the trial of the cause, was correct upon the point stated;—viz. that the continuance of the mill-dam for about forty years past, was not legal evidence of a grant from the proprietors of the *Kennebec* purchase, of a right to flow the lands in question without payment of any damages, as mentioned in the third plea of the respondent; the flowing being a lawful act.

The argument of his counsel proceeds on the ground that after the lapse of so many years, a grant may, and ought to be presumed; inasmuch as during all that period no objection has been made against its continuance; and no claim for damages has ever been exhibited against any one, prior to the present complaint.

The validity of this argument depends on the circumstances under which the dam was originally erected, and has since been continued; producing its natural consequence—the flowing of the lands adjoining the river above it. When one person has been for many years in the open and undisturbed enjoyment of an easement in the land of another, with the knowledge of the true owner of the land, a grant may be, and often is presumed. The presumption is founded on the implied admission of the real proprietor that the easement had a lawful origin and commencement, and had been lawfully continued under his original permission, though

the written evidence of the grant may be lost. The law gives a natural construction to the conduct of the parties; and, after a long succession of years, presumes that the person enjoying the easement, having no right to enjoy it *unless* under the grant of the true owner, *had* such a grant; and that in consequence of it he had never been molested in his enjoyment. This, in the absence of all explanatory circumstances, would be the usual and legal presumption. But in the case above supposed, if the person claiming to be the true owner could show that the easement was enjoyed only by consent, for a limited number of years, or during pleasure, and that the term had elapsed, or the permission been revoked, it seems clear that in such cases all presumption of grant would instantly vanish, whatever length of time the user had under such circumstances been continued. In 1 *Phil. Evid.* 125, it is laid down, that "the presumption of a deed from long usage "is for the furtherance of justice, and for the sake of peace, "when there has been a *long exercise of an adverse right.*" In support of this principle the case of *Knight v. Halsey* 2 *Bos. & Pul.* 206, and many other cases are cited. So in *Holcroft v. Heel* 1 *Bos. & Pul.* 400, it was decided that "an *adverse* enjoyment of a "way over another person's land for above twenty years, is strong "ground for the jury to presume a grant." See also 1 *Phil. Evid.* 125, 129, and the numerous cases there cited. It will be observed that in these cases the possession and user were *unlawful* and *adverse*,—not by permission of the owner of the land. Professor *Stearns*, in his treatise on the law and practice of real actions, page 240, says—"Presumptions of this kind are adopted "from the *general infirmity* of human nature, the *difficulty* of pre- "serving muniments of title, and the *public policy* of supporting "long and uninterrupted possessions. They are founded upon the "consideration that the facts are such as could not, according to "the ordinary course of human affairs, occur, unless there was a "transmutation of title to, or admission of an existing title in, the "party in possession. They may therefore be encountered and "rebutted by contrary presumptions; and can never fairly arise "where all the circumstances are *perfectly consistent with the non-* "*existence of a grant.*" In cases like the present, the ground of

presumption fails;—the reason of the law ceases, and the legal principle also ceases. These positions are plain, and require neither further illustration nor authorities.

Let us now examine the principles especially applicable to the case before us. As early as the year 1714, it was provided by a provincial act, that "where any person or persons have already "or shall hereafter set up any water mill or mills, upon his or "their own lands, or with the consent of the proprietors of such "lands, legally obtained, whereupon such mill or mills are or "shall be erected or built; that then such owner or owners shall "have *free liberty* to continue and improve such pond for their "best advantage, without molestation." The act further provided the mode by which persons whose lands were injured might obtain compensation. By the statute of 1795, *ch.* 74, provisions were made nearly similar to these, though more particular and numerous; which, with few alterations, have been enacted in this State, by *stat.* 1821, *ch.* 45,—but in all, the *right to flow* the lands of others, paying damages, is distinctly given and continued to mill owners. Under this licence, *given by law*, the dam in question was built and has been continued. Of course no consent of the owner of the land flowed was *necessary* to be given; and therefore none *need* be, or *can* be presumed, notwithstanding the lapse of forty years.

The facts which the defendant offered to prove, were not denied by the complainant; but the relevancy of those facts was the matter in dispute; and the question presented at the trial was, whether from them any presumption arose, or could arise, in favor of such a grant as is alleged in the plea in bar, inasmuch as the acts done and continued by the defendant and those under whom he claims were *permitted by law*, upon the terms and conditions before mentioned. It has been pressed upon us in the argument that the facts on which the presumption of a grant is alleged to depend, should be submitted to the decision of the jury, together with the facts relied on as repelling that presumption. This is true; but such is not the present case. The complainant does not rely on any *proveable facts* to repel the alleged presumption; but upon a *public statute*, of which the Court are bound to take judicial notice. There was nothing in contest before the

jury;—nothing for them to decide. The undisturbed user of the mill-dam, and continuance of the flowing, was the only fact offered to be proved; and this has never been contested. Under such circumstances it was a question of law, whether, from those admitted facts, authorized by a public statute, it was competent for the jury to presume a grant. As it would have been improper for them, in such circumstances, to presume the alleged grant, the rejected proof could be of no use to them; and in fact could not authorize them to find a verdict for the defendant.

But it has been further urged, that the fact may have been, that the defendant and those under whom he claims, never considered themselves as acting under the license given by the statute; but independently of its provisions and in opposition to them. To this it may be replied that when a man has a *legal title*, which is disclosed to the Court, he shall not be received to say that he holds by wrong.

It is true no damages have before been demanded; but they might have been, if actually sustained;—and the omission to claim these furnishes no presumptive evidence of grant of the easement in question, when by law, such a grant was not necessary, and when the conduct of all concerned was explainable on legal grounds, without recourse to such presumption. Surely if a lessee had been in possession of a farm for thirty or forty years, by the written or verbal permission of the owner, and under an agreement to pay him a reasonable sum annually for the use of it, a jury could not presume that the farm had been granted and conveyed to the lessee, to hold free of all claims of the owner, merely because he had never been called on for the agreed rent. Perhaps a part of it might be lost by the operation of the statute of limitations, or the common law presumption of payment after the lapse of twenty years; but no other consequence would ensue, to the injury of the owner. The undisturbed enjoyment of a *known legal right*, furnishes no ground of presumption either way;—and none is necessary. A *right* is sometimes presumed from circumstances, where the origin and fountain cannot be found. By a long series of years, wrongs may ripen into rights; but the enjoyment of a *right* gives no title to its continuance beyond its own limits and duration. On

these grounds we think the opinion of the presiding Judge was correct, and that the defence is unsubstantial.

Judgment on the verdict.

Brown *vs.* Gay.

In ascertaining the boundaries of the lots of land into which a township may have been laid out, the actual locations by the original surveyor, so far as they can be found, are to be resorted to; and if any variance appears to exist between them and the proprietors' plan, the locations actually made control the plan.

Where two adjoining lots were laid down on the proprietors' plan as being *each* of the width of a hundred rods, but their *united* actual width was only one hundred and seventy six rods; and there was no evidence of the original location of the line between them; it was holden that the plan was to be resorted to, as the next evidence; and this representing them as of equal width, the deficiency was apportioned equally to each lot.

And if there be an excess, under the like circumstances, it is to be equally divided.

If the owner of a parcel of land, through inadvertency, or ignorance of the dividing line, includes a part of the adjoining tract within his inclosure; this does not operate a disseisin, so as to prevent the true owner from conveying and passing it by deed.

This was a writ of entry in which possession was demanded of a lot described as "lot No. 4, on *Bullen's* plan." The tenant owned the adjoining lot numbered *three* on the same plan; and the question was, whether a part of the land inclosed by the tenant, belonged to the latter lot, or to the former.

The surveyor, at the trial before *Weston J.* testified that he intended to make, and supposed he did make each of the lots in that survey of the width of one hundred rods, and that he marked trees for the corner boundaries of the several lots. The corner boundary made by him between the lots numbered *three* and *four* originally was a beech tree; but the place where it stood was now wholly unknown. The monuments between lots numbered 2 and 3, and lots numbered 4 and 5, which were made by the surveyor, are now existing; but the distance between them is only one hundred and seventy six rods, instead of two hundred, as rep-

resented on the plan. This error, the surveyor testified, must have been occasioned by a mistake in reckoning, at the time of making the survey of one of these lots, but which lot, he was unable to ascertain. The plan of the proprietors represented all the lots as being each one hundred rods wide, and the lots numbered 2, 3, 4 and 5, as lying contiguous to each other, in the same range.

Before the date of the demandant's deed, the tenant, in 1815, had entered on lot numbered *three*, under his own title deed, and had caused it to be surveyed by the original surveyor, of the width of one hundred rods, and built his fence conformably to this survey.

His counsel hereupon contended, *first*, that the demandant ought not to recover, unless he should prove that the original monument, made by the surveyor between the two lots, was situated at the point to which he claimed;—and *secondly*, that the tenant being in actual possession of the disputed land at the date of the demandant's deed, nothing passed by this deed, the grantor being disseised at the time of making it; and so this action could not, on any principles, be maintained.

The Judge instructed the jury that if the demandant had failed to satisfy them that the beech tree, the original monument between lots numbered 3 and 4, was at the distance of one hundred rods from the monument between lots numbered 4 and 5, he could not *recover* to *that extent* ;—and that if the tenant had not proved to them that the beech tree was at the distance of one hundred rods from the monument between lots numbered 2 and 3, he could not *defend* to *that extent* ;—and that if they had no proof to satisfy them where the tree originally stood, they must regard it as having never existed ; in which case they must be governed by the plan, and treat the lots as of equal width, though it be less than a hundred rods.

He also instructed them, that if the tenant were in possession of the premises defended by him, at the date of the deed to the demandant, he was in possession claiming it as a *part of lot numbered three* ; that if they should find it not a part of that lot, he was in by *mistake* ; and that *such* a possession would not operate a disseisin of the grantor.

Under these instructions they returned a verdict for the demandant for one half the premises defended, adopting a divisional line which made both the lots of equal width ;—which was taken subject to the opinion of the whole Court upon the correctness of the Judge's instructions.

Evans, for the tenant.

In settling the facts in this case, the jury erred in applying a rule of apportionment to lots bounded by known monuments. It was admitted that the premises defended were part of lot numbered *three*, if that lot was entitled to the width of a hundred rods. The deficiency was occasioned by a mistake in surveying one of the lots ; but it was not known in which of them this happened. The jury have therefore done injustice to one party or the other, in not allowing him the full measure of a hundred rods. Now every demandant must recover only on the strength of his own title ; and in this case he should have shewn that *his* lot was in fact laid out a hundred rods wide ; and failing to do this, the tenant is protected in his possession by the rule of *melior est conditio possidentis.*

Farther, as the tenant was in possession at the time of the making of the demandant's deed, nothing passed by that deed, the grantor being disseised. Nor was this a possession by *mistake.* He claimed the land as part of the lot numbered *three*, and as such he still maintains it.

R. Williams, on the other side, was stopped by the Court, whose opinion was afterwards delivered as follows, by

Weston J. The tenant is the owner of lot numbered three, according to *Bullen's* plan, and the demandant, by a subsequent deed, of lot numbered four, according to the same plan. A verdict has been returned for the demandant, for a portion of the demanded premises, as constituting a part of number four ; and one of the questions raised between the parties is, whether, upon this point, the verdict is justified by the evidence. The plan was made in pursuance of an actual survey ; and trees were marked as the corner bounds of the several lots. The lots were design-

ed to be each one hundred rods in width ; and they are thus represented on the plan. The monuments, originally marked and established by the surveyor, between numbers two and three, and between numbers four and five, were proved to be still existing; but the monument between three and four could not be found ; nor could the place where it stood be ascertained. The space between two and five, instead of being two hundred rods, as by the plan it should be, is found to be only one hundred and seventy-six rods and fourteen links. The surveyor testifies that there must have been a mistake in the survey of one of the lots, but that it is impossible for him to ascertain in which.

Upon these facts, the counsel for the tenant contends, that the burthen of proof is upon the demandant, before he can restrict the owner of number three to less than one hundred rods, to shew that, by the original location, his lot was thus restricted. The same position might, with equal propriety, have been taken by the owner of number four, if he had been in possession, to the extent of one hundred rods in width, and the owner of number three had brought his action to recover part of it. The rights of the parties do not depend upon their respective possessions ; but upon a sound construction of the deeds and of the plan, which forms a part of them. The original locations by the surveyor, as far as they can be found, are to be sustained ; and if any variance appears to exist between them and the plan, the locations actually made control the plan. Applying these principles to the facts, it appears that the distance between two and five must be limited to one hundred and seventy-six rods and fourteen links. It being impossible now to fix the bounds between numbers three and four, as originally made by the surveyor, the plan remains as the only guide, by which the division can be ascertained. By the plan it appears, that the space between two and five, is exactly divided between three and four ; and there being nothing to control the plan, this space must therefore be equally apportioned to the owners of three and four, in conformity with the verdict.

The same rule would have prevailed, if the distance between the monuments fixed, had been found to exceed that which is represented on the plan ; a case of much more frequent occur-

rence. In the case before us, it would not accord with the plan to give to number three, because it precedes four in the series, a width of one hundred rods, throwing the deficiency altogether upon number four. So, if the distance had been three hundred rods, it would have accorded as little with the plan, to have restricted number three to one hundred rods, and to have given to number four the whole excess. The same principle of apportionment would equally apply, where an excess or deficiency was found to exist, in the estimated distance, between fixed monuments, divided into any given number of lots ; where a plan is the only guide, by which to determine their location. For instance, if the distance between two rivers or streams, at a certain point, and in a certain direction, be assumed to be one thousand rods ; and the whole be divided into ten lots, of one hundred rods each in width, and thus delineated, without any actual survey, on a plan, numbered from one to ten inclusive ; and the lots be sold severally, referring to such plan ; if the distance between the two rivers or streams be actually found, upon the face of the earth, to be fifteen hundred rods, the rule of apportionment requires that, the whole space being regarded as consisting of one thousand parts, one hundred should be assigned to each lot. The fact that each of these parts proves to be a rod and an half, instead of one rod, in length, as represented on the plan, has no tendency to vary the principle. The plan in the case supposed, by which alone the location can be made, extends the ten lots over the whole space, and gives to each lot an equal proportion.

It is further contended that, as to the premises, for which a verdict has been returned for the demandant, he has made out by the evidence no title thereto ; inasmuch as his grantor, as it is insisted, at the time of the execution of the deed by him, was disseised of this part of the land by the tenant, and that therefore nothing passed by the deed. The tenant has no title to any part of number four, nor does he pretend to have any. He is the owner of number three ; and he claims and defends the premises in dispute, as a part of that lot. If they are no part of that lot, his claim is plainly founded in mistake. If the owner of a parcel of land, through inadvertency or ignorance of the dividing line,

includes a part of an adjoining tract within his enclosure, this does not operate a disseisin, so as to prevent the true owner from conveying and passing the same by deed.

It appearing to the Court that the jury were properly instructed by the presiding Judge, upon both the points made, there must be judgment on the verdict.

JOY *vs.* THE INHABITANTS OF THE COUNTY OF OXFORD.

The authority given by *Stat.* 1796, *ch.* 58, *sec.* 3, [*Stat.* 1821, *ch.* 118, *sec.* 24] to the Courts of Sessions to make assessments for the opening and repairing of highways in townships not incorporated, relates only to highways laid out by the order of such Courts.

Where the Court of Sessions taxed lands in a plantation for the repair of a road laid out by the State, and not by the Court, their proceedings were holden merely void ;—and the lands having been sold by the county treasurer for non-payment of the tax, and redeemed by the owner, it was held that he might recover back the money so paid, in an action for money had and received against the county.

THIS was an action for money had and received, &c. and came before the Court upon a case stated by the parties.

The legislature of *Massachusetts*, by a resolve passed *June* 20, 1794, granted to *Jacob Abbot* 4000 acres of land in township No. 6, on condition that he should open a sufficient passable road from *Farmington* to the line of *New-Hampshire*, towards upper *Coos*, and leading through said township ;—on the completion of which, to the satisfaction of the committee for the sale of eastern lands, they were authorized to execute a deed of conveyance to him of the land. This road was completed in the autumn of 1797, and and deed made and delivered *Feb.* 7, 1800, in pursuance of the resolve.

The Court of Sessions for the county of Oxford at their *June* term 1819, after due notice, ordered and assessed a tax of two cents per acre on all the lands in township No. 6, and appointed a committee to collect and expend it in repairing the same road. Of this tax, which was four hundred and forty six dollars and sixty

cents, the plaintiff's proportion was three hundred and eighty two dollars and eighty cents; which being unpaid, all his lands in the township were advertised and sold *July* 6, 1820, to one *Stevens*, by the county treasurer, and a deed of conveyance executed on the tenth of the same month, in the forms prescribed by law; for the consideration of four hundred and seventy dollars, being the amount of the whole tax and charges of sale.

These lands were sold on the twenty seventh of the same month by *Stevens* to *Henry Rust Jun.* ; to whom, on the ninth of *October* following, the plaintiff, in order to redeem his lands, paid the sum of four hundred and fifteen dollars and twenty eight cents, being his proportion of the tax, including interest and charges. *Mr. Rust*, at the time of this payment, was treasurer of the county. The plaintiff also paid twenty dollars more in his endeavors to obtain repayment of this money.

The money obtained from this tax was expended in repairing the road in 1822, but the road was never laid out or accepted by any other authority than that of the State as before mentioned. The plaintiff had prefered a petition to the Court of Sessions for the county of *Oxford*, praying for repayment of the money, which was refused.

Bond, for the plaintiff.

The Court of Sessions in assessing the tax, probably supposed their proceedings to be within the *Stat.* 1796, *ch.* 58. But that statute refers only to roads laid out under the authority of the Sessions, after previous notice to the proprietors of lands, to shew cause against the location. But this road was laid out by the State, and to be kept in repair by the State alone, so long as it shall be deemed of public utility. The Sessions had no more authority over it than over a turnpike or toll-bridge ;—and having no jurisdiction of the subject matter, their whole proceedings are merely void. *Sumner v. Parker* 7 *Mass.* 79. *Wales v. Willard* 2 *Mass.* 120. *Cutts v. Haskins* 9 *Mass.* 543. *Smith v. Rice* 11 *Mass.* 507.

If the Sessions had no jurisdiction, the money raised by the sale of the plaintiff's lands must be considered as holden in trust for him who has the lawful right. The county is a corporation ;

the treasurer is its receiving officer, for whose acts the county is responsible ; and his expenditure of the money is a misapplication of it, under an illegal order of the Court of Sessions. *Gray v. Portland Bank* 3 *Mass.* 364. *Winter v. The Bank of New-York* 2 *Caines* 337. And the action is correctly brought against the county ; for being commenced to try a right, it should be sued against the principal, and not against the mere agent or receiver. *Sadler v. Evans* 4 *Burr.* 1984.

Orr, for the defendants.

The Court of Sessions had jurisdiction, under the statute of 1796, which speaks generally of roads "laid out," without designating by what authority. Here the State, owning the land, opened and made a public road through it, as they had a right to do. It was legally laid out, for the use of the whole community, when the statute was enacted ; and so is manifestly within its provisions.

If it were not so, yet it had become a public road by more than twenty years use and acquiescence. An indictment would lie for neglect to keep it in repair ; and *a fortiori* it might be repaired as other public highways.

The money was not received nor held for the use of the county. It was expended on a public road, not for the benefit of the county, but of the whole State ; and more for the advantage of the plaintiff than of any other citizen or corporation ;—and on this ground also, this action cannot be supported.

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

By an examination of the statute of *Massachusetts* of 1796, *ch.* 58, under the supposed authority of which the assessment was made by the Court of General Sessions of the Peace of the county of Oxford, we are satisfied that the construction given to it by the counsel for the defendants, cannot be correct. The act is entitled "An Act in addition to the several Acts now in force respecting Highways." The authority given in the *third* section, to the Courts of General Sessions of the Peace to make assessments for the purpose of defraying the expenses of making and mending

highways in tracts of land not comprehended within the bounds of any incorporated town or plantation, has an evident relation to highways *laid out by such Courts*, and to such only. The introductory part of the section plainly shews this. The language is, "that the Court of General Sessions of the Peace in the several counties of this Commonwealth, *whenever application shall be made to them* to lay out any new highway through any such tract, &c. or for an order thereof to *amend or repair* any highway *already laid out* in the same," &c. The section proceeds to give power in such cases to the Court to make an assessment on such tracts of land, &c. for making or amending *such* highway, &c. In fact, the provisions of this statute cannot be considered as having reference to any highways, except such as *had been* or *should be* laid out by the Court of General Sessions of the Peace; the act being intended as an *extension* of the power of such Courts as to highways in unincorporated tracts of land.

Hence it follows that, as that Court in the county of Oxford undertook to assess and did assess the lands of *Mr. Joy*, to defray the expense of amending and repairing the road made by *Mr. Abbot*, according to his stipulation with the Commonwealth of *Massachusetts*,— a road never laid out by that Court, but merely by an individual under contract, or the condition of his grant; we are very clear that the tax was illegal; and that the Court had no kind of jurisdiction in the case, any more than though the lands had been situated in the county of *Cumberland*. The Court having no jurisdiction, the assessment was a perfect nullity; not merely *voidable*, but *absolutely void*. It is equally clear that when the lands were sold by the county treasurer to *Stevens*, and the money arising from the sale was paid into the county treasury, the sale being void, *Stevens* or his grantee might have recovered back from the county the money thus paid by him without any valuable consideration. The case finds that while the right of redemption existed, *Joy* paid into the county treasury the amount of the taxes assessed and incidental expenses, being $415 28, which sum he was *compelled* to pay to prevent a sacrifice of his property. The sum thus paid has put an end to all pretence of title in *Stevens* or his grantee; and has also relieved the county from all liability on account of their treasurer's

sale, by thus furnishing them with funds equal to the purchase money which *Stevens* paid. The above sum is thus paid by the plaintiff to the use of the county, and is now recoverable by him in the present action. Though the tax was assessed without any authority, the county have received its amount into their treasury; and the Court of Sessions, who defend this action as the authorized and legal agents of the county, have thus sanctioned the appropriation of the plaintiff's money as the act of the county. Hence the county is responsible, a legal demand having been made for the amount above mentioned. It is no answer to this action that the monies thus collected and paid into the treasury, have since been expended in repairing the road made by *Abbot*. Such an appropriation of it, without the consent of the plaintiff, was unlawful. As to the money, which he has paid for certain expenses in endeavoring to obtain a repayment of the money sued for, it cannot be allowed. But we are clearly of opinion that the plaintiff is entitled to recover the above sum of $415 28, and interest from the first day of *July* 1822.

A default must be entered and judgment rendered accordingly.

WILLIAMS, *libellant*, *vs.* WILLIAMS.

In a libel for divorce *a mensa et thoro*, the Court will require evidence of the marriage, even though the respondent does not appear, to answer to the libel.

THIS was a libel for divorce *a mensa et thoro* for the cruelty of the husband; who did not appear to answer to the libel.

Clark, for the libellant, was proceeding to offer evidence of the acts of cruely charged in the libel, when the Court called on him for proof of the marriage. He cited *Hill v. Hill* 2 *Mass.* 150. to shew that it was not the practice to offer proof of this fact, unless it were denied.

But THE COURT said that possibly the other party might not have had actual knowledge of the pendency of the libel, even though it may have been served or published as the law requires;

—and as the consequences of the divorce might seriously affect his estate in the matter of alimony, they would not decree a divorce from bed and board, until it should appear that the parties had been legally married, and that the libellant was thereby entitled to her alimony by law.

BACKUS, *libellant*, *vs.* BACKUS.

In a libel for divorce *a vinculo* for adultery, proof that the injured party has forgiven the offence by subsequent cohabitation with the offender, may be given in evidence under a general traverse of the facts alleged in the libel.

THIS was a libel by the wife for divorce *a vinculo*, for the adultery of the husband; who answered by a general traverse of the matters and things alleged in the libel. The fact of the adultery having been proved, *Orr*, for the respondent, offered to show that the wife, after knowledge of the offence, had cohabited with the husband, and had children by him, forgiving the injury he had done her. To which *Sprague*, for the libellant, objected that as the evidence went to justify the offence, or at least to excuse it, the matter should have been specially pleaded.

But THE COURT overruled the objection, observing that such evidence had always been heard in any stage of the cause, and even after a default.

THE INHABITANTS OF GREEN *vs.* THE INHABITANTS OF BUCKFIELD.

The *Stat.* 1821, *ch.* 122, *sec.* 2, which fixes the settlements of persons not paupers, in the towns where they resided at the passage of the act; relates as well to those who previously had settlements in this State, as to those who had none.

Supplies cannot be considered as furnished to a man as a pauper, under that clause in the act, unless furnished either to himself personally, or to some of his family, who reside under his immediate care and protection.

THIS cause, which was *assumpsit* for the support of a pauper, came up to this Court upon exceptions taken to the opinion of *Smith J.* before whom it was tried in the Court below.

The pauper was the wife of *Jeremiah Hodgdon, Jr.* whose lawful settlement was in *Buckfield*, until *March* 21, 1821. On that day he resided and had his home in *Lewiston*, where he had dwelt for more than a year previous, without having personally received supplies from any town as a pauper. But two of his minor children at that time, and for a long period before, were supported as paupers by *Buckfield*. It was proved, however, that his family had long since been broken up, the husband, wife, and children having separate places of residence, and the latter wholly abandoned by the parents, and released from all control by them for nine years preceding. The husband had been enrolled in the militia of *Lewiston*, previous to 1821, but was very poor, and sometimes a transient person, and had not lived with his wife for several years past.

Upon this evidence the Judge was of opinion that the action was not maintainable, and ordered a nonsuit, to which the plaintiff excepted.

This cause was argued at *June* term 1823, by *Bond* and *A. Belcher* for the plaintiffs, and *Sprague* for the defendants.

For the plaintiffs, it was said that the settlement of the father was not affected by the *Stat.* 1821, *ch.* 122, because, by a fair construction of its provisions, he must be understood to have received supplies as a pauper, within a year previous to the passage of the statute. For he was bound to support his children, and *they* were assisted as paupers. It was not the intent of the legislature to change the settlement of persons thus situated; and yet if the father is settled at *Lewiston*, the children follow him, being minors, and thus the settlement of paupers will be transferred, contrary to the express language of the statute.

If the father is not liable for these supplies, the children are, both by common law, and by the statute; and to this purpose are to be regarded as adults, relieved as paupers, and so within the exception in the act.

But it was not the intention of the legislature, by the peculiar provisions of this statute, to change the settlement of any persons *already settled* in this State. Before that period there were many persons who had no settlement in the territory which now

constitutes *Maine*, and who, if hereafter falling into distress, could not be removed to *Massachusetts*, though settled there, but must be relieved here, at the expense of the State. The legislature intended to fix the settlement of this class of persons, in the several towns which might then be enjoying the benefit of their industry. Other persons already had legal settlements, which were recognised and expressly confirmed by the first section of the act. It was not designed to annul existing settlements in any case, merely to give new ones in other places. There was no necessity for such a provision. This construction gives operation to all the provisions of the statute; while a different interpretation defeats the first section, as it respects all those who, though lawfully settled in one town in the State, yet resided in another. The existing evil was confined to the case of those who had no settlement in *Maine*, and to these alone ought the provision to be restricted.

For the defendants, it was replied that though the father might be liable at law, for necessaries furnished to his child, yet these could not be considered as supplies furnished to *him*, *as a pauper*, without doing violence to the language of the statute, which evidently relates only to the person actually receiving relief. The interpretation adopted on the other side would render any citizen, however wealthy, constructively a pauper; for all the kindred, who are bound to relieve their relatives falling into distress, and even strangers, who may be under contract for their maintenance, must be considered as receiving relief *as paupers*, whenever the least assistance was rendered to those they were bound to support.

After this argument the cause stood over for advisement, and at *August* term 1824, in Oxford, the opinion of the Court was delivered by

MELLEN C. J. It is admitted that the pauper has her settlement in *Buckfield*, unless her husband gained one in *Lewiston*, in virtue of his residence in that town on the 21st of *March* 1821; that being the date of the statute relative to the settlement and support of the poor. The counsel for the plaintiffs have relied upon two objections, to shew that the residence of the pauper's

husband in *Lewiston*, at the time alluded to, has not changed his settlement from *Buckfield* to that town.

It is urged that the intention of the legislature was that no persons, excepting those who had no settlement in any town in the State, should gain one in the town in which they might reside at the date of the act, in virtue of such residence. And to establish this position, the counsel have relied on the last clause of the first section, which is in these words;—" but all settlements *already* " *gained* by force of said laws, or otherwise, shall remain until " lost by gaining others in some of the ways hereafter mentioned." We do not perceive the force of this argument; for though the clause relates to settlements " already gained," it also provides for their continuance no longer than till others shall be gained, in some of the ways afterwards mentioned in the act; and *residence* in any town at the time, and under the circumstances, mentioned in the act, is one of those ways. We are therefore of opinion that the pauper was a person *capable* of gaining a settlement in the manner before stated, within the true intent of the act.

The next inquiry is whether he *did so gain one*. Under the *seventh* mode of gaining a settlement, stated in the *second* section, is the following provision;—" 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 dwells and has his home." The case finds that the pauper did on that day dwell and have his home in *Lewiston*, and that he had not personally received support or supplies as a pauper, from any town, within one year next preceding. The only question then is, whether supplies furnished during that year to *his children*, who had not lived with him, nor been dependent on him, for several years before, are to be considered as furnished *to the father*, *as a pauper*, within the true meaning of the statute. The plaintiff's counsel contend that they are. In giving a construction to that clause, it should be remembered that the statute provisions with respect to the settlement and support of the poor are perfectly arbitrary; not founded on any natural connection or moral obligation; at least so far as they regard the liability of towns.

Hence the argument which has been urged, grounded on the liability of a father to maintain his children, seems to furnish no reason for the construction contended for by the plaintiffs. Besides, there seems little room for *construction*, where the language of the statute is plain and unambiguous. It is equally true that in such cases all the words of a statute are to be considered as having a meaning; and none are to be rejected as useless. As the statute was intended to introduce and establish new principles, it seems that the provision under consideration was designed to fix all settlements on the day the act was passed; so that in the decision of questions which might afterwards arise, the 21st day of *March* 1821, might be resorted to as the point at which to commence inquiries. But it will be seen at once that the principle urged by the plaintiffs' counsel would completely defeat such an object; because if supplies furnished to a man's children in other parts of the State, and having no connection with his family, are to be considered as constructively furnished to the father, his residence in a particular town, on the day the act was passed, will be no decisive proof of his having gained a settlement in such town; all will be left in uncertainty; and after the lapse of a few years the principle will lead to confusion.

But the word "pauper" in the clause now in question must not be rejected, as it forms a distinct and important part of it. The residence of any person, in any town, on the day the act was passed, fixed his settlement there, unless, within a year, he had received support and supplies *as a pauper*. Therefore, if the supplies furnished to a man's absent children, who are paupers, may, according to the argument, be deemed as constructively furnished to the man himself, still this is not enough;—they must have been furnished to him as a *pauper*, to bring the case within the exception; and if not within the exception, it must be within the rule. It is not pretended in the case before us that the father was a pauper within the year, or that he *personally* received aid from any town. Now can it have been the intention of the legislature that a man who had his dwelling in a particular town on the day mentioned,—was possessed of a large estate,—taxable and taxed therein,—should not gain a settlement in such town, merely because one of his minor children was destitute, in some

distant part of the State, and was then actually receiving support from the town in which he was then resident ? Do the supplies thus furnished to the son, *ipso facto* convert the father into a pauper, according to the true intent and meaning of the provision ? Such a construction not only seems to do violence to the plain and direct language of the act, and to have a manifest tendency to abolish the principle of reciprocity, founded on taxation and support ; but also to lead to all that uncertainty and confusion in deciding questions of settlement hereafter, which was evidently intended to be avoided, by fixing on that day as a *terminus a quo*. Such a construction we think inadmissible ; and after mature consideration we are of opinion that supplies cannot be considered as furnished to a man as a pauper, unless furnished to *himself personally*, or to *one of his family* ; and that those only can be considered as his family, who continue *under his care and protection*. As the language of the statute is plain, we are not disposed to seek for occult meanings, and thus draw conclusions which may never have been contemplated by the legislature. The consequence is, that the supplies furnished in this case to the children, cannot be considered as furnished to the father, as a pauper ; and accordingly the exceptions are overruled, and the judgment of the Court of Common Pleas affirmed.

CHADWICK & AL. *vs.* WEBBER & AL.

Where the grantor in a deed, after its execution, handed it to the grantee to be put into a trunk which contained their joint papers, they being partners in trade,—the key of which trunk was always kept by the grantor, and was returned to him as soon as the deed was deposited therein,—this was holden to be no delivery of the deed.

THIS was a writ of entry, in which the demandants claimed five ninths of an estate formerly belonging to their ancestor, *Charles Webber*, of which estate they allege that he died seised. The tenants pleaded that the ancestor, by his four deeds duly

executed and delivered, in his life time, conveyed the premises to *Jeremiah Webber* his son, who died seised of the same, and from whom the premises descended to the tenants, his children and heirs at law. These facts were traversed, and issue taken thereon.

At the trial of this issue, before *Weston J.* the tenants produced a deed, bearing date *June* 3, 1809, in the handwriting of *Jeremiah Webber*, and purporting to be a conveyance to him from his father, *Charles Webber*, of his homestead farm, for the consideration of 4000 dollars ;—and proved that the *father* called on a Justice of the Peace with the deed, in the *absence* of the son, the *grantee*, and in presence of the Justice and of another witness, executed the deed with the usual formalities, and after the acknowledgment was certified thereon by the Justice, the grantor took the deed, and returned home.

They also proved that *Charles* and his son *Jeremiah* were partners in trade, transacting business in a store on the homestead;—that the papers and money of the firm were deposited in a trunk in the store, of which the father kept the key;—that *Jeremiah* was the active partner, who transacted most of the business of the firm, the father being in the habit of sitting in the store and keeping the keys ;—that when the son had occasion to go to the trunk for the notes of the firm, which were kept there, or to pay or deposit money, he applied to his father for the key, which was regularly returned as soon as such object was accomplished ;—that the father was tenacious of the keys, and frequently declared that he meant to hold the purse strings as long as he lived ; and that the keys were about his person when he died.

It further appeared that on the 28th day of *February* 1814, the father called one person into the store, and the son called another, to witness the execution of certain other deeds ;—that when the witnesses came into the store the father and son were together ;—that the son took up ten or twelve deeds, which were in his own handwriting, unfolded them, and laid them down for his father to sign, which he did, and acknowledged them before one of the witnesses who was a magistrate ; after which they were subscribed by the witnesses, the acknowledgements certified, and the

deeds taken up and folded by the son, and wrapped in a piece of brown paper ;—that the old gentleman then took from his pocket the key of the trunk and handed it to his son, who deposited the deeds in the trunk, locked it, and returned the key to his father. Nothing was said to the witnesses touching the contents of the deeds. They only saw that one was to *Charles Jarvis Webber* ; and they identified three others which were produced at the trial. These deeds, and the deed of *June* 3, 1809, were found in the desk of the father, after his decease ; and on the wrapper was written—" *Charles Webber's* deed to his son, not to be opened " till after his death."

There was also evidence to shew that the son lived with the father, and assisted in the management of the farm ;—that the father sometimes called the farm *Jeremiah's* ; and that he once refused to sell a part of it, without his son's consent, saying he had given him a deed. And there was other evidence adduced by the demandants, to shew that the deeds never were delivered to the grantees, but remained always under the control of the grantor ; after whose decease they were put on record.

The tenants then offered to prove the declarations of the grantor at several times, and to different persons, that he had disposed of his property by deed, and what provision he had made for his children by his first wife ; that he intended *Jeremiah* should have the residue ; and that the Judge of Probate should have nothing to do with his estate, &c.—all tending to shew that he considered his estate as finally disposed of by the deeds in evidence.

The Judge ruled that any declarations of the father, tending to shew the nature of his possession of the land which he occupied till his death, and whether he claimed the estate thus occupied in his own right, or as tenant to his son, were admissible ; but the evidence last offered, being objected to, he rejected. He also instructed the jury that the burden of proof was upon the tenants, who ought to satisfy them that the deeds were actually delivered by the grantor, in his lifetime, to the grantee, or to some other person for his use, with intent to pass the estate therein described. If this had been done, they would find for the tenants. But if they believed, from all the testimony, that the deeds never

were delivered by the grantor to the grantee with intent to pass the estate, but only for the purpose of depositing them in a place of safety as the agent of the grantor, and that this purpose was clearly expressed and made known by the grantor to the grantee, at the time, then their verdict ought to be for the demandants; for whom they accordingly found. And the questions upon the admissibility of the rejected evidence, and the correctness of his instructions to the jury, were reserved by the Judge for the consideration of the whole Court.

R. Williams, for the tenants, said that the principal question being upon the delivery of the deeds, all evidence of the intent of the grantor was admissible, including his declarations as well after as before their execution. It was not a question between first and second purchasers, where the declarations of the grantor after making the second deed are inadmissible for another reason, as disturbing vested rights; but the evidence offered went only to confirm and effectuate the prior acts of the grantor; and his declarations injured no person but himself, he being the only party in adverse interest, during the period when the declarations were made. And he commented on the evidence reported by the Judge, as shewing a sufficient delivery of the deeds; and cited *Bridge v. Eggleston* 14 *Mass.* 245. *Verplank v. Sterry* 12 *Johns.* 536. 1 *Phil. Ev.* 209, 418, *note a.* 421. *Ivat v. Finch* 1 *Taunt.* 141. *Bartlett v. Delprat* 4 *Mass.* 702. *Clark v. Waite* 12 *Mass.* 439. 5 *Johns.* 412. *Wheelwright & al. v. Wheelwright* 2 *Mass.* 447. *Hatch & al. v. Hatch & al.* 9 *Mass.* 307. 13 *Johns.* 285.

Sprague, for the demandants, replied that the intent of the grantor, which alone gives character to his actions, was properly left to the jury; and by them had been conclusively settled against the tenants. Nor could it be found otherwise;—for it is essential to the delivery of a deed, that it be voluntarily placed out of the control of the grantor. *Fairbanks v. Metcalf* 8 *Mass.* 230.

The declarations of the grantor, not accompanying the act of delivery, were clearly inadmissible, being at best but hearsay. And it is not a sound rule that any confessions or admissions may

be received which appear contrary to the interest of the party making them; because the real interest of the party cannot always be apparent to the Court. On another ground also, they were properly rejected, as going to prove a transfer of real estate, which, if transferred at all, must have been by some other conveyance, the deeds read in the case being insufficient, for want of delivery. Where the grantor is a party to the suit, his declarations are not admitted to prove his own deed, but the subscribing witnesses must be called;—*a fortiori* they cannot be received where he is not a party, and where no fraud is imputed to him, as in the case at bar. *Fox v. Reil* 3 *Johns.* 377. *Jackson v. Kniffen* 2 *Johns.* 31.

WESTON J. at the ensuing *August* term in *Oxford*, delivered the opinion of the Court, as follows.

By the general rule of law, hearsay evidence of a fact in controversy, is not admissible. To this rule there are certain well established exceptions; as in questions of pedigree, custom, certain entries or writings, which fall within the principle of hearsay evidence, of a party charging himself, or restraining his own right thereby; and declarations making part of the *res gesta*. So proof of the declarations of tenants in possession, as to the nature of their occupancy, and under whom they hold, when the seisin of the proprietor is in controversy, has been admitted. And generally declarations of persons not under oath, when received in evidence, are admitted as facts in themselves, from which presumptions may arise for or against the facts in question.

Upon an examination of the authorities, we do not find that the testimony rejected falls within any exception to the general rule, by which hearsay evidence is excluded. They were declarations of the ancestor, under whom both parties claim, unaccompanied by any act, of the disposition which he had made, or intended to make, of his estate.

The cases, cited by the counsel for the tenants, are all distinguishable from the case before us. *Verplank & al. v. Sterry & al.* was a case in chancery; in which *Arden*, the party whose declarations were received in evidence, had given his answer

under oath ; and the declarations had a tendency to disprove that answer. *Ivat v. Finch*, cited from *Taunton*, related to a personal chattel ; and does not accord with the opinion of Lord *Ellenborough*, who tried the cause. In *Bartlet v. Delprat* 4 *Mass.* 702, and *Clarke v. Waite*, 12 *Mass.* 439, evidence of the declarations of the party was rejected ; nor is there to be found in these cases any *dictum*, warranting the admission of the testimony rejected in the trial of this cause. In *Bridge v. Eggleston* 14 *Mass.* 245, the deed, under which the tenant claimed, was impeached on the ground of fraud. In the case, cited from 5 *Johns.* 412, *Spencer* J. says " that the declarations of a party to a sale or transfer, going " to destroy and take away the vested rights of another, cannot, " *ex post facto*, have that consequence, nor be regarded as evi- " dence against the vendee or assignee." But he does not state that such declarations would be evidence, if made before, or if made in affirmance of such sale or transfer. The declarations received in evidence in *Doe v. Roe* 1 *Johns. Cas.* 402, were those of a tenant, while in the possession and occupancy of the land in question, stating to whom the same belonged.

A delivery of a deed may be by acts, or by words ; or by both. It may be delivered by the party, who made it ; or by any other person, by his appointment or authority precedent, or assent subsequent. It may be made, either to the grantee, or to any other person authorized by him to receive it ; or to a stranger for his use and benefit. But if a man throws a writing on a table, and the party takes it, this does not amount to a delivery, unless it be found to have been put there, with intent to be delivered to the party. *Com. Dig. Fait*, (A. 4.) And, upon the same principle, if the maker of the deed avails himself of the hand of the party for whom it is made, merely to put the deed into a trunk, desk, or other place of deposit, within the control of the maker, and such purpose is indicated and made known at the time, there is no legal delivery ; no act being done, or declaration made, expressive of an intention to deliver.

In *Wheelright v. Wheelright* 2 *Mass.* 447. *Hatch v. Hatch* 9 *Mass.* 307, and *Ruggles v. Lawson* 13 *Johns.* 285, cited by the counsel for the tenants, the actual delivery of the deeds to a third per-

son was proved; and whether originally delivered as deeds or escrows, they were under the peculiar circumstances of each of these cases, holden to be operative as deeds, from the first delivery. But the deeds in question in the present case, were never delivered to, or deposited with, a third person; nor does it appear that, during the life time of the grantor, they were ever, by his consent, placed within the control of the grantee.

We are of opinion, that the testimony rejected was not legally admissible; and that the jury were properly instructed at the trial. There must therefore be judgment on the verdict.

TUCKERMAN & AL. *vs.* HARTWELL.

If the place of payment of a note is designated in a memorandum at the bottom; or if to the acceptance of a bill is added a particular place of payment, with the assent of the holder; such memorandum or qualification is part of the contract.

And if only the name of the place be written at the bottom of the note or bill, it is for the jury to determine when, by whom, and for what purpose it was placed there.

Assumpsit by the plaintiffs as indorsees, against the defendant as drawer, of a bill of exchange, of the following tenor,—viz— "$445. Sixty days from date and grace, pay to the order of "Messrs. *Whittier and Tuckerman*, four hundred and forty-five "dollars, value received, and place the same to account of your "ob't ser't, *John T. Hartwell.*

"*Joseph T. Wood, Esq.*

"*Augusta May* 16, 1816."

The acceptance was written across the face of the bill, in these words—"Accepted to pay in *Boston*. *Joseph T. Wood*;"—after which the bill was indorsed by the drawees to the plaintiffs. At the bottom of the bill, and near the left hand corner of the paper, was a writing which was not plainly legible, but which the defendant's counsel at the trial read as the name of "*A. F. Howe & Co.*"; and contended that it was a part of the acceptance, designating the place in *Boston*, where the bill was to be presented for

payment. For the plaintiffs it was contended that those words, if legible, were no part of the acceptance; and the holders of the bill were not bound to present it at any particular place in *Boston* for payment;—if the bill was in the city at its maturity, and the acceptor was not there, it was dishonored, and the drawer, upon due notice, was holden to pay. This due notice was proved.

It was also proved that the bill was presented for payment by the plaintiffs' direction at the counting room of *A. F. Howe & Co.* on the nineteenth day of *July* 1816.

Upon this evidence, *Weston J.* before whom the cause was tried, instructed the jury that if they were satisfied that the name of *A. F. Howe & Co.* was placed upon the bill by the acceptor, at the time of the acceptance, and was intended to designate the place in *Boston* at which the bill should be presented for payment; and that the plaintiffs knew that it was so intended, and where the place was;—it was incumbent on the plaintiffs to prove a demand at that place. But, he also said, tho presentment for payment on the *nineteenth* day of *July* was too late. To avail the plaintiffs it should have been on the day preceding. Hereupon the jury returned a verdict for the defendant, which was taken subject to the opinion of the whole Court upon the correctness of those instructions.

Sprague, for the plaintiffs, contended that the words at the bottom of the bill were no part of the acceptance, which was written in another place, across the face of the bill, and was intelligible and perfect in itself. *Chitty on Bills* 321, 325, 326, *notes a. b. Saunderson v. Judge* 2 *H. Bl.* 509. *Exon v. Russell* 4 *Maule & Selw.* 505.

But if they were intended as a part of the acceptance, this was not binding on the payees, unless known and admitted by them at the time of the acceptance. *Storer v. Logan* 9 *Mass.* 55. And here was no evidence to that effect. The utmost the jury can be said to have found, is, that it was the appointment of a place by the acceptor, at which he would make payment. But such *appointment*, being no part of the acceptance of a bill, only gives the holder his option, to present it at the place appointed, or to the acceptor in person, according to the written engagement ap-

parent upon the face of the bill. 3 *Johns. Ca.* 71. *Parker v. Gordon* 7 *East* 385. *Chitty* 328. 4 *Maule & Selw.* 462. *Mason v. Franklin* 3 *Johns.* 202. *Boot v. Franklin* 3 *Johns.* 210. It was enough to charge the drawer, if the bill was in *Boston* at its maturity.

And the construction of the instrument, and the legal effect of the acceptance were purely matters of law, which the Judge should have declared to the jury. Where there is an *omission* of proper instructions to the jury, the Court will grant a new trial. *Ulmer v. Leland* 1 *Greenl.* 135.

R. Williams for the defendant, adverted to the diversities of opinion at Westminster hall upon the effect of a memorandum made at the bottom of a bill or note, by the maker or acceptor, designating a particular place of payment;—and cited *Saunderson v. Judge* 2 *H. Bl.* 509. *Callaghan v. Aylett* 2 *Camp.* 549. *Lyon v. Sundies* 1 *Camp.* 523, 425, *note*. *Saunderson v. Bowes* 14 *East* 500. *Hodge v. Fillis* 3 *Camp.* 463. *Dickenson v. Bowes* 16 *East* 110. *Howe v. Bowes* 5 *Taunt.* 30. *Gammon v. Schmoll* 5 *Taunt.* 344. *Fenton v. Goundry* 13 *East* 459. But he considered the question as put at rest by *Rowe v. Young*. *Brod. & Bing.* 165, by which the presentment of a bill at the place designated for payment is rendered indispensable, whether the place be inserted in the body of the contract, or merely noted by a memorandum at the bottom; the latter being now taken as a part of the contract. And agreeably to this are the *American decisions*. *Foden v. Sharp* 4 *Johns.* 184. *Woolcot v. Van Santvoord* 17 *Johns.* 248. *Carley v. Vance* 17 *Mass.* 389.

There is an essential difference between the liability of a maker or general acceptor of a note or bill, and that of the drawer or indorser; the former being absolute,—the latter conditional and contingent. The party seeking to charge the drawer, must shew a strict compliance with the conditions of his undertaking. In the present case the engagement was to pay, if the acceptor should not pay according to the terms of his acceptance. These terms the payees were willing to receive, and the jury have found that they were well understood by the parties, and formed part of the contract. With this contract the payees have never com-

plied, by presenting the bill at the place in *Boston* appointed for payment, nor even by making any inquiry there for the acceptor or his bankers; and thus have lost their remedy on the drawer by their own laches. *Chitty on bills* 333. 2 *H. Bl.* 509. 7 *East* 385. 19 *Johns.* 391. *Jones v. Fales* 4 *Mass.* 245. *Starr v. Metcalf* 4 *Camp.* 217. *Trecothick v. Edwin* 1 *Stark.* 469. *Platt v. Smith* 14 *Johns.* 368.

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

Though it does not appear expressly that the bill in question was in *Boston* on the 18th of *July* 1816, yet, as it was presented for payment at the *counting room* of *A. F. Howe & Co.* on the 19th of that month, and as no reliance has been placed on this circumstance, if by the terms of the acceptance it was payable in *Boston generally*, perhaps the action is maintainable; though there is not proof of any inquiry and search for the drawer, who, it is admitted, was at that time an inhabitant of *Wiscasset* in this State. But we give no opinion on these points, because they have received but little attention from the counsel, and also because we place our opinion on another ground.

The only questions then, are, what is the *legal character* of the words "*A. F. Howe & Co.*" written at the bottom of the bill? For *what purpose* were they placed there; and *what operation*, according to law, do they have in regard to the *acceptance* and the *rights* of the parties? The answer to these questions is not unattended with difficulties. With a view of ascertaining the *words themselves*, as well as their *import*, *design*, and *use*, the inquiry was submitted to the consideration of the jury; and under the instructions they received from the presiding Judge, they have found that they were placed on the bill *by the acceptor*, at the *time of the acceptance*; that they were *intended* to *designate* the *place in Boston* at which the bill should be *presented for payment*; that the *plaintiff knew* that *such* was the intention; and knew also *the place* thus designated as the place of payment. These facts thus found, taken in connection with the circumstance of the bill having been indorsed *after acceptance*, furnish proof that the nature and

qualification of the acceptance, whatever they may be, were known to the payees at the time of the indorsement. Thus it appears that *all* the parties to the bill have acted with full knowledge of the nature of the contracts they have made. One objection urged against the instructions of the Judge is, that he ought not to have submitted the above mentioned facts to the consideration of the jury, but should himself have decided the legal effect of the acceptance, and of the additional words at the bottom of the bill. The answer to this objection is, that some of those facts could not appear from inspection; such as the *time when* the words were placed there, the *person who* wrote them, and the *purpose* for which they were written. These were facts proper for the jury to settle; and as to their *legal effect* the Judge *did* decide. His instruction to them was, that if they *should* find those facts, and also *knowledge* on the part of the plaintiff, to be as they actually *did* find them, that then, on legal principles, the plaintiffs were not entitled to recover. The finding of the jury amounts to this, that the words added at the bottom of the bill are a *part* of the *acceptance*, and, of course, have the same effect as though added immediately after the word "*Boston*"; and the acceptance would then have stood thus, "accepted to be paid in *Boston* at the store of *A. F. Howe & Co.*"

In this view of the facts proved, and the instructions given, we perceive no error, provided the *legal conclusions* drawn by him were correct, as to the operation of the acceptance thus proved and understood. An examination of the English decisions on the subject of *special* and *limited* acceptances, and the nature and effect of a *memorandum* on a note or bill, as to the place of payment, shews, at one view, *change*, *variance* and *confusion* of opinions; not only as to the legal operation of these qualifications of the contract created by *designation of place* for payment of a bill or note, but as to the *mode of declaring* upon such bill or note. The cases can never be reconciled, and we must either continue to go on in uncertainty in our endeavors to preserve uniformity of decision in the commercial world, as far as we are able, by similar fluctuation of opinion; or else extract the good sense and sound reason of these conflicting cases, and then govern ourselves by settled principles. There have been so many *distinctions*

introduced, not to say in some instances, *refinements*, that the real and honest intentions of the contracting parties, have in numerous instances been overlooked or disregarded. The principle of law seems to be well settled in *England* that when a *particular place of payment* is introduced into *the body* of a bill of exchange or note, and *not by way of memorandum*, whether the action be against the *maker* or *indorser* of a note ; or the *drawer* or *acceptor* of a bill ; the bill or note must be presented and demand made at such place, in order to maintain the action. See *Wolcott v. Van Santvoord* 17 *Johns.* 248, and the cases there cited, and the note by the reporter. But if the designation of the place of payment is intimated in a *memorandum* in the margin or at the bottom of a note ; or if the acceptance of a bill is accompanied by words "payable at" a particular place, such memorandum or qualification is not considered as *any part of the contract*, as it regards the note or acceptance, according to several English decisions ; and according to several others, the *contrary principle* is established. In *Smith v. Delafontaine*, tried before *Lord Mansfield in* 1785, *Saunderson v. Judge* 2 *H. Bl.* 509, *Lyon v. Sundies & Sheriff* 1 *Campb.* 423, *Wild v. Rennard Ib.* 425, *Trapp v. Spearman* 3 *Esp.* 57, *Nicholls v. Bower* 2 *Campb.* 498, *Price v. Mitchell* 4 *Campb.* 200, and *Fenton v. Goundry* 13 *East.* 459,— such memorandum or qualification was holden to be no part of the contract. In *Parker v. Gordon* 7 *East.* 385, *Ambrose v. Hopwood* 2 *Taunt.* 60, *Calligan v. Aylett* 3 *Taunt.* 397, *Gammon v. Schmoll* 5 *Taunt.* 344, and *Chitty* (2 *Ed.* 1807) 184, the *contrary* principle has been adhered to. If a bill of exchange be *general*, and the drawer accept it *payable at a particular place* ; thus limiting its generality, the holder is not *bound* to take such an acceptance ; but *Johnson* in the note above mentioned, says, "If a holder of a bill, who is *not bound* to receive a qualified "acceptance of it, does think proper to receive an acceptance "restricting the payment to a particular place, is it not, as "between him and the acceptor, as much a part of the contract "as if it was inserted in the bill itself, or as much as in the case "of a promissory note made payable at a particular place ? "There seems to be no foundation for the distinction. The "Court of C. B. are more consistent when they put it on the

"ground that it is a *qualification* of the contract and a *condition* "*precedent*, the performance of which must be alleged and shown "to entitle the plaintiff to his action." There certainly is much sound sense in this reasoning of the reporter. Besides, when the acceptor thus designates the place of presentment and payment, the presumption is that he will place funds there for payment; and when the holder receives such a qualified acceptance, why should he not apply at the place appointed, where the funds are presumed and agreed to be placed?—for the same reason that the holder of a town order is bound to present it to the town treasurer, before he can maintain an action against the town, as we have decided in the case of *Varner v. Nobleborough* 2 *Greenl.* 121.

The acceptance of a bill of exchange is an independent act; as much so as the drawing of the bill. The drawer may accept on his own terms, but the holder is not bound to receive such an acceptance, if varying from the bill; if however, he does so accept it, why in reason and justice should he not be considered as agreeing to its terms and conditions. And when this restriction or qualification is in the form of a *memorandum*, and is by all parties considered as a qualification, why should it not be considered a part of the *contract*, and as binding on all parties *assenting to the same*, as if inserted in the body of the bill or note? To make a distinction seems to be to give as much importance to a *shadow* as a *substance*. Several of the cases before cited, seem to make a distinction between actions against the acceptor upon a qualified acceptance, and actions against a *drawer* or *indorser*;—that in the *former* case, the acceptance renders the acceptor universally liable and absolutely so, without any demand at the *particular* place named in the acceptance;—while in the latter case, an action cannot be maintained unless a demand or presentment has been made at the appointed place; because the liability of the *drawer* and *indorser* is always *conditional*. The line of distinction however is not drawn with clearness, and therefore we have not founded our opinion upon it, though there seem to be good reasons for the distinction.

Considering the difference of opinion which has prevailed in the English Courts, there is more room and more reason for our careful examination of principles and the adoption of those, for

our guides, which appear to be founded in the most substantial justice and soundest good sense ; those principles which sanction and give effect to legitimate contracts, in whatever form they are made, which are perfectly understood, and are not forbidden by any statutory regulations. But we consider the principles established in the case of *Jones v. Fales* 4 *Mass.* 245, as strengthening the arguments we have used as to the construction and effect to be given to the qualifying language of the acceptance. The action was founded on a promissory note given by *Clapp* to *Fales*, whereby he promised to pay him or order $680 in sixty days. Near the bottom of the bill were inclosed in brackets the words [*foreign bills*]. The note was indorsed by *Fales* to *Jones*, and the suit was against *Fales* as indorser ; and one question in the case was whether the note was a cash note ; and if not, whether it could support the plaintiff's declaration. In the decision of that cause, two questions were settled which are of importance in this. One was that the words "*foreign bills*" were explained by parol testimony, in order to ascertain whether they were a *part of the original contract*, or a distinct and collateral engagement, not applicable to the note in the hands of an indorsee. And the Court set aside the verdict for the very purpose of admitting parol explanatory evidence. This authority seems to remove all objection to the propriety of admitting parol evidence in the present case, and submitting the facts relative to the memorandum, the circumstances under which it was made, and its import and intention, to the consideration of the jury. Another point decided was, the legal effect and operation of the words "*foreign bills*," when unexplained by any parol proof.

For the sake of clearness we quote the language of *Parsons C. J.* in delivering the opinion of the Court. He observes, " The " next question is, whether these words, thus written, and placed, " are a part of the promisor's contract. There is no proof by " whom the body of the note was written, or whether these " questionable words were inserted before or after the signature, " or by the promissor or promissee. I can therefore reason only " from the face of the note. And it is a reasonable conclusion " that they must all be taken to be the words of the maker of " the note, written before it was delivered to the promissee :

" and not the words of the promissee assuring to the promissor " any honorary or legal indulgence, either absolute or conditional. " If they are the words of the promissor, they must be considered " either as *idle words*, or as a part of the promise to which he " gave his signature ; or as a subsequent memorandum, explana- " tory of the manner in which the promise was to be performed. " I am not authorized to consider them as words without meaning, " and I do not think it material whether they were a part of the " original contract or added in explanation, for when the promis- " see took the note with these words on it, he was subject to the " explanation in the memorandum, if it was one, as much as he " would be bound by these words, if they were a part of the " promise." According to this decision, the words "*A. F. Howe & Co.*" written by the acceptor at the time of the acceptance, and the return of the bill to the payees, would have rendered the memorandum explainable, had the present action been brought by them, and such explanation would have bound them ; and for the same reason it was explainable in the hands of the plaintiffs as indorsers ; and as by the finding of the jury, knowledge is brought home to them, of course they also are bound by the memorandum, if it is considered as such, in the same manner as they would have been, if by the bill itself, the drawer had been requested to pay its amount at the store of *A. F. Howe & Co. Boston.*

In a word, according to the case of *Jones v. Fales*, the words "*A. F. Howe & Co.*" were a part of the contract of acceptance, and therefore, binding, even without explanation ; and being by law explainable, and having been explained and proved to have been inserted for the very purpose of designating the place where the bill *should be*, not merely *might be* presented ; and this being known and understood by all concerned, all are bound by it. And as the bill was not in due season presented for payment at the place designated in the acceptance, the present action cannot be maintained.

But there is another point of view in which the cause may be considered. As the bill in question is general in its form, not specifying any particular place of payment ; and as the restriction relative to the place of payment was inserted by

the drawer in his acceptance, he had as much right to make the bill payable at a particular store in *Boston*, as in *Boston* generally. Now in the body of the acceptance, *Boston* is made the place of payment; and in the memorandum at the bottom of the bill the store of *A. F. Howe & Co.* is made the place; and as the jury have found that all was written at the same time, and for the same purpose; and as this restricted acceptance was not objected to by the holders of the bill, nor the bill protested on that account, as it might have been; and as knowledge of all this was given to the plaintiffs, as the jury have found; all parties must be considered as having assented to this limited acceptance, and must be bound by it. But supposing that the payees and the plaintiffs were never bound by it, and that they had a right to treat the restrictions as to the place of payment, as nullities even without a protest, how would the cause stand then? If such were the case, it is clear that the bill should have been presented for payment, not in *Boston*, but at the house or counting room of the drawee at *Wiscasset*, where he was well known to reside and do business; yet it was never presented there. Therefore, whether the plaintiffs were bound or not bound by the restrictions in the acceptance, the presentment was ineffectual. On this latter ground also the plaintiffs must fail.

As the jury have found for the defendant there must be judgment on the verdict.

Winthrop *vs.* Dockendorff & al.

Where a debtor in execution was liberated from prison, on giving a bond conforming to the provisions of a law for the relief of poor debtors, which was not then in force;—it was holden that the bond was good at common law;—and the debtor having regularly taken the poor debtor's oath, in the forms provided by the *repealed* law, the creditor, in a suit on the bond, had execution awarded in equity, for only a nominal sum.

Upon the revision of the laws during the session of the legislature in the winter of 1821, the former statutes for the relief of poor debtors in prison were included in the general act, by which most of the statutes of *Massachusetts*, so far as they related to this

State, were repealed. The subject of the relief of poor debtors was then in the hands of a committee; but not being fully matured before the end of the session, it was referred to the next legislature;—so that from *March* 21, 1821, to *Jan.* 19, 1822, there was no statute in force authorizing the enlargement of debtors in prison, on their giving bonds; though this fact not being generally known, the practice of liberating on bond, and of admitting debtors to take the oath of insolvency and thereupon to discharge them, continued as before.

During this period, the defendant *Dockendorff*, being committed to prison on an execution in favor of the present plaintiff, was enlarged on giving a bond in the usual form to the gaoler, in the name of the plaintiff, conditioned that he should continue a true prisoner in the custody of the gaoler, and within the exterior limits of the gaol-yard or debtors' liberties, until he should be lawfully discharged, without committing any manner of escape, &c.;—and after citing the creditor, and pursuing the course prescribed by former statutes, his discharge by taking the poor debtors' oath was entered on the kalendar, and he returned to his home.

The plaintiff thereupon commenced this action on the bond. The defendants, after oyer, pleaded, *first*, a special performance of the terms of the condition. To this the plaintiff *replied* that the debtor escaped from prison before he was lawfully discharged. The defendants, in the *rejoinder*, set forth all the provisions of the law as they stood on the 21st of *March* 1821, and alleged the universal practice at all the prisons in the State after that time, as before; and stated the proceedings relative to *Dockendorff*, and the certificate thereupon issued to the gaoler, who lawfully discharged him. To this the plaintiff demurred generally.

In the *second* plea the defendants set forth the same proceedings and provisions of law, as having been *represented by the plaintiff* to be legal, and in full force, and such as the debtor might adopt to obtain a lawful discharge; and that he did adopt them, and was discharged accordingly. The plaintiff *replied*, denying such representations, and tendering an issue to the country, which was joined.

The *third* plea represented the bond as having been given to the gaoler for permission to go at large within certain limits, des-

cribing the debtors' liberties; and so as against law, and void. Hereupon also the plaintiff demurred in law.

At the trial of the second issue, before *Weston J.* the only evidence was that of the gaoler, who testified, that supposing the former statutes to be in force, he advised the debtor to give bond, and had divers conversations with him and his sureties, on that subject, as was his custom in such cases, and had no doubt but he facilitated his discharge in the form prescribed in the former laws. But he had no special authority from the plaintiff, nor was it pretended that the plaintiff had any other agent in the business. The plaintiff objected to the admission of any conversations of the gaoler, until it should be first proved that he was the plaintiff's agent; but the Judge overruled this objection, the plaintiff having accepted the bond. A verdict was returned for the defendants, which was taken subject to the opinion of the whole Court upon the admissibility of the evidence; and the plaintiff also moved for a new trial on the ground that the verdict was against evidence, and against the weight of evidence in the same cause.

Allen and *Sprague*, for the defendants, contended that the parties, by referring to the debtors' liberties, and to a discharge by due course of law, which did not exist, had created a latent ambiguity in the bond, rendering it void for uncertainty, unless extrinsic evidence could be resorted to for its explanation. But by such evidence, it is manifest that the parties referred to the old law as part of their contract, and considered themselves as fully adopting its provisions, thus continuing it, conventionally, in force, so far as their respective rights were concerned. 7 *Johns.* 385. 1 *Phil. Evid.* 476. *Rex v. Laindon* 8 *D. & E.* 379.

But if the old statutes are not to be taken as part of the contract, the bond stands at common law, and is void being for ease and favor. 1 *Phil. Evid.* 134. 1 *Saund.* 161. *Thompson v. Lockwood* 15 *Johns.* 256. 4 *Bac. Abr. Sheriff, O. Dole v. Moulton* 2 *Johns. Ca.* 205. *Dole v. Bull* 2 *Johns. Ca.* 239. *Com. Dig. Pleader* 2. *W.* 25. *Loud v. Palmer* 7 *Johns.* 159. It is void on the ground of public policy, as it gives the sheriff the dangerous power to liberate one prisoner and retain another at his pleasure, discriminating between friends and foes.

It is also void because given for bail, in a case where the party was not bailable. *Bartlett v. Willis* 3 *Mass.* 103. *Page v. Trufant* 2 *Mass.* 162. *Morse v. Hodgdon* 5 *Mass.* 317. *Churchill v. Perkins* 5 *Mass.* 541. 10 *Co.* 100. But whatever may be the merit of these positions, yet substantial justice has been done between the parties; and in such cases it is the rule of the Court not to disturb the verdict. *Cogswell v. Brown* 1 *Mass.* 257. *Gerrish v. Bearce* 11 *Mass.* 193. 7 *Mass.* 467, 507. 8 *Mass.* 336. 1 *Johns. Ca.* 255. *Boynton v. Hubbard* 7 *Mass.* 112. 2 *Powell on Contr.* 196, 202. 3 *Burr.* 1909. The bond was given under the former statute, to be discharged by a compliance with its provisions; and the creditor, by accepting it, has adopted all the acts of the gaoler relating to the *same subject matter*. *Paley on Agency* 249.

R. Williams, for the plaintiff, insisted that the condition of the the bond was free from ambiguity; and admitted a sensible interpretation without resorting to any thing *ab extra*. There being at the date of the bond, no prison limits or debtors' liberties beyond the walls of the gaol, those terms in the condition may be referred to such apartments as the gaoler might and ought to provide for debtors, apart from persons committed for felony. 2 *Bl. Com.* 340. And by the lawful discharge mentioned in the bond, may be understood, a discharge by payment of the debt, or by consent of the creditor.

If this interpretation is inadmissible, then the condition is insensible, and void, and the bond is single. *Co. Lit.* 206. 1 *Bac. Abr. Condition, N.* Nor is it any excuse that the debtor was misinformed of his rights, or that the gaoler was ignorant of the law. 8 *Mass.* 423. 7 *Mass.* 101. 10 *Mass.* 190.

Neither is the bond void for ease and favor. The statute of *Hen.* 6. applies only to bonds running to the sheriff. 5 *Mass.* 340. But this bond is to the creditor, given voluntarily, and conditioned to remain a true prisoner, which was a lawful act; and it therefore is good. 11 *Mass.* 11. 7 *Mass.* 200. 8 *Mass.* 373, 423. 5 *Bac. Abr. Obligation, D.* 3.

As to the conversation of the gaoler, the plaintiff was not bound by it, unless he knew and ratified it. The act of suing the bond

is a ratification of the *taking* of it, but of nothing more. The principal ratifies only such acts of the agent as come to his knowledge. 1 *Bac. Abr.* 679. *Condition Q.* 3. 4 *Mass.* 427.

This cause was argued at *June* term 1823, and being continued under advisement, the opinion of the Court was delivered at *August* term 1824, in *Oxford*, by

MELLEN, C. J. In this case the defendants have pleaded *three pleas.* To the *second* plea there is a replication and issue to the country. To the *first*, there is a replication and a demurrer to the rejoinder. To the *third*, there is a demurrer. Upon the issue to the country, the jury have returned a verdict for the defendants; and there are *two* motions made by the plaintiff that the verdict may be set aside; one on exceptions to the opinion of the Judge in the admission of certain proof to the jury; and the other, at common law, on the ground that the verdict is against evidence and law. In the view we have taken of the cause, we do not deem it of any importance to examine the merits of either of the above motions, as we are satisfied that the issue to the country is wholly immaterial. It would therefore be useless to set aside the verdict, and grant a new trial, even if the motions were found to be maintainable; because upon the issues at law it is our opinion that the action is maintainable, and that the plaintiff is entitled to judgment, notwithstanding the verdict which has been found for the defendants on the immaterial issue. We proceed therefore to the inquiry which, in essence, though not strictly in form, is this, whether the *first* and *third* pleas in bar are good. They are both nearly of the same character. They seem to disclose only the particular facts relative to the prison limits as formerly established; the commitment to prison of *Dockendorff*, and his liberation therefrom, on taking the oath prescribed by a law, not then in force, to be taken by poor prisoners in gaol on execution. Now, as all the laws on the subject of gaol limits, and the discharge of poor debtors from close confinement on giving bond to continue within the gaol limits or debtors' liberties, had before this time been repealed by mistake, and were not revived until some time after the transaction set forth in the pleadings had taken place; we need not spend a moment in examining any por-

tion of them, subsequent to the declaration; for the facts therein disclosed are of no importance in legal contemplation, and of this we are bound to take judicial notice. The only question is, whether the declaration is good, and discloses a good cause of action: or in other words, whether such a bond as that now under consideration is a valid contract, or absolutely void.

As we have before observed, the several laws relative to the establishment of prison limits, and the liberation of poor prisoners committed on execution from close prison, on giving bond, were all of them, by mere mistake, repealed on the 21st of *March* 1821, and were not revived until *January* 19th, 1822. The bond now in suit bears date *Nov.* 15th, 1821. It was, therefore, given at a time when there was no statute in force in this State prescribing its condition or approbation, or authorizing the liberation of *Dockendorff* from close confinement in consequence of the execution of such bond. Of the repealing act, and its legal consequence, we are bound to take judicial notice. At the time of the execution of the bond, *Dockendorff* was lawfully in prison; he had no right by law to be relieved from *close* confinement, in any manner, or on any terms, unless on *habeas corpus*, or by payment of the debt, or the consent of the creditor. The bond is, as usual, made payable to the creditor; and in conformity to the laws which had been, and were, by all concerned, supposed *then* to be in force; and all parties acted fairly on that supposition. The plaintiff has agreed to accept it, by claiming the benefit of it in this action; and though he might have refused to accept it, and enforced his claim against the sheriff for an escape, he has very properly waived such claim, and as far as lies in his power, has ratified the bond by considering it as a valid one, and agreeing to accept it as such.

Several objections have been urged by the counsel, for the purpose of shewing the bond to be illegal and void.

1. It is said to be void as being a bond given for ease and favor. Such bonds are always made payable to the officer having the custody of the debtor. *Churchill v. Perkins* 5 *Mass.* 541. *Ibid. Morse v. Hodsdon* 314. *Clapp v. Cofran* 7 *Mass.* 101. And even such bonds were not void at common law, nor till the statute

of 23 *Hen.* 6, *cap.* 9, which is now, by adoption and usage a part of *our* common law. But, besides, it must be remembered that the bond in the present case was made payable to the creditor; it was never intended as a security to the officer against the consequences of his own act.

2. It is urged that such a bond is void on the ground of policy, being in *restraint of liberty*; and it has been compared to bonds in *restraint of trade*. If a bond in restraint of personal liberty be void, on what principle is it void? Cannot a man enlist as a *soldier*, or ship himself as a *seaman*, and thus restrain himself as to his liberty? Do the laws of Congress in either case create the obligation; or does the voluntary act of the man himself create it? Those laws designate his duties, and the punishments for his neglect to perform them; but he cannot be bound to their performance, or subject to those punishments, without *his own* prior consent and obligation.

Among the cases collected by *Powell on Contracts* 196—202, we do not find the case of bonds in restraint of liberty as void on the ground of public policy. Indeed we do not know in what books the doctrine contended for is to be found and established. But we cannot perceive how the bond in question can be said to have been given by the defendants in restraint of *Dockendorff's liberty*. The truth is, it was given for the express purpose of his enlargement from close confinement; for the purpose of obtaining *more liberty*, than he could by law be permitted to enjoy without the creditor's consent. Where is the principle to be found which renders such a bond void, if accepted by the obligee? The bond in question was given with the same motives, and for the same object, as though the repealed laws had been then in force; and if they had been in force would not the bond have been just as much in *restraint of liberty*, as it is now, or in other words, would it not have been for the obtainment of *more liberty*?

At this moment, what law is it which renders a bond for the liberties of the prison, binding on the obligors? Not the statute which authorizes such bonds. The act of *February* 29th, 1812, which described the condition, provides that when the bond prescribed shall have been given by the debtor, "the gaol keeper "shall release him from close confinement without requiring

" any other condition in such bond." The bond is the sheriff's protection; but it precedes the prisoner's discharge, and is made when he is in close confinement, for the purpose of procuring his enlargement. The principles of the common law give validity to the bond; by *these* principles, its due *execution* and proper *construction* must be determined; by these principles must its *validity* be decided, on any plea which may bring that in question. The only difference between a bond given by a prisoner in execution for debt, while the above statutes were not in force, and such a bond given before their repeal, or since their revival, is this; that in the *former* case the sheriff had no right to discharge the prisoner in consequence of the bond; and its validity depended on the acceptance of the creditor; whereas in the *latter* case, the sheriff might, and ought to discharge the prisoner from close confinement, if the bond were duly made and approved; and such would be valid and sufficient, whether the creditor would or would not accept it. In both cases, as before stated, the bond must be tested by the principles of the common law; and the bond in the *latter* case, would be good, though not approved by two justices, if accepted by the creditor, according to the case of *Bartlett v. Willis* 3 *Mass.* 86. This seems to be the only fair and reasonable construction to be given to the statues on the subject.

On what principle, then, is the bond in question to be adjudged void? It was voluntarily given;—there is nothing immoral or unlawful in the condition;—it was given to the creditor, for the purpose of obtaining an indulgence to which the debtor was not by law entitled, but which the creditor has sanctioned by his acceptance of the bond.

There are many cases where bonds given with the intention of complying with a statute provision, though not conformable to the statute, have been adjudged good at common law. The before cited case of *Morse v. Hodsdon* establishes this principle. In *Clapp v. Cofran* the bond was not given for double the sum due on the execution, as the law required;—if it had been, it would not have been liable to chancery. The same principle is recognized in *Freeman v. Davis* 7 *Mass.* 200; and to the same point is *Arnold v. Allen* 8 *Mass.* 147. In *Burroughs v. Lowder* 8 *Mass.* 373, the bond was not taken in double the amount for which the

prisoner stood committed, and the sureties were not inhabitants within the county, as they should have been. But the Court observed,—"There is no reason why the bond should not be good "at common law; it having been voluntarily entered into *for the "benefit of the principal*, to procure a relaxation of a lawful "imprisonment, to which he could not have been entitled with- "out giving bond. The bond is now *accepted by the obligee*, and "he is entitled to judgment of forfeiture," &c.

A sheriff is not excusable for liberating a debtor on execution, unless a bond is given according to the direction of the statute. If not *so* given, it is given and received *without any legal authority*; as much so as when *no law* exists permitting debtors committed in execution to have the liberties of the prison. And yet in the cases before cited, the bond was holden to be good, being accepted by the creditor, as a contract at common law. The bond in the present case was not authorized by any statute; neither was it in the case of *Burroughs v. Lowder*, and several other cases resembling that. What substantial reason, then, can be assigned for the supposed difference,—or can any difference in reality exist?

According to the cases before mentioned, the bond in question is good at common law; and according to the provisions of the statute, execution may be awarded for the sum which is due according to equity and good conscience. Considering all the facts in the case, there can be no difficulty in ascertaining this sum. The plaintiff in fact has suffered nothing. All parties have acted fairly and with good faith; and the result is what it would have been, had the laws been in full force, as they were supposed to be at the time the bond was executed. But as the condition of the bond has been violated, there must be judgment for the amount of the penalty; and the plaintiff may have execution for one dollar debt, and full costs.

Burgess *vs.* Lane & al.

A verdict, and judgment thereon, are not admissible evidence of a copartnership, even where that fact was expressly put in issue by the pleadings, unless the action, in which such evidence is offered, is between *both* the parties to the former suit.

Where the party objecting to a witness, on the ground of interest, which was acquired by a contract entered into subsequent to his knowledge of the facts he is brought to prove, is himself a party to the agreement creating the interest, or had any agency in causing it to be created, the witness may be admitted to testify, notwithstanding such interest.

In this action, which was *assumpsit*, the first count in the writ was upon a promissory note dated at *Miramichi*, *June* 19, 1819, signed by *John Lane*, and payable to the plaintiff or his order on demand. In the second count it was alleged that *Lane* and *Leadbetter*, the other defendant, were partners under the name and firm of *John Lane*, under which name they made the note declared on. There was also a count for labor done. The defendant *Lane* was defaulted. *Leadbetter* pleaded the general issue, and also that he was not a co-partner with *Lane*; which issues were joined.

At the trial, which was before the *Chief Justice*, it was admitted that all the counts were for the same cause of action.

To prove the partnership, and also certain declarations of *Leadbetter*, the plaintiff offered one *Norris* as a witness, who was objected to on the ground that he had similar claims against the defendant, and that *Leadbetter* would be concluded by the verdict in this case on the question of partnership, should it be found against him. This objection was overruled and the witness admitted. The same objection was made to one *Cary*, offered as a witness by the plaintiff, who had an action then pending in the Court of Common Pleas, in which an agreement was filed by the parties, that if the plaintiff in this action prevailed, the plaintiff in that action also should prevail. This objection likewise was overruled.

Those witnesses, and others introduced by the plaintiff, testified to certain conversations of *Leadbetter* at *Miramichi*, in *October*

1818, both before and after the plaintiff's arrival there, tending to prove that *he* hired the plaintiff to work ;—that he was concerned with *Lane* in the lumbering business in that vicinity ;—and *Cary* testified that *Leadbetter*, after the plaintiff had commenced labor, said he was in company with *Lane* ; gave certain directions about the work ; and before leaving them in the spring of 1819 to return to this county, told the men thus employed that when their work should be finished for that season, if he was not there, they might settle with *Lane*, and take an order on him, or *Lane's* note, either of which should be good, and he would be accountable. This evidence also was objected to.

Cary further testified that some days prior to the making of the note, and while *Lane* was employed in settling with some other of the workmen, the plaintiff said he would not take *Lane's* note, unless *Leadbetter* was holden ;—to which *Lane* replied that it was as good as if signed by *Leadbetter*, who was then absent, and who, he said, was as far holden as *Lane* was.

The defendant then proved that the plaintiff, and *Lane*, who had formed a connection in business with two other persons, continued to reside at *Miramichi* more than a year after the date of the note ; during which time *Lane* was in good credit ; and that the plaintiff might have secured the debt by attachment of *Lane's* property, if he had used ordinary diligence ;—that soon afterwards he failed ;—that after his failure the plaintiff both there, and after his return to this county, frequently declared he had lost his winter's work by taking *Lane's* note ;—that in the spring of 1821, the plaintiff and *Leadbetter* returned in company from *Miramichi*, when he was heard to repeat the same to *Leadbetter*, without making any claim on him for the debt. The timber which was cut during that period never came to the use of *Leadbetter*, but was seized and sold for the payment of *Lane's* debts, after his failure.

Upon this evidence the jury were instructed that, if they were satisfied that *Lane* and *Leadbetter* were jointly concerned in said business of lumbering, they were, as to that concern, copartners, and that the plaintiff was entitled to recover ;—but that if said *Lane* and *Leadbetter* were jointly concerned and did jointly agree with the plaintiff, still if they should be of opinion that the note

of hand of *Lane* alone was received in payment for his labor ; or that the defendants were not jointly concerned in business, and did not jointly promise, then they ought to find for the defendant *Leadbetter*. The verdict was for the plaintiff upon both issues, and was taken subject to the opinion of the whole Court.

Orr and *Allen*, for the defendant, contended—1st. That the witnesses objected to were improperly admitted. The issue was upon the fact of copartnership, and the verdict, if it established the existence of a joint concern, might be given in evidence in another action against these defendants. Both the witnesses had therefore a direct and manifest interest in the success of the present plaintiff. This objection, as it regards *Cary*, applies with increased force, from the agreement that his suit should abide the event of this. *Whateley v. Menheim & al.* 2 *Esp.* 607. 1 *Phil. Ev.* 45, 253.—2d. The note was both given and received for the debt due ; and being negotiable, it is a discharge of the unwritten contract. If there *had been* any liability of *Leadbetter*, this was a substitution of a new contract for the old one, by which this latter was forever discharged. *Thatcher v. Dinsmore* 5 *Mass.* 299. *Greenwood v. Curtis* 4 *Mass.* 93. 6 *Mass.* 358. *Hunt Adm'r. v. Adams* 5 *Mass.* 358. 6 *Mass.* 519.—3d. The undertaking of *Leadbetter*, if any, was wholly collateral, as guarantor ; and not original and direct. The plaintiff therefore has lost his remedy by the want of diligence. The interest of the defendants in the timber was but a tenancy in common, in which case one could not bind the other without a special authority. And the engagement of *Leadbetter* was only to make the note good, which is plainly a conditional and collateral stipulation. *Lifkin v. Walker* 15 *East* 10, *note.* 2 *Wils.* 353. *Ellis v. Wild* 6 *Mass.* 321. 7 *Mass.* 286. 1 *Esp.* 106.

R. Williams, for the plaintiff. The interest of the witnesses was at most only in the question, and not in the cause itself ; and the objection was therefore wholly to their credibility. 4 *Mass.* 488. 7 *Wheat.* 424, 468. 1 *Phil. Ev.* 38. Nor could the verdict in this case bind any but parties, and those claiming under them. No one can take the benefit of a verdict, unless he would have

sustained damage by a different decision. 1 *Phil. Ev.* 247, 249, 250, *note c.* *Bull N. P.* 232. 18 *Johns.* 352. The excepted cases are those of customs, tolls, pedigree, &c.; and the Court in 1 *Wheat.* 8, say that these exceptions ought not to be enlarged. The agreement in *Cary's* case is not binding, because not reciprocal. And if it were, yet the plaintiff here has an interest in his testimony, of which the witness could not deprive him by any act of his own. *Bent v. Baker* 3 *D. & E.* 27.

The note was never taken as a substitute for the joint liability of both partners, but only as a memorandum of what was due to the plaintiff. The principle of substitution applies only where the note is given by all the parties who were originally liable. *Johnson v. Johnson* 11 *Mass.* 359. Here *Leadbetter* was out of the province when the note was given; and the existence of the partnership being first proved, as well by direct admissions, as by their joint participation in the profit and loss,—*Wats. on part.* 1, 5, 11,—the declarations of either party became good evidence against both.

WESTON J. at the succeeding *August* term in *Oxford*, delivered the opinion of the Court as follows.

The testimony of *Grafton Norris*, which was received at the trial of this cause, is objected to as incompetent; upon the ground that he has similar claims against *Leadbetter*, one of the defendants, and that the latter would be concluded by a verdict rendered against him, upon the question of copartnership in any action, which might be brought by the witness. In support of this position, the case of *Whately v. Menhein & al.* 2 *Esp.* 608, as ruled by Lord *Kenyon* at *nisi prius*, has been cited; where a verdict, upon an issue out of the Court of exchequer, upon a bill filed by one of the defendants against the other, finding a copartnership existing at a certain period between them, was received as admissible and conclusive evidence of that fact, in favor of the plaintiff, against both the defendants.

Formerly an interest in the question, was generally held to render a witness incompetent. But by later decisions, both in *England* and in this country, the objection goes to his credit only;

not to his competency. Thus in an action upon a policy of insurance, one underwriter upon the same policy, may be a witness for another. The interest which excludes a witness, must be an interest in the event of the suit; or where the verdict may be given in evidence, for or against him, in another suit.

A verdict or judgment in a former action, upon the same matter directly in question, is evidence for or against the parties to the suit; and for or against privies in blood, privies in estate, or privies in law. But a verdict cannot be given in evidence for either party, against one who was a stranger to the former proceeding. Thus if the verdict had been in favor of *Leadbetter*, upon the question of copartnership, such verdict could not be used for him, in any action which might be brought by the witness *Norris*; because, in this case, the latter had no opportunity to introduce or to examine witnesses, or otherwise to defend himself. It was decided by C. J. *Holt*, and all the Judges, in a trial at bar, that no verdict can be given in evidence, but such whereof the benefit may be mutual. And Chief B. *Gilbert* lays it down, that nobody can take benefit by a verdict, who had not been prejudiced by it, had it gone contrary. *Gilb. Ev.* 28. *Buller's N. P.* 333. It may be difficult to reconcile this rule with the case cited from *Espinasse*; but the rule itself is manifestly founded in justice and good sense, and is well supported by authority. Nor does the question of copartnership, like cases of custom, and perhaps pedigree, where a special verdict has been found, fall within any exception to the rule, that verdicts and judgments shall be admitted in evidence only between the original parties to the suit, or their privies.

The same objection is made to the competency of *John S. Cary*; with the further reason, that he had an action pending in the Common Pleas, against *Leadbetter*; and that it had been agreed between the parties, that if the plaintiff prevailed in this action, the witness should have judgment in that. The witness had thus acquired a direct interest in this suit, and was therefore inadmisable, unless his case comes within any exception to the general rule of law, which excludes interested witnesses.

In the case of *Bent v. Baker* 3 *D. & E.* 27, it was stated as a general principle, supported by the authority of Lord *Holt*, in the

case of *Barlow v. Vowell Skin.* 585, "that where a person makes "himself a party in interest, after a plaintiff or defendant has an "interest in his testimony, he may not by this deprive the plain- "tiff or defendant of the benefit of his testimony."

In *Jackson v. Rumsey* 3 *Johns Cas.* 237, it is laid down by *Kent*, C. J. in delivering the opinion of the Court, that "the interest, "in order to exclude the witness, must not have arisen after the "fact to which he is called to testify happened, and by his own "act, without the interference or consent of the party by whom "he is called; because, in that case, it would be in the power "of the witness, and even of the adverse party, to deprive the "person wanting his testimony, of the benefit of it."

Lord *Ellenborough*, however, in the case of *Forrester v. Pigion* 1 *Maule & Selw.* 9, appears disposed to limit the general application of this principle to cases where the witness was originally relied upon, by both parties, to testify to the transaction, and when an agreement had been fraudulently entered into between him and the party objecting to his testimony, for the purpose of excluding it. And he intimated an opinion, that where a witness, not originally relied upon by the parties as such, becomes interested, *bona fide*, after he has acquired a knowledge of the facts to which he is called to testify, he must, by the general rule of law, be rejected as incompetent. It does not appear to us that former decisions, or the spirit of the rule, requires its restriction to cases of fraud only; but that in all cases, where the party objecting to the witness is himself a party to the agreement by which his interest is acquired; or has had any agency in causing him to become interested, subsequently to his knowledge of the facts which he is brought to prove, his testimony may be received, notwithstanding such interest. We are therefore of opinion that *Cary*, who become interested in consequence of his agreement with *Leadbetter*, the party objecting to his testimony, was a competent witness.

It is urged that *Lane* and *Leadbetter* were not copartners. The jury have found that they were jointly concerned in the business of lumbering; and *Cary* testified that *Leadbetter* said, while they were engaged in that business, that he was in company with *Lane*. Copartnerships may be either general, or special and limited.

The connexion of the defendants must have been a copartnership of this latter description; for it is fairly to be inferred that they were to share in profit and loss, in their lumbering concern. The plaintiff's demand was for services afforded to them in that business; and they were therefore jointly liable to him prior to the giving of the note, which is declared on in one of the counts in this action. It is insisted that in taking this note, which is negotiable, the plaintiff must be presumed to have accepted the security of *Lane* alone, in payment of his demand against both the defendants. Such might have been the legal presumption, if nothing appeared in the case to repel it; but it is manifest from the declaration of all the parties, at and before the time the note was given, that the plaintiff insisted upon the security of both the defendants; to which they both assented. And the jury have found, under the direction of the Judge, that the note of *Lane* alone was not received in payment of the plaintiff's demand. *Leadbetter* was an original debtor; and it was not incumbent upon the plaintiff, before he could be charged, as his counsel has contended, first to have used due diligence to obtain the debt of *Lane*.

The witnesses objected to, being in our opinion competent; and the jury having been properly directed, by the Judge who presided at the trial, there must be judgment on the verdict.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE COUNTY OF

SOMERSET.

JUNE TERM,

1824.

THE INHABITANTS OF CANAAN *vs.* THE INHABITANTS OF BLOOMFIELD.

Where the selectmen of a town drew an order in favor of a pauper on one of the inhabitants, for supplies to be furnished to the pauper, which the drawee did not accept, but the supplies were voluntarily advanced by another person, who took up the order;—it was holden that these supplies were not "received from *some town*" within the meaning of *Stat.* 1821, *ch.* 122, *sec.* 2, the person who advanced them not having any remedy on the town for reimbursement.

THIS was *assumpsit* for supplies furnished by the plaintiffs to one *James Pratt*, whose residence was in *Bloomfield* on the 21st day of *March* 1821; and the only question in the cause was, whether the operation of *Stat.* 1821, *ch.* 122, upon his domicil at the time of its passage, was prevented by his having received supplies from the *town of Bloomfield*, as a pauper, within a year previous to the passage of that statute. To prove that he had received such supplies, the plaintiffs, in the Court below, at the trial before *Smith J.* produced an order issued in his favor, of the following tenor, viz.—"*Bloomfield*, *June* 6, 1820, *Mr. John* "*Weston*—Sir, Please to let *James Pratt* have three bushels of po- "tatoes, and charge the same to the town. *John Kimball. James* "*Bigelow*, *Jr.* Selectmen."

It was proved by the testimony of *Pratt*, that he presented this order to *Weston*, who was an inhabitant of *Bloomfield*, soon after

its date, who said he was unable to comply with it, and did not accept it; and that soon afterwards he presented the order to one *Levi Bigelow*, of *Bloomfield*, who accepted and paid it, saying he would as lief have the order as a note of hand. The parties intending to bring the question upon this evidence before this Court, a verdict was taken under the direction of the Court below for the defendants, to which the plaintiffs excepted.

Greenleaf and *Deering*, for the plaintiffs, cited *Adams v. The Supervisors of Columbia* 8 *Johns.* 323, to shew that orders for the relief of the poor were to be liberally treated; and argued that upon this principle the acceptance by *Bigelow* might be regarded in the light of an acceptance of a bill of exchange for the honor of the drawer, and, as such, binding on the town. But if not, it amounted to a certificate of his pauperism, and shewed that he stood in need of relief, which the order enabled him to receive, on the credit of the town; and this was substantially the whole office it was designed to perform. The pauper was thus brought within the spirit of that clause of the statute, which was designed to fix the settlement of all persons, *except* those who were objects of public charity, at any time within a year previous to the passage of the law.

McClellan and *Boutelle*, for the defendants, contended that there was nothing in the case shewing that the transaction related in any degree to the relief of a pauper. It is to be presumed that every town chooses overseers of its poor, such being the duty enjoined by law; and unless that was omitted, the selectmen had no authority relating to the poor. Nor does it appear that the party in whose favor the order was drawn was in need of relief, nor that the selectmen did so regard him. For aught that appears, the order was drawn for the payment of a debt.

But if it were otherwise, yet it does not appear that the goods were delivered on the credit of the town, or by the order of the selectmen, nor that *Bigelow* ever notified the selectmen of the payment, or intended to resort to the town. It may be deemed a private charity; and if so, it is not within the exception in the statute.

PER CURIAM. Though the case does not state in terms that the person receiving the order was a pauper; yet considering the character of the supplies, and that he was soon afterwards assisted by the plaintiff town, we may well conclude that at the date of the order he stood in need of relief. And as the charge of providing for the relief of the poor is devolved by statute, on the selectmen of every town where overseers are not specially elected, it may reasonably be concluded that they acted in that capacity in drawing the order.

But the supplies do not appear to have been furnished *by the town*, within the meaning of the statute. The case shews nothing which renders the town liable upon the order. The law-merchant, respecting acceptances for the honor of the drawer, cannot be applied to transactions out of the course of mercantile affairs; and therefore furnishes no analogy in aid of the plaintiffs. The exception, in the statute does not attach itself to cases of private charity; nor to such as the present, where an individual, in the hope of ultimate remuneration from the town, but without entitling himself to any remedy, volunteers the relief which it was intended should have been furnished by another person.

The judgment of the Court of Common Pleas is therefore affirmed.

HUTCHINS, *Adm'r*, *vs.* ADAMS.

An administrator may maintain *trespass* for an injury to personal property committed after the death of the intestate, and before administration granted.

And if the property be described in the writ as the property of the deceased, without saying of the administrator, it is sufficient after verdict.

THIS case came before the Court upon exceptions to the opinion of *Smith* J. in the Court below, in overruling a motion there made by the defendant in arrest of judgment.

The action was trespass against the sheriff of this county, brought by the administrator on the estate of *James Hutchins*, deceased, for taking a yoke of oxen, alleged in the writ to be the

property of the deceased, and of the value of forty dollars. In the defence, upon the general issue, the taking was justified under a precept against one *David Hutchins*, a son of the deceased, whose property the oxen were alleged to be.

The plaintiff offered this son as a witness, who was objected to, as being interested in the estate as heir at law; but he was admitted, on his signing a receipt to the plaintiff, of the following tenor;—"*March* 10, 1824. In consideration of one dollar "received of *James Hutchins*, administrator on the estate of *David* "*Hutchins*, late of *New-Portland*, deceased, and my late father, "I release and discharge the said *James* from any claim or sup- "posed claim on said estate, or any right whatever to the same. "*David Hutchins*;"—it being at the same time proved that the father left no real estate.

This witness testified that five or six years ago he received of his father a cow and a pair of yearling steers; and for the profits which he might derive from the cow, he was to keep the steers till the father should call for them;—and that he kept both the cow and steers, till the latter, being the oxen mentioned in the writ, were taken by a deputy of the defendant as the property of the witness, about two years after the decease of his father. No administrator was appointed till after the taking of the oxen.

Hereupon the counsel for the defendant objected that the plaintiff could not recover, because, at the time of the taking, there was no administrator on the estate of the deceased; and no demand was ever made on the sheriff for the oxen, which were never in the possession of the administrator. These objections the Judge overruled; and the jury returned a verdict for the plaintiff, assessing his damages at forty five dollars. The defendant thereupon moved in arrest of judgment,—1st. that the verdict was for a greater sum than the plaintiff in his declaration had alleged the property to be worth;—2d. that the oxen were not alleged to be the property of the plaintiff.

Pope and *H. Belcher*, for the defendant, contended that the witness was improperly admitted, the release being insufficient to discharge the administrator from his claims. A decree of distribution in the Probate Court must be made in favor of the son;

which being a judgment, would not be barred by the paper filed in this case. *White v. Derby* 1 *Mass.* 239. As to the action, they insisted either that it was wholly misconceived, being *trespass*, which cannot be supported by proof of property alone, without possession ;—or, that the plaintiff should have shewn a demand of the oxen before action brought. Such demand every officer is entitled to, who by mistake seizes the goods of a stranger which are intermingled with those of the debtor ;—and especially in this case, where the administrator himself could have no greater rights than his intestate, who leased his oxen to be kept *till demanded.* 1 *Esp. Dig.* 383. 2 *Chitty Pl.* 329.

To the second ground of the motion in arrest of judgment they cited 1 *Esp. Dig.* 406. And they argued that the case not shewing any ground of damages beyond the value of the property, this ought not to have been estimated beyond the price fixed by the plaintiff himself.

Greenleaf and *Haskell* for the plaintiff.

MELLEN C. J. The proper averment in this case would have been that the oxen were the property of the plaintiff *as administrator* of the estate of the deceased,—2 *Chitty* 327—as in trover. But the allegation in the writ in this case may now be considered as sufficient, the omission, as well as that of the words *contra pacem*, being cured by the verdict. 1 *Saund.* 228 *c. Stat.* 1821, *ch.* 59, *sec.* 16. The motion in arrest of judgment is therefore overruled.

Neither can the motion for a new trial prevail. An administrator may maintain an action of trespass for an injury to personal property committed *after the death* of the owner, and *before* administration granted. 1 *Chitty Pl.* 166. *Smith & al. v. Miller* 1 *D. & E.* 480. 2 *Saund.* 47, *note k.* Here the lease of the cattle was terminated by the death of the owner ; and as soon as the plaintiff was appointed administrator, the property vested in him, and drew after it the possession. 2 *Saund.* 47, *note* 1. Of course no demand was necessary prior to the commencement of the action. The act of the defendant was a violation of the plaintiff's rights and possession as administrator. As to the release, we

consider it sufficient to remove any objection to the competency of the witness.

The exceptions are overruled, and the judgment of the Court of Common Pleas is affirmed.

BROWN'S CASE.

The offence of cutting and girdling fruit trees is not punishable by indictment at common law ; but only by *Stat.* 1821, *ch.* 33.

This defendant was indicted for that with force and arms, to wit, with a knife, axe and saw, and other offensive weapons, unlawfully, maliciously, and with intent to injure one *R. S.* he broke and entered his inclosure, and girdled, mutilated, and destroyed thirty of his apple trees &c. against the peace. And being convicted, he moved in arrest of judgment,—that the facts alleged in the indictment did not constitute any offence at common law,—and were not charged as being against the form of any statute.

The *Attorney General,* being called upon by the Court to support the indictment, observed that the defendant having been absent during the year to which prosecutions under *Stat.* 1821, *ch.* 33, are limited, the party injured had preferred no complaint within that period ; and he had therefore proceeded against him for a malicious mischief at common law. And he contended that by the common law of this State, this offence was punishable by indictment. The basis of our common law on this subject is found in the *Stat.* 37 *Hen.* 8, which makes the offence of "barking fruit-trees" a misdemeanor, punishable by action at the suit of the party injured, and a fine of ten shillings to the king. *East's P. C.* 1053. The provincial statute of 1698, *ch.* 52, to prevent trespasses, speaks of persons *convicted* of hurting and pulling up fruit trees ; and for the cutting of trees it provides a fine, and in some cases whipping, setting in the stocks, and imprisonment. The statute also of 1785, *ch.* 28, speaks of the remedies provided and penalties annexed by the common law, as being insufficient ; thus recognizing the existence of common

law relating to the offence, and enacting cumulative penalties. And it is only at common law that this Court can take jurisdiction of the offence ; for by the statute of this State the remedies there provided can be pursued only before Justices of the Peace, or in the Court of Common Pleas.

But the indictment charges a breach of the peace with a high hand, and by a person armed with dangerous weapons ; which is punishable by indictment. *Co. Lit.* 257. 3 *Burr.* 1731. *Harding's case* 1 *Greenl.* 22.

Sprague for the defendant.

THE COURT observed that they were not aware that the statute of 37 *Hen.* 8 had ever been adopted in this country ; and that from the early colonial legislation on the subject, it seemed improbable that it had been. The offence therefore was not indictable except under the statute of this State; and *this* remedy is limited to one year from the commission of the offence, which term had expired before the finding of the indictment.

Judgment arrested.

SELDEN & AL. *vs.* BEALE.

Where goods were left with a factor for sale, and he had sold them, or might by common diligence have so done, but had rendered no account, nor made any remittance, nor advised any one of his proceedings ;—it was held that he was not chargeable on a count for goods sold and delivered alone,—but should be declared against as factor, for the proceeds of sale.

Assumpsit for the price of ten barrels of pork, sold and delivered to the defendant. At the trial of this cause, upon the general issue, before *Weston* J. the plaintiffs produced *Daniel Shaw* as a witness, who testified that he was employed by them in *January* 1820, to carry the pork to *Eastport*, to sell on their account ;—that not being able to sell it there, at that time, he stored it with one *Emery* to sell, presuming that a sale might be effected to advantage in the following spring, *Eastport*, at that season, being a good market for the sale of provisions ;—that he

then went to *St. John*, where he saw the defendant, whom he requested to assist in the sale of the pork if a favorable opportunity presented, without limiting him as to price, and at the same time informing him to whom it belonged ;—and that he informed *Emery* of this, on his return to *Eastport*.

Emery deposed that in the winter of 1820, a short time after he received the pork, he delivered it to the defendant's order, according to the direction of *Shaw*, to whom he supposed it belonged. It was also proved that between that time and the date of the writ, which was *June* 11, 1821, the defendant, at divers times, and by private and safe conveyances, had remitted considerable sums to a person in *Farmington*, about twenty miles from the plaintiffs' residence, for whom he had sold provisions in the *British* provinces. And it did not appear that the defendant had rendered any account, or given any advice, or remitted any money to the plaintiffs.

Upon this evidence the defendant contended that he was not liable to the plaintiffs until they demanded of him the proceeds of their pork, he having been constituted their factor to sell.

But the Judge instructed the jury that if, from the evidence, they were satisfied that the defendant, in the spring of 1820, had sold, or in the faithful discharge of his duty might have sold the goods ; it was his duty as a factor to have advised his principals of the sale, and to have rendered them an account, within a reasonable time. And it appearing that he had repeated opportunities so to do, before the commencement of this action, of which he had neglected to avail himself, he had therein failed in the performance of his duty as a factor, and was liable to the plaintiffs for the fair value of their goods, with interest from the date of the writ.—And they returned a verdict for the plaintiffs accordingly ; which was taken subject to the opinion of the Court upon the case as reported by the Judge.

Allen and *H. Belcher*, for the plaintiffs, being called on by the Court to shew how the verdict could be supported, the only count in the writ being for goods sold, and the whole evidence shewing the defendant to be merely a bailiff or factor ;—contended that the case plainly shewed that the defendant was chargeable to the

plaintiffs for the proceeds of the sale, as their factor, and thus their case was, at the worst, not one of a defective title, but of a good title defectively set out ; which is always sustained after verdict. *Wells v. Prime* 4 *Mass.* 6. *Moor v. Boswell* 5 *Mass.* 306. *Stilson v. Tobey* 2 *Mass.* 521. *Avery v. Tyringham* 3 *Mass.* 160. 7 *Mass.* 169. *Kingsley v. Bill* 9 *Mass.* 198. *Whitney v. Crocker* 10 *Mass.* 316.

If substantial justice has been done by the verdict, as is manifestly the case here, the Court will not disturb it. *Brazier v. Clap* 5 *Mass.* 1. *Newhall v. Hopkins* 6 *Mass.* 350. *Dwyer v. Brannan* 6 *Mass.* 330. *Cogswell v. Brown* 1 *Mass.* 237. *Gerrish v. Bearce* 11 *Mass.* 193. *Booden v. Ellis* 7 *Mass.* 507. *Pierce v. Adams* 8 *Mass.* 383.

Besides, the rule is understood to be, that objections to the evidence, as not comporting with the declaration, are not to be admitted unless taken at the trial, and the point reserved ; for if taken at the trial the plaintiff might have cured the defect by amendment. *Jones v. Fales* 4 *Mass.* 245. *Bridge v. Austin* 4 *Mass.* 115.

If the defendant was liable for the goods in *trover*, which will not be denied, then it is competent for the plaintiffs to treat him as a purchaser ; and his use of the goods as such is thereby sanctioned and confirmed. *Cummings & ux. v. Noyes* 10 *Mass.* 433, 436. And no demand was necessary. *Clark v. Moody* 17 *Mass.* 145.

E. Pepe, on the other side argued that the undertaking of the defendant, being, for aught appearing in the case, wholly gratuitous, he was chargeable only for any breach of good faith. He was not bound to do any thing more than to assist in the sale. His duty was only to sell the goods if a purchaser should offer, and to keep the money till called for. *Jones on Bailm.* 26.

If he was a factor, he is not liable without a demand, because he had no directions as to remitting the proceeds ; and it does not appear that he had sold the goods. *Greely v. Bartlett* 1 *Greenl.* 172. The cases where a factor is made chargeable without a demand, are where he had particular orders respecting remittances. *Clark v. Moody* 17 *Mass.* 145.

Neither does it appear that he had any opportunity to forward an account, or to remit the whole proceeds. The objections therefore are not so much to the form of action, as to the right of action in any form whatever.

MELLEN C. J. at the ensuing *August* term in *Oxford*, delivered the opinion of the Court, as follows.

The writ, on examination, is found to contain only one count ; viz. *assumpsit* for ten barrels of pork sold and delivered by the plaintiffs to the defendant. But the facts reported do not shew any thing like a sale and delivery ; nor were they intended for this purpose, but to charge the defendant as bailiff or factor. The want of a proper count for this charge was not noticed at the trial, either by the Judge who tried the cause, or by the counsel for the defendant, and a verdict has been returned for the plaintiffs. We do not feel disposed to question the correctness of the opinion of the Judge so far as he meant it should extend; but he instructed the jury that if they were satisfied on certain points, relating to the defendant's proceedings as factor, then the plaintiffs might well sustain their action for the fair value of the pork. And the question now is, whether the evidence supports the verdict, so that we can render judgment on it ; or whether we must set the verdict aside, that the plaintiffs may amend their declaration and conform it to the proof in the case. It is said that the merits are found to be with the plaintiffs ; and that therefore we ought not to disturb the verdict on a formal objection ; and some cases have been cited in support of this principle. Thus in *Jones v. Fales* 4 *Mass.* 245, *Parsons* C. J. says, "I am strongly inclined to "the opinion that objections to the evidence, as not comporting "with the declaration, ought not generally to be admitted, unless "the objections were made at the trial, and the point reserved." The rest of the Court are silent on this point. At most it is the expression of an inclination of his mind only.

The Court proceeded on other grounds; and the verdict was in fact set aside. The case of *Bridge v. Austin* 4 *Mass.* 115, very nearly resembles this. *Parsons C. J.* in giving the opinion "of the Court *says* "we are satisfied that the construction of it,"

(the memorandum declared on) "is agreeable to the direction "of the Judge, and that the verdict cannot be set aside for his "misdirection supposed by the defendant. But upon looking "into the *declaration*, it clearly appears that the written memo- "randum was not legal evidence to prove the plaintiff's count; "and as a judgment in *this* action would not be a bar to *another* "action on the contract stated in the memorandum, the verdict "must be *set aside* and a *new trial* granted; when the plaintiff, if "he should think proper, may move to amend on terms. In the case mentioned at the bar, but not reported, the Court proceeded on a similar principle, where a similar difficulty occurred on the part of the plaintiff. This case is alluded to in *Farmington Academy v. Allen* 14 *Mass.* 172. In *Booden v. Ellis* 4 *Mass.* 115, the question was not upon any disagreement between the declaration and proof; but whether *trover* would not lie as well as *assumpsit*. The case seems to have received but little consideration; and the language is so general, that, if adopted as it stands, it would go far to abolish all the distinctions as to the different classes and forms of action. In *Coffin v. Storer* 5 *Mass.* 252, there was an agreement inserted in the case at the suggestion of *Parsons C. J.* waiving objection to the *form of action*, if the plaintiff should be considered entitled to recover in *any* form. I was of counsel in the cause and know the fact. Besides, the frequent insertion of similar agreements in statements of facts, seems to be founded upon its necessity; and shows the general understanding as to the legal principle.

It may be further observed that it is, to say the least, doubtful whether a judgment rendered on the verdict in this case would be a bar to another action founded on the defendant's liability as the baliff or factor of the plaintiffs. The exceptions filed, constitute no part of the record; and in *Jones v. Fales* the Court say, "the "defendant cannot aver any thing *contrary to the record* to which "he is a party;" and by the record, in the case before us, the defendant is charged as a purchaser of the pork, and the jury, by finding a verdict for the plaintiffs, have found that the same was actually sold and delivered to him. The difficulties in which the action is placed, were produced by the plaintiffs themselves or their counsel; and they have therefore no reason to complain.

Their declaration should have been adapted to the facts of their case. We have also examined the other cases cited by the plaintiffs' counsel ; but they are not cases of variance between the declaration and the proof, and therefore are not similar to the case before us.

On the whole, we think the verdict must be set aside and a new trial granted. The plaintiffs may then move for leave to amend, if they should think proper; and the Court will grant leave on such terms as might then be deemed just and reasonable.

Verdict set aside.

WYMAN *vs.* DORR.

Where cattle were leased for a term of years, to be taken back by the owner, within the term, if he should think them unsafe in the hands of the lessee; it was held that the lessor could not reclaim them without notice.

And where cattle thus leased, were seized under an execution against the lessee, it was held that the lessor could not maintain replevin for them, he not having the right of immediate possession.

Leave to amend is granted at the discretion of the Court; and the exercise of this discretion cannot be impeached by a bill of exceptions.

THIS was replevin of a cow and a yoke of steers, against a deputy of the sheriff of *Kennebec*; and came before this Court upon exceptions taken to the opinion of *Perham J.* in the Court below, pursuant to the statute.

In the writ it was originally alleged that the property was taken at *Clinton* in the county of *Kennebec*, and was then detained in *Fairfield* in this county. It was replevied by a coroner of *Somerset*, and the defendant summoned by a constable of his own town, in the county of *Kennebec*. The coroner did not return that he had taken any bond of the plaintiff, as the statute requires; but a bond conformable to the statute was returned to the Court.

At the *second* term of the Court the defendant moved that the writ be quashed, because it was served by a coroner of *Somerset*, the sheriff of *that* county or his deputy not being parties to the suit; and because it did not appear that he had taken bond of the

plaintiff previous to, or upon, the replevin. And because upon the plaintiff's own shewing, the action ought to have been brought in the county of *Kennebec*, the property having been taken at *Clinton* in that county. But this motion the Judge overruled; and permitted the plaintiff to amend his writ, by alleging the taking to have been in *Fairfield* in this county, and striking out *Clinton* in the county of *Kennebec*; the defendant opposing the amendment.

The defendant then pleaded that the property of the cow was in one *Benjamin Read*, and of the steers in one *Leonard Read*; which was traversed, and issue taken thereon.

These persons, being introduced as witnesses for the plaintiff, testified that the cow was received of the plaintiff by *Benjamin Read* in *June* or *July* 1822, to be kept four years and returned with another cow, according to the custom of farmers, reserving leave to the plaintiff to take back the cow, at any time when he should think himself unsafe;—and that the steers were received of the plaintiff by *Leonard Read* upon a special contract for their use, for six years, reserving to the plaintiff the same liberty to reclaim them if he should think himself unsafe.

The defendant contended that this transaction was colorable and fraudulent between the plaintiff and the *Reads*; and offered to prove that under the same execution, by virtue of which he had taken the cattle replevied, he also seized other beasts in the county of *Kennebec*; for which seizure an action was brought against him in the name of the present plaintiff, and supported principally by the testimony of the *Reads*;—and that after judgment for the plaintiff, he assigned the execution to *Benjamin Read without any consideration*; and that *Read* collected and applied the money to his *own use*. This evidence the Judge rejected; and instructed the jury that if they were satisfied that the plaintiff had a right, by the terms of the lease, to take back the cattle whenever he should think himself unsafe, and that the property was in the plaintiff, they ought to find for him; which they did.

Rice and *Allen* supported the exceptions.

The defects in the service of the writ being apparent on the record, the regular course of practice is to point them out to the

Court by motion, and not by plea; and in this way advantage may always be taken of them. It is deemed irregular to state any thing in the plea which is already on the record. As to the service by the coroner, it was a case in which he had no authority by law to execute the precept, because the defendant is not a deputy sheriff of that county. It is only where a sheriff or deputy of *his own* county is a party, that the statute requires the service of a coroner. *Moors v. Parker* 3 *Mass.* 310. *Cady v. Eggleston* 11 *Mass.* 282. *Brewer v. New-Gloucester* 14 *Mass.* 216. *Gage v. Gannett* 10 *Mass.* 176. *Cutts v. Haskins* 11 *Mass.* 56. *Lincoln County v. Prince* 2 *Mass.* 544. *Kennebec Co. v. Hawkes* 7 *Mass.* 461. *Scott v. Godwin* 1 *B. & P.* 67. *Stat.* 1821, *ch.* 93, *sec.* 1.

The taking having been in another county, and so originally alleged, the action should have been brought in that county. The Courts in this county have no jurisdiction of the cause; and the amendment ought not to have been permitted. *Stat.* 1820, *ch.* 80, *sec.* 4. *Robinson v. Mead* 7 *Mass.* 353. *Lucking v. Denning* 1 *Salk.* 201. *Nightingale v. Adams* 1 *Show.* 91. *Foot's case* 1 *Salk.* 93.

The witnesses were interested, and therefore incompetent. They had such a property in the cattle as would have entitled them to maintain trover or replevin; and of course had an interest attachable till the will of the owner was determined. *Ricker v. Kelley* 1 *Greenl.* 117. 1 *Chitty Pl.* 159. *Gordon v. Harper* 7 *D. & E.* 9. *Ward v. Macauley* 4 *D. & E.* 489. *Smith v. Plomer* 15 *East* 607.

The testimony rejected by the Judge ought to have been admitted, because it went to discredit the witnesses, and to shew fraud in the plaintiff. It might not have been conclusive, but it should have been weighed by the jury.

Boutelle for the plaintiff.

The defect of service was cured by the appearance of the defendant. This objection should have been taken by plea in abatement; but it is waived by imparlance. It could not now be a sufficient ground to reverse the judgment, on error; and there-

fore cannot be the ground of a *motion* to quash the writ. *Whiting v. Hollister* 2 *Mass.* 102. *Gilbert v. Nantucket Bank* 5 *Mass.* 97. *Thatcher v. Miller* 11 *Mass.* 413.

The leave to amend was properly granted; for the action may be brought in any county where the property is detained, as well as in that in which it was originally taken. 2 *Phil. Evid.* 126. 2 *Wils.* 354.

Here the plaintiff had the constructive possession of the goods, and this is sufficient to support the action of replevin. For he might reduce them to his actual possession at his pleasure. And if he had such right against the debtor, why not against all persons claiming under him? *Gordon v. Harper* 7 *D. & E.* 9.

MELLEN, C. J. at the ensuing *August* term in *Oxford*, delivered the opinion of the Court as follows.

This case comes before us on exceptions alleged against the opinions and instructions of the Court of Common Pleas.

As to the service of the writ, and non-return of the replevin bond;—objections on both these accounts are in abatement, and of course should have been made at the first term; they were too late at the *second* term. *Whiting v. Hollister* 2 *Mass.* 102. *Gilbert v. Nantucket Bank* 5 *Mass.* 91.

The objection as to *venue* was removed by the amendment, alleging the taking to have been in the county of *Somerset*. This amendment was made by leave of Court; it was a question of expediency and discretion merely, and not of law, and therefore not liable to exception; as we have decided in *Clapp & al. v. Balch.*

As to the question of fraud,—it was properly submitted to the jury and they have decided it in favor of the plaintiff.

The remaining and more important inquiry respects the right of the plaintiff to maintain the action, considering the circumstances in which the property was placed when replevied. Replevin cannot be maintained except by him who has a property in the goods, either *general* or *special*. *Waterman v. Robinson* 5. *Mass.* 303. *Ludden v. Leavitt* 9 *Mass* 104. *Perley v. Foster ib.* 112. And he must not only have the property, but an immediate right of possession. 1 *Chitty Pl.* 159; even *trover* requires such

immediate right of possession. *Ward v. Macauley* 4 *D. & E.* 489, and *Gordon v. Harper* 7 *D. & E.* 9. Let us apply the principles of these cases to the facts in the case at bar. In *June* or *July* 1822, the plaintiff leased the cow to *Benjamin Read* for four years, and the steers to *Leonard Read* for *six* years; in both instances under an agreement reserving to him leave to take them back *when he should think himself unsafe.* Neither of the limited terms had expired when the replevin was sued; and there is no proof in the case that prior to the commencement of this action the plaintiff thought himself unsafe; or, if he did, that he had given notice thereof either to *Benjamin* or *Leonard Read*, or to the defendant, the attaching officer; and in the case of *Smith v. Plomer & al.* 15 *East* 607, it was decided that where goods were let without limitation as to time, the lease must be determined by notice to the lessee; and that notice to the *officer* is not sufficient. In the present case no notice was given to *either.* The leases then for four and six years were in full force at the time the action was commenced; and of course, at that time, he had no *immediate right of possession*; and therefore, according to the authorities, which are not questioned or overruled, the plaintiff is not by law entitled to maintain his action.

The exceptions are sustained;—the verdict is set aside, and a trial is to be had at the bar of this Court

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE COUNTY OF

PENOBSCOT.

JUNE TERM,

1824.

PORTER *vs.* HAMMOND.

Where the tenant of land for a year, held over, and after the expiration of his term paid rent to a stranger, and refused to quit the premises, being called upon by the agent of the lessor for that purpose ;—this was held to be not such a disseisin of the lessor as would prevent the operation of his deed conveying the premises to a third person.

THIS was a writ of entry, in which the demandant counted on his own seisin, and a disseisin by the tenant ; who pleaded in bar that the demandant, being seised of the premises, by his deed of *Feb.* 10, 1821, bargained, sold and conveyed the same to one *William Grant* in fee. The demandant replied that at the time of making that deed he was disseised of the premises by one *Henry H. Snow*, and traversed his own seisin ;—on which issue was taken.

To support this issue on his part, the demandant proved that in *February* 1821, the tenant, being in the occupancy of the land, paid rent therefor to *Snow*.

The tenant then proved that he became tenant of the demandant *April* 16, 1819, under a written license from *Jacob Mc Gaw* Esq. his attorney, to occupy the land till the first of *January* then next, for the rent of twenty dollars ; and that he thereupon gave the demandant a writing, in the following terms :—"I agree to "improve the *Bessey-place*, so called, in the town of *Atkinson*,

"during the present year, and until the first of *January* next, "under Capt. *Seward Porter*, and to pay him twenty dollars for "the use thereof. *William Hammond. Bangor, April* 16, "1819."

Mr. *Mc Gaw* testified that since the expiration of the term he had repeatedly called upon the tenant to quit the premises, which he refused to do; and continued in possession when this action was brought.

Upon this evidence *Weston* J. who tried the cause, being of opinion that *Hammond*, at the execution of the deed of *Feb* 10, 1821, was still but a tenant at sufferance to *Porter*, gave the demandant leave to become nonsuit, with liberty to move to set it aside, if in the opinion of the whole Court, the action could be supported.

Mc Gaw and *Greenleaf*, for the demandant, contended that he had a right, upon the facts in the case, to consider himself disseised; and cited *Blunden v. Baugh Cro. Car.* 303, *Lit. sec.* 588. *Booth on Real Actions* 285. *Hob.* 461. *Atkyns v. Horde* 1 *Burr.* 110. And that the lease did not estop the tenant from denying the seisin of the lessor, after the expiration of the term. *Co. Lit.* 47 *b.* 2 *Jacob's Law Dict.* 440, *tit. Estoppel.*

Godfrey and *Williamson*, for the tenant.

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

The single question presented by the pleadings, and the evidence adduced to support the replication, is, whether the demandant, at the time of executing the deed to *Grant*, was disseised of the demanded premises; so that in consequence, nothing passed by the deed. *Hammond*, the alleged disseisor, at first entered, as the lessee of the demandant, for one year; during which time he was estopped to deny the right and title of his lessor. But the case finds, that after the end of the year, and during the interval between that time and the commencement of this action, he was repeatedly called on by the demandant's counsel to quit the premises, but he refused so to do; and paid rent to *Snow*, who it is said claimed the land. This is the evidence

relied on to prove the alleged disseisin. There are two kinds of disseisin ;—a disseisin at the election of the owner of the land ;—and a disseisin in spite of the true owner. The distinction between these two kinds is particularly stated in the case of *Atkyns v. Horde*, cited in the argument from *Burrow*. An owner may, and often does, elect to consider himself disseised for the sake of using the remedy of an action to obtain possession of the land ; and when the tenant pleads the general issue, he admits himself to be tenant of the freehold. 7 *Mass.* 381. 4 *Mass.* 443. 12 *Mass.* 373. And thus both parties agree in this form to try the question of title. But in such a case there need not exist a disseisin in spite of the true owner, to enable the demandant to maintain a writ of entry. So when to a writ of entry the defendant pleads *non tenure*, and the demandant replies that the defendant is tenant of the freehold ; such replication would be supported by proof that the tenant had been called on to quit the premises and refused so to do ; for if such proof should not be held sufficient, how is the owner to regain seisin and possession of the land ? The case before us, however, is different from both of those abovementioned. The disseisin stated in the replication, must be such an one as deprives the true owner of the legal power to convey the lands by deed, or devise them by will ;—that is, a disseisin in spite of the owner. In the case of *Prop. Ken. Purchase v. Laboree & al.* 2 *Greenl.* 275, we had occasion to review the law of disseisin and consider the facts necessary to constitute a disseisin in spite of the owner. It must be open, exclusive, adverse and continued. By looking at the case before us, we find no facts shewing the possession of *Hammond* to have been exclusive or adverse to the title of the demandant. He only paid some rent to *Snow* and refused to quit the premises. Upon these facts we do not see why *Porter* might not have maintained trespass against the defendant ;—or at least, why *Grant* might not have brought the present action and maintained it. We cannot think that the possession of the defendant, and refusal to leave the premises, would have prevented the operation of the deed and the conveyance of the title to *Grant*.

We are therefore of opinion that the nonsuit must be confirmed.

BUSSEY *vs.* GILMORE.

The power given to towns by statute to raise money for "necessary charges," extends only to those expenses which are incident to the discharge of *corporate duties.*

Hence a tax of money for the discharge of a contract entered into by a town with the corporation of a toll bridge, for the free passage of the bridge by the citizens of the town, was held illegal, as transcending its powers.

THIS was a writ of entry on the demandant's own seisin and a disseisin by the tenants, of lands in *Bangor*; and it came before the Court upon a case stated by the parties, containing the following facts.

The *Bangor* bridge-company, incorporated in 1807, having erected a bridge across the *Kenduskeag* river in the town of *Bangor*, granted in 1808, to the resident inhabitants, taxed in the town, with their families, carriages, &c. the right to pass the bridge, free of toll, for the term of twenty years; and covenanted to surrender the bridge in good repair, at the end of that term, to the inhabitants of *Bangor*, to be their own property forever;—in consideration of which the inhabitants of the town, in their corporate capacity voted and covenanted to pay to the bridge-company a certain sum annually during the term of twenty years.

The sum thus agreed to be paid was annually raised by vote in town-meeting, and assessed in the town tax among the usual items of town charges, upon the property as well of non-resident as of resident owners of land; and paid without objection till the year 1822.

The demandant who is a citizen of *Massachusetts*, had owned lands in *Bangor* more than ten years; which had been taxed as other estates, and which taxes he had paid without objection. He had often in that period visited *Bangor*, and passed the bridge, paying toll as other strangers; but not knowing the purposes for which the town tax was assessed, till the year above mentioned.

In the year 1822, the town tax was raised and assessed in the usual manner, including four hundred dollars raised by vote to pay the sum stipulated to be paid for that year to the bridge company. This tax the demandant refusing to pay, his lands were

sold under the provisions of the statute, and a deed made by the collector to the tenant, who was the purchaser at the collector's sale.

And the question was, whether the contract with the bridge company was within the legitimate powers of the town, and the tax therefore valid in law ?

Greenleaf and *Godfrey* for the demandant.

1. The contract to pay toll to the bridge company was not within the corporate powers of the town. It has no powers but such as are *expressly granted*, or are *necessarily incident* thereto. *The People v. The Utica Ins. Co.* 15 *Johns.* 358.

These powers are enumerated in *Stat.* 1785, *ch.* 75, *sec.* 7, and in *Stat.* 1821, *ch.* 114, *sec.* 6, and are—to raise money for the support of the ministry, the schools, the poor, " and other *neces-* " *sary* charges arising within the same town." Some other pecuniary duties are imposed by other statutes. These " necessary charges" are explained by *Parker C. J.* in *Stetson v. Kempton* 13 *Mass.* 278, to mean such sums as should be necessary to meet the ordinary expenses of the year, or which are the effect of the legal discharge of their *corporate* duty. Hence money raised for necessary defence in war was held an illegal assessment. Similar powers in parishes are limited to the defraying of expenses arising from the execution of the powers *previously enumerated*. *Dillingham v. Snow* 5 *Mass.* 553. *Bangs v. Snow* 1 *Mass.* 187. Accordingly it has been held that the commutation of the *labor-tax* on the highways, for a grant of money to be expended in repairing highways and rebuilding bridges was illegal, as transcending the legitimate powers of the town. *Libby v. Burnham* 15 *Mass.* 144.

Now no *corporate* duty is devolved on the town, to which the passage of a toll-bridge is *necessarily* incident; and therefore the contract is illegal.

2. But if a town might, under *any* circumstances, make a contract for the payment of toll, yet *this* contract is void, because it is unjust, partial, and oppressive.

By the act of incorporation, the farmers of *Bangor* are specially exempted from toll, when going to and from their farms. But if

the town as a corporation may assess upon all persons a tax to purchase a general exemption, then those who are already exempted by law, must pay their proportion to purchase the same immunity for others who are not.

So non-residents, who are taxed in their estates to purchase this immunity for the inhabitants of *Bangor*, can yet derive no benefit from it themselves, but are obliged to pay their toll, when visiting and managing the very estates thus taxed.

As to the clause in the act which authorizes the bridge-company to commute the toll with *any corporation*,—this gives no sanction to a contract with the town; but must reasonably be intended to mean those manufacturing corporations in *Bangor*, whose agents, in the transaction of the business of the corporation, necessarily must pass the bridge.

Allen, for the tenant.

The contract was within the legitimate powers of the town; both under the general statute enumerating those powers, and also under the particular acts relating to the bridge in question.

1. As to the general statutory provisions. The *Stat.* 1786, *ch.* 75, authorizes towns to raise money for the purposes therein specified, and for "*other necessary charges*," &c. This term is to be received in a civil or political, and not in a strictly philosophical sense; and is in this place to be understood as equivalent to *expedient* or highly *useful*;—not as implying any thing which cannot, by any possibility, or under any circumstances, be dispensed with; but as indicating a case where the town, fairly calculating the advantages on the one hand, and weighing the burdens on the other, finds the former most decidedly to preponderate. A line must be drawn somewhere, within which the town may lawfully exercise its discretion as to what it may consider as necessary charges. This line must vary, as the subject matter of it applies to the various circumstances and situation of each town. But whatever is essentially important to the convenience of a large portion of citizens, and is open to the enjoyment of all, ought to be considered as within this general delegation of power. It is in this liberal manner that the term *necessaries* is used when

applied to a minor; and which is always understood to mean whatever is suitable, and convenient, and adapted to his situation. In the like manner is the same term expounded, when applied to the nature and character of the relief afforded by a town to persons falling into distress as paupers. But in the case of *Stetson v. Kempton* 13 *Mass.* 278, the Court, in express terms, adopt the broad rule of construction, saying that the erection of public buildings, town houses, and market houses, may be proper town charges, as coming fairly within the term "necessary charges," for they may be *essential to the comfort and convenience of the citizens.* In the present case the town has determined that *some* method of crossing the navigable waters of the *Kenduskeag* was essential to the comfort and convenience of its citizens; and that a composition for the toll was less expensive than to maintain a public and free bridge.

2. The private statutes relating to this subject, recognise the same power. By the act of *Feb.* 20, 1807, the *town* was authorized to erect this bridge, and to reimburse the expense by a toll. The right thus granted could not be taken away but by their consent; and this was expressed in the act of *June* 1807, under which the bridge-corporation was empowered to erect it; and by which the town contracted to part with its rights for a stipulated consideration. At the end of twenty years the bridge was to become the property of the town; and as a compensation for its erection, as well as for the immunity of toll, an annual sum was to be paid to the corporation. By the last act, the proprietors of the bridge are expressly authorized to commute the toll with any person or persons, or with any corporation. There can be no doubt that the town was here intended, since its rights and convenience so obviously form a part of the care of the legislature. This provision of the statute cannot be satisfied, but by extending the same power to "any corporation" to enter into such contract of commutation. And so the parties understood its enactment, by forthwith carrying it into effect. So far as resident citizens are concerned, no objection can be made to the tax; and non-residents, whose estates are enhanced in value by this very bridge, might with as much reason object to a tax for erecting a town-hall, or a market house.

WESTON J. delivered the opinion of the Court, as follows.

The original title of the demandant to the premises demanded is admitted; he therefore must recover, unless the tenant has shewn a title in himself. The title he exhibits, arises from a collector's sale, for the nonpayment of taxes in the town of *Bangor*, for the year 1822. The only objection urged against the validity of this sale, arises from the assessment, as a part of the tax for the year in question, of the sum of four hundred dollars, stipulated to be paid by the town to the *Bangor Bridge Company*, for certain privileges and advantages, secured by contract from that company to the town of *Bangor*, and to the citizens thereof. The demandant contends that, in voting this sum, the town transcended the powers incident to it in its corporate capacity. And if such should appear to be the fact, the title of the tenant fails. The counsel for the tenant insists that the town has this authority, *first*, from the statute of 1785, *ch.* 75, *sec.* 7, the law in force at the time of the making of the contract before mentioned, and which has been re-enacted in our revised statutes. And, *secondly*, by the effect of the act of *February* 27, 1807, authorizing the town of *Bangor* to erect a bridge; and by the act of *June* 20, 1807, incorporating the existing company.

The construction of the statute of 1785, before referred to, in relation to the authority of towns to raise, assess and collect money, is so clearly stated and so fully illustrated, in the case of *Stetson v. Kempton et al.* cited in the argument of this cause, that we have little occasion to say more than that we are entirely satisfied with the principles of that case, and the deductions there drawn. The Court remark that "it is important that it should "be known that the power of the majority over the property, and "even the persons, of the minority, is limited by law to such cases, "as are clearly provided for and defined by the statute, which "describes the powers of these corporations." By that decision, this principle did become known; and believing that it is justified, as well from considerations of public policy, as from a sound construction of the law, we have no disposition to modify or change it, if we had the power to do so, which we clearly have not. It is conceded that the authority of the town to vote and assess the

sum in question, can be deduced only from the general terms used in the statute, which, after authorizing towns to raise money for certain specified objects, adds, " and other necessary charges." The generality of this phrase has received in the case before referred to, a reasonable limitation. Without enumerating the objects which this term, *other necessary charges*, may be understood to embrace, it may in general be considered as extending to such expenses as are clearly incident to the execution of the power granted, or which necessarily arise in the fulfilment of the duties imposed by law. It is not pretended that the contract made with the bridge-company, was necessary to the discharge of any corporate duty. Towns are not required, nor have they the power, to provide for the erection of bridges over tide or navigable waters. The powers granted to towns are specified and defined by statute; and we have discovered no one to which a charge of this sort can be considered as incident. Without adverting therefore to the various topics, by which the injustice of this assessment has been impeached on the one side, or its utility or convenience defended on the other, we are clearly of opinion that it is not supported by any general law in force at the time it was made, or when the contract was entered into, which it was designed to fulfil.

It remains to consider whether it is justified by the act of *February*, or of *June*, 1807, either by their express terms, or by fair implication. By the act of *February* the franchise was granted to the town ; and they were empowered to commute the toll with any person or persons, or with any corporation. And the same power of commutation is granted to the present company by the act of *June*. In both cases the persons or corporations, with whom a commutation might be made, must be understood to be such only as had a legal capacity to contract. The power conferred was upon the grantees of the franchise. Their competency to make the commutation was established and confirmed; but the competency of those, with whom such contracts might be made, was left to depend upon the general rules of law, unaffected by the provisions of these acts. Thus femes covert, minors, or other persons or corporations, who were before incompetent to enter into a contract of this description, must be considered

as still remaining under the same disability. The acts relied upon did not enlarge their capacity, or confer upon them any new powers.

But it is said that, by the term corporation, the town of *Bangor* must be considered as particularly embraced; because such a contract would be more beneficial to them than to any other corporation, and that therefore authority was, by implication, conferred upon them thus to contract, if they did not possess it before. The privilege purchased by the contract, was valuable to many of the citizens, in their individual capacity; but the town had no corporate interest to be promoted by the immunity. The interests of other corporations of the manufacturing kind, might be directly aided by such a contract; which would enable them, at less expense, to transport their materials and goods across the bridge, and to provide for the unrestrained passage of such, as might be in their employment. The term in the first act, did not embrace the town; for the bridge was to be their property. Nor can the term, in the second act, be considered as conferring on them any additional powers; as it is fully satisfied by limiting it to other corporations, competent to contract. The interests of the citizens of *Bangor* are otherwise provided for, by the provision by which they are permitted to pass free of toll, to and from public worship; and by that which authorizes such of them as are farmers to pass free, to and from their farms.

The portion of the tax of 1822 objected to, being unauthorized by law; and the title of the tenant therefore failing; by the agreement of the parties, he is to be defaulted, and judgment is to be rendered for the demandant.

The Inhabitants of Garland *vs.* The Inhabitants of Brewer.

A notification under *Stat.* 1821, *ch.* 122, *sec.* 17, is sufficient, if it be signed by the chairman of the selectmen, *eo nomine*;—and it will be presumed that the town did not appoint any overseers of the poor, unless the contrary appear.

In this case, which was *assumpsit* for the expenses of supporting a pauper, and came up, by exceptions, from the Court below,

—the only question was—whether the notice was sufficient, it being signed—"*Isaac Wheeler*, chairman of the selectmen of said "*Garland*."

Gilman, for the defendants, objected that it did not appear that the notice was signed by a majority of the *overseers of the poor*, nor by their order, nor by any person in their behalf. And if the *selectmen* were competent to give notice, which he denied, it does not appear to be signed by *their* authority. And he cited *Quincy v. Braintree* 5 *Mass.* 86. *Dalton v. Hinsdale* 6 *Mass.* 501. *Westminister v. Barnardston* 8 *Mass.* 104.

Mc Gaw, in reply, said that no *signature* was required, by the statute. It was enough if the facts relative to the pauper were stated in writing by direction of the overseers. But if it were otherwise, if the act purports to be official, it is sufficient. The word *chairman* implies that it was the act of the board officially assembled, and certified, as is the practice in all other cases, by its presiding officer. And as to the addition of the office of *selectmen*, the duty of relieving the poor is devolved on them by law, in all cases where overseers are not specially chosen. *Bridgewater v. Dartmouth* 4 *Mass.* 275.

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

When a town does not elect any overseers of the poor, the selectmen are such *ex officio*; according to the third section of the statute of 1821, *ch.* 122. As it does not appear that the town of *Garland* had elected any oversers of the poor, we presume they had not; and therefore the notice given in the present case, signed by *Isaac Wheeler* as chairman of the *selectmen*, is not objectionable on that account. But it is contended that if he had signed the notice as chairman of the overseers of the poor of *Garland*, it would have been fatally defective. We do not find any decision in *Massachusetts* which is precisely in point. The statute provides that the overseers may send a written notification to the overseers of the poor of the town where the settlement of the pauper is alleged to be. The form of the notification is not prescribed.

In the case of *Westminster v. Barnardston* 8 *Mass.* 104, the notification was signed by one of the overseers with the addition that he signed by order of the board of overseers, and it was held sufficient. The notification, thus signed, purported to be the act of the board; and though there was no proof that the notification was signed by one of the overseers by order of the others, the notice was of itself deemed to be a compliance with the statute provision. In the case before us the notification is signed by *Isaac Wheeler, chairman*, &c. This is a declaration on his part, that the notification thus signed is an official act of the board of overseers. The Court receives the notice and considers it to be what it purports to be. The object of the law is to give official notice from one town to another; so that the overseers of the town to whom the notice is sent may take such measures as they may think expedient with respect to the pauper. And in this view of the subject, we are satisfied that a notification signed by one of the overseers as *chairman*, is equally as good as one signed by an overseer by order of the board of overseers. In both cases the act purports to be, and is considered to be, an official act of the board; and is therefore legal and sufficient.

The exceptions are overruled, and the judgment of the Court of Common Pleas is affirmed.

SARGEANT *vs.* ANDREWS & AL.

Where, in an action on a note not negotiable, the defendant pleaded that this debt had been attached in his hands, in a foreign attachment at the suit of a creditor of the plaintiff, and judgment rendered thereon, which was in full force;—and at a subsequent term the plaintiff replied that the execution on that judgment having been returned *nulla bona*, the creditor had sued out a *scire facias* against the trustee, who had appeared and was discharged, upon his disclosure;—the replication was held good, though the judgment in the *scire facias* was since the filing of the plea.

THIS was *assumpsit*, on a written promise of the defendants to deliver certain specific articles at the plaintiff's house; and came before this Court upon exceptions taken by the defendants to the opinion of *Perham* J. in the Court below.

The defendants pleaded in bar, that the defendant, *John Andrews*, had been summoned as trustee of the plaintiff, in a foreign attachment, and that judgment was rendered against him in the Court of Common Pleas at *January* term 1823, by default, and execution awarded ; by which judgment the debt was bound and payable to the plaintiff's creditor.

The plaintiff replied that the execution which issued in that case being returned unsatisfied, the creditor sued out a writ of *scire facias* against *John Andrews*, who appeared and submitted himself to examination under oath, pending the present action, and answered that he had no goods, effects or credits of the plaintiff in his hands ; and that the Court of Common Pleas, at the *June* term 1824, adjudged him not trustee of the plaintiff, and he was thereupon discharged ;—to which the defendant answered by a general demurrer.

It appeared that after the filing of the plea, this cause had been continued, in order that the *scire facias*, which was then pending, might be determined ; after which the pleadings were closed, as above stated.

Williamson, for the defendants, contended that when this suit was commenced, the plaintiff had no ground of action, his effects in the hands of *John Andrews*, to the full amount of his claim, being bound by the judgment in the foreign attachment, which was then in full force. *Stevens v. Gaylord* 11 *Mass.* 265. *Jewett v. Bacon* 6 *Mass.* 61. And if not, yet no costs were taxable for the plaintiff while the *scire facias* was pending.

Godfrey, on the other side, was stopped by the Court ; whose opinion was delivered by

MELLEN C. J. The plea in bar is good, unless avoided by the replication. The question then is, whether the replication is sufficient. It discloses the fact, that notwithstanding *John Andrews*, the supposed trustee, was defaulted at the return term, and judgment was then entered against the goods, effects and credits of the plaintiff in his hands ; still he appeared upon the *scire facias* and disclosed to the Court that he was not the trustee of the plaintiff, and at the following term he was accordingly

discharged. Thus it appears that neither of the defendants is under any obligation to pay the contents of the note declared on, to any one except the plaintiff; and why then should not the present action be maintained? It is said that the discharge of the supposed trustee, took place at a term of the Court of Common Pleas, holden since the commencement of this action; and that when the action was commenced the judgment against the goods, effects and credits was in full force, and by law bound them in the hands of the supposed trustee. This argument has no legal foundation. The law bound nothing in the hands of *John Andrews*, because it appears by his disclosure and the judgment of Court thereon, that he had nothing in his hands belonging to the plaintiffs at the time the trustee process was commenced. The replication shews that this process never had any legal effect upon the case before us; and if the supposed trustee had attended at the first term and disclosed, as he was required to do, it never would have appeared that any goods, effects or credit of the plaintiff were in his hands and bound by the service of the trustee process. The very statement of the case, as disclosed in the plea and replication, viewed as one statement of facts, shews most clearly that the trustee process, though conducted as it was, furnished no kind of defence to this action. To sustain the defence would produce manifest injustice to the plaintiff, and completely relieve the defendants from the payment of a just demand. It is further contended that the plaintiff is not entitled to costs while the trustee process was pending. There is no merit in this objection. If *John Andrews* had appeared and disclosed at the first term, as he ought to have done, he would then have been discharged; his own neglect rendered a *scire facias* necessary. The delay in the present action was occasioned by this neglect; and the defendants must not take advantage of their own wrong or omission.

Replication adjudged good.

HOWES & AL. *vs.* SHED.

The *purchaser* of a log illegally taken from a river, without the consent of the owner, against the provisions of *Stat.* 1821, *ch.* 168, having at the same time full knowledge of the unlawful manner in which it was obtained, is liable to the penalty of that statute.

THIS was debt for a penalty incurred under *Stat.* 1821, *ch.* 168, *sec.* 1, for unlawfully converting to the defendant's own use a log of the plaintiffs, lying in *Penobscot* river.

At the trial before *Perham* J. in the Court below, the plaintiffs proved that one *Patten*, seeing the log floating down the river, conveyed it on shore, and sold it to the defendant, telling him at the same time by what means he became possessed of the log. The defendant thereupon converted it to his own use.

The Judge, upon this evidence, instructed the jury, that if they believed that the log was taken up and converted by *Patten*, to his own use, and then sold to *Shed*, the penalty did not attach to the purchaser, but to *Patten* ;—but if they believed, from the evidence, that *Shed* took up the log and converted it to his own use, he was liable to the plaintiffs in this action. And the jury finding for the defendant, the plaintiffs took exceptions to the instructions given them by the Judge.

McGaw, for the plaintiffs, argued that the defendant, having full knowledge of the illegal manner in which *Patten* obtained the log, was a participator in his guilt ; and as in torts all parties are severally guilty, the defendant was liable alone for the penalty. If not, the statute may always be evaded ; for worthless men may always be found, to follow the business of picking up logs floating to market, and selling them to responsible partners, who will always escape, under the character of purchasers.

Brown, for the defendant, adverted to the strict rule of construing penal statutes ; and said that only one penalty could be recovered for one offence ; *Rex v. Clark Cowp.* 612, and this was incurred by the first aggressor. Otherwise, as many penalties may be recovered as there are purchasers.

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

This case comes before us on an exception to the opinion of the Court of Common Pleas as delivered to the jury. The opinion is expressed in general terms, but we must understand it as having reference to the particular facts on which it was founded. The latter instruction to the jury seems not to be important; because there are no facts in the case shewing or tending to shew that *Shed* took up the log and converted it to his own use. The proof is that he did not take up the log; but that he purchased it of *Patten*, who did take it up, and disposed of it to *Shed*. The only question then is, whether the former instruction to the jury was correct. The case finds that *Patten*, when he sold it to the defendant *Shed*, informed him by what means he had obtained it. It seems he obtained it unlawfully, and without any legal authority disposed of it. Such a disposition of the log so obtained, rendered *Patten* liable to the penalty of the law, inasmuch as what he did, was done understandingly, and with the evident intention to make a profit out of the illegal appropriation of the property,—and the defendant, by purchasing the log under such circumstances, and with full knowledge of the illegal mode by which *Patten* obtained it; and his actually disposing of it afterwards, rendered him equally guilty with *Patten*; and the plaintiffs might have maintained an action against *Patten* and the defendant jointly upon the evidence before us, the whole appearing to have been one transaction. But as the action, though sounding in contract, is founded on a tort, and torts may be considered as joint or several, the present action is well brought against the defendant only. *Boutelle v. Nourse* 4 *Mass.* 431. *Frost & al. v. Rowse* 2 *Greenl.* 130. And the evidence maintains the action. The case would be otherwise if *Shed* had fairly purchased the log, without any knowledge of the illegal manner in which *Patten* obtained it; but this knowledge connects the defendant with the wrong of *Patten*, and subjects him to the consequences of such connection, and the penalties of the statute. We are of opinion that the first instruction of the Judge to the jury was incorrect. The exception is allowed—the judgment of the Court of Common Pleas must be set aside; and a trial may be had at the bar of this Court.

TAYLOR & AL. *vs.* GREELY.

On a motion to set aside a verdict, on the ground that one of the jury had prejudged the cause; the testimony of the juror himself is to be heard, in explanation of the language and conduct imputed to him.

A verdict having been returned for the plaintiffs in this cause, the defendant moved that it be set aside, for the alleged prejudice and partiality of one of the jurors.

In support of the motion it was proved that to two different persons the juror had declared, a short time before the trial, that he knew all about the cause, and that the plaintiffs would, and ought to recover;—and that to another he said it would be a hard case for the plaintiffs if they should fail in the action.

It was admitted that at the trial the defendant's counsel inquired of the juror whether he had formed any opinion upon the merits of the cause; to which he gave satisfactory answers in the negative; and the counsel declined having him examined under oath.

The juror himself deposed that he had no recollection of ever having used the language imputed to him, though he might have so done; and that when he went upon the panel he was unbiassed, unprejudiced, and impartial.

THE COURT, at the succeeding *August* term in *Oxford*, said that under the circumstances of this case they could not sustain the motion. The defendant had not thought it necessary to have the juror interrogated under oath, as he might have done; but declined it, and was satisfied with his answers, reposing confidence in his integrity. The juror himself had sworn that he was impartial, and not under the influence of any impure motives; and the expressions he is said to have used may be explained and understood without any impeachment of his motives, and consistently with pure intentions and a desire to do justice.

The Inhabitants of Dixmont *vs.* The Inhabitants of Biddeford.

Supplies furnished to a woman as a pauper, without the knowledge of her husband, she living apart from him,—are not supplies received by him, as a pauper, within the meaning of *Stat.* 1821, *ch.* 122, *sec.* 2.

This was *assumpsit* for the support of *Celia Basford*, a pauper, wife of *John Basford*, from *Jan.* 23, 1821, to *April* 2, 1822;—and came before the Court upon exceptions taken by the defendants to the opinion of *Smith J.* in the Court below.

At the trial in the Court of Common Pleas, the plaintiffs, to prove the marriage of the pauper, offered a witness who was present at the marriage about twenty years ago, and that it was celebrated before one of two magistrates whom he named, but he could not recollect which;—and that the parties afterwards cohabited as man and wife, at least a dozen years, when the husband abandoned her, and had since provided her nothing.

Another witness testified that *Basford* lived in *Biddeford* in *March* 1821, and for years before, under the assumed name of *John Byfield*.

Another witness being sent by the plaintiffs, called on the assessors of *Biddeford*, and asked for a certified copy of their assessments of taxes against *Byfield*, which they refused to give; but permitted the witness to take extracts from the books, shewing the taxes assessed on his poll and estate in possession, which was valued at more than two hundred dollars, from 1814 to 1820, which he produced and verified on the trial.

The opinion of the Judge upon this evidence was that the marriage was fully proved, and that the husband's settlement was in *Biddeford*, and a verdict was returned for the plaintiffs accordingly.

Mc Gaw, in support of the exceptions.

The proof of the marriage ought not to have been received. It was not the best evidence which the case would admit. The witness not being able to recollect any thing distinctly respecting it, the certificate of the officiating magistrate ought to have been produced.

But if the marriage be proved, yet it does not appear that the husband ever gained a settlement in *Biddeford* by virtue of any law of *Massachusetts*, nor even that he *paid* taxes any *one* of the years of his residence there.

Nor did he acquire a settlement there under the particular provision of *Stat.* 1821, *ch.* 122, fixing the settlement of every citizen at the place where his domicil *then* was; because he was within the exception in the same clause, by having received supplies as a pauper within a year then next preceding. All the relief furnished by overseers of the poor, is upon the credit of *the town* in which the pauper had a settlement; and the town has a remedy over against the husband or other relative bound to support the person relieved. Wherever therefore the wife is thus assisted, it is virtually by the town where the husband is settled; —and being constructively assistance to him, he is brought within the exception in the statute.

Brown, for the plaintiffs,—being stopped by the Court from arguing as to the evidence of the marriage,—contended that the husband acquired a settlement in *Biddeford* under the *fifth* method pointed out in *Stat.* 1793, *ch.* 34, being taxed five years successively for an estate valued at more than sixty pounds. The evidence of this fact was the best the case would admit. The certificate of the town clerk would have been sufficient, but the means of obtaining it were withheld by the defendants themselves. But the evidence under oath of any other person to the truth of a copy which he has actually compared with the original, is of equal solemnity. *Buttrick v. Allen* 8 *Mass.* 273. Nor was it necessary that the taxes should appear to have been paid. *Westbrook v. Gorham* 15 *Mass.* 160.

But he also gained a settlement there by virtue of his residence in *Biddeford*, *March* 21, 1821, when the statute of this State was enacted. The supplies to his wife make no difference in the case. He had abandoned her for many years, was himself in possession of a decent estate, and had no knowledge of her situation. If relief administered in this manner to the wife or child of any man, brings him within the meaning of the word *pauper*, in the statute; then the most wealthy citizen may become such without

his knowledge, and himself may be liable to be sent to the almshouse, and his children to be bound as apprentices, under the other sections of the statute.

MELLEN, C. J. at the ensuing *August* term in *Oxford*, delivered the opinion of the Court as follows.

The exception as to the testimony admitted to prove the marriage cannot be sustained. The witness saw the marriage solemnized; and as *one* or the *other* of the magistrates named, performed the ceremony, it is of no importance which. As to the *admission* and the *effect* of the evidence offered to prove a settlement by the assessment of taxes, it is unnecessary to examine, or give any opinion, because we are satisfied that the husband of the pauper gained a settlement in *Biddeford*, by residing and having his home in that town on the 21st of *March* 1821. His wife, the pauper, had for many years lived separate from him, and in a different part of the country; and therefore, though she received supplies from *Dixmont* during the year next preceding, still that did not prevent the *husband's* gaining the settlement in *Biddeford*; and there *she* has her settlement also. The reasons on which our opinion is founded, are stated at large in the case of *Green v. Buckfield* [*ante p.* 136,] to which we refer.

Judgment affirmed.

WILLIAMS *vs.* GRAY.

Where two non-residents held in common an unsettled tract of land, which without their knowledge was sold for non-payment of the State taxes; and they afterwards made partition by mutual deeds of release and quitclaim, in common form; after which one of them, within the time of redemption paid the tax to the purchaser at the sheriff's sale, from whom he took a deed of release and quitclaim to himself alone, of the whole tract;—it was held that this payment and deed enured to the benefit of them both;—that the party paying had his remedy by action against the other for contribution;—and that he who had not paid, might still maintain a writ of entry against the other, for his part of the land.

THIS was a writ of entry to recover possession of certain lands in *Etna*; and came before the Court upon a case stated by the parties, as follows.

Gen. Crosby, being the proprietor of township No. 4, in the second range north of the *Waldo* patent, now called *Etna*, by his deed dated *Dec.* 15, 1810, mortgaged the south half of the township to *Mr. Gray*;—and afterwards, *Jan.* 16, 1812, mortgaged the remaining half to the *Penobscot* bank; which last mortgage was, prior to 1820, assigned to *Mr. Gray* and *Mr. Williams*, in the proportion of four fifths to *Gray*, and one fifth to *Williams*. *Gen. Crosby*, being unable to pay the mortgages, afterwards released his equity of redemption.

January 10, 1820, the parties divided that portion which had been mortgaged to the bank, and which they held in common; and *Gray* made to *Williams* a deed of release and quitclaim of the demanded premises, with covenants that they were free of all incumbrances by him made, and of warranty against the grantor and his heirs, and all persons claiming under them;—and *Williams* made a similar deed to *Gray* of the residue of the land.

The State taxes upon the whole township for the years 1812 to 1818 inclusive, amounting to $41,09 being wholly unpaid, it was sold by the sheriff of the county *January* 4, 1819, under a warrant from the treasurer, pursuant to the statute, to *Hill & McLaughlin*, they being the highest bidders, for $61,10, being the amount of the taxes and charges of sale; and a deed was made to the purchasers, conveying the township to them and their heirs, subject to the right of the proprietors to redeem the land, by payment of the money at any time within two years.

March 13, 1820, an agent of *Mr. Gray* came to *Hill & McLaughlin* professedly to redeem the land; and paid them the amount of their claim. Whereupon they executed a deed to *Gray*, prepared by the agent, by which they "sold, released and quitclaimed" to him all the right, title, interest and claim which they had to the township by virtue of their deed from the sheriff. Under this deed the tenant now claimed to hold the land.

Orr for the demandant, and *Greenleaf* for the tenant, submitted their arguments in writing, to the following effect.

Arguments for the demandant.

1. No title passed to the tenant in the *demandant's* land, by the deed of *Hill & McLaughlin* to him. The sheriff's deed to

them reserves a right of redemption to the proprietors of the land. This reservation is a substantive part of the deed, in its operation on the rights of the demandant. Of whom, by this reservation, was he to redeem his land? Not of the assignee of *Hill & McLaughlin*, but of them personally, or their heirs. Otherwise, the owner of land might always be defeated of his right of redemption by a succession of assignments or releases, and thus be deprived of his land. The purchaser from the sheriff must therefore retain the capacity to release to the owner, till the time of redemption expires; and consequently none but the owner can redeem. It follows that by *Hill & McLaughlin's* deed to the tenant, no estate passed in the demandant's land.

2. If the joint right to redeem the whole tract sold by the sheriff, was not severed by the partition deeds of the parties, so that *Hill & McLaughlin* were obliged to release to each his share; then their deed to *Gray* would operate as a confirmation of the demandant's title to an estate in fee under him. And such was the nature of the incumbrance that they were not obliged thus to release to the respective owners in parcels. And if either or both the parties had a right to tender the whole sum and demand a deed of release, then the demandant is entitled to the benefit of the redemption; for even an estate held by two joint purchasers under a disseisor, and of course any other joint right, would be confirmed by a deed of confirmation from the disseisee to one of them. *Co. Lit.* 297. Here the parties had a joint right to redeem the whole tract, and therefore a deed to one, discharging the incumbrance, shall avail the other; the party making the payment having a right to a contribution from the other for the money advanced.

3. But as between these parties, the deed of the tenant to the demandant, of *Jan.* 10, 1820, conveyed a several right of redemption. It is a release and conveyance of all his title and interest. Now the right of redemption existed at the time of the execution of the deed; and if so, then it passed, as fully as any other right in the land. The tenant is therefore estopped by the deed to say that he had no such right, or that he afterwards acquired it. And he is equally estopped by his covenant to warrant and defend to

the demandant the very title he now claims, against all persons claiming under him and his heirs. *Co. Lit.* 47. (X) 4 *Com. Dig.* 85, *tit. Estoppel E.* 10. *Trevivan v. Lawrence & al.* 1 *Salk.* 276.

Arguments for the tenant.

1. By the *Stat.* 1785, *ch.* 70, to which the authority of the sheriff is referred, he is to *sell the land*, and execute a deed to the purchaser and his *heirs and assigns*, saving to the proprietor a right of redemption; to whom, on payment of the money, the *land* is to be *re-conveyed* by the purchaser. The alienation of the estate is involuntary, by operation of law; but the rights of the parties are the same as if the transaction were voluntary, and between themselves; in which case the purchaser would take a fee simple conditional; liable to be defeated on payment of the sum agreed. In this latter case the purchaser might alien the estate at his pleasure, subject to the condition; such being the attribute of every fee simple. And there is no difference, whether the estate be acquired by voluntary grant, or by force of the statute. The owner, by suffering his land to be thus burthened, in effect mortgages it for the amount of the tax; and the difficulty of redeeming it after successive assignments, is no more than is incident to every mortgage. The estate, therefore, which *Hill & McLaughlin* took was alienable, and of course it passed to their grantee. *Rising v. Granger* 1 *Mass.* 47. *Gilman v. Brown* 1 *Mason* 212—218.

2. It appears that the tenant owned at least one half the township in *severalty*; and yet the tax is upon the whole tract, in one entire sum. Had this been a tax assessed by town officers in a gross sum upon a tract of land held in severalty by different owners, whose deeds were recorded, it would have been illegal; for in such case no one could relieve his own land, without paying the debt of his neighbor also. The taxes in the present case being imposed by the sovereign power of the State, must be taken with reference to the acknowledged rights of the citizens in other and similar cases; which can only be done by admitting each owner in severalty to redeem his own land by paying his proportion of the tax. If therefore the tenant had been redeeming his

own land only, he would have taken a deed of his own part of the tract. But as he took a regular conveyance of the whole, his intent obviously was to acquire the right of his grantors to the whole estate. The passage cited from *Co. Lit.* 297, only means that the release of the disseisee to one jointenant shall enure to both as *against him*; but not that it shall effect their rights as *against each other.*

3. If *Mr. Gray* stands in the place of *Hill & McLaughlin*, the demandant cannot have the land, on his own principles, without first tendering his proportion of the taxes. Had he done this, and a reconveyance been refused him, his remedy would have been plain by bill in equity, in which case the *real* merits of the contest would be opened, and both parties be compelled to do equity. For if the purchase from *Hill & McLaughlin* was a redemption of the land, it was so as to *them alone.* It still remained equitably charged with the lien in the hands of the tenant; who ought to be regarded in as favorable a light as an equitable mortgagee by deposit of title deeds;—9 *Ves.* 115. 2 *Ves. & Beame* 79, 83. *Russell v. Russell* 1 *Bro. Ch. Ca.* 270;—or as a surety who pays the debt of his principal, and takes an assignment of the debt, and of the mortgage which the principal had given to secure it. *Norton v. Soule* 2 *Greenl.* 341. See also *Davis v. Maynard* 9 *Mass.* 242. *Cary v. Prentiss* 7 *Mass.* 63. *Parsons v. Welles* 17 *Mass.* 419. *Clason & al. v. Morris* 10 *Johns.* 524.

As to the estoppel,—it must not work injustice. The doctrine is conceived to apply only to the cases where one having *no estate*, undertakes to convey,—or where one undertakes to convey a *greater estate* than he had at the time. The *universal* administration of the rule would work great mischief. As if A sells land to B, with warranty; and C, a creditor of B, extends his execution upon it, and thus acquires an absolute title; and afterwards sells it again to A; can B, claim it of A, by estoppel? The reasonable limitation of the rule would seem to require that the intent of the parties at the time of the conveyance, should be carried into effect. Now their obvious intent, by the deeds of partition in the present case, was nothing more than to designate the portions which each should hold in severalty, and to protect each one against titles *then* subsisting in or derived from the other; leaving

rights unforeseen, and subsequently acquired, to their unrestrained operation.

MELLEN C. J. at the adjourned session of this Court in *Cumberland*, in *April* 1825, delivered the opinion of the Court as follows.

For some time prior to *January* 10, 1820, the parties in this suit were tenants in common of the north half of the township in question; and on that day they came to a division; and *Gray*, by his deed of that date, sold and released all his right to the demanded premises (being *part* of said north half) to *Williams*; and *Williams* sold and released to *Gray* all his right to the residue of said north half.

This deed from *Gray* is a good title as against him; and unless he has since that time acquired a title *paramount* to this, and of which he has a legal right to avail himself in this action, the demandant is entitled to recover. Whether he has acquired such a title is the question. The facts in the case are few and simple.

A year before the division, viz. on the 4th of *January* 1819, the whole of said township was sold, pursuant to law, by the sheriff of the county, for the payment of the taxes which had been assessed thereon for the seven next preceding years. It was purchased by *Hill & McLaughlin* for $61 10; and the sheriff gave them a deed of it, reserving to the proprietors or owners the right of redeeming it within two years. On the 13th of *March* 1820, *Gray* paid the purchasers $69 11 by way of redeeming the property sold; and they thereupon gave him a deed, whereby they sold and released to him all their right in said township. On these facts the tenant grounds his defence. From a view of them it appears that as the township had been sold a year before the execution of the division deeds, *Gray* and *Williams*, at the time of making those deeds, had no right or title remaining in them but the right of redemption; and the right of redeeming the demanded premises was conveyed to and vested in *Williams* by virtue of *Gray's* deed of *Jan.* 10, 1820. What then was the effect of *Gray's* payment to *Hill & McLaughlin*, and of their deed to *Gray*? The answer to this questiou will settle this cause.

It is not necessary in this cause to decide whether *Hill & McLaughlin* could, during the two years, sell the same land to a stranger, and thereby subject the original proprietors to the inconvenience and necessity of redeeming the lands of such stranger; the facts do not present this question. Whatever *Gray* did was in the form of redeeming the lands; and the deed which he received of the purchasers, contains merely a release of their right, without any reservation of a right of redemption, as would probably have been the case had the conveyance been made to a stranger. Nor need we decide the effect of such a deed. We place the decision of the cause on another ground.

It is a well settled principle of law that if A sells with warranty to B, a piece of land to which he has no title; and afterwards purchases a good title; such title thus procured shall enure to the use and benefit of B;—because A is estopped, by his deed to B, to demand the land of him, or deny his own right to convey what he undertook to convey to him. *Co. Lit.* 47, *b*, and *note* 307. *Fairtitle v. Gibbs* 2 *D. & E.* 171. *Jackson v. Metcalf* 10 *Johns.* 91. *McCracken v. Wright* 14 *Johns.* 193. *Jackson v. Stevens* 16 *Johns.* 110. And there are also several cases by which it is decided that although a deed contains no covenants of warranty, still the grantor shall never be permitted to aver that he had no title to the land at the time of conveyance, and thus to claim against his own deed, in consequence and in virtue of an after-acquired title. To this point may be cited *Jackson v. Bull* 1 *Johns. Cases* 91, and *same v. Murray* 12 *Johns.* 201. These cases seem not to have been decided on the ground of estoppel technically considered. Perhaps, however, it is not necessary particularly to notice this distiction between the two classes of cases abovementioned, because the deed to *Williams* contains a special covenant of warranty on the part of *Gray*, against all persons claiming from, by or under him or his heirs. This covenant must surely be as binding on him in this action as it would be if his heir or assignee was the defendant and the defence should succeed. According to the true intent and spirit of his covenant, it must be construed to extend as well to his own acts, as to the claims of those claiming from, by or under him. Should the defence in this action prevail, it must prevail in consequence of

Gray's own act in procuring the alleged title from *Hill & McLaughlin*. Against this act and claim his covenant binds him; and, therefore, according to all the authorities, he is now estopped to claim the demanded premises against his own deed to the demandant. We see no principles on which the defence can be supported. In redeeming the lands, *Gray* must be considered as the agent of *Williams*, so far as his interest extended. And if *Williams* has not already reimbursed the monies advanced by *Gray* for the purpose of redemption, he stands legally liable for the amount. For the present action is a ratification on the part of *Williams* of the act of *Gray* in redeeming the lands.

Let a default be entered, and judgment for the demandant.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE COUNTY OF

WASHINGTON.

JUNE TERM,

1824.

WALKER *vs.* GREEN.

If the *sheriff* return a *talesman*, in a cause in which his deputy is a party, it is a good ground of challenge to the juror, but will not support a motion to set aside the verdict.

IN this case, a verdict being returned in favor of the defendant, who was a deputy of the sheriff of this county, and was sued in this action for an alleged misfeasance in his office, the plaintiff moved the Court to set aside the verdict and grant him a new trial, because, the panel not being full, the *sheriff* returned two talesmen, who sat in the trial. At the time of their being so returned, no objection was made.

Wilson and *Hobbs*, in support of the motion, contended that the return of the sheriff was error, and vitiated the trial; and that it did not accord with the purity of trials by jury, to permit the sheriff to exercise so extensive a control over a cause in which his deputy was a party. And they cited *Morgan v. Wye* Cro. *Eliz.* 574. *Gregory v. Booker ib.* 586. *Corn v. Pasboro ib.* 894.

Greenleaf and *Chadbourne*, for the defendant, said that the objection was only a ground of challenge; and that it was waived by the silent assent of the plaintiff at the trial. 3 *Bac. Abr. tit. Juries, B.* 3, *E.* 1, *K. Trials per pais*, 51. *Co. Lit.* 125 *b.*

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

In this case the talesmen were returned by the sheriff, without objection, although the defendant is one of his deputies ; and the question is, whether the verdict, which has been returned in favor of the defendant, ought to be set aside on that account. The fact on which the motion is founded appears on the record ; and of course, the plaintiff must be presumed to have known it, when the talesmen were returned. Here, then, is evidence of an implied waiver of all objections on that account. The return of the talesmen by the sheriff was certainly a good cause of challenge; and had they been challenged they would have been set aside; but under the circumstances of this case, the objection comes too late. The case of *Jeffries & al. v. Randall* 14 *Mass.* 205, is a stronger one than this. There it does not appear that the fact on which the motion for a new trial was founded was known to the demandants until after verdict. The juryman was by statute disqualified from sitting in the cause, if challenged, on account of his being interested in a question similar to that which was then in trial ; but, as he was not challenged, the Court refused to set aside the verdict. See also the case of *Amherst v. Hadley* 1 *Pick.* 38, and note.

We are of opinion that the present motion cannot be sustained.

Judgment according to the verdict.

CLAPP *vs.* BALCH.

The want of an indorser to an original writ may be taken advantage of in abatement, either by plea or motion ; but it cannot avail the defendant after pleading in chief.

Under *Stat.* 1822, *ch.* 193, exceptions can be alleged only to the opinion of the Court in some matter of law, involving and deciding the *legal* rights of the parties ;—but not to any exercise of the *discretionary* power of the Court, as in the terms or times of granting amendments of what is legally amendable, continuances, &c.

IN this cause the general issue was pleaded and joined, after the plaintiff's attorney had informed the counsel for the defendant that the writ was duly indorsed. But on opening the cause

to the jury before *Perham* J. it being discovered that this information was erroneous, the defendant's counsel moved the Court that the plaintiff be nonsuited for want of an indorsement on his writ. This motion the Judge overruled, and permitted the counsel for the plaintiff to indorse the writ. To which the defendant took exceptions, pursuant to the statute.

Mc Gaw, *Weston*, *and Davcis*, for the defendant, contended that the plaintiff had no right to call on the defendant to answer, till he exhibited a writ duly indorsed according to the statute. Failing to do this, it was the duty of the Court to nonsuit him, on motion made at any time during the first term. This remedy was not waived by pleading over ; especially where, as in this case, it was occasioned by the mistake of the plaintff's own attorney. And the offer to indorse the writ, during the trial, cannot avail without the consent of the defendant. *Ely v. Forward* 7 *Mass.* 25.

Deane, for the plaintiff, contended that the right was waived by pleading to the action ;—*Livermore v. Boswell* 4 *Mass.* 437. And he objected that the cause was improperly brought here by exceptions ; the sum demanded in damages being large enough to give the right of appeal. The mistake into which the defendant's counsel were led in the Court below was one to which *he* was no party ; and it was no subject for the interference of this Court, but only for adjustment among the counsel who participated in it.

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

The defendant moved the Court below to nonsuit the plaintiff, because the writ was not indorsed by any person whatever ; but the Court overruled the motion ; and we think very properly. If a writ is not indorsed before service, it may be a good objection by way of plea in abatement, or on motion ; provided such plea be filed or motion made in due season ; otherwise the objection is considered as waived. By *Stat.* 1821, *ch.* 59, *sec.* 8, if the person who indorsed the orignal writ is not of sufficient ability, the Court on motion may order the plaintiff to procure a new

indorser ; and in failure thereof, a nonsuit shall be directed ; but that is not the present case, and of course this exception cannot be sustained. The order of Court granting leave to the plaintiff's attorney to indorse the writ at the time of trial is the ground of a second exception ; but as the first is overruled, this can be of no importance, because such an indorsement could by no possibility prejudice the rights of the defendant. Of course this exception must share the fate of the other. The defect in this case, arising from the want of an indorsement, as we have before intimated, should have been taken advantage of by plea in abatement or on motion; and we are disposed to consider it as a motion to abate the writ ; but in this view of the subject, we are of opinion the exception cannot prevail ; the motion was too late—the general issue had been joined, and the cause was partly opened to the jury. This was a waiver of all matters of abatement, and we are bound so to consider it. The declarations of the plaintiff's counsel that the writ was indorsed, cannot in a legal point of view vary the case. The defendant's counsel should have examined for himself. It is a principle of law that pleas and motions in abatement should be treated with strictness. We are therefore of opinion the decision of the Court was correct in overruling the defendant's objection ; and the cause must be permitted to proceed to trial. 4 *Mass.* 437, is a case in point.

We would avail ourselves of this opportunity to correct a mistaken opinion which we have had occasion to notice on the Circuit with respect to the right of the parties in a cause to file exceptions to the opinion of the Court of Common Pleas. The extent of the right seems not to have been perfectly understood. The provision contained in the fifth section of the act of 1822, *ch.* 193, is in these words; "That either party aggrieved by any "opinion, direction or judgment of said Court of Common Pleas, "in any action originally commenced in said Court, in any matter "of law, may allege exceptions to the same." It is manifest that the legislature did not intend that every opinion of the Court of Common Pleas should be subject to revision in this Court. The opinion, direction or judgment must be in some matter of law, involving and deciding the legal rights of one of the parties. Hence, if that Court should, contrary to law, admit or reject a

witness, or written proof, or give instructions to the jury, not warranted by legal principles,—or give an incorrect opinion, decisive of the cause, one way or the other ; or deprive either party of his rights, by ordering a nonsuit in those cases where such an order would be unauthorized; or enter a default and judgment against a defendant who claimed to be heard, and opposed such default ; in all these cases exceptions may be rightfully alleged ; because they are decisions in matters of law. But there are numerous questions which that Court, or a Judge of this Court, when sitting alone, has a right to decide finally ; questions not subject to the revision of this Court. Such are all questions submitted for decision to the direction of the Court. Of this character are motions for a continuance ;—for leave to amend, in cases where the proposed amendment may legally be made;—for leave to enter actions after the usual time,—to take depositions,—for postponement of causes, &c. In these cases no exception can be alleged against the order or decision. They are not questions of law, but of expedience, and they are not settled by any fixed legal principle, but according to the circumstances of each case and the sound discretion of the Judge. At the last term at *Castine*, we dismissed an action from our docket in which an exception had been alleged against the decision of the Court of Common Pleas, ordering the continuance of the cause. In the case before us we doubt whether the defendant's motion for a nonsuit was proper ;—whether the Court had a right to order one ; and whether the decision, overruling the motion, furnished legal ground for an exception ; but considering the motion in nature of a motion to abate the writ for want of an original indorser, it was one which the Court might and ought to decide ; and the decision of which, if against the plaintiff and unreversed, would be fatal to the action. On this ground we think the exception was lawfully alleged ; and on this ground we sustain the action ;—but for the reasons before mentioned, we overrule the exception, and the defendant must answer over to the merits of the cause.

The Inhabitants of Lubec *vs.* The Inhabitants of Eastport.

A minor, emancipated from his parents, is capable of acquiring a settlement under *Stat.* 1821, *ch.* 122.

An ideot, or person *non compos*, is capable of gaining a settlement by any mode in that statute, not requiring any act of volition of his own.

This case, which was *assumpsit* for the support of a pauper, was brought up by exceptions alleged by the defendants to the opinion of *Perham* J. before whom it was tried in the Court below. It was submitted without argument ; and the facts are stated in the opinion of the Court, as delivered by

Mellen C. J. By the exceptions, as amended by consent of parties, it appears that *Oliver Shead*, the pauper's father, had his legal settlement in *Eastport*, and there died in 1813 ;—that his widow died in 1814 ;—that the family was then broken up and scattered ;—that the pauper, who is now about seventeen years old, is an ideot ;—that soon after his mother's death, he was removed to *Lubec*, where he has remained ever since, supported, at board, at the expense of his uncle. On these facts the question is whether he has lost his derivative settlement in *Eastport*, and gained one in his own right in *Lubec*, by reason of his residence in that town on the 25th of *March* 1821, and in virtue of the second section of the act of 1821, *ch.* 122. The provision in the section alluded to, is in these words; "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 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. From the facts before us, it seems clear that when the pauper was removed to *Lubec*, he was destitute of a home in *Eastport*, and in a state of poverty and dependence. He was therefore, in this respect, capable of having a home in *Lubec* ; and, unless his ideocy and his infancy, or either of them, rendered him incapable of gaining a settlement in *Lubec*, we have no hesitation in saying that his residence in that town, in the circumstances before mentioned, on the 25th

of *March* 1821,—the day the act was passed,—gained him a settlement there. The next inquiry is whether the circumstance of his being an ideot prevented his gaining such settlement. The words of the statute are, "any person," &c. The words of the statute of *Massachusetts* of 1793 are, "all persons dwelling and "having their homes in any unincorporated place at the time "when the same shall be incorporated into a town or district "shall thereby gain a legal settlement therein." And in the case of *Fairfax v. Vassalborough*, it was decided by the Supreme Judicial Court of *Massachusetts*, that the statute applied to a resident *non compos*, who had no parents, and who thus gained a settlement in *Fairfax*. See 1 *Greenl.* 96, *note*. As the act of 1821, operated upon thousands, to fix their settlement in the towns in which they respectively dwelt and had their home on the day of its passage, without any volition on their part, and even without their knowledge ; the want of understanding and power of volition in the pauper would not seem to furnish any objection to his capacity to gain a settlement in *Lubec*, by his dwelling and having his home there when the act was passed.

It is true that in the case of *Upton v. Northbridge* 15 *Mass.* 237, the Court decided that a *non compos* who continued to reside in his father's family, after he was twenty one years of age, and was maintained by him, and removed with his father from *Northbridge* to *Upton*, (where *he* gained a settlement,) still remained one of his family so as to continue to derive his settlement under him; but the Court also in the same case say distinctly that they do not mean to decide, that a person so circumstanced cannot *by virtue of his estate* acquire a settlement. We cannot but believe that the operation of *an act of the Legislature* may fix the settlement of an *ideot* in a particular town as effectually as *his ownership of estate*, of which he would probably be ignorant. On the whole, we are of opinion that the pauper's ideocy was no bar, under the circumstances of the case, to his gaining a settlement in Lubec.

The remaining question is whether the *minority* of the pauper at the time the act took effect—he being then about fourteen years of age,—rendered him incapable of gaining a settlement in *Lubec*. It is very clear that a wife and minor children, which compose a part of the husband's and father's family, cannot gain

a settlement distinct from *his*. It would lead to a separation of husband and wife, and parents and children. Policy forbids this. *Shirley v. Watertown* 3 *Mass.* 322. *Hallowell v. Gardiner* 1 *Greenl.* 93. But if a minor child is *emancipated*, he may gain a settlement himself, and distinct from his parents. In *Somerset v. Dighton* 12 *Mass.* 383, the question was whether the pauper, being eleven years old, who had removed from *Dighton* into that part of *Swansey*, which afterwards was incorporated into a town by the name of *Somerset*, had gained a settlement there by not being warned out of town. It was contended that she had been *emancipated* from her mother—the child being illegitimate. But the emancipation was not satisfactorily proved; and for that reason the Court decided that such a residence in *Swansey*, did not gain her a settlement there, but she was considered as belonging to her *mother's* family. So in the case of *Granby v. Amherst* 7 *Mass.* 1, it was decided that minors, *forisfamiliated*, might, under the statute of 1789, by occupancy of an estate belonging to them, acquire a settlement.

In the case before us, the father and mother have been dead many years. The pauper was thrown upon the world,—destitute and without a home;—*emancipated by misfortune* from the care and protection of his parents. Under these circumstances we are of opinion he was as capable of gaining a settlement during his minority, as if his father had been living, and he had been, by his express consent, emancipated, and had left his home and commenced business for himself.

For these reasons we think the opinion and instructions of the Court of Common Pleas were incorrect. The exceptions are sustained, and a new trial must be had at the bar of this Court.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE COUNTY OF

OXFORD.

AUGUST TERM,

1824.

THE INHABITANTS OF SUMNER *vs.* THE INHABITANTS OF SEBEC.

A book found in the hands of the town clerk, and purporting to be a record of births and marriages in the town, is *prima facie* evidence of the facts it contains, though it may have no title, or certificate, or other attestation of its character.

Where a parent, on removing to a distant part of the State, left his daughter in the care of an inhabitant of her native town, to live with him till she should be eighteen years old, and be treated as his adopted child;—this was held to be no emancipation, the father having still the right to reclaim her.

Emancipation of a child is never to be presumed; but must always be proved.

THIS was *assumpsit* for the support of *Miriam Crocket*, a pauper, whose settlement in *Sebec* was said to be derived from her father, who was an inhabitant of that town at its incorporation in 1811.

At the trial before *Smith J.* in the Court below, the father of the pauper testified that he removed from *Sumner* to *Sebec* in *January* 1811;—that during his absence from home in the preceding summer, his wife, as she told him, put *Miriam* out to live with *Calvin Bisbee*, in *Sumner*, till she should be eighteen years of age, he engaging to treat her as one of his own children;—that he accordingly left her with *Bisbee*, never expecting to have any more control over her; and had never seen her since. He believed she was born in 1800, but the town records of *Sumner*, he said, would tell.

The said *Bisbee* testified that he took the girl in 1810, to live with him till she was eighteen years old, or so long as they should be mutually satisfied;—that she was to fare as one of his own children;—but that the father had a right to take her away at his pleasure, and the witness had the same right to send her away; —that she did live with him till she was eighteen, after which she had received her own earnings,—that she was born and had always dwelt in *Sumner*, except a short residence in *Buckfield*; and had never been in *Sebec*.

Another witness testified that about the same time the mother of the pauper offered her to him on the same terms; and that *Bisbee* took her as he testified.

The mother of the pauper testified that *she gave* the child to *Bisbee*, never expecting to have any farther authority or control over her, and not doubting but he would consider her in all respects as his adopted child; that he agreed so to treat her;—that she was then over eleven years old;—and that she had never seen her since.

The defendants alleged that the pauper was of age at the passage of the law of *March* 21, 1821, and thus capable of acquiring a settlement under it. To this point the plaintiffs called the town clerk of *Sumner*, who produced a book which he received from his predecessor in office, containing memoranda of sundry births and marriages in that town; and which was delivered to him as an official record, but contained no title or attestation of its character, nor any certificate shewing by whom the entries in it were made. The admission of this book was objected to, but the Judge overruled the objection. The book contained the name of *Miriam Crocket*, as having been born *June* 27, 1800; but there was no evidence shewing when or by whom it was recorded.

The Judge upon this evidence instructed the jury that if they were satisfied that the pauper was not of age on the 21st of *March*, 1821, under the circumstances of this case she was not emancipated, but followed the settlement of her father. And they found for the plaintiffs. To which the defendants alleged exceptions, pursuant to the statute.

Greenleaf, in support of the exceptions, maintained these two positions;—1st. That the book was not admissible in evidence, without previous proof of its authenticity as a public record, or that the entries in it were in the hand writing of the town clerk. *Highland Turnpike Co. v. McKean* 10 *Johns.* 154. —2d. That the pauper was capable of gaining a settlement by residence in *Sumner* at the passage of the act of *March* 21, 1821, she having been emancipated by her father, and not being proved to be a minor.

Fessenden and *Brown*, for the plaintiffs, contended that the book, being referred to in the deposition of the father, was placed at least on the footing of an entry in the family bible, or any other domestic memorandum; and so was intitled to inspection. But it was of a higher grade of evidence, being proved to be kept by the town clerk as a public registry of marriages and births.

As to emancipation, this exists only where the child is placed beyond the reach and control of the parent. But in this case it was not so. The person with whom she dwelt expressly disclaimed any exclusive right to her services or the custody of her person. And if he once had such right, it expired on her attaining the age of eighteen years, when all the authority of the father revived. Her subsequent care of herself and receiving her own earnings creates no difference in the case. *Somerset v. Dighton* 12 *Mass.* 383.

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

In this case it is admitted that the pauper has her legal settlement derived from her father, in the town of *Sebec*, unless she has gained one elsewhere. The defendants contend that she has gained a settlement in *Sumner* under the act of 1821, *ch.* 122;—that she was twenty one years of age before the said act was passed; or, if not, that she had before that been emancipated by her father; and so, on either ground she had the capacity to gain a settlement for herself, and did gain one in *Sumner*, by residing, dwelling and having her home in that town on the day of the passage of the act.

The question as to her age has been settled by the jury. They have found she was under the age of twenty one on the 21st of

March 1821; and on *this* point, the verdict is conclusive, provided the book which was offered in evidence was properly admitted. This book *purported* to contain a record of births and marriages in *Sumner*; but was not *attested* in any part of it, by any town clerk, that it was such a record. It was, however, produced at the trial by the acting town clerk of *Sumner*; and it is stated that *he* received it from the *former* town clerk, who delivered it to him as the *record* of births and marriages in that town. There was no suggestion of fraud or fabrication at the trial, or in the argument; and considering all the circumstances in which the book was offered in evidence, we think it was proper as *prima facie* proof of the age of the pauper, and, on that ground, admissible. The exception to this opinion of the Court is, therefore, not sustained.

The next inquiry is, whether the pauper had been emancipated. The proof in the case has reference only to the period between the time when she was placed in the family of *Bisbee*, and her arrival at the age of eighteen;—and by the evidence it appears, that during that period *Bisbee* had a right to turn her away when dissatisfied; and her father also had a right to rescind the contract at pleasure, and reclaim his daughter, and exact her services;—and besides, *after* the age of *eighteen* the father had a right to these services until her age of *twenty one*, and the case shews no renunciation of this right. Emancipation is not to be *presumed*; it must be *proved*. And we are all well satisfied that the facts presented to our consideration do not shew an emancipation of the pauper. Of course she could not gain a settlement in her own right at the time and in the manner supposed. On this ground also the defendants fail. The consequence is, that the exceptions are overruled, and the judgment of the Court of Common Pleas is affirmed.

Colby *vs.* Russell & al.

Where a private statute required the assessors of a corporation to " make perfect " lists of assessments *under their hands*, and commit the same to the collector, " with a warrant under their hands and seals;"—it was holden that the signing of the *warrant*, though it were on a leaf of the same book which contained the assessment, was no signing of the *assessment*, and that without a separate signature the assessment was imperfect and invalid.

In this action, which was trespass *vi et armis* against the assessors of the Proprietors of the *Fryeburg* Canal, the only question raised was upon the validity of their assessment of a tax upon the plaintiff as one of the corporation, under a private statute passed *June* 19, 1819. This act required them to " make perfect lists " of their assessments, *under their hands*, or the hands of a major " part of them, and commit the same to the collector of said " corporation, *with a warrant under their hands and seals*, in the form " herein after directed; and the said *assessment shall be recorded* " by the clerk," &c. The assessment in question was not signed by either of the assessors, but in the same paper book which contained it there was a warrant under the hands and seals of the assessors, requiring the collector, among other things, to " *levy* " *and collect the tax in the list herewith committed*" to him.

The Chief Justice, before whom the cause was tried, being of opinion that the assessment was fatally defective in not being *signed by the assessors*, directed a verdict for the plaintiff, subject to the opinion of the whole Court.

Fessenden, for the defendants, at the last term, contended that the signing of the warrant, it being at the end of the same book, and on the same sheet, was a sufficient signing of the assessment, and that the law was substantially complied with. The assessors might have incorporated the tax into the body of the warrant, and it would have been good. It is enough if the assessment is declared to be such, under their hands; for the only object of this particular provision is to lay the foundation of an appeal for any one who is overrated. The cases respecting the signature of wills, and notes of hand proceed on the same principle. *Peake's*

Evid. 361. *Hunt v. Adams* 5 *Mass.* 358. *White v. Howland* 9 *Mass.* 314. *Moies v. Bird* 11 *Mass.* 436.

Longfellow, for the plaintiff.

MELLEN, C. J. at another day in the same term, delivered the opinion of the Court as follows.

The language of the statute upon which the present question is raised, seems very plain and intelligible. The *assessment* is to be *under the hands* of the assessors,—and the *warrant* under their *hands and seals.* This certainly requires that *each* should bear on its face the evidence of its official sanction,—each being an independent act. The *assessment* must be recorded. The *warrant* need not be. This also shews that the assessment must of itself, and without aid from any other document, be a complete act of the assessors. Would the act be complied with, or any of the contemplated advantages of a recorded assessment be realized, by recording one not signed by the assessors, nor bearing any one stamp of authority, but being a mere unfinished proceeding? Reason and good sense oppose the idea, as clearly as the language of the section in question.

It has been urged also that the circumstance of the assessment and the warrant being both in the same paper book, and the reference in the warrant to the assessment, will render it valid. An answer to this argument is, that the warrant does not refer to the assessment as *annexed* to it, but as *herewith delivered.* There is therefore no certainty that it referred to the one before us. Another objection to the defendant's argument, and which seems to be satisfactory, is this ;—the assessors are not authorized to make out a warrant to collect a tax, till it has been legally assessed. The act requires the assessors to make the assessment *under their hands*, and to commit *the same* to the collector, *with a warrant.* The acts to be performed are successive and distinct ; and both must, of themselves, be complete. The case of a submission of demands before a Justice of the Peace, pursuant to the *Stat.* 1821, *ch.* 77, is somewhat analogous to the case before us. By that statute the person claiming damages must

make out his demand, in the form of a particular statement against the alleged debtor or delinquent, and *sign the same* ; and then lodge it with a Justice of the Peace, who is to make out an agreement of submission to the referees agreed on by the parties, which agreement is also to be signed by them, and acknowledged before the Justice. Here, both the demand and the agreement must be signed. Many reports of referees have been rejected, and judgments upon reports reversed on error, because the *demand* was not signed, as well as the *agreement of submission.* The latter signing has never been considered as virtually applying to and sanctioning the former. We are all of opinion that the assessment is imperfect and invalid.

Judgment on the verdict.

THE INHABITANTS OF TURNER *vs.* THE INHABITANTS OF BUCKFIELD.

By the words "*dwells and has his home,*" in *Stat.* 1821, *ch.* 122, *sec.* 2, the legislature meant to designate some *permanent* abode, or residence with an *intention to remain,* or at least without any intention of removing.

Assumpsit for supplies furnished to one *Esther Smith*, a pauper, whose settlement was alleged to be in *Buckfield.*

At the trial in the Court below, before *Whitman* C. J. it was agreed that the pauper, who was then about 24 years of age, had her settlement in *Buckfield*, derived from her father, unless she had gained a new one by having her domicil in some other place at the passage of the act of *March* 21, 1821 ;—that she removed with her father from *Buckfield* to *Turner* in *March* 1813, and resided with him there till his death in *April* 1814 ;—that she continued to reside in *Turner*, in different families, except two or three months' residence in *Hebron*, till the spring of 1816, from which time, till *August* 1818, she lived in the family of *Eleazer Snell*, in *Turner* ;—that at the last mentioned date she removed, with her bed, into the family of *Samuel Jenkins*, jun. her sister's husband, in *Buckfield*, she being then pregnant with

an illegitimate child, of which she was delivered in *April* following ;—that she removed in *Nov.* 1819, with the family of *Jenkins* to *Hebron*, and there continued, except working a few weeks in *Turner*, till the last of *October* 1820 ;—she then went to her brother's house in *Hartford*, where she remained till *Dec.* 13, 1820 ;—then to *John Keen's* house in *Turner*, till about *Feb.* 7, 1821 ;—thence to her brother's in *Hartford* ;—that she again went to *Jenkins'* the last of *February* or early in *March*, and returned again to her brother's on the 26th day of *March*, having sold her bed to *Mrs. Jenkins*, in whose care she left her child ;—that she remained two nights at her brother's, and then went to a house in *Turner* for about eleven days, and thence to another family in *Hartford*, where she remained till *July* following, and thence to *Turner*, where she resided in different families till *Sept.* 1822, when she became chargeable.

Jenkins testified that he never considered her as having a home at his house after *October* 1820 ; and that at that time, and during the winter following, she removed from his house her bed clothes, trunk, and wearing apparel, leaving her bed, which was afterwards sold to his wife.

Hereupon the counsel for the defendants contended—1st. That under the provisions of *Stat.* 1821, *ch.* 122, the pauper had her settlement in *Hebron*, her home being in that town at the time of passing the act ; the manifest intent of which was to fix the settlement of every citizen of the State, not within its exceptions.

2. If not,—then by the same statute her settlement is in *Turner*, that being her home during the life of her father, she being then a minor ; and by a fair construction of the statute that home continued till she gained a new one.

3. That the pauper not being in *Buckfield* at the time of passing the act, she must under the statute have acquired a settlement either in *Hartford*, *Turner*, or *Hebron* ; in one of which towns she was at the time of its passage.

The Judge, upon this evidence, which was admitted by the parties to be true, was of opinion that the pauper had no *home* within the meaning of the act, on the 21st of *March* 1821, and so instructed the jury ; who returned a verdict for the plaintiffs ;

and the defendants filed exceptions pursuant to the statute in such cases provided.

Greenleaf and *Porter* for the plaintiffs.

Fessenden and *Brown* for the defendants.

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

It appears by the bill of exceptions, that the pauper has now her settlement in *Buckfield*, derived from her father, unless since she became of age she has gained a settlement in her own right. It is contended she gained one in *Hebron*, in virtue of the statute of 1821, *ch.* 122. The clause in that act, which the defendants' counsel relies upon, is in these words ;—"any person, resident "in any town, at the date of the passage of this act, (*March* 21, "1821) 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." Numerous questions have arisen in different parts of the State, depending on the construction to be given to the provisions of the above quoted clause. Some of those questions we have already decided. The question in the present case is, what is meant by being resident in a particular town, on the 21st of *March* 1821, and there dwelling, and having a home. In many instances, it may be an inquiry of great nicety, and difficult of solution, and perhaps no general principle can be established beforehand, embracing all cases. And of course each cause must be decided on its own particular facts. Our present inquiry is, whether the pauper, in the case before us, resided, dwelt, and had her home, in the town of *Hebron*, on the day the act passed. We must give a reasonable construction to the words of the law, and proceed on the ground that the legislature intended, by the use of the expression, "dwells and has his home," to designate some permanent abode, a residence with an intention to remain, or at least without an intention of removal,—something more than the habits and life of a wanderer, who has no place where he has a right to continue, and call it and claim it as his rightful home. In the present case, we do not deem it necessary to be more definite and explicit. Our decision is con-

fined to the facts before us; and from a review of those facts, we are clearly of opinion, that the pauper can, in no legal sense, be considered as dwelling and having her home in *Hebron*, on the 21st of *March* 1821. It is true, she was in that town on that day and had been for a few days before, and for five days after. But there are no facts in the case, indicating a permanent residence or home there, but on the contrary, she seems to have been wandering from town to town, for years before the law was passed, and for months after ; having no settled place of abode, but floating about in society, in that course, which friendship and sympathy directed. We are of opinion, that such a residence, as this was in *Hebron*, could never have been intended by the legislature, as a dwelling and home in *Hebron* ; and the consequence is, she gained no settlement in that town, by virtue of such occasional, and as it were momentary residence. The provision of the statute does not embrace such a case as hers, and therefore her settlement in *Buckfield* still continues. We overrule the exceptions, and affirm the judgment of the Court of Common Pleas.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE COUNTY OF

YORK.

APRIL TERM,

1825.

Memorandum. PREBLE J. during the whole of this Circuit, was absent on a voyage for the recovery of his health.

HILL *vs.* VARRELL.

Where the declaration on a bill of exchange contains an averment of due notice of the dishonor of the bill, legal *notice* must be proved. Evidence that the holder had used *due diligence* to give notice, *without effect*, will not support the declaration.

Where the residence of the drawer of a bill of exchange is unknown to the holder, he ought to inquire of the other parties to the bill, if their residence is known to him.

Assumpsit by the indorsee against the drawer of a bill of exchange, of the following tenor;—"*New-Orleans*, *May* 22, 1822. "In *Boston*, sixty days after sight of this first of exchange, (sec- "ond, third, and fourth unpaid,) pay to *William G. Hewes*, or "order, five hundred and thirty eight dollars and seventy one "cents, value received, and charge the same to account of brig "*Susan*, with or without further advice, from your obedient "servant, *John Varrell.*" It was directed "to *Jonathan S. Barrell*, Esq. *York*, *Maine*,"—and was accepted at "*York*, *June* 24, 1822," by a writing on the margin of the bill.

At the trial before *Weston* J. the plaintiff proved that on the twenty-sixth day of *August* 1822, diligent search was made in

Boston for the acceptor, who could not be found there ; and that upon diligent inquiry at the banks, and upon the public exchange in *Boston*, no other person could be found to pay the bill. It was thereupon on that day protested for non-payment, and a letter was put into the post office by the notary, on the same day, addressed to the drawer at *New-Orleans*, giving notice of the dishonor of the bill. The bill was remitted and indorsed by *Hewes* the payee to *John A. Haven* at *Boston*, in payment of goods shipped by *Haven* to *Hewes* ; and on the same *August* 26th, the plaintiff called on *Haven* to know where *Varrell* the drawer resided, and received for answer that he did not know. It appeared that *Haven* knew that the drawer was master of the brig *Susan*, belonging to *Barrell*, at the time he drew the bill ; and that the bill was drawn by him for an account against the brig ; but it did not appear that this information was communicated to the plaintiff, to whom the bill was negotiated in the regular course of trade.

The defendant proved that he had a family in *York*, where he had resided from his youth upwards ; and that the acceptor had resided in the same place all his life time, and was well known in *Boston*, as a merchant resident in *York*. He also proved that after drawing the bill and before the acceptance, he sailed from *New-Orleans* in the brig *Susan*, and that this fact was known to *Haven*. It was admitted that he had a right to draw the bill. It did not appear that any inquiry was made of the *acceptor* concerning the place of *Varrell's* residence ; nor that any notice of the non-payment of the bill was ever given to *Varrell*, unless the letter aforesaid of the notary was legal notice.

But the Judge being of opinion that no sufficient notice was proved to have been given to the defendant as drawer, directed a verdict to be returned for the defendant, subject to the opinion of the whole Court upon that question.

Shepley for the plaintiff.

The law requires of the holder that he should use reasonable diligence to give notice of non-acceptance or non-payment to the drawer ; but lays down no universal rule to shew in what this consists. In every case it is a compound question of fact and

law. *Darbyshire v. Parker* 6 *East* 3. Here the plaintiff could not find the acceptor at the place of payment,—he inquired of the indorser concerning the drawer's residence, but without effect,—and he sent notice by mail in due season, to the place where the bill was drawn ; which was sufficient, being all he could reasonably be required to do. *Chapman v. Lipscombe* 1 *Johns.* 294. *Blakely v. Grant* 6 *Mass.* 386. *Ogden v. Cowley* 2 *Johns.* 284. *Saunderson v. Judge H. Bl.* 509. *Bateman v. Joseph* 12 *East* 433. The only case which seems opposed to these is *Fisher v. Evans* 5 *Bin.* 541. *Chitty on Bills* 236 *c.*—But there the plaintiff does not appear to have attempted to charge the defendant at any place. But where no notice was in fact given, but certain other acts were done, which the plaintiff contends are sufficient evidence that he has *done what he could* to give notice, it is a question for the jury to determine whether he might have done more to notify the party ; and this question not having been submitted to them, a new trial ought to be granted.

Emery for the defendant.

The plaintiff's proof does not correspond with his declaration. Having averred notice, he should have proved it ; for the defendant was entitled to notice, having had authority to draw. *Blakely v. Grant* 6 *Mass.* 388. It is true that in certain cases the want of notice is excused,—as if the holder or his agent be suddenly sick, &c.—provided he proceed to give notice as soon as may be after such impediment is removed. But such is not this case ; for the holder inquired but once, and that in the place where the bill was payable, which was not enough. *Beveridge v. Burgess* 3 *Campb.* 262. He should have inquired of the other persons whose names were on the bill. *Esdail v. Sowerby* 11 *East* 114. *Fisher v. Evans* 5 *Bin.* 541. *Freeman v. Boynton* 7 *Mass.* 483. *Ireland v. Kip* 11 *Johns.* 231. And common diligence in his inquiries of *Haven*, who knew all the facts, would have led him to the knowledge of them. Or he might have asked *Barrell*, whose residence he must have known was in *York*, since the bill was addressed to him at that place. Even after the plaintiff was informed of these facts, he took no measures to give notice to *Varrell*. The case therefore is a case of gross negligence.

To the plaintiff's second point he cited *Taylor v. Bradeen* 8 *Johns* 173. 11 *Johns.* 231. *Hussey v. Freeman* 10 *Mass.* 84.

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

The only question which has been raised by the parties in this cause is, whether sufficient notice has been given to the drawer of the non-payment of the bill ; or due and reasonable diligence used to give it. The declaration states that notice of the non-payment was duly given to the drawer. When such is the averment in the declaration, legal notice must be proved ; and the proof of due and reasonable diligence, when ineffectual to give such notice, will not support such averment ; on the contrary, the plaintiff should aver that he had used such diligence, but had been unable to give notice of the dishonor of the bill. See 6 *Mass.* 386 *Blakely v. Grant.* The only notice given in this case was a letter seasonably deposited in the post office in *Boston*, by the notary, whose protest is in the case, directed to the drawer at *New-Orleans.* Now, by the report it appears that the defendant, the drawer, has from his youth resided in *York*, in this State, and for many years with a family there. There is no proof or pretence that he ever resided or had a counting room in *New-Orleans* ; and therefore notice sent by mail, directed to him at that place, cannot be considered as legal notice ; though it would have been sufficient if he had been resident there, though the letter had never reached him. *Freeman v. Boynton* 7 *Mass.* 483. *Shed v. Breet* 1 *Pick.* 401. As the proof, therefore, does not support the averment in the declaration, we are of opinion that the decision of the Judge before whom the cause was tried, that no sufficient notice was proved, was perfectly correct and proper. And here we might stop and enter judgment on the verdict ; but as the counsel have proceeded further, and gone into an examination of the facts reported, and considered them as establishing the point that due and reasonable diligence had been used, though without success, and so that the plaintiff was entitled to recover; it may not be improper or useless to express our opinion on this point also. The authorities cited by the plaintiff's counsel clearly shew that there is on this subject, no universal rule ; that the

law only requires due and reasonable diligence in giving or attempting to give notice ; and that each case must stand on its own peculiar facts and circumstances. The counsel has relied on the case of *Chapman v. Lipscombe* 1 *Johns.* 294. In that case the plaintiff made inquiries in *New-York* to ascertain the residence of the drawer ; and of those whom he supposed most able to inform him. He was informed that he resided in one place, when in fact he resided in another. He notified according to this false information ; innocently given no doubt, and innocently followed ; but the Court considered that as he had made such inquiries as were in his power, and by the information he had received, was led into an error, he was excusable ; and under the circumstances of the case he was considered as having used due diligence, though he had not given legal notice. The counsel has also relied on *Bateman v. Joseph* 12 *East.* 433. That was an action by an indorsee against an indorser. The plaintiff might have given notice to the defendant on the first of *October*, had he known where he lived ; but he did not ascertain that fact till the 4th, when he did give notice. The ignorance of this fact was his excuse for not giving earlier notice ; though he knew where the acceptor and drawer both lived.

The question of *due diligence* was left by Lord *Ellenborough* to the jury, who gave a verdict for the plaintiff. *Garrow* moved for a new trial on the ground that *due diligence* had not been used in making inquiries for the defendant's residence. But the Court said it was a question properly left to the jury, and they had decided it; and without expressing any opinion as to the diligence, refused a rule. This case therefore seems to decide nothing in relation to the one before us. The case of *Fisher v. Evans* 5 *Bin.* 541, and a note in *Story's* edition of *Chitty* 236, *c.* the plaintiff's counsel frankly admitted were not in accordance with his argument. Having noticed these authorities, let us look a moment at the facts in this case, and see what proof there is of *due* and *reasonable diligence*. It does not appear that any inquiry whatever was made in *Boston*, as to *Varrell's* residence when the bill was protested for non-payment; though diligent search was then made for *Barrell* the acceptor; no inquiry appears to have been at *any time* of *any person*, except of *John A. Haven*; so that there is much

obscurity as to what *was done*; but there are facts in the case which shew what *might have been done*, and with every probability of success. Much may be gathered from the face of the bill itself. It is dated at *New Orleans*, and drawn on *Barrell of York, Maine*, and his acceptance is dated at *York*. *Varrell* requests *Barrell* to charge the amount of the bill "to account of brig *Susan with* or *without* further advice;"—and the bill is made payable in *Boston* in 60 days after sight. It is believed that every mercantile man would, from reading this bill, at once conclude that *Varrell* was the master, and *Barrell* the owner of the brig *Susan*; or at least that there was a connection in business between them; and that the anticipated funds for the payment of the bill would be in *Boston* on the arrival of the brig at that place. Now as the holders of the bill could at once know *Barrell's* residence was at *York*, where he always lived, we cannot think that *reasonable diligence* was used to ascertain the place of *Varrell's* residence, when we see that no inquiry, or attempt at inquiry, was made of him. There was every reason for believing that by applying to *Barrell* the desired information could at any moment have been obtained, —the distance between *Boston* and *York* being only seventy miles. This omission is unreasonable inattention and negligence. In the above cited case of *Bateman v. Joseph* notice was given on the 4th instead of the 1st. But in the case at bar no notice was ever given. We will not say that the notice would have been too late, if *Hill*, as soon as the bill was protested, had immediately written to *York* and ascertained of *Barrell* the defendant's place of residence, and on receiving the intelligence, had forthwith sent notice to the defendant,—but nothing of this kind is done, nothing has been attempted by way of inquiry, except in one instance, of *Haven*, and when that was, is left uncertain. On the whole, we perceive no grounds on which the plaintiff can recover, and accordingly, there must be judgment on the verdict.

BUTLER & UX. *vs.* LITTLE.

Where a testator devised lands to his wife, and after her decease to one of her sons, without expressing the nature or duration of the son's title; and bequeathed a legacy to another son "as his proportion of the estate;"—it was holden that the devisee of the remainder, after the death of the wife, took a fee.

THIS was a writ of entry *sur disseisin*, brought by the demandants as heirs at law of *Samuel Lord*, against the tenant, who was sole heir of *Mark Lord*, son of the said *Samuel*, and a devisee under his will;—and it came before the Court upon a case stated by the parties, in which the only question was,—whether *Mark Lord* took an estate for life, or in fee, in the demanded premises, which were devised to him by his father.

The testator devised a portion of his estate to his wife, during her natural life;—and in a subsequent part of the will devised the same estate to his son, in these words;—"I give and bequeath to "my son *Mark Lord*, my dwelling house, barn, and warehouse, "on the same side of the highway with my dwelling house, with "the garden and all the lands adjoining, on the same side of the "way, after the decease of my well beloved wife."—He also, in another part of the will, gave to each of the children of his late son *Samuel*, a certain sum, which "*is his proportion of my estate.*" The other parts of the will contained nothing material to the question.

Burleigh, for the demandants, hereupon contended that *Mark Lord*, the devisee, took only an estate for life. The heir is not to be divested of his rights, unless such appear plainly and beyond doubt to be the intent of the testator. *Rowe v. Yewd 2 New Rep.* 214. *Willes* 141. *Cro. Car.* 147, 149. But the clause in the will under which the tenant claims, contains nothing which shews an intent to create any other or greater estate than a tenancy for life. To evince the contrary it must appear either that the devisee is charged with some burthen, in consideration of receiving a fee,—or that the testator was ignorant of the force of the language used, and knew not how to describe a fee,—or that the introductory clause in which he professes to dispose of his worldly

estate, and the creation of a tenancy for life of the wife, manifest such intent. As to the two first, he argued from the different parts of the will that there was nothing to support them. As to the introductory clause, very little if any reliance is placed upon it. *Cook v. Holmes & ux.* 11 *Mass.* 528. And to shew that the language of the devise itself is not to be extended beyond its legal import, he cited 1 *Roberts on Wills* 432. *Tanner v. Morse Cas. temp. Talbot* 284. *Hogan v. Jackson Cowp.* 299. *Gaskin v. Gaskin Cowp.* 657. *Baker v. Stocker* 5 *D. & E.* 13. *Bates v. Clayton* 8 *East* 147. *Drewry v. Bacon* 14 *East* 372. 6 *Cruise's Dig.* 237—240. *Wright v. Sidebotham* 2 *Doug.* 759. *Ferries & ux v. Smith & als.* 17 *Johns.* 281.

Dane, for the tenant. Although anciently, in *England*, and for reasons originating in that country, wills have received a rigid construction in favor of the heir; yet in this country as well as latterly in that, the object of Judges has been to ascertain and support the intent of the testator. *Richardson v. Noyes* 2 *Mass.* 60. 11 *Mass.* 528. Here the testator made a bequest to the children of one of his sons, as their proportion of his estate, which shews his intent to leave no reversionary interest for them to inherit;—and he has made no devise over, which he certainly would have done if he intended to give *Mark* only an estate for life. He also has directed the devisee to pay certain legacies; and upon the principle that the devisor always intends a benefit to the devisee, this direction, connected with the terms of the gift, shew an intent to create a fee. *Bows v. Blacket Cowp.* 235.

WESTON J. delivered the opinion of the Court, as follows.

The question submitted to the decision of the Court is, whether by the will of *Samuel Lord*, *Mark Lord*, his son, took a fee in the demanded premises; or only an estate for life. This point must be determined, by collecting the intention of the testator from the whole will, taken together. The premises in controversy are devised to *Mark Lord*, by the third clause in the will, after the decease of the wife of the testator, to whom a life estate therein had been previously given. No words of inheritance, or other words of equivalent meaning are used; so that by this clause

alone the devisee would, by legal construction, take only an estate for life. His claim therefore to take a fee, if valid in law, must be derived from other parts of the will.

The testator commences by declaring that, "as to the worldly "estate, wherewith it hath pleased God to bless me, I give, "devise, and dispose of it in the manner following;" and if a life estate to *Mark Lord* in the premises only was given, the reversion was undevised; although it would seem that he intended to dispose of his whole estate. This introductory clause would not alone, consistently with the authorities, have the effect to enlarge an estate, subsequently devised; yet in connection with other parts of the will, it may properly have some influence, in collecting the intention of the testator. *Goodright v. Stocker* 5 *D. & E.* 13. *Loveacres v. Bright Cowp.* 352.

So the presumption that he intended a benefit to the devisee, which if he took a life estate only, he would not realize unless he survived the widow of the testator; although not of itself indicating, with sufficient clearness, an intention to give a fee, or legally having that effect, yet it is a circumstance not altogether undeserving of consideration.

But there is another clause in the will, which, in connection with the foregoing, or even without their aid, requires that the devisee should take a fee in the estate in question. After giving to his grandson *Samuel Lord*, eldest son of *Samuel Lord* deceased, a legacy of forty pounds, he bequeaths in the fifth clause, "to "each of the other children of my late son, *Samuel Lord*, de- "ceased, that shall survive at my decease, twenty shillings, to "be paid by my son *Paul Lord*, in two years after my decease, "which, with what I have given above, is his proportion of my "estate." Now unless *Mark Lord* took a fee in the demanded premises, the reversion being undisposed of, the children of *Samuel Lord* would be entitled to a share of it; and thus the sums bequeathed to them would not be his proportion of the estate, although so declared to be by the testator. Considering therefore the introductory clause, which professes to dispose of the whole estate; that the reversion is not otherwise devised, either specifically or by a residuary clause; that if *Mark Lord* took a life estate only, he would derive no benefit from the devise,

unless he survived the widow; but more especially considering that part of the will, which makes provision for the children of *Samuel Lord*, professedly as his full proportion of the estate, we are satisfied that, upon a just construction of the whole will, *Mark Lord* took a fee in the demanded premises. In support of this opinion, the case of *Cook et al v. Holmes et ux.* cited in the argument, is strongly in point.

It has been urged that the testator, having used proper words of limitation in giving an estate for life to his wife, in the first clause of the will, and in giving a fee in the second and fourth clauses, must be presumed to have a knowledge of the use and effect of technical language; and that his omission of words of limitation in the third clause was designed, with a full knowledge that, by legal construction, a life estate only would pass. But we are not satisfied that he possessed the legal knowledge, which the argument ascribes to him; or that he so nicely calculated the legal result of the omission. Had he known the force and meaning of legal language, it is hardly conceivable that, in so solemn and important an instrument as a last will and testament, he would deliberately have left that to be settled by construction, which the use of two or three words would have placed beyond all possible doubt. That he was unskilful in the use of legal language, is apparent from the fact, that the testator applies in the second clause words of limitation, by which a fee passes, as well to personal as to real estate. In popular understanding, where land is given, the whole estate is considered as passing, unless words are used indicative of a design to give a less interest. In the devise to his wife, he limits to her an estate for life expressly, and we have no means of knowing, whether he might not have deemed it as essential to use such express terms restrictive of the interest given, when he passed a life estate, as to use words of inheritance, when a fee was intended.

It being the opinion of the Court that *Mark Lord* took a fee in the demanded premises, by the agreement of the parties, the demandants are to become nonsuit, and the tenant to be allowed his costs.

ANDERSON & AL. *vs.* BROCK.

The deacons of the societies of Shakers are capable of taking and holding lands in succession, within the meaning of *Stat.* 1785, *ch.* 51, and *Stat.* 1821, *ch.* 135.

In trespass *quare clausum*, the plaintiffs were permitted to amend their writ, which charged the defendant for an injury to their own property, by setting forth that they sued as deacons and overseers of a society of Shakers.

In trespass *quare clausum*, by the deacons of a society of Shakers for an injury to the common property, the members of the same society are competent witnesses, on releasing to the plaintiffs their interest in the action, and receiving releases from the plaintiffs of all obligation to contribute to the costs of the suit.

THIS was an action of trespass for breaking the close of the plaintiffs, who styled themselves, in the original writ, "*John Anderson* and *Isaac Bracket*, both of *Alfred*, yeomen." After the cause came into this Court, the plaintiffs moved for leave to amend their writ, by adding that they sued "as deacons and over-"seers of the society of shakers in said *Alfred*," which was granted, though objected to by the defendant.

At the trial, which was before the Chief Justice, upon the plea of soil and freehold in the defendant, the plaintiffs offered as witnesses certain members of the same society of shakers of which they were deacons; to whose admission the defendant objected, on the ground of their alleged interest in the event of the suit, it being one of the articles of their association that "the "members should possess one joint interest" in all the temporalities of the church, and should be equally entitled to the use of the common property according to their several necessities;—but upon the witnesses executing in Court a release to the plaintiffs of all their interest in this action, and in the damages which might be recovered in it, and the plaintiffs executing to them a release from all obligation to pay any costs which the defendants might recover against the plaintiffs in this action;—they were admitted to testify.

The plaintiffs then read a deed from *Barbara Brown* to *Gowen Wilson*, *Joshua Harding*, and *Jonathan Newell*, styled deacons or overseers entrusted with the care and management of the estate and temporal interest of the family of shakers in *Alfred*, convey-

ing the *locus in quo* to them and their successors and assigns in trust for said family or society, for the support of the gospel among them, the relief of the poor, and their common support, and for other pious and charitable uses;—and then shewed from the records of the society, that the plaintiffs were their regular successors.

The defendant contended that the title did not pass to the plaintiffs by this deed and by such succession;—and further objected that the plaintiffs had no right to maintain the action at this time, because it appeared by the book of records of the society, that while this action was pending, *John Anderson* had resigned the office of deacon, and others were appointed in his stead.

Both these objections were overruled by the Chief Justice, and a verdict, under his instructions, was returned for the plaintiffs, subject to the opinion of the Court.

Shepley, for the defendant, objected first to the amendment of the writ, which he said wholly changed the nature of the action, and was therefore inadmissible. It stood on a cause of action accrued to the plaintiffs in their own right, to which their executors would succeed as privies; but it was now changed to a title *en autre droit*, the interest in which would pass to their successors in office. *Haynes v. Morgan* 3 *Mass.* 210.

As to the witnesses,—they had a direct interest in the cause of action, being joint owners of the common fund, which would be increased or diminished by the result of this suit, and which their releases did not affect. Nor could the plaintiff's release discharge their pecuniary liability to contribute to the expenses of the suit, for this the plaintiffs had no power to do. At most it was but a private undertaking of the plaintiffs to indemnify them; but cannot operate to discharge them from the common obligation to contribute to the common burthens. The principle of a community of interests and rights and liabilities, enters deeply into, and pervades the foundations of the religious faith of this society, and cannot be eradicated. Each witness, whether he executes a release or not, is still a member of the family, and entitled to a support from the common stock; and if the suit is unsuccessful, that support is to be derived from a diminished fund.

The resignation of *Anderson*, he contended, ought to abate the suit, there being no provision by law for his successor to come in and prosecute it.

But he insisted that the deacons or overseers of the shakers were not a corporation within the statute respecting grants to charitable uses, and so were incapable of taking in succession. There can be no church, without a parish; and as the shaker societies do not assume parochial forms, their deacons are not within the terms of the law, not being deacons of any *churches*. *Boutelle v. Cowdin* 9 *Mass.* 254. Further, in the construction of that statute, the intent of the legislature is to be gathered from the state of facts as they existed when the law was enacted; but at *that time* no such people as shakers were known; and the quakers or friends, so far from being objects of the fostering care of the government, were the subjects of its severest animadversions. It is not therefore to be supposed that the legislature would grant any new capacities to the officers of a people whom they were endeavoring to banish from the Commonwealth.

J. Holmes and *Goodenow* for the plaintiffs.

As to the amendment, they said that it did not affect the action, which still remained the same as before ; it only designated the character in which they claimed damages and the persons to whom they were accountable. If they are compellable to account, they are trustees, and therefore are rightly described in the writ. If not, they are entitled to damages in their own right. But either way, it was of no importance. *Kincaid v. Howe* 10 *Mass.* 203. *Leighton v. Leighton* 1 *Mass.* 433. Besides, the granting of leave to amend is a discretionary act of the Judge, preparatory to the trial, and not during its pendency ; and if improperly exercised, it is not open, in *this* form, to the defendant's objection, within the meaning of the statute. *Haynes v. Morgan* 3 *Mass.* 208.

As to the witnesses ;—it would be strange if any persons could place themselves in such relations to each other as could not be changed even by themselves. Here they have executed mutual releases. If an agent acting for two persons release to one of them, he devolves no increased responsibility on the other ; but

only assumes it himself;—and thus the rights of the plaintiffs against the society, remain now, as they were before, unaffected by the release. But independent of the releases, there exists no compulsary power to enforce a contribution in the case. The *covenant*, by which all shakers are bound to each other, and which forms a part of this case, contains an express stipulation that the parties shall never resort to legal remedies against the society or its members. It is a perpetual bar, containing a formal surrender of their legal rights, and retaining a hold only on the consciences and religious principles of the parties. This also is consistent with law. All donations to the shakers and all the fruits of their common industry are expressly consecrated to eleemosynary purposes; and none but the *donors* can compel an execution of the trust. They are gifts in trust for the poor; but in such cases it is well known that no action lies, except by the donor or his heirs. *Wells v. Lane* 8 *Johns.* 462.

Nor can the resignation of *Anderson* affect the suit. No case has been cited to shew that his successors may not come in and prosecute the suit to judgment. But if they cannot, yet he may, for his resignation of the office ought not to be taken as an abandonment of a cause then pending.

The argument against the capacity of the plaintiffs to take by succession, they contended was not founded in law. Whatever may have been the severities exercised against this description of people when the law of *Massachusetts* was enacted, the principle in *Maine* is that of universal toleration. Every association of christians for religious purposes is recognized as a church; and its presiding officers are made capable of taking in succession. *Const. of Maine, bill of rights, art.* 3. *Stat.* 1821, *ch.* 42, *sec.* 1, and *ch.* 135, *sec.* 10. And if it were not so, yet here is a conveyance in trust, to certain individuals and their successors; and who these successors are, is a fact susceptible of proof as any other matter *en pais*. In this view of the case they may take as trustees at common law. *Newhall v. Wheeler* 7 *Mass.* 179.

Weston J. at the succeeding term in *Kennebec* delivered the opinion of the Court as follows.

By the fourth article of the declaration of rights in the constitution of *Massachusetts*, it is provided that "every denomination of

christians, demeaning themselves peaceably, and as good subjects of the commonwealth, shall be equally under the protection of the law." The statute of 1785, *ch.* 51, for the better securing and rendering more effectual grants and donations to pious and charitable uses, doubts being entertained how far such grants could go in succession, provided that the deacons of all the several protestant churches, shall be deemed so far bodies corporate, as to take such grants, whether of real or personal estate, in succession. The spirit and object of this act, as well as the provision of the constitution before cited, require that it should receive a liberal construction, for the benefit of every sect and denomination of protestant christians.

A church, separate from the society with which it is connected, has not the rights and privileges of a corporation. It is however a body, having a distinct existence and character, in our ecclesiastical history and usages, and as such is recognized by the law. Although it does not enjoy the attributes of a corporation, yet having a well established identity, it was quite within the scope of legislative power to constitute certain of its officers, also equally well known, by the name of their office, a corporation, and to endow them with power to take estates, real and personal, in succession ; and also with a capacity to sue and defend all actions touching the same. This latter power, which the statute before cited expressly gives, designates a body sufficiently tangible and responsible, in relation to all questions which may be raised respecting all such grants and donations, as might be made to them in their official capacity. It is contended that the church, of which the plaintiffs are deacons, not being connected with any religious society, having a corporate existence, cannot be considered as embraced within the true intent and meaning of the act before referred to. A congregational church is a voluntary association of christians united for discipline and worship, connected with, and forming a part of some religious society, having a legal existence. Presbyterian, baptist, and methodist churches have generally the same character and connexion ; as have probably the churches of many other denominations of christians. But religious toleration, which is the vital principle of protestantism, and which is effectually secured by

the constitution and laws of our own State, as well as of that from which we have separated, has produced and is producing many modifications of discipline and doctrine, in bodies associated for spiritual and ecclesiastical purposes. The sect, with which the plaintiffs are connected, have been for some time known among us, and their peculiar tenets and modes of discipline have been embodied and settled by their teachers in regular, and among them, well established forms. Although once persecuted by the mistaken zeal of former days, they are now permitted, under more favorable auspices, to keep the peaceful tenor of their way, unmolested. They are in general quiet, sober, and industrious ; and the fruits of these commendable qualities are exhibited to the public eye, in their beautiful villages and cultivated grounds, and in the apparent comfort and abundance, with which they are surrounded.

If the persons, who acquire authority and influence among them, should be found to abuse their power, they are answerable both civilly and criminally, for their misconduct. Like all other citizens, they are amenable to the laws, by which they are protected ; and from obedience to which their seclusions afford them no immunity or exemption.

On the whole, upon a sound and liberal construction of the act of *Massachusetts*, under which the donation in question was made, considering also the spirit of the constitution of that commonwealth upon the subject of religion, we do not perceive any sufficient reason for withholding from the deacons of churches of the religious sect or denomination called shakers, the privileges and immunities granted by that statute. But if in fact doubts might be fairly raised and entertained upon this point, we are not disposed to sustain objections made by the defendant, who has exhibited no title or interest in himself, to the official character and authority of the plaintiffs, unless they are already and fully supported by law.

The constitution of our own State is not less liberal and tolerant, upon the subject of religion, than that of *Massachusetts* ; and in the third section of our declaration of rights, there is secured to religious societies, unincorporate, the right of electing and

maintaining their own teachers. Thus religious societies, unincorporate, are recognized as having a legal existence, for very important purposes. By the tenth section, chapter 135 of the revised statutes, " the deacons, elders, trustees, stewards, or other presiding officers of every church or religious society, having by its usages no settled minister, shall be deemed capable of taking in succession any estate granted to them to the use of such church, or of the poor thereof; and of prosecuting and defending all actions, petitions, and processes touching the same." We can discern no good reason, why the case of the plaintiffs is not fairly within the provisions and protection of this statute.

As to the amendment objected to, if the plaintiffs were rightfully in possession, although as trustees, it is by no means certain that they might not maintain an action of trespass against a wrong doer, declaring upon their own possession, without setting forth their official capacity. But we see no objection to the amendment. The cause of action remained the same. It exhibited more perfectly the title of the plaintiffs; and the nature and character of their seisin and possession, and is supported by the case of *Leighton v. Leighton*, cited by their counsel.

The interest of the witnesses must be considered as legally extinguished by the mutual releases, so as to restore their competency, if they were before incompetent. It is difficult to conceive any interest, going to the competency, which may not be thus removed. If notwithstanding the witnesses still expect some advantage or benefit from the result, which they could not legally enforce, it is an objection to their credibility. The plaintiffs have no authority, by the release by them executed to the witnesses, to increase the burthens of the other members of the society; and to prevent this injustice, they might be deemed to have assumed themselves, by their release, the proportion of costs and expenditures, which the witnesses might otherwise have been holden to contribute.

With regard to the change in the office of deacons of this church, which appears in this report, we do not decide whether this objection might not have prevailed, had it been seasonably pleaded in abatement; but as the trespass complained of hap-

pened while the plaintiffs were rightfully in possession, we are of opinion that it did not constitute, at the time of the trial, a valid objection to their right to sustain this action.

The motion to set aside the verdict is not sustained, and judgment must be rendered thereon.

CARLISLE *vs.* BURLEY.

In a suit upon a contract arising, or for a tort committed, after the death of the testator, it is not necessary for the executor to declare in his official capacity.

In an action of trover by an executor for the conversion of goods since the decease of the testator, a legatee under the will is a competent witness, the event of the suit having no tendency to increase or diminish the assets.

The property in the goods in an action of trover is not changed by the default of the defendant, but by the recovery of judgment against him.

Where the personal estate of a testator, being chiefly neat stock, was suffered to remain on his farm, as before his death, in the hands of the residuary legatee, with an understanding that he would pay the legacies to his sisters, which would not become due till several years afterwards, but which he neglected to pay ;—it was holden that the residuary legatee was only the bailee of the executor, and was answerable to him in trover for the goods, if they should be requisite in order to pay the legacies.

THIS was an action of trover for certain goods enumerated in the inventory of the estate of the late *Andrew Burley*, Esq ; and was tried upon the general issue, and a plea of the statute of limitations, before the Chief Justice, at the last *September* term.

At the trial the following facts appeared. The plaintiff, being executor of the will of Mr. *Burley*, which was proved in the year 1811, duly returned an inventory of the property which came to his hands, including the goods sued for in this action ; and in 1823 settled an account at the Probate office, in which he charged himself with the personal estate as inventoried, and prayed allowance of the amount of the furniture and other articles sued for, as left with the family for their benefit and for the management of the farm; which account the Judge of Probate allowed.

The testator by his will gave legacies of cows, calves and sheep, to each of his three daughters ; one of which cows was to

be delivered over in a year after his decease, and the residue were made payable in twelve years after that event, "unless it could be done sooner with conveniency." He constituted his son *John*, the defendant, residuary legatee of the personal estate, and devised to him all the real estate, providing that his widow should have a comfortable support out of his estate, to be furnished by his son *John*; which provision she waived. The defendant, at the decease of his father, was a boy of fourteen years old; and was soon after placed under the guardianship of his brother in law *Hasty*; but continued to live with his mother, and assisted in the management of the farm, under the advice of his guardian. All the debts of the deceased were paid; and the personal property was all permitted to remain in the house and on the farm, as the most convenient arrangement, with the understanding that the defendant would pay the legacies to his sisters. Only a part, however, of the legacies had been paid by the defendant; the residue being due, though not specially demanded. A short time before the commencement of this action the plaintiff read to the defendant a copy of the inventory, and demanded four hundred dollars worth of the goods named in it; to which the defendant replied that he had nothing to do with them.

The plaintiff at the trial offered as witnesses one of the legatees, and *Hasty*, the husband of another, who were objected to as incompetent on the ground of interest, but the Judge admitted them.

It appeared that the widow some years since had removed from the farm, taking with her a part of the furniture; since which the defendant had resided on the farm and managed it as he pleased;—and that certain other of the goods had been carried away by another person.

It also appeared that the plaintiff had brought another action against the widow, for the same property sued for in this action; and that she had been defaulted, and the cause now stood continued for judgment.

The defendant also produced a receipt for about forty dollars, signed by the plaintiff, in full of all demands against *the estate* of the testator; but it appeared that at the time it was signed

nothing was said of legacies, and that it had no relation to the property sued for in this action. The personal estate was inventoried at nearly 800 dollars.

Upon this evidence the Chief Justice instructed the jury that the plaintiff was by law answerable for the property inventoried, and could maintain this action in his own name, without declaring as executor;—that the demand of the property as made and proved, connected with the defendant's answer, was good evidence of a conversion;—that the action against the widow, could have no effect on this suit;—that if they believed that the property was left in the hands of the defendant by mutual consent and with the understanding above stated, he was not liable until after a demand and refusal; and that the statute of limitations did not attach itself to the case till such demand and refusal, which being but a short period before the suit was commenced, the plea of the statute was not supported,—that the legacies not being payable till after twelve years from the decease of the testator, the executor was still liable to the legatees; and therefore had a right to recover of the defendant so much of the property or its value, as would enable him to pay the legacies still due, if so much remained in the hands of the defendant, which it was for them to determine;—and that as to the receipt, they would judge from its terms, and from the other evidence, whether it was intended to bar this action, or only to discharge any claims of the plaintiff against the estate of the testator. And under these instructions they found a verdict for the plaintiff, which was taken subject to the opinion of the whole Court whether, upon the evidence as reported by the Judge, the jury were rightly instructed.

Emery, for the defendant, admitted the general principle that an executor may sue in his own capacity for the goods of the testator, without disclosing his office on the record, he being liable for the property. But he contended that as against an heir or residuary legatee, the executor could have no claim but by virtue of his office, which must be set forth in the writ, it being the foundation of his right of action. 2 *D. & E.* 477. 11 *Mass.* 329. *Latch* 214. Nor need the omission of his office be pleaded in abatement, because it goes to the merits of the action.

The witnesses, he insisted, were improperly admitted, because, being legatees, they were interested in the estate, and so came within the principle of *White v. Derby* 1 *Mass.* 239.

He also urged that the action against the widow, in its present situation, was a bar to this suit. In that action the plaintiff has alleged that *she* had converted the same property to her own use; and her default, being made by the statute a judicial confession that the charge in the declaration is true, is now become evidence of record that she has done so. This brings the case precisely within the principle of *Adams v. Broughton* 2 *Stra.* 1078, that a recovery against one in trover vests the property of the goods in the defendant. The widow is now entitled to the benefit of this confession of record; of which the plaintiff cannot deprive her by the contrivance of keeping the action on foot by continuances for judgment. He is now seeking damages, not for the conversion of *his* property, but of her own.

The receipt, he argued, was substantially a discharge of the defendant from all claims *on account* of the estate of the testator, and shewed an assent of the executor that the defendant should afterwards enjoy the property as residuary legatee.

But he insisted strongly on the point that the property having been delivered to the defendant as residuary legatee, by the executor, it could not be reclaimed. The executor is allowed to judge whether he will pay a legacy or not; and if so, upon what terms. But his assent to a legacy, if not absolute, can only be on condition *precedent*. It cannot be on condition subsequent. Such condition is void, and the assent of the executor is absolute and irrevocable. Here the delivery to the defendant was with the intent that the goods should be *his own*; and this vested the property in the legatee, and took effect by relation to the death of the testator. 1 *Com. Dig.* 343, *tit. Administration C.* 8. *Off. Ex.* 340. *Toller's Ex.* 310, 311. 10 *Rep.* 52. *Leon.* 130, 131. 1 *Saund.* 278. *Noel v. Robinson* 2 *Ventr.* 385. *Cowp.* 284, 289. *Doe v. Guy* 3 *East* 120. *Paramour v. Yardley Plowd.* 339. 4 *Rep.* 28. *Young v. Holmes* 1 *Stra.* 70.

J. Holmes and *Goodenow*, on the other side, contended that the conversion being since the decease of the testator, the action was

rightly brought in the plaintiff's private capacity;—that the witnesses were merely in the character of creditors, and therefore competent;—and that the cases of assent cited on the other side, were cases of specific legacies, and not of residuary bequests. And they examined at large the provisions of the will, and the evidence reported, to shew that it was the intent of the testator that the property should remain on the farm, under the general superintendence of the executor, who was to pay out the legacies as the stock might increase, at his discretion; and that the persons in whose custody the property was left, were only the bailees of the executor, out of whose hands he might at any time recall it.

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

Upon the decease of the testator, his personal property vested in the plaintiff, his executor, to be administered according to the provisions of the will, and the requirements of law. Upon contracts arising, or torts committed, in relation to this property, after the testator's death, the action is properly brought in the name of the executor, in his individual capacity; and he is answerable over for the faithful fulfilment of his trust.

With regard to the competency of the witnesses objected to, neither their claim under the will, nor their remedy against the plaintiff, can be affected by the event of this suit. The fund, placed at his disposal, was abundantly sufficient for the payment of all the bequests in the will; and whether he managed it providently, or wasted it, or lost it by his negligence, his responsibility to the legatees would remain the same. If he prevails in this action, he may be the better able to discharge his duty to them; but their situation, in this particular, differs not from that of a creditor, who is a competent witness for his debtor. The case cited from 1 *Mass.* 239, is very briefly reported; but it appears to have been an action for a sum of money, alleged to be due to the estate of the testator, brought by the executrix, as such. The assets therefore would necessarily be increased by a recovery in that action; and thus the heir, entitled to a distributive share, directly interested. But the event of this suit can have no tendency either to increase or diminish the assets.

It is objected, that the averment of property in the plaintiff is negatived by the action against the widow of the testator; which has been defaulted, and is now continued for judgment. The case cited from *Strange*, in support of this objection, shews that the property is changed by the recovery of damages. But judgment is not yet rendered, in the suit against the widow. It may be arrested; or the default may be taken off, at the discretion of the Court, and she may yet prevail in a trial upon the merits.

The debts having been paid, and the payment of the legacies, except one cow, being postponed by the testator, for the period of twelve years after the decease, unless it could be sooner done with convenience, the case finds that the personal property was suffered to remain on the farm; under an implied understanding that the defendant would pay the legacies. As the defendant is residuary legatee, if this had been done, the plaintiff might not have been able to sustain this action. But it has not been done. The property was not transferred by the executor; it was suffered to remain where it was, until the period should arrive, when it might be necessary for the payment of the legacies. The defendant was bailee of the property for the executor; and no action accrued against him, until after demand and refusal. The statute of limitations therefore is no bar.

As to the receipt given by the plaintiff to the defendant, it was proved at the trial that it had no relation to the property now in controversy.

The Court, being of opinion that the jury were properly instructed by the Judge, who presided at the trial, there must be judgment on the verdict.

Low *vs.* Ross.

Where, in trespass *quare clausum fregit*, the declaration was general, describing no particular close, and the defendant in his *plea* described a large close, in in which he alleged that the act complained of was committed, and to which he pleaded title; and the plaintiff *replied*, newly assigning a *small* close, parcel of the large one, as the place where the trespass was done, which he alleged was his own soil and freehold, and *traversed* the title of the defendant to the *whole* of the large close; to which the defendant *rejoined* that he was not guilty of any trespass in the *small* close, and concluded to the country;—it was held on demurrer that the plaintiff's traverse of the defendant's title to the *whole* close was an immaterial traverse, which the defendant might well pass by; and that the rejoinder was good.

In trespass *qu. cl.* before a Justice of the peace, if the defendant plead a title to the soil and freehold, this plea, without any replication from the plaintiff, puts an end to the magistrate's jurisdiction over the cause; except that he must take the recognizance of the party for its prosecution in the Court of Common Pleas, where the pleadings are to be closed.

In this case, which was trespass *quare clausum*, brought before a Justice of the peace, the plaintiff declared generally for breaking and entering his close in *Kennebunk*, without giving it any particular designation or description. The defendant pleaded title to the close before the Justice, who thereupon proceeded to take his recognizance to prosecute the suit in the Court of Common Pleas, pursuant to the statute. In that Court the pleadings proceeded to a joinder in general demurrer; on the opening of which before *Whitman* C. J. he ordered that the action be dismissed, on the ground that the soil and freehold not having been *put in issue* before the Justice, the cause was brought up prematurely, and the Court of Common Pleas had not jurisdiction. From this decision the plaintiff appealed.

The Court said that no replication was necessary before the Justice; it was enough that the title to real estate was *pleaded* there. On the *filing* of such plea, the jurisdiction of the Justice was determined; and it was his duty forthwith to take the recognizance of the defendant, as the statute directs. They therefore sustained the appeal, and ordered the cause to stand for trial in this Court.

The nature of the pleadings in this case will be sufficiently understood as they are briefly stated in the opinion of the Court, delivered at the ensuing term in *Cumberland*, by

MELLEN C. J. In this case the declaration is general; not describing any close in particular. The *plea* describes a close by metes and bounds, containing 150 acres; and states that the supposed trespass was committed in that close, and that it is the soil and freehold of *Mary Hanscom*, as whose servant the defendant did the act complained of. The replication states that the trespass was committed in a close of fifteen acres, being a part of the close of 150 acres; which part is described by metes and bounds;—and it further states that it is the soil and freehold of the plaintiff; and contains a traverse that the *whole* close of 150 acres is the soil and freehold of said *Mary Hanscom*. The defendant then in the rejoinder pleads to this new charge that he is *not guilty* of any trespass on the close of fifteen acres and concludes to the country. To this there is a general demurrer and joinder.

The pleadings appear to have been drawn rather inartificially; and for that very reason, the application of legal principles, in deciding the cause, is attended with more difficulty than in those cases where technical rules are observed.

The replication seems to have been intended as a *new assignment*; —and the facts disclosed are such as to render a new assignment necessary and proper; for the plaintiff does not in his replication assert a title to the whole close; but only to the fifteen acres, in which he says the trespass was committed. "As the "plaintiff may new assign the trespass in a *different* close, so he "may new assign it in *another part* of the *same* close." *Lawes on Plead.* 163. This is done in the present case; but the plaintiff has gone further and traversed the title of *Mary Hanscom*, to the whole close of 150 acres described in the plea. A new assignment of the trespass as committed in another close, need not and should not contain any *traverse*; for the object is to reduce to certainty the place where the trespass is intended to be proved; which was not attempted in the declaration, and which the *plea* has not *done*. "The plaintiff may new assign with or without "taking issue on, or otherwise answering the special plea."

Lawes 240, 1 *D. & E.* 479, 636. The more correct mode of pleading in this case would have been for the plaintiff in his replication to have *restricted* the close described in the plea; and having butted and bounded the fifteen acres, as he has done, to have averred the same to be *his soil and freehold*, and traversed the title of *Mary Hanscom* to that particular part of the 150 acres. This would have been proper, as the defendant in his plea had alleged the whole close to belong to *Mary Hanscom*; of course, *she* and the *plaintiff* both claimed the fifteen acres. Had such been the traverse it would have brought the question between the parties to an end, and settled the cause. For if the small close is really the soil and freehold of *Mary Hanscom*; the plaintiff has no cause of action; or if this close belonged to the plaintiff, still if the defendant has not committed any trespass on the close of fifteen acres, then, also, the plaintiff has no cause of action. The defendant has by the general issue denied any such tresspass; and the plaintiff has demurred to that plea. If the replication in this case be considered, as it was without question intended, as a new assignment, the defendant, by pleading not guilty to it, has not been guilty of a departure. Besides, if a plaintiff vary in his replication from his count, or a defendant in his rejoinder from his plea, in a fact which is not material, this is not a departure. *Com. Dig. Pleader F.* 11. *Chitty Pl.* 622. 1 *Salk.* 222. 1 *Ld. Raymond* 120. Now, in the present case, by the replication, restricting the close described in the plea, and confining the question to the fifteen acres, it became a point perfectly immaterial, who owned the residue of the 150 acres. In this view of the cause, considering the replication as a new assignment, and the defendant's rejoinder as a general issue, denying the charge newly made against him; it would seem to be properly pleaded, and not to amount to a departure from the plea. We do not mean to decide, however, as to the correctness of this view; and accordingly, we rest our opinion upon another ground. Proceeding on the supposition that the rejoinder is bad, as being a departure; still on this demurrer, we must look back and see who has committed the *first* fault. The inquiry then is, whether the replication, not considered in the nature of a new assignment, is good and sufficient. As we have before stated,

when the defendant had described a close distinctly, containing 150 acres, as the place where the supposed trespass was committed, and justified under *Mary Hanscom* as owner of it; the plaintiff, as he did not claim title in any part of it, except the fifteen acres described in the replication, very properly confined the assertion of his ownership to the fifteen acres;—thus drawing the question nearer to a point. Having thus replied, it at once became totally immaterial whether *Mary Hanscom* owned the residue of the 150 acres, as we have stated before, or *who* owned it. The plaintiffs therefore should have traversed her title to the fifteen acres only; and not to the whole 150 acres. *Chitty* 597, says—"If a traverse be of a matter *immaterial* or an "inference of law, or *not to the substance and point of the action*, "the other party may either *demur specially*, or *pass it by* and "tender *another traverse*." According to this authority, as the defendant did not demur specially on account of the immateriality of this traverse, he cannot, perhaps, on the general demurrer of the plaintiff avail himself of it, by way of *first fault*, on the plaintiff's part; but he might *pass it by* and tender *another* traverse. Has he so done in the present case? Instead of taking issue on the traverse, he has taken no notice of it, but has *denied* having trespassed on the fifteen acres. And why is this not a traverse of a material fact? If the plaintiff does own the fifteen acres he certainly ought not to recover of the defendant, if he is innocent. He pleads he is *not guilty*, and the plaintiff seems to have fairly admitted the truth of the rejoinder by his demurrer. On this point, the case of *Richardson & al. in error v. The Mayor and Company of Oxford* 2 *H. Bl.* 182, appears to be an important one.

This case was decided, on error, in the exchequer chamber, and by the decision, the judgment of the Court of King's bench was reversed. In the original action the mayor and company of *Oxford* brought trespass against the plaintiffs in error, for fishing in the plaintiff's fishery. The defendant pleaded that the *locus in quo* was an arm of the sea, in which every subject of the realm had the liberty and privilege of free fishing. The plaintiffs replied a prescription for the sole and several right of fishing; and traversed that every subject had the liberty and privilege of

free fishing in the *locus in quo*. This, on general demurrer, was held to be a bad traverse ; and that the defendants therefore, might well pass it by in the rejoinder, and traverse the prescriptive right of the plaintiffs, stated in the replication. Lord Chief Justice *Eyre*, in delivering the opinion of the Court says, " The " first traverse was of the right of all the King's subjects to fish " in the arm of the sea ; this was clearly a bad and immaterial " traverse ; for it was not only a traverse of an inference of law, " but it was so taken, that if at the trial it had been proved that " it was the separate right of others, and not of the plaintiffs, the " issue must have been found for the plaintiffs, not only without " their being obliged to prove either possession or right, but " where in fact they had neither possession nor right." So in the present case, if the defendant had taken issue on the traverse, he must have failed, unless he had proved a title in *Mary Hanscom* to the whole close of 150 acres, although the plaintiff had proved no title to the 15 acres ; and though the defendant had not committed any trespass whatever on that close. Reasoning which leads to such a conclusion cannot be correct, and ought not to be sanctioned. The pleadings as they stand have perplexed the cause, requiring a minute and laborious examination ; but the authorities have led us to the conclusion that the demurrer must be overruled ; and the Court accordingly adjudge the rejoinder good and sufficient.

Freeman *vs.* Paul.

Where the legal and equitable estates become united in the mortgagee, the mortgage will be considered as subsisting, or not, according to his intention, actual or presumed. If no such intention appears, the Court will consider what is most for his interest. And if it appears wholly indifferent, the charge or incumbrance will be treated as merged.

After a bill in equity is brought to redeem mortgaged premises, the Court will not permit the officer, who execute the writ of *habere facias* under which the mortgagee entered, to amend his return, by stating an earlier day of service, for the purpose of foreclosure.

In this case, which was a bill in equity to redeem an estate mortgaged, the principal facts were as follows.

The premises were originally mortgaged on the 18th day of *May* 1814, by *Peter* and *Theodore Littlefield*, who were tenants in common, to *Samuel Lunt* and *Jeremiah Paul*, to secure a joint debt of both the mortgagors, for the sum of four hundred dollars, due in six months with interest.

Afterwards, *July* 16, 1816, their right in equity of redemption was sold to *Edward A. Emerson*, at a sheriff's sale, in due course of law, by Mr. *Paul*, the defendant, who was a deputy sheriff, to satisfy two writs of execution in his hands against them in favor of another creditor.

At *October* term 1816, of the Supreme Judicial Court, *Lunt* and *Paul* recovered judgment upon their mortgage, for possession of the premises.

February 22, 1817, *Lunt* conveyed all his interest in the premises to *Edward A. Emerson.*

In *July* following, Mr. *Emerson* conveyed to the plaintiff *one half* of all the right in equity which belonged to the mortgagors, and which he had before purchased of Mr. *Paul*, at the sheriff's sale, the condition in the deed not having been performed.

A *pluries habere facias* having been duly issued on the judgment obtained by the mortgagees for possession of the premises, it was delivered *July* 13, 1818, to a coroner for service, by the present plaintiff, who was the attorney of the mortgagees in that suit. The coroner testified that on *that day* he gave possession of the land to *Emerson* and *Paul*, in presence of the mortgagor and his family ; and that afterwards having collected the bill of costs, he paid over the money to the present plaintiff, *October* 24, 1818 ; who, on the same day wrote the coroner's return, bearing that date, and running in the usual form,—" By virtue of this precept *I have delivered* seisin and possession," &c. which was then signed by the coroner. It did not appear that the plaintiff had any actual knowledge of the precise *time* when possession was delivered by the officer to the mortgagees ; but only that he knew that it had been done, and that he wrote the return at the officer's request.

May 22, 1819, *Emerson* conveyed to *Paul*, the defendant, in fee, all his right, title and interest in the land ; thus uniting in

Paul the titles of mortgagor and mortgagee of half the premises. This conveyance the plaintiff treated as payment of one half of the debt, and accordingly, on the 5th day of *October* 1821, being less than three years after the date of the coroner's return, tendered to the defendant two hundred and ninety dollars for the amount due to him, which being refused, the present bill was filed.

Shepley, for the plaintiff, contended that by the union in the defendant of both titles to one undivided moiety of the land, one half of the debt was *ipso facto* extinguished; and the plaintiff was thereupon entitled to redeem, upon payment of the residue. To this point he cited 2 *Com. Dig.* 676. *Chancery* 4 *N.* 8, 9. 6 *Com. Dig.* 323. *Suspension B. ib.* 190. *Release B.* 6. *Co. Lit.* 280 *a.* 148 *a. Litt. sec.* 222, 543, 544. *Thomas v. Thompson* 2 *Johns.* 471. *Ld. Compton v. Oxenden* 2 *Ves. jr.* 264. *Selby v. Alston* 3 *Ves. jr.* 339. *Berry v. Usher* 11 *Ves.* 90. 13 *Ves.* 62. *St. Paul v. Ld. Dudley & Ward* 15 *Ves.* 173. *Forbes v. Moffatt* 18 *Ves.* 384. *Porter v. Millett* 9 *Mass.* 101. *Collins v. Torrey* 7 *Johns.* 278. *Ritchie v. Williams* 11 *Mass.* 50. *Stevens v. Gaylord ib.* 266. *Winship v. Bass* 12 *Mass.* 199.

The officer's return, he insisted, was conclusive evidence of the time when possession was delivered; and was not to be controled by parol testimony; nor could the officer now be permitted to amend it, as such amendment would impair the rights already vested in a third person. Neither could the parol evidence of what was done on the 13th day of *July* avail the defendant as an entry *en pais* for condition broken, because the evidence shewed that it was not so intended. To the conclusiveness of the return, he cited *Purinton v. Loring* 7 *Mass.* 391. 6 *Com. Dig.* 242. *Retorn G. Williams v. Brackett* 8 *Mass.* 240. *Davis v. Maynard* 9 *Mass.* 247. *Bott v. Burnell* 11 *Mass.* 165.

Greenleaf, for the defendant, having at the opening of the case moved the Court to permit the officer to amend his return, by stating the *true time* when he delivered possession to the mortgagees, now argued that the amendment was in perfect consonance with established principles, as it did not go to contradict

the return, but only to explain it. The return states that he *had* delivered possession, but not *on what day* this was done; and to ascertain this day is the object sought. Nor would it affect the rights of strangers, the plaintiff claiming at that time to be a privy in estate, by his purchase in the preceding year. *Thatcher & al. v. Miller* 11 *Mass.* 413. If, however, this motion is not granted, the evidence shews an entry *en pais July* 13, 1818, in presence of the mortgagor, and with his assent; and by the lapse of three years from that time the mortgage is foreclosed.

The union of titles in the defendant, he contended, was not to be construed to his injury; but the mortgage was to be kept on foot as it originally stood, so long as it was plainly his intention, or his interest, that it should be so treated. Otherwise, the mortgagee to whom a mortgagor has executed a release of the land, must lose his remedy on the covenants in his mortgage deed; and hold the land subject to all mesne attachments and incumbrances. But here the intent of the mortgagees evidently was to claim the benefit of the mortgage. *Forbes v. Moffatt* 18 *Ves.* 384. *Denn v. Wynkoop* 8 *Johns.* 168. *Norton v. Soule* 2 *Greenl.* 341.

But *the plaintiff in this case* is not, on any principle, entitled to redeem; because nothing passed to him by his deed, it being a conveyance of *part* of a right in equity, which was indivisible.

The cause being continued *nisi*, the opinion of the Court was delivered at the ensuing *August* term in *Oxford* by

MELLEN C. J. If the coroner's return speaks the truth as to the time when seisin and possession was delivered to the mortgagees, then the tender was made in due season; being within three years next following the date of the return. For the purpose of being relieved from the effect of the return, as it now stands, the counsel for the defendant has moved for leave to the officer who made it to amend it, by inserting *July* 13, 1818, as the day when seisin and possession were in fact delivered; and he has introduced proof with a view of establishing the truth of his assertion. This motion is opposed by the plaintiff, as not being grantable on principle. It is not necessary to notice the

authorities introduced by his counsel to shew the conclusiveness of the return. On the other side this seems admitted; and hence is perceived the importance of the motion to amend it, inasmuch as it cannot be contradicted in its present form. In support of the motion, the defendant's counsel has cited the case of *Thatcher v. Miller* 11 *Mass.* 413. The report of the case there shews nothing decisive. The same case was again considered and is reported in 13 *Mass.* 270. By this last report it appears that the motion was denied; the Court considering that it would be dangerous to grant it. But if we were clear that on principle it would be proper to grant the leave requested; another question remains, and that is, whether, in the circumstances of this case, justice requires that the amendment should be made. As a general principle, it is certainly true that when a mortgagee takes possession under his *habere facias*, the owner of the equity of redemption has a right to consider the officer's return thereon as speaking the truth, and to make his calculations accordingly, with respect to redeeming. It may be, and often is the only evidence which he has as to the time of taking possession. He will in such cases rely on the record, presuming it cannot deceive him. It is said, however, that the general principle is not applicable in this case, because *Freeman* had personal knowledge that the *habere facias* was executed *July* 13, 1818. It is difficult to arrive at this conclusion from the depositions in the case. All the deponents, except *Howard* the officer, say expressly they do not know that *Freeman* had any knowledge of the service of the writ of possession; and *Howard* himself, who doubtless has strong wishes on this subject, only says that *Freeman* had knowledge of the service of the writ, and was present at the time, which he says he has no doubt was on the 13th of *July*; but he adds, that he is positive that *Freeman* wrote the return himself; and yet this very return bears date *Oct.* 24, 1818. He says further, that *Freeman* wrote the return at his request. It must therefore be considered as written and dated according to *Howard's* direction; and thus contains a declaration on his part that the return was completed, and was to take effect on that day and not before; and of course *Freeman* was justified in so considering it;

and from that day commenced his calculation of the three years within which he must redeem the premises. On these principles, it would seem to be direct injustice to allow the amendment, as its operation would be retrospective, and destructive of the plaintiff's claims. But, if we only place the present motion on the common ground of motions out of time, to plead infancy, or the statute of limitations, or the statute against usury, motions which are seldom granted, there would seem to be good reasons for denying the leave requested. This is a process in equity; and by refusing the motion and eventually sustaining the bill, we do no injustice to the defendant;—his debt and interest must be paid, and perfect justice be done him, before he will be compelled to surrender up the possession of the premises. But by granting the leave, the tender must be decided to have been too late, and the equity of redemption lost. As the motion is addressed to our discretion, we are at liberty to grant or refuse the amendment, according as the justice of the case may seem to demand. On the whole, considering all the circumstances abovementioned, our opinion is that the motion ought not to prevail; and we deny it accordingly.

The counsel for the defendant has contended that as the return now stands it does not follow necessarily that possession was not delivered on the 13th of *July* 1818; because the officer in his return dated *Oct.* 24, 1818, only says, "by virtue of this precept I have delivered," &c.—not saying *when*. We cannot admit this construction. The act must be considered as done on the day stated at the head of his return. It has also been urged that, laying the return out of the case, there was an *entry en pais* on the 13th of *July*; and that such an entry was sufficient. On looking carefully into the proof, it does not establish any such fact; it is mere opinion or hearsay. Besides, the answer of the defendant alleges nothing of this kind; it relies merely on the seisin and possession delivered by *Howard*, by virtue of a writ of *habere facias*. These circumstances, therefore, can have no effect in the decision of the cause.

The only question remaining to be considered is, whether a sufficient sum was tendered by the plaintiff to entitle him to

maintain this bill; and under this head three points have been presented.

1. Was the equity of redemption capable of division so that the plaintiff could legally purchase a moiety of it?

2. If so, could he redeem the premises by paying or tendering a moiety only of the original debt and interest?

3. If so, has he tendered a moiety of such debt and interest?

In considering these points, we shall change their order. As to the third, we would observe that a question arose at the hearing, whether the sum tendered was a moiety of the original debt and interest due at the time of the tender; to answer which question, it became necessary that an account of rents, profits, and expenses, since the entry of the mortgagees, should be taken. This has been done, and it is now ascertained that the sum tendered, added to the balance of rents and profits received by *Paul*, since possession under the judgment was taken, was sufficient; being more than a moiety of the original debt and interest. This disposes of the third point.

As to the first point, it is of importance to attend to dates. It appears by the deeds in the case that on *Feb.* 22, 1817, *Emerson* was the owner of all the equity of redemption, and of a moiety of the premises as mortgagee; or rather as assignee of one of the mortgagees. Now, if this union of titles in *Emerson*, as to a moiety, operated as an extinguishment of the mortgage in respect to such moiety and a merger of the equity in the legal title, as is contended by the counsel, and will be examined by us under the second point, then it follows that when *Emerson*, on the 26th of *July* 1817, conveyed to *Freeman* what he called one half of the equity of redemption, he in fact conveyed all the right that he had and that was then in existence. On this principle, the objection disappears, and leaves only one question or point more; being the second point before mentioned, viz.—could the plaintiff redeem the premises and be entitled to a decree of restoration by tendering only a moiety of the debt and interest? This resolves itself into the question, whether the union of titles in *Emerson*, of which we have before spoken, did, as to a moiety, extinguish the mortgage, and of course, leave only one half the original debt and interest in legal existence. If so, the bill must be sustained

and a decree passed in favor of the plaintiff,—if not, it must be dismissed.

On this head we have examined the places referred to by the counsel for the plaintiff in *Littleton* and *Coke*, and the cases in the *New-York* and *Massachusetts* reports. The former relate to extinguishment of rent as to all, or to a part, in certain cases ; the latter refer to cases of extinguishment or suspension of debts by the appointment of the debtor as executor or administrator. The cases from 2 *Ves.* 264, 3 *Ves.* 339, and 15 *Ves.* 173, seem to establish or recognize the general principle that the union of the legal and equitable estates produce a merger of the equitable, unless the contrary appears to have been the intention on the part of him in whom the two interests are united. In the case from 8 *Johns.* 168, cited by the defendant's counsel, there was express proof, that the mortgage was kept on foot by way of security. But he principally relies on the case of *Forbes v. Moffatt* 18 *Ves.* 385, as containing and establishing principles that will settle this cause in his favor. This case was also cited by the counsel for the plaintiff. The facts were, *John Moffatt* held a mortgage of certain estates to secure the payment of 13,000*l.* Afterwards the mortgagor died ; having by his will devised all his property real and personal to the said *John Moffatt* the mortgagee ; and the question was, whether the mortgage was extinguished or sunk in the devise. Sir *William Grant*, the master of the rolls, in delivering his opinion, lays down certain principles, regulating in all questions of such a nature. He observes—" It is very " clear that a person becoming entitled to an estate subject to a " charge for his own benefit, may, if he chooses, at once take the " estate, and keep up the charge. The question is upon the " intention, actual or presumed, of the person in whom the " interests are united. In most instances it is, with reference " to the party himself, of no sort of use to have a charge on his " own estate ; and where that is the case, it will be held to sink, " unless something shall have been done by him to keep it on foot. " The owner of a charge is not, as a condition of keeping it up, " called upon to repudiate the estate. The election he has to " make is not, whether he will take the estate or the charge ; " but whether, taking the estate, he means the charge to sink

" in it, or to continue distinct from it." Where no intention is expressed by words or actions, on the part of the mortgagee, as to the manner in which he holds the estate after acquiring the whole title, recourse is to be had to presumptive intention. On this point the master of the rolls proceeds and says,—" With " regard to presumptive intention, it was evidently most advan- " tageous for *John Moffatt* that this mortgage should be kept on " foot; for otherwise, he would have given priority to the other " mortgage and all the debts of his brother, (the mortgagor.) " The reasonable presumption, therefore, is that he would choose " to keep the mortgage on foot. When no intention is expressed, " or the party is incapable of expressing any, I apprehend the " Court considers what is most advantageous to him. Upon that " principle it was holden in the case of *Thomas v. Kemish*, that " the charge should not sink; as that was for the advantage of " the infant." He further observes,—" Upon looking into all the " cases in which charges have been held to merge, I find nothing " which shows that it was not perfectly indifferent to the party, " in whom the interests had united, whether the charge should or " should not subsist; and in that case, I have already said it sinks." In the above case of *Forbes v. Moffatt* it was contended that as the whole estate was devised to *John Moffatt*, the mortgagee, the whole charge or mortgage was sunk. In the case before us as *Paul* purchased the equity of redemption as to a moiety only, it is not contended that more than a moiety of the mortgage is extinguished or charge sunk. Let us now apply the principles we have been considering, to the facts in the case before us, and see if there are any circumstances shewing an express intention on the part of *Paul* as to the continuance or merger of the moiety of of the mortgage. We have none of his language or declarations on the subject; and the only acts on his part, in relation to the mortgage, are the recovery of judgment thereon in the year 1816, by him and *Lunt*, and receipt of seisin and possession in *October* 1818,—and both these events took place before *Paul* had acquired any interest whatever in the equity of redemption. This interest he purchased in *May* 1819. Of course neither of those acts can explain the intentions of *Paul*, in a transaction

which did not occur till many months afterwards. As to *Paul's* refusal of the money tendered, accompanied by his reasons for the refusal, it certainly does not furnish any evidence of intention as to the point under consideration. He claimed the property as his own absolutely ; and denied all right on the part of *Freeman.* Such conduct is perfectly consistent with any good title in him, from whatever source derived. There being then, no proof of intention by words or acts on the part of *Paul*, the next inquiry is whether the case furnishes any grounds of presumptive intention. The answer is simple and plain. No facts are disclosed, shewing that the continuance of the mortgage or charge, as to the moiety owned by *Paul*, has been, since he became the owner of it, or ever can be, of any advantage to him. We hear of no intermediate incumbrances whatever, and have no grounds presented to our view on which we can perceive any possible advantage in holding the moiety under the mortgage, when he owned the whole title and estate therein. In the language of Sir *William Grant*, we find nothing which shows that it was not, and is not, perfectly indifferent to *Paul* whether the charge should or should not subsist ; and in that case it sinks.

The result is that there must be a decree for the plaintiff.

BERRY & AL. *plaintiffs in error, vs.* CARLE.

Rivers and streams, above the flow of the tide, if they have been long used for the passage of boats, rafts, and timber, are public highways, and, like other highways, are to be kept open, and free from obstruction.

If the property of one person happen accidentally to lodge on the land of another, or in waters of which he has the control as his private property, the latter, in removing it from his premises, is bound to do it with as little injury as possible.

UPON a writ of error to the Court of Common Pleas, the case appeared to be thus:—

The action was trespass, brought by *Carle*, the defendant in error, against *Berry & al.* before a Justice of the peace, for taking and carrying away ten of his mill-logs. At the trial in the

the Court of Common Pleas, into which it came by appeal, before *Whitman* C. J. the original plaintiff proved that he and others, among whom was one *Tucker*, were owners of certain saw-mills on a certain fall on *Saco* river;—that the plaintiff's mill was on one side, and *Tucker's* mill towards the other side of the river;—that the owners of the mills had their respective parcels of logs above the mills secured in booms, for the purpose of being sawed at the mills;—that occasionally logs would escape from these booms, and lodge on the common dam, or among the drift wood above the dam;—that the original defendants, now plaintiffs in error, were employed in *Tucker's* mill as his servants;—that on the day alleged in the writ, being Sunday, a quantity of logs and drift wood, covering nearly three quarters of an acre, having accumulated above the dam, and that being the only day in the week when the mills were all stopped, and the water thereby raised so to enable them to turn over the drift stuff with convenience, the defendants turned it over the dam, with two of the logs in question; which being thus carried below the mills, were of less value to the plaintiff.

The original defendants proved that *Tucker's* mill was frequently injured, and its operations impeded, by the accumulation of drift stuff which floated into the floom;—that in several previous instances they had turned such stuff and drift logs over the dam, without notifying the other owners of mills; and that a similar practice had obtained at some of the mills on the other falls on the river. But this did not appear to have been the uniform usage at the mills in question. In some instances either notice had been given by an owner about to clear away the stuff, to the other proprietors, to secure their logs; or they had been detained for their owners, on such occasions;—and at the time stated in the writ the owners, had they been notified in season, could have secured their logs with very little trouble.

There was other evidence tending to prove that at that time there was no very great urgency for turning away the drift stuff, none being then in *Tucker's* floom;—that the plaintiff and other owners of the mills were near at hand, and might have been notified with very little trouble;—and that when the defendants had already made some progress in that work, the plaintiff requested

them to desist, which they refused. It also appeared that a considerable number of the logs thus turned down the river belonged to persons owning mills below, of whom *Tucker* also was one.

Upon this evidence the original defendants requested the Judge to instruct the jury that if *Tucker's* mill was injured by the accumulation of the drift stuff, they had a right to turn it over the dam, without notice to the other owners of mills on the same falls. But this the Judge declined; and instructed the jury that if they should find that the drift stuff and logs did impede *Tucker's* mill, yet the defendants were not justified in turning the plaintiffs logs over the dam, unless they should find it unavoidably necessary so to do, in order to free the mill;—that if with but little or no inconvenience they could have notified the plaintiff to take care of his logs, or could with the same facility have saved them for him, they were bound so to have done;—that the plaintiff apparently was not in fault on account of the situation of the logs, *that* seeming to be a casualty to which all owners of such property were liable;—and that though if the fault were the plaintiff 's, the defendants might not be bound to exercise the same degree of care for the safety of his property; yet if no negligence was imputable to him, the case was merely that of one man's property accidentally intermingled with another's to his damage, in which case the party injured would not be justified in doing more damage to the property of his neighbor than was necessary to extricate or disembarrass his own. To this opinion the defendants filed exceptions, the verdict and judgment being rendered against them.

Shepley, for the plaintiffs in error, maintained the following points.

1. The river, though not navigable from the sea, is yet a public highway, by immemorial usage, common to all the citizens for the conveyance of their goods and lumber, without obstruction. 3 *Com. Dig. tit. Chimin A.* 1. *B.* 1. And even an uninterrupted usage of twenty years, is held to be evidence of this right. *Shaw v. Crawford* 10 *Johns.* 236. *Perley v. Chandler* 6 *Mass.* 454.

2. The logs and drift wood, accumulated against the mill, were a nuisance. 4 *Bl. Com.* 167. 3 *Bl. Com.* 216, 218. *Weld v. Hamley* 7 *East.* 195. The existence of the mills and dams make no difference, since these are lawful by common law, as recognized by the statute regulating mills, and from a legal modification of the public right to the use of the river. Even booms cannot be erected without leave of the legislature; and the grant of such leave shews that they would otherwise be nuisances. The public right, moreover, is the right of conveyance *per transitum*, not of deposit.

3. Being thus unlawfully deposited on the defendant's dam, and nuisances, they might well be abated, and that promptly, by the party injured. 3 *Bl. Com.* 5. *Arundel v. McCulloch* 10 *Mass.* 70. *Hodges v. Raymond* 9 *Mass.* 316. *Wales v. Stetson* 8 *Mass.* 143. *Com. Dig. tit. Action on the case for nuisance, D.* 4.

4. And this, too, without notice or request, and in the way most convenient to himself, without any reference to the convenience of the owner. If the law were otherwise, any one may obstruct the rivers at his pleasure; and to oblige persons, thus injured, to take care of the property of the wrong doer, is to impose on them a burden without remuneration. 5 *Rep.* 101, *a. James v. Hayward Cro. Car.* 133. *Lodie v. Arnold* 1 *Salk.* 453.

Burleigh, for the defendant in error, contended that the case disclosed sufficient evidence of a usage to give reasonable notice to the owners of logs before turning them over the dam; and that by such usage the defendants were bound. If not, yet to require this of the defendants would be nothing more than a reasonable application of the paramount rule of doing as they would that others should do in the like case. At most, the case was like that of the accidental escape of one's beast into another's close, or the breaking of his carriage on the highway; where no law can be found to justify the unnecessary injury or destruction of the property, by the party incommoded by it. *Bac. Abr. trespass E. Cro. Car.* 228. 2 *Roll. Abr.* 567. 11 *East* 568.

If it were a nuisance, yet the right to abate it instantly, and without notice, applies only to nuisances *wilfully* erected, and not to accidental occurrences, like the present.

But as the dam belonged as well to the original plaintiff as to the defendants, the logs were lawfully lodged there, at least so far as the defendants were concerned; and any removal by *them* was a trespass.

The cause being continued for advisement, the opinion of the Court was delivered at the ensuing *August* term in *Oxford*, by

WESTON J. It is assumed in argument, by the counsel for the plaintiffs in error, that the *Saco* river, at the place where the logs of the defendant in error were found, is a public highway; and that, although he had a right to avail himself of that way, as a passage for his logs, yet he had no right to suffer them to remain stationary in the river; and that, being in that condition, and thus becoming a nuisance, the plaintiffs in error were justified in propelling them over the dam and along the stream; which was the injury complained of by the original plaintiff.

By the common law rivers, as far as the tide ebbs and flows, are public and open for the use and accommodation of all subjects or citizens, and any obstruction erected or continued therein is a common nuisance; and may be abated as such. So rivers and streams, above where the tide ebbs and flows, although the land over which they pass belongs to the owners of the adjoining banks, yet if they have been long used for the passage of boats, rafts, or timber, although they have not the character of public rivers, within the meaning of the common law, yet they thus become public highways, and, like other highways, are to be kept open and free from obstruction. *Sir Matthew Hale, de jure maris*, in *Hargrave's law tracts*, 5, 8, 9. 3 *Caines* 307. 10 *Johns* 236.

In 4 *Burr.* 2164, *Yates* J. says "The cited cases prove this distinction, that navigable rivers or arms of the sea belong to the "crown, and not, like private rivers, to the land owners on each "side, and therefore the *presumption* lies the *contrary* way in the "one case, from what it does in the other." And he cited with approbation a case from Sir *John Davy's* reports, from which it appears that by the term navigable river is intended a river, where the tide ebbs and flows.

In the case of *Dunbar v. Vinal*, in the Supreme Court of *Massachusetts* in 1801, it was decided "that the *navigable waters* of the "country were a common privilege for passing upon them, and "that the plaintiff had no right to interrupt it by a dam." But in the case of *Spring v. Chase & al.* it was in 1799, decided by the same Court to be otherwise, where the party owns the adjoining land, and no tide ebbs and flows. In that case the plaintiff, being the owner of the adjoining lands, erected a bridge over *Saco* river above, but near the great falls and above the tide waters. The defendants threw down the bridge as a nuisance, for which they were called upon to answer in trespass. The plaintiff had judgment because, in the opinion of the Court, there were not navigable waters, where the bridge was built; although the river was there convenient for boats and rafts, and for many miles above. These cases are not reported at large, but are briefly stated in 2 *Dane's Abridgement* 696. Notwithstanding the *Saco*, above the tide waters, may not be open to the public, as a highway of common right, yet by long usage as such, it may acquire this character.

In the case before us, it is not stated as a fact that the *Saco* river is, at the place where the injury complained of was done, a public highway. It is above where the tide ebbs and flows; and it appears that it is obstructed by a dam quite across the river. We must be governed by the facts, as they appear in the exceptions; nor can we assume any other, except such as we are judicially bound to regard. The facts are imperfectly exhibited if the river has, in the place in question, by long usage, the attributes of a public highway, and the ground taken by the counsel for the plaintiffs in error is therefore insufficient to entitle them to a reversal of the judgment.

But if the *Saco* is at that place to be deemed a public highway, it is by no means clear that the plaintiffs in error, under the circumstances of this case, had a right to treat the original plaintiff's logs, in the manner they have done. *Tucker*, one of the plaintiffs in error justifies, and the others under him, not because the original plaintiff's logs were found in the river, but because they were stationary there to his annoyance. They were stationary, because arrested in their progress by an obstruction placed there,

by the concurrence and for the convenience of both the defendant in error and *Tucker*. If they happened to lodge on *Tucker's* land, or in waters of which he had the control, as his private property, they could be removed only with as little injury as possible, and the jury found, under the direction of the judge, that they might have been saved to the original plaintiff with little inconvenience to the original defendants.

The exceptions are overruled, and the judgment of the Common Pleas affirmed, with costs for the defendant in error.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE COUNTY OF

CUMBERLAND.

MAY TERM,

1825.

WILLIAMS & AL. *vs.* GILMAN.

The usages adopted by the individuals employed in any particular course of business, become as to them, the rules by which their contracts relative to that business are to be construed.

A usage among printers and booksellers, that a printer, contracting to print for a bookseller a certain number of copies of any work, is not at liberty to print from the same types while standing, an *extra* number for his own disposal, is not an unreasonable usage, nor in restraint of trade.

Where a printer, having contracted to print for his employer a thousand copies of a book, and no more, printed from the same types, while set up at the expense of his employer, five hundred other copies for his own disposal, he was held liable to refund to his employer one third part of the expense of setting up the types, no actual damage having been proved.

Where there has been evidence on both sides, which the jury have considered, *quære* whether the Court will set aside the verdict as being against the weight of evidence.

THIS was an action of trespass on the case, brought by the plaintiffs, who were booksellers in *Boston*, against the defendant, a printer in *Hallowell*, in which they alleged that they contracted with and paid the defendant for the printing *an edition* of Taylor's Holy Living, to consist of one thousand copies *and no more*; the *whole* of which edition was to be delivered to the plaintiffs; but that the defendant, in violation of good faith, printed fifteen hundred copies of the work, subducting five hundred copies thereof,

and disposing of them to his own use, thereby overstocking the market, enabling himself to undersell the plaintiffs, and depriving them of the benefit of the contract.

At the trial which was upon the general issue, before *Weston* J. the plaintiffs produced several letters of the defendant which proved the contract to print an edition of a thousand copies of the work; and also proved that they had paid the defendant for setting the types and for all other charges relative to the contract;—and for proof of an engagement on the part of the defendant to print no more than the stipulated number, they relied on the usage among printers and booksellers.

To establish this usage many depositions were read in which printers and booksellers in this and the neighboring states testified to that point;—some of them stating that it was a general usage and considered a governing principle among them, that when one contracted to print an edition of any work, consisting of a certain number of copies, he was not at liberty to print any more from the same types on his private account;—that a person learning the trade in one State would of course become acquainted with the usage in that and the neighboring States;—that the intercourse between *Boston* and *Hallowell* was close and frequent;—and that the fact of five hundred extra copies being in existence, would injure the sale of the thousand copies. There was some testimony tending to shew that this usage did not apply to school-books. The testimony of some other deponents, resident in *Maine*, appeared to negative the existence of any such usage in *Hallowell*.

It further appeared that the defendant had sold two hundred and fifty of his extra copies;—that two thirds of the plaintiffs' edition were gone from their store before the trial of this cause;—and that five years was a reasonable time for the sale in *Boston* of a thousand copies of this work. There was no proof of actual damage to the plaintiffs in the sale of their books from any act of the defendant; and it was proved that while the work was in sheets one of the plaintiffs inquired of a witness if there had been any extra copies printed; and being told that there were five hundred, he made no objection.

Upon this evidence the Judge instructed the jury that if it was proved to their satisfaction that by the usage among printers and

booksellers it was considered a part of the contract, whether stipulated expressly or not, that a printer, undertaking to print any number of copies of a book, the copy right whereof is not secured by law, is not at liberty without the assent of his employer, to print, on his own account, any extra copies from the types while standing, set up at the expense of his employer, the contract to this effect set forth in the declaration might be considered as proved.—That in this case, if they found the usage proved, the contract being to print one thousand copies of *Taylor's* Holy Living in sheets for the plaintiffs, and it appearing that the defendant had printed from the same types, while standing, five hundred extra copies for himself, the proper measure of damages would be one third of the expense of setting up the types:—That it was a legal usage, not in restraint of trade, nor of the mechanic arts, nor was it unreasonable; but that it was necessary that the usage should be proved to be general among printers and booksellers, and well known in *Hallowell*, where the work was done, as well as in *Boston*; in which latter place the contract must be considered as much made as in the former.

The jury hereupon found a verdict of fifty dollars for the plaintiffs; and the question as to the correctness of the Judge's instructions was reserved for the opinion of the whole Court. The defendant also filed a motion at common law to set aside the verdict as being manifestly against the weight of evidence in the cause.

Emery and *Orr* for the defendant.

The defendant having performed all which he expressly stipulated to do, the claim of the plaintiffs to any further duty is founded on some supposed usage or custom governing all contracts of this description.

But no such usage is found in the case. The deponents in *Maine* expressly deny its existence in *Hallowell* where the defendant resided; and its universality being thus disproved, it is as nothing. If the plaintiff contracted with reference to places where such usage prevailed, the defendant may well be supposed to refer to a place where it did not. *Baker v. Wheaton* 5 *Mass.* 509. *Smith v. Smith* 2 *Johns.* 235. 3 *Caines* 154.

If there be such a universal usage, it is bad ;—because it has not existed *time out of mind* ; the commencement of printing in this State being within the memory of the present generation, and within sixty years. It is also bad for uncertainty ; for it is proved not to extend to school-books ; and yet nothing can be less certain than this term, whether regard is had to the kind of the school or place of instruction, or to the almost endless variety and unceasing succession of books used in them all. *Selby v. Robinson* 2 *D. & E.* 758.

It is also bad as being in restraint of trade and the mechanic arts, and as being unreasonable, and tending to monopoly. It is true the defendant might, for a valuable consideration, have entered into a contract not to print more than a stipulated number. But the plaintiffs in this case seek to restrain all printers, in all cases ; against the right which every mechanic possesses, at common law, to exercise his trade to the extent of his ability. He may renounce this right, for a fair equivalent ; but the law does not renounce it for him. Besides, the prices of books are already enormous, in consequence of combinations known to exist among booksellers, by means of which they are enabled, in practice, to create monopolies almost at their pleasure, and to exclude all others from a fair and open competition with them in the market. And to countenance the usage now contended for, is but to encourage and legalize such impositions. *Reimsdyck v. Kane* 1 *Gal.* 371. *Dav.* 87, *case of Tanistry.*

But if the plaintiffs could have availed themselves of such a custom, and it were part of this contract, that right appears to have been waived by one of them, he having silently assented to the act of the defendant, of which they now complain.

At all events, the rule of damages, as stated to the jury, was erroneous. They should have been instructed to give the plaintiffs no greater sum in damages than they proved themselves to have sustained ; which, in this case, were merely nominal ; or, at most, to award only the profits actually made by the defendant. *Miller v. Taylor* 4 *Burr.* 2319.

And they contended that the verdict was manifestly against the weight of evidence in the cause.

Greenleaf, for the plaintiffs.

The usages adopted by printers and booksellers in the course of their business, become, as to them, the rules by which their contracts are to be construed. *Homer v. Dorr* 10 *Mass.* 26. *Smith v. Whiting* 12 *Masss.* 6. *Lincoln & Kennebec Bank v. Page* 9 *Mass.* 155. *Weld v. Gorham* 10 *Mass.* 366.

The contract in this case was not local, it being made by letter, and to be performed as well in *Boston* as in *Hallowell* ;—and it is to be governed by the general usage of the trade, which is personal, and not local. And it is a reasonable usage, its effect being to bring the parties into the market on a footing of perfect equality. For if the setting up of the types is to be *wholly* charged to the plaintiffs, the defendant can retail his books, at a profit, for less than the *cost* of the plaintiffs' books. The existence of the usage, and its generality, are found by the jury.

Where there is evidence on *both sides*, the Court will not set aside a verdict as being against the weight of evidence ; even though the Judges might, if on the jury, have come to a different result. *Anon.* 1 *Wils.* 22. *Swain v. Hall* 3 *Wils.* 45. *Smith v. Parkhurst* 2 *Stra.* 1105. *Ashley v. Ashley* 2 *Stra.* 1142. *Smith v. Higgins & al.* 2 *Stra.* 1142. *De Fonclear v. Shottenkirk* 3 *Johns.* 170. *Ward v. Center* 3 *Johns.* 271. *Pierce v. Butler* 14 *Mass.* 310. *Cowperthwaite v. Jones & al.* 2 *Dal.* 55. *Walker v. Smith* 4 *Dal.* 389. *Pike v. Evans* 15 *Johns.* 210.

Nor will the Court set aside a verdict for the plaintiff, where, from the amount of the recovery, he is liable to pay costs to the defendant ; as is the case here, the plaintiffs having appealed from the Court below, and the verdict in this Court being less than a hundred dollars. *Hurst v. Burrell* 5 *Johns.* 137.

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

The motion in this case for a new trial is founded on an alleged misdirection of the Judge to the jury ; and because the verdict is supposed to be greatly against the weight of evidence.

The Judge instructed the jury, that if there was such a custom or usage proved as was contended by the plaintiff, and that it was general among printers and booksellers, and well known in *Hallow-*

ell as well as *Boston* ; then the contract might be considered as proved. It certainly is a very plain principle of law, that contracts should be construed according to the intention of the parties, as far as that can be done. Hence, a contract made and to be executed in *New-York*, must be construed according to the laws of that State ; because the parties are presumed to have been acquainted with those laws and to have made their contract with reference to them ; and our Courts, in deciding on that contract, would construe it in the same manner as the Courts of the State of *New-York*. So if in a particular branch or kind of business, certain usages exist which are well known to those connected with it, those who make contracts in relation to such transactions, are always presumed to have made the contract in reference to such usages; and of course, these are deemed to form a part of the contract, as much as though actually incorporated into it, or expressly referred to. Numerous cases have established this principle;—and it is not denied by the counsel, as applicable to the law of insurance and the transactions between banks and those in the habit of doing business with or at such banks. But the counsel for the defendant have treated this usage among printers and booksellers as a custom ; such as we find described in our law books ; and have contended that to be valid it must have existed for time immemorial, uninterrupted, definite, reasonable, &c. We apprehend that the law of local customs is not applicable in this case. The usage relied on has nothing local in its nature ; it relates to a certain class of people spread through the country, and to the peculiar business in which they are employed. And we cannot distinguish it from those other usages we have mentioned. Usages are to be found among numerous classes of people in relation to their particular trades ; and they are always to be attended to in deciding questions touching their concerns. We therefore can perceive nothing incorrect in the instructions given by the Judge to the jury on this point.

But it is said such a custom or usage is in restraint of trade. The counsel has answered this objection himself; for he admits that in many cases the printer expressly agrees not to print any surplus copies, and that such an agreement is lawful. Now, if an

express agreement of this kind is not unlawful, as being in restraint of trade, why should the agreement be unlawful if made by reference to the usage? There cannot be any legal distinction between the cases. The instructions on this head also are approved; and the verdict cannot be impeached on account of the opinion of the Judge touching the rule of damages.

The next inquiry is whether the verdict is greatly against the weight of evidence. There was a great body of proof laid before the jury as to the nature, extent, generality and knowledge among all printers and booksellers of the usage in question; and though some of the defendant's witnesses, or most of them, testify their ignorance of the usage at *Hallowell*; yet they also say they have known only a few instances of surplus copies of small works. On the other hand numerous witnesses have testified that the usage is general in the country, and perfectly well known among all concerned; and it appears that the defendant for many years worked in a printing office in *Exeter*, in *New-Hampshire*, before he settled in *Hallowell*. All this evidence the jury have examined, and have by their verdict decided that the usage was known at *Hallowell*, as well as *Boston*. On the whole, we do not feel at liberty to disturb the verdict for any of the reasons which have been urged.

Judgment on the verdict.

Hasty & ux. *vs.* Johnson.

Under *Stat.* 1783, *ch.* 32, an administrator is not required to give a new bond, on being licensed to make sale of the real estate of his intestate, except in those cases where he is authorized to sell the *whole* of such real estate, lest by a sale of part the residue would be injured.

An administrator selling land by license, under *Stat.* 1821, *ch.* 60, *sec.* 29, cannot convey any other or greater estate than the intestate had in the land.

A deed of a mill, dam, and falls, "*and a right to the road and landing to haul logs as has been customary,*" conveys only an easement in the road and landing.

This was a writ of entry dated *Feb.* 18, 1823, upon the seisin of the demandants within thirty years, for possession of one fifth

part of two pieces of land, containing 58 acres more or less, formerly the estate of *George Johnson*, who was father of the *feme* demandant, and also of the tenant ;—and it was tried before *Weston* J. upon the general issue.

In the defence it was admitted or proved that the tenant was duly appointed administrator of his father ;—that the estate was represented insolvent ;—and that the administrator, by the Court of Common Pleas in *Cumberland*, at *June* term 1804, was duly licensed, for payment of the debts of the deceased and incidental charges, "to sell and convey the mills, and *so much* of the residue "of the house and land belonging to the estate of said deceased, "as shall be necessary to satisfy the said debts and incidental "charges ;—the said administrator taking the oath, and posting "up notifications, as the law in such cases requires." The Court did not direct notice of the sale to be published in any newspaper. The oath required by law was duly administered, but no bond was given to the Judge of Probate, except the general administration bond.

The tenant produced a copy of the *Portland Gazette* of *August* 6, 1804, notifying the sale under the license ; and a witness testified that he was a subscriber to that paper at that time, and recollected reading the advertisement, and seeing a similar one posted in a store in *Windham*.

In pursuance of *such* notice a sale was fairly made *August* 23, 1804, to one *Winship*, he being the highest bidder, of a tract of twenty four acres of land, being *part* of the estate of the deceased, to hold *in common and undivided*. *Winship* testified that he paid nothing for the land, but that he purchased in behalf of the tenant ; who, on the following day, gave him a deed of this tract, in his capacity of administrator, with the covenants usual in such cases ; and on the same day took back a reconveyance from *Winship* to himself.

As to the second tract, the tenant read a deed dated *Nov.* 26, 1802, by which his father conveyed to him in fee "all his right, "title and interest in and to the falls at Horse-Beef, so called, "together with a right in the dam and booms, and *a right to the* "*road and landing to haul logs and boards, as has been customary.*" This second tract was claimed as part of the landing referred to in the deed.

It was proved that from eight to fifteen years ago this landing lay common, not inclosed by a fence ; and that boards had often been laid upon it by the mill-owners at Horse-Beef falls in *Gorham* ;—that for about seven years, or more, it had been fenced and tilled ;—that formerly there were several saws at those falls, but for several years past there had been but one there ;—that the land was not now used or needed as a landing place ;—and one witness testified that he had known it more than forty years, and that it never was considered appurtenant to any of the mills.

Upon this evidence the Judge instructed the jury that the seisin of the ancestor, and the descent of one fifth part of his estate to the wife of *Hasty* the demandant, being proved or admitted, the demandants were entitled to recover ; unless the tenant shewed title in himself, either from the ancestor in his life time, or legally acquired since his decease ;—that as to the first tract, he had not made out a sufficient title under the license to sell as administrator ;—and that as to the second tract, if it ever was a landing attached to the mill, the tenant only had an easement therein, for the disturbance of which he might have a remedy at law ; but that proof of such easement, if it was made out, did not maintain the issue on his part.

The jury thereupon returned a verdict for the demandants ; which was taken subject to the opinion of the whole Court upon the correctness of those instructions.

Hopkins, for the tenant, contended—that although the evidence did not shew a full compliance with every requisition of the statute respecting giving notice by administrators, previous to the sale of real estate ; yet there was sufficient ground for the jury to presume, after the lapse of nineteen years, that due notice had been given ; and the evidence to this point ought to have been weighed by the jury, and not by the Court. *Brown v. Wood* 17 *Mass.* 72. *Pejepscot Proprietors v. Ransom* 14 *Mass.* 145. *Blossom v. Cannon ib.* 178. 1 *Phil. Evid.* 120—126. 1 *Burr.* 434. *Cowp.* 109. 2 *H. Bl.* 297. *England v. Slade* 4 *D. & E.* 683. 10 *Johns.* 377. 3 *Mass.* 399.

There is no case shewing that a conveyance by an administrator to hold *in common* is *therefore bad* ; and having proceeded

in this instance fairly, under a license, his doings ought, if possible, to be supported. But the deed of the mill will be found, on examination, to convey upwards of thirty acres, and the administrator's deed conveys in truth just the residue of the demanded premises, though it is not technically expressed by the scrivener. And if not so, yet the heirs cannot impeach it ;—for the sale was made *bona fide*, under authority of law, for the payment of debts, and the proceeds honestly accounted for ;--and the heirs having full knowledge of the facts, and acquiesced nearly twenty years, must be understood to have assented. *Coleman v. Anderson* 10 *Mass.* 105. *Perkins v. Fairfield* 11 *Mass.* 227. 1 *Starkie* 109.

The second tract passed under the grant of the "*privilege*" of the mill. Without such privilege or landing place, the mill itself would be useless ; and as at the time of the grant it was so used, and was visibly appurtenant to the mill, it must be supposed to have been in contemplation by the parties. All the words in a deed must be satisfied, if possible ; and yet upon any other construction, *this* word is senseless. *Shep. Touchst.* 83, 84.

Adams, for the demandants, insisted on the neglect of the administrator to give notice as by law required previous to the sale of real estate, which, he contended, must be proved even *after* the lapse of twenty years. *Gray v. Gardiner* 3 *Mass.* 399.

He had neglected to give bond previous to such sale ; which the statute seems to contemplate, and usage always requires. *Knox v. Jenks* 7 *Mass.* 488. *Wellman v. Lawrence* 15 *Mass.* 326. *Nelson, Judge &c. v. Jaques* 1 *Greenl.* 144.

The deeds, being of the same date, form but one conveyance, which is from the administrator to himself. Such a conveyance is void, as against the policy of the law, which does not afford its encouragement to fraud or abuse of trust. If it be not so, a door would be opened to unlimited corruption.

The sale at auction is also void, being of a tenancy in common, of which the intestate was never seised. No administrator has authority thus to create new tenancies, at his pleasure.

The deed of the smaller parcel conveys only an easement or right of way, for the use of the mill ; and this having ceased to exist, the easement is gone also.

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

In this action two pieces of land are demanded; and the tenant claims to hold them under different titles. The first under a title derived from himself as administrator of *George Johnson* his father, and father also of the wife of *William Hasty*. The second piece under a conveyance from the intestate himself. The original title of *George Johnson* is not disputed; and therefore, as one of the demandants is his daughter and one of his heirs, the demandants are entitled to recover, unless the title to both the tracts demanded has been legally conveyed to the tenant. This action was commenced *Feb.* 18, 1823. In *June* 1804, the tenant was duly licensed to sell so much of the real estate of said *George Johnson* as would raise a sum sufficient to pay the amount of the intestate's debts; which amount is not particularly stated in the report. A sale of the first tract was made on the 23d of *August* 1804, to *Seth Winship*; and on the 24th, a deed thereof was given to him by said administrator; and on the same day said *Winship* conveyed the same to the tenant in fee by his deed of that date; which deeds were duly acknowledged and recorded. The deed purports to convey to said *Winship* twenty-four acres in common and undivided with the residue of the tract of which it is a part. The first objection to this deed is that the administrator, *Johnson*, gave no bond to the Judge of Probate prior to the sale. We do not sustain this objection. The first section of the statute of *Massachusetts* 1783, *ch.* 32, under which the sale was licensed, does not require any special bond; though a usage has prevailed to demand and receive one. Such special and additional bond is only required when a sale of the whole estate, or of more than is necessary for the payment of debts, is considered advisable, to prevent the injury to the residue by means of such partial sale, as provided in the second section of the said statute.

The second objection is, that there is no direct proof that legal notice was given of the intended sale. This is apparent from the report; but it is urged by the counsel for the tenant, that the Judge, instead of deciding against the legality of the sale, should have left the evidence of notice, such as it was, to the consideration of the jury, with instructions to them that they might, from

the circumstances actually proved, presume that the notice by law required, was given, after the lapse of nineteen years; and he has cited several cases in support of this position. Most of these have no relation to conveyances of the kind in question. *Coleman v. Anderson* was a case of presumption afterthe lapse of more than thirty years. So *Pejepscot Proprietors v. Ransom* was a case where the collector's deed was made in the year 1780. It is true that in the case of *Blossom v. Cannon* the Court said a jury might presume that the collector had been sworn after a lapse of about seventeen years. The cases above cited relate to sales by collectors of taxes; not executors or administrators. In *Gray v. Gardner*, the question arose upon a sale by an administrator, which had been made more than twenty years before the suit; and the jury were permitted to presume that notice of sale &c. was duly given; and though there was much deficiency in the evidence on this point, still, many attending circumstances were noticed by the Court, as calculated to aid and strengthen the presumption. And beyond all this, much reliance was placed on the circumstance that at the time of the sale there was no law in force pointing out the mode of perpetuating the evidence of the transaction. The law on that subject was passed *Feb.* 14, 1789, and by means of it the present tenant might have easily preserved record evidence of the regularity of his proceedings, if they were regular. Considering this circumstance, and also the fact that he himself was the administrator who made the sale, it would seem that there is less room, than in common cases, to indulge presumptions in favor of one who seems to have been very inattentive in the discharge of his duty in this respect. If a man shall not take advantage of his own wrong, it would seem that he who has been negligent in respect to his own duty and interest, has less claims than third persons have upon the Court or the jury for the aid of presumptions in favor of his care and correctness. We are therefore strongly inclined to believe that this objection is fatal, as regards the first tract of land demanded; still we do not mean to give a definite opinion on this point, or to place the decision of the cause as to this tract upon the ground above stated; because we think that on another principle the sale of the twenty four acres is illegal. The deed of the admin-

istrator purports to convey this piece in common with the residue of the tract. The tenant's counsel has argued that from the writ the fact appears otherwise. We do not think so. Besides, the tenant is estopped by his own deed to say that the conveyance was in severalty. We are not aware of any authority which one man has to convert the sole tenancy of another into a tenancy in common except in the case provided for in the 29th *sec.* of the act of 1821, *ch.* 60, or how a tenant in common can convert his estate into a several tenancy, without the consent of his cotenant, or by process of law. A sole owner may do it himself; but the statute under the supposed authority of which the sale in question was made, gives no such power in terms; and the language of it seems evidently to have respect only to a sale of a part by metes and bounds. By way of illustration, it may be observed that when a creditor has an execution against a debtor who owns real estate in common, if he would extend his execution on this estate, he must levy on a part in common. *Baldwin v. Whiting & al.* 13 *Mass.* 57. So if the debtor owns in severalty, the creditor must levy on a part in severalty. So if a creditor would extend his execution on estate of which his debtor was sole seised at the time of his death, he must levy his execution on a part in severalty, and by metes and bounds, unless he should levy on the whole, or the cases should fall within the provisions of said 29th section. We do not perceive that an administrator has any more power than a creditor to change the tenure. The words of the first section above quoted are—" and every executor or administrator, being " so licensed and authorised as aforesaid, shall and may, by virtue " of such authority, make, sign and execute, in due form of law, " deeds and conveyances for *such houses, lands or tenements* as " they shall so sell, which instruments shall make as good a title " to the purchaser, &c." as the testator or intestate had. The above expression " *such houses, lands or tenements*" would not be correct, if a sale in common had been contemplated. The proper language would have been " deeds and conveyances" of the proportion " of such houses, lands and tenements as they shall so sell." In the case *Drinkwater v. Drinkwater* 4 *Mass.* 354, *Parsons* C. J. when speaking of a sale of real estate by an administrator on license, and the effect of such sale says—" And the

" purchaser, by virtue of his deed, may lawfully *enter into the* " *lands sold*; and may count on his entry as a lawful seisin, and " try his title if it is disputed." The defence, therefore, fails as to the first tract. As to the second tract, it is important to notice the terms of the deed from the intestate. By this he conveyed " all his right, title and interest in and to the falls at Horse- " Beef so called; together with a right in the dam and booms; " and a right to the road and landing *to haul logs as has been cus-* " *tomary.*" By the terms of this deed, the conveyance of the falls, dam, and booms is in fee simple. But when speaking of the road and landing, the grantor conveys nothing more than a right to pass over them for the purpose of hauling to and from the mills or falls as had been customary. This is a mere easement—not an estate in fee, or a freehold. The tenant by pleading the general issue, admits himself to be tenant of the freehold, and to claim and defend such an estate. Cases need not be cited to so plain a point. As the deed in question does not convey such an estate, it does not support the defence, or disprove the demandant's title.

But it further appears that this second tract, claimed as part of the landing, has been distinctly known for more than forty years, and the case finds that it never was appurtenant to any of the mills. The deed to the tenant was given in 1804, and it does not appear that any lumber had been laid upon this land by the mill owners, more than fifteen years next before the trial—so that it may be doubtful whether even the easement can be claimed on what is now demanded as the second tract. However, if it can be, the fee of the land covered by the road and composing the landing, on the death of *George Johnson*, descended to his heirs at law, subject to the easement, unless it has become extinguished by *non user* or waiver. If it has not, an action may lie against those who may disturb him in the enjoyment of it.

We cannot sustain the motion for a new trial.

Judgment on the verdict.

MUSSEY *vs.* WHITE & AL.

The preparation of an alphabetical list of voters, previous to the annual meeting of a town for the choice of its officers, is not necessary to the validity of the election; the *Stat.* 1821, *ch.* 115, being in this respect merely directory.

Where the record of a town states that certain persons were *chosen* to a certain officer without saying whether by ballot or otherwise, the presumption of law is that it was in the *legal* mode.

Where the inhabitants of a town, at their annual meeting, voted that their selectmen should also be assessors, but did not elect them such by *ballot*, as the statute requires, and they were sworn into both offices; and afterwards, at an adjournment of the same meeting, they were regularly elected assessors by ballot, and proceeded to discharge the duties of their office as such, but were *not sworn again;*—it was holden that their neglect to be sworn after the *valid* election was a refusal of the office; but that their proceedings might be supported as the doings of selectmen, acting under the statute, in a vacancy of the office of assessors.

If one of the inhabitants of a town absent himself, in order that he may not receive personal notice from the assessors to bring in a list of his taxable estate, where the known usage was to give notice in that method, he cannot afterwards object to the legality of his tax on that account.

The words "*In the name of the State of Maine,*"—and the sentence beginning with the words—"*it being this town's proportion of a tax,*" &c. in the form of the warrant for collecting taxes, in *Stat.* 1821, *ch.* 116, *sec.* 17, are matters of form only, the omission of which does not vitiate the warrant.

It is not necessary to the validity of a warrant for the collection of taxes, that it be *delivered* to the collector during the year for which he and the assessors were elected; it being sufficient if they made and signed it while in office.

THIS was trespass of assault, battery, and false imprisonment, brought against the assessors of the town of *Standish*; who pleaded the general issue, and also justified under due proceedings against the plaintiff for non-payment of his taxes, which was traversed, and issue joined thereon.

At the trial, before *Weston* J. the plaintiff proved his arrest and imprisonment by one *Joseph Bayley*, the collector, under authority of a paper purporting to be a warrant to him, signed by *White* and *Tompson*, the defendants; and *Bayley* appeared to have been duly chosen and sworn as constable and collector of the town of *Standish*, at a meeting holden in *March* 1821, *unless* the want of proof of an alphabetical list of voters having been prepared for such meeting, rendered the same invalid.

The plaintiff also proved his detention in prison till he paid the sum of three hundred and twenty-four dollars and seventy cents.

To support their justification the defendants proved by the town record that they, and *William Hasty, Jun.* were elected as selectmen and assessors of *Standish*, as there stated, at a meeting of the inhabitants thereof holden *March* 22, 1821, but whether elected *by ballot* or not, did not appear. It was objected by the plaintiff that no proof was offered that an alphabetical list of voters was prepared before, or used at, this meeting, but the Judge, for the purposes of this trial, ruled that such proof was not necessary.

The defendants further proved that on the 24th day of *March* 1821, *Tompson* was sworn as *selectman and assessor*; and that on the 26th day of the same month *White* and *Hasty* were also sworn in the same manner;—and that afterwards, at an adjournment of the meeting above mentioned, holden on the 30th day of *April* 1821, *Tompson*, *White* and *Hasty*, were elected assessors by *ballot*, but it did not appear that they were afterwards sworn *as assessors.*

The assessors did not give to the plaintiff any personal notice to render to them any list of his rateable polls or estate; nor did they post up any general notification requiring the inhabitants of *Standish* so to do. But it was proved by the defendants that it was the practice of the assessors of *Standish* to give personal notice to the inhabitants for that purpose; that such was the course they adopted that year;—and that they did give notice to several persons, and *attempted* to notify the plaintiff. And the jury, upon being requested by the Judge to answer to this fact, found that the assessors used due diligence to give notice to the plaintiff, but that he went away and remained absent for the purpose of avoiding it.

The defendants also exhibited a book on which was written at some unknown time, the words "*Valuation* 1821," but it had no other title. It contained a schedule of taxable estates of inhabitants of *Standish*, and among others of the plaintiff, whose real estate was set down at $2171, against which, in a column headed "*faculty*," was put the sum of $130 26. In the same book was what the defendants exhibited as an assessment of taxes against the

inhabitants of *Standish*. It was not so entitled; but the words "*State, county and town tax for the year* 1821" were legibly written on the first page of it. At the end of the book was written "*Standish, August* 27, 1821, *William Tompson, Mark White, Assessors.*

No copy of this valuation was lodged with the town clerk; but it was proved that the assessors had an office in which they transacted their official business, which was generally known to the inhabitants of *Standish*;—that the valuation and assessment were lodged in that office, open to public examination: and that the town clerk kept his papers in the same office, but transacted his business in a store kept in the room below. The jury, being requested by the Judge to settle this fact also, found that the valuation was seasonably lodged in the assessor's office, about the time it was made.

The warrant by which *Bailey* the collector arrested the plaintiff, though dated *August* 27, 1821, was not delivered to him till *October* 9, 1822, the day before the arrest; at which time it was delivered to him by *Tompson*, who was assessor for 1822, though *White* was not. But it was proved that when the assessors delivered the tax bills to the collector, the warrant was duly made out and ready to be delivered; but that by mistake they delivered to him the *commitment* of the bills, as it is termed, being a direction to collect the taxes, instead of the warrant of distress, without discovering the error till the collector informed *Tompson* of it on the day before the arrest. This warrant had but one seal; and it stated that the list following was an assessment on the polls and estates of the persons therein named, amounting to such a sum, contained in twenty eight pages, which they thereby committed to him to collect;—directing him to whom, and at what times to make payment of the monies collected; and to distrain the goods or chattels, and in want thereof the bodies of delinquents;—giving, in substance, the directions given in the statute; but not containing any *formal* command in the *name of the State*, nor referring to any statute, or reciting any prior proceedings, as the foundation of the authority given in the warrant. This warrant, the plaintiff insisted, was not conformable to law; and that the defendants had no right to deliver it to the collector so late as *October* 1822.

It was also proved that the inhabitants of *Standish* had assumed the defence of this suit.

The Judge hereupon directed the jury to find a general verdict for the defendants; reserving for the consideration of the whole Court the questions whether the evidence was competent or sufficient to support the justification, as to the points to which it was applied; and whether what the defendants omitted to prove was essential to their defence.

Emery and *Potter*, for the plaintiff, now took the following exceptions to the proceedings of the defendants, as disclosed by the evidence.

1. It appears that an alphabetical list of persons entitled to vote was not prepared previous to the town meeting for the choice of officers. This document is of vital importance to the order and purity of elections, and the law has recognized its value in these respects, by allowing no person to vote till it is ascertained that his name is on the list. *Stat.* 1821, *ch.* 115, *sec.* 15. *Wheeler v. Russell* 17 *Mass.* 258. *Springfield Bank v. Merrick* 14 *Mass.* 322. *Russell v. De Grand* 15 *Mass.* 35. These authorities shew that it is not in the power of the town to dispense with this necessary preliminary, because it would be against law. Such an agreement would be void.

2. The defendants, in *March*, were chosen selectmen and assessors, but not *by ballot*; after which, in the same month, they were sworn. In *April* they were elected assessors by ballot, but not again sworn. If they acted as assessors under their election in *March*, that was void, not being by written ballot;—if under the choice in *April*, their proceedings are void, they not having been sworn. The law authorizes selectmen to act as assessors only where the town neglects or refuses to choose, or they decline serving. But here the town did not neglect, but actually elected them; and the same individuals being both selectmen and assessors, the capacity in which they acted could only be known by their own declarations, and by this evidence they assumed to act *as assessors*.

3. The assessors did not give notice to the inhabitants to bring in lists of their polls and taxable estates. If the plaintiff was absent

to avoid personal notice, this does not excuse the defendants, who should have done all in their power to make the notice public, by posting it up in public places in the town. Such an apology would not protect an officer neglecting to serve a writ on a trustee ; nor excuse a party bound to tender performance of a duty ; and it ought not to avail the defendants.

4. The valuation and assessment are not entitled as being of polls and estates in *Standish* ; and, for aught appearing on them, may have belonged to any other town. *Portland Bank v. Apthorp* 12 *Mass.* 252. *Thurston v. Little* 3 *Mass.* 429. 10 *Mass.* 105. And the former is illegal, as it includes "*faculty*" as a proper subject of taxation, which is incapable of pecuniary estimation, and is not enumerated in the statute.

5. Nor was any copy of the valuation and assessment lodged in the office of the town clerk or assessors, as the statute requires.

6. The warrant is not in the form prescribed by the statute. It was in the nature of a writ of execution, and ought to recite the authority on which it assumes to invade private property.

7. And it was not delivered to the officer for service till long after the offices of the assessors had expired, and so was no legal authority to him. It is for the interest of the State that the collector should have his warrant of distress delivered with his tax bill ; and any neglect of this duty in the assessors ought not to receive the protection of the law.

Fessenden and *Deblois* for the defendants, replied to the *first* of these objections that the record was conclusive evidence of the legality of the meeting. *Thayer v. Stearns & al.* 1 *Pick.* 109. 14 *Mass.* 320. And if not, yet it was not the duty of these assessors to prepare the list, but of their predecessors in office ; nor are these defendants liable in trespass for any neglects of duty but their own.

To the *second* they answered that it appearing of record that they were *chosen* assessors, the presumption of law is that the choice was legal, till the contrary appears. But if they were not chosen as the law directs, it is no choice ; and if after the election in *April* they were not sworn, it is a refusal of the office ; in either of which cases the statute devolves their duty on the selectmen,

who are "*declared and appointed the assessors.*" *Colman v. Anderson* 10 *Mass.* 105.

As to the *third* objection,—it ought not to avail the plaintiff, because the want of notice was occasioned by his own fault. If not, he might have had the proper remedy, by appeal to the Court of Sessions. *Borden v. Borden* 5 *Mass.* 67. *Doug.* 694. 4 *Cranch* 239.

To the *fourth* they said that the book was sufficiently entitled for all purposes intended by law, since its character and import could not be mistaken. And the sum set in the column under "*faculty*" would be found, on inspection, to be six *per cent.* of the value of the real estate, which is the legal *ratio* of taxation. But if otherwise, yet the defendants are not liable in *trespass. Wells v. Battelle* 11 *Mass.* 477. *Dillingham v. Snow* 5 *Mass.* 547.

The *fifth* objection they considered as settled by the jury. And as to the warrant,—they contended that the *substance* agreeing with the precedent in the statute, it was enough. A strict adherence to form in these summary proceedings is never required. *Cook v. Gibbs* 3 *Mass.* 193. *Wood v. Ross* 11 *Mass.* 271. *Commonwealth v. James* 1 *Pick.* 375.

And to the *last* objection they replied that the warrant being made and signed in due season, it was the property of the collector, who might lawfully take it wherever it could be found ; and delivery by the assessors was wholly unnecessary to give it force. Most of these objections, they observed, were altogether technical ; and it was important to the fiscal affairs of the State, and vitally so to towns, that they should not be suffered to prevail. Besides, the statutory provisions are multifarious, in some respects difficult clearly to comprehend, and devolving on assessors many embarrassing duties ;—and if sureties are with propriety said to be favorites with Courts, much more ought assessors to receive protection, when in the honest endeavor to discharge their duty.

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

Numerous objections have been stated and urged against the competency or sufficiency of the evidence offered and introduced

by the defendants by way of justification of their official conduct; and these objections are relied on as the grounds of the plaintiff's motion for a new trial. The parties and their counsel have considered the cause as one of importance; and as such we listened to the arguments with attention, and have examined most of the authorities which have been adduced, that we might be able to arrive at a conclusion satisfactory to ourselves. The plaintiff considers the cause important to him; as intimately affecting his rights as a citizen, and his pecuniary interests. The defendants' view is also important to them in a pecuniary point of view; and as public officers of their town, and they claim of the Court to view their official acts with all that indulgence which is due to honest intentions and anxious endeavors to perform their duty correctly; although they may in some minute particulars have erred in judgment. Courts cannot grant favors to parties, but must decide their causes on legal principles. But in doing this, they may, and in many instances do, consider statute provisions as only directory. Numerous cases might be stated where the law directs an officer to perform a certain act, and subjects him to a penalty for its omission, without meaning to render all his other acts void. As an instance of this, we may refer to the law which requires town officers to take the oath of office within a certain time after being notified of their choice, under a penalty for neglect;—still, if they take the oath after that time, their acts are not the less valid on that account. *Colman v. Anderson* 10 *Mass.* 105. Waiving, however, further preliminary remarks, we proceed to notice and examine the several objections which have been urged by the plaintiff's counsel.

The *first* is that at the town meeting holden on the 22d of *March* 1822, at which the defendants were elected into office, there was no alphabetical list of voters present, and that no such list had been previously prepared, according to the provisions of the acts of *Massachusetts*, of which the 1st, 14th, 15th, and 17th sections of the statute of this State, *ch.* 115, are a transcript. By those sections, viewed in connection, it appears that it was the duty of the assessors of *Standish*, as well as all other towns, on or before the 20th of *February* annually, to make out a correct alphabetical list of all inhabitants of their respective towns,

qualified to vote in the choice of town officers; and a penalty not exceeding $200 is incurred by selectment or assessors, by neglecting their duty;—and "that no person shall be permitted "to give in his vote or ballot, at any meeting for the choice of "town officers, until the person presiding at such meeting shall "have had opportunity to inquire his name, and shall have ascer- "tained that the same is in the list aforesaid, and shall have had "time to check the same,"—and any person wilfully voting contrary to the above provisions incurs a penalty. The plaintiff contends that all the proceedings of the town meeting on the 22d of *March* 1821, were illegal and void; inasmuch as such alphabetical list had not been seasonably prepared by the assessors, and was not present at the meeting. As none had been made and prepared pursuant to law, of course none could legally be used at the meeting. The defendants' answer to all this is, that the neglect in the above particular was not their neglect; but that of their predecessors, the assessors of 1820; for whose faults and nonfeasances they, the defendants, are not responsible. The question then is, as no list of voters had been prepared by the assessors of 1820, could or could not the inhabitants of *Standish*, legally warned and assembled in town meeting, proceed to the election of town officers, and the transaction of the necessary business of the town? We think that a negative answer to this question would lead to incalculable mischiefs. If the principle contended for be correct, the town can never organize themselves or transact any town business for themselves or for the benefit of the county or State. These evil consequences are all avoided by considering the foregoing regulations as directory to the assessors, who, by their neglect of an assigned duty, have incurred the statute penalty;—and this is the only consequence. The town is not disfranchised, and its government dissolved. The provision in the 15th section seems predicated clearly on the idea that a correct list has been prepared, and is in the meeting, and open to the examination of the presiding officer, so that he can see the names of the voters and check them. And we cannot think it reasonable to give such a construction to that section as to subject a voter in a town meeting in *March* 1821 to a penalty,

because the moderator of the meeting had no list of voters in the meeting which he could inspect; for the best of all reasons, namely, because the assessors of 1820 had illegally neglected to prepare one. Besides, the statute declares that the assessors shall make out correct alphabetical lists on or before the 20th day of *February*. Now, are all the transactions of the next annual meeting void, because the list was not correct; there being several qualified voters in town whose names, by some means or other were not borne on that list? The objection founded on such a principle cannot be sustained, and we therefore overrule it and pass to the next; merely observing that we do not consider the cases cited from 14 *Mass.* 322, 15 *Mass.* 35, and 17 *Mass.* 281, as applicable in their principles; they being all questions of illegal consideration.

The *second* objection is that the defendants were never duly sworn, and therefore never qualified to act as assessors. This at first appeared unanswerable; and if it is so, it at once settles the case in favor of the plaintiff. By the record of the proceedings of the meeting on *March* 22d, it appears that a certain person was chosen moderator, and that the defendants and one *Wm. Hasty*, jr. were chosen selectmen and assessors. The record is silent as to the mode of choice, as to all four of those persons; and we apprehend that this record thus far was made in the usual manner. And as by law the moderator, selectmen and assessors must all be chosen by ballot; we must presume that the town proceeded in the legal mode; that is, the record, if not impeached by itself, imports a legal choice and is to be credited; but if in any particulars it is impeached by itself; then, so far as it is thus impeached, it is not entitled to credit. By looking at the record of the proceedings of the meeting at the adjournment on the 31st of *April*, we find that the defendants and *Hasty* were chosen assessors by ballot; this is a clear implication that they were not chosen in that manner on the 22d of *March*, and is therefore so far an impeachment of the record of their legal choice as assessors on that day; but as the record speaks of no others chosen by ballot on the 30th of *April*, the impeachment of the first record extends no further than to the choice of assessors;

leaving the usual import of the record in other respects on its original ground. It seems then on this principle, that there is legal record evidence of the choice of the defendants and *Hasty* on the 22d of *March* as selectmen. It appears further, that *Tompson*, on the 24th of *March* was duly sworn as selectman and assessor, and that on the 26th the other two were sworn in the same manner. But as neither of the three was legally chosen assessor till the 30th of *April*, it is very clear that the oath taken by them as assessors before that time, was of no avail ; and it further appears that they never after were sworn as assessors. Of course they never were qualified to act that year as assessors, in virtue of their election as such on the 30th of *April*. The remaining question is whether they were *ex officio* assessors, in virtue of their office as selectmen, in the peculiar circumstances above detailed. The statute must answer this question. The second section of our statute of 1821, *ch.* 116, provides "that if "any town shall not choose assessors as aforesaid ; or if so many "of them so chosen shall refuse to accept, as that there shall not "be such a number of them as any town shall vote to be the "assessors thereof, then the selectmen of such town shall be and "hereby are declared and appointed the assessors thereof." Now as the persons chosen assessors on the 30th of *April* never took the oath of office as such after that choice, they could not act in virtue of that election, as we have before stated ; and in such a case as this we do not see why this omission to become qualified may not be fairly considered as a refusal to accept, and an election to consider themselves as *ex officio* assessors, in virtue of their election as selectmen ; and their having, after that election, taken the oaths as selectmen and assessors too. The case before us presents several questions which seem to be new and susceptible of different considerations ; and under such circumstances we see no violation of principle in giving them such a construction as tends to sanction the proceedings of the defendants rather than defeat them. In this view of the subject, this second objection falls to the ground ; because, we do not consider the circumstance of the defendants having acted as assessors and signed the assessment and warrant as such, as evidence of acceptance ; there could be no legal and effectual acceptance without their

having been duly sworn. Besides, the above section declares them in such circumstances, to be assessors ;—of course they might very properly subscribe the assessment and warrant as such.

The *third* objection is that the assessors did not give legal notice to the inhabitants to bring into them perfect lists of their polls and estate. The language of the 12th section of said statute on the subject is this,—" shall give seasonable warning to the " inhabitants by posting up notifications in some public place in " said town or plantation, or notify the respective inhabitants in " some other way." The report states that it was the practice in the town for the assessors to give personal notice ; and that such was the practice they adopted that year ; and it states further that the assessors took proper pains to give the plaintiff this usual notice ; but that he went away and stayed away on purpose to prevent their giving such notice. After this singular evasion, the objection on account of the want of notice comes with a very ill grace from the plaintiff ; and it would not be much credit to our laws or our Courts of Justice, if such a stratagem should meet with success or even countenance. As this was the usual mode of giving notice, the plaintiff must have been conusant of it ; and it seems he expected it, by his avoidance. Mr. *Dane* in his abridgement, *vol.* 5, under the title "*bond*," page 178, 179, when speaking of disjunctive conditions, says, " If both, when the " bond is made, be possible; and one becomes impossible after, " it is material to inquire when and by what means ; if after the " time set for performance, it is clear the bond is forfeited by " non-performance at the time; if before such time, then by what " means ;—if by the act and fault of the obligee, it has been " shewn he can never plead his own fault, to have a performance, " which, without such act or fault, he never could have enforced." This is the law in case of a solemn contract ; and it would seem that in the case of an obligation imposed by law, the principle would not be applied against those on whom the obligation is imposed, with more severity. By the statute, the defendants were bound to give notice by posting notifications, or personal notice, at their option. The plaintiff, by his own act of artifice and evasion, rendered it impossible for them to give him personal notice ; and

therefore, he cannot plead this act and fault of his own, to have a a performance of the other part of the alternative, which, without such act and evasion, he could never have demanded. The reason and spirit of the law appears the same in both cases. In *Borden v. Borden* 5 *Mass.* 67, the Court say, "but supposing a "tender necessary, proving himself ready with a deed, which "would have been tendered, if the defendant had not avoided it "by evasive contrivances, seems equivalent to a tender; and "such is the opinion of the Court on this point." We therefore overrule this objection.

The *fourth* is that the papers produced as the valuation and assessment, were not respectively so entitled. The law does not require any such title. The book which is composed of both those documents, was lodged in, and taken from the assessors office; and these documents are properly signed by the defendants; and on inspection are found to be in the form of valuation and assessment. Another objection made is, that it appears the assessors assessed the plaintiff for faculty, contrary to law. The reply to this objection is, that on inspection of the document, the fact is found to be otherwise. These objections cannot avail the plaintiff.

The *fifth* is that the valuation and assessment were not lodged in the clerk's office; but the verdict has given a decisive answer, by finding that they were seasonably deposited in the assessors office; and this by law, was sufficient.

The *sixth* objection is that the warrant signed by the defendants and delivered to the collector was illegal; inasmuch as it was not made conformably to law. The 17th *sec.* of our statute before cited, prescribes the form of a warrant from assessors to collectors, for the collection of State taxes; and directs that such warrants shall in substance agree with such forms;—and that a similar form, *mutatis mutandis*, shall be used for the collection of county and town taxes. Upon comparing the warrant in the present case, which embraces all three of the taxes, it is found in several particulars to vary from the statute form; and the only question is whether it does in substance conform to the law. The expression "in substance" used in the statute, was inserted to prevent the evil consequences which would probably follow in

every town in the State, if strict formality were in all cases required. We are therefore authorized and bound to give a fair and liberal construction of the words used, and of the conduct of officers in framing the instruments alluded to in the section. Are the variances in matter of form, or of substance? The first variance is, that in the direction of the warrant to *Bayley*, he is stated to be the collector of taxes for the town of *Standish*, without designating in what county that town is situated; but on looking into the writ in this case, which is referred to in the report, we find the plaintiff says the defendants live in *Standish* in the county of *Cumberland*. The next objection is, that the warrant does not contain the introductory words—" In the name of the State of Maine you are required, &c. The answer is that a public law authorizes assessors to issue warrants to collectors; of this we are bound to take notice; and also that all the officers in the State act under its authority and in its name, either expressed or implied; because they are exercising a portion of the sovereign power delegated to them. In a justice's writ this idea is expressed;—*his* requisition being in the *name of the State*. The precepts from this Court and the Court of Common Pleas are not so. The State itself speaks to its officers. The language in question inserted in the statute form is respectful and proper; but we cannot deem the warrant as illegal in consequence of their omission; that is —they are not words of substance within the meaning of the law. The next objection is, that the warrant essentially varies from the prescribed form, in omitting entirely to state the following clause —" it being this town's proportion of a tax or assessment of " (naming the total amount of the State tax) granted and agreed " upon by the legislature of said State at their session, begun " and held at *Portland* on the——day of——for defraying the ne- " cessary charges of securing, protecting and defending the " same." It is evident that all this is mere recital; and of itself is no evidence of the truth of the facts recited. In an action to recover lands sold for taxes, it would be necessary for the person claiming to hold under the sale, to shew the granting of the tax, as well as the legality of its assessment, and it would by no means be sufficient for a tenant in such an action to give in evidence the warrant containing a recital of such grant to prove the tax was

granted. Uniform practice is in conformity to this principle. If then the recital of the fact in the warrant is no proof of the existence of the fact, why should the omission of the recital vitiate the warrant, and render it a dead letter? And how can such a recital be matter of substance, in respect to the collector, or to the persons named in his list, if in fact the tax has been granted by the legislature and duly assessed by the proper officers? In such a case we are disposed to consider the recital as matter of form and not of substance, in favor of the correctness of proceedings, if otherwise conformable to law. The same observations may be applied to the non-recital as to the legal origin of the county and town tax. These, however, or their respective amounts, are directed to be paid to the treasurers respectively authorized to receive them. It is not contended that there are in the warrant any other variations from the statute form; and as it is under the hands of the assessors and under seal, we consider it was sufficient, notwithstanding the foregoing objections; and this leads us to the seventh and last.

This last objection is, that the warrant, though made out and signed by the defendants on the 27th of *August* 1821, was not delivered to *Bayley* the collector, until the 9th of *October* 1822, the day before the arrest, and was then delivered by *Tompson*, *White* not being an assessor for 1822. It further appears by the report that the assessors intended to deliver the warrant with the bills of assessment, but by mistake delivered to him another paper instead of it. And now, what are the legal consequences of these facts? The warrant was a lawful precept when made and signed; and if it had then been delivered to the collector, it would be in full force at this moment, provided any of the sums assessed in the bills committed to him are now due and unpaid; although other persons have been elected assessors; and another person collector. See *Stat.* 1821, *ch.* 116, *sec.* 27. The virtue and life of a warrant therefore, do not depend on the official life of the assessors who signed it, or of the collector to whom it is directed and delivered. The only question then is, when did it lose its virtue? Or in other words, was it not an existing, legal precept in itself, when delivered to *Bayley*; though he might not have derived any authority from it, until he actually received it?

No cases have been cited to this point by the counsel on either side. The arguments stand on the reason of the thing, and upon general principles. Suppose a Justice of the Peace, on complaint and oath should issue his warrant against a person charged with larceny, and returnable before himself or any other Justice of the Peace in the county; and should die, or his commission should expire before the warrant is placed in the hands of an officer for service; may it not still be served and returned before another magistrate, and he legally take cognizance of the offence, or recognize or commit the person charged? Or suppose that a majority of the selectmen of any town should decease immediately after they had made out and signed in due form a warrant for a town meeting; could not such warrant be legally delivered to a constable to warn the meeting; and would not the meeting be regular? If the clerk of this Court should make out an execution in due form, and place it in his desk, and the next day resign; could not the attorney in the cause, properly hand the execution a week afterwards to an officer for service; and would not the execution be a legal precept and a complete and justification to the officer? Other cases might be put by way of illustration; but these are sufficient. If the question should be considered as doubtful, we should certainly incline to that decision which would go to sanction rather than to disturb proceedings, honestly intended and believed to be regular.

We have thus taken a distinct view of each objection urged by the plaintiff's counsel, and given it a particular examination; and the result is, that they furnish no legal or proper ground for setting aside the verdict. The motion is overruled and there must be judgment on the verdict.

TOMPSON *vs.* MUSSEY.

In cases of *tort*, the Court will not set aside a verdict on the ground of excessive damages, unless from their magnitude, compared with the circumstances of the case, it be manifest that the jury acted intemperately, or were influenced by passion, prejudice, partiality, or corruption.

Under *Stat.* 1821, *ch.* 115, *sec.* 14, it is sufficient if the assessors post up notice of the time and place of their intended session to receive evidence of the qualifications of voters; without causing such notice to be inserted *in the warrant* for calling the town meeting.

THIS was an action of trespass on the case, in which the plaintiff alleged that the defendant had maliciously, and without probable cause, procured him and two other assessors of the town of *Standish* to be indicted for not making out a correct alphabetical list of voters in said town previous to the annual meeting in *March* 1823; and for not being in session in some convenient place to receive evidence of the qualifications of persons whose names were not on such list; and for not giving public notice of such session *in the warrant* for calling the town meeting; of which they were acquitted.

At the trial, which was upon the general issue, before *Weston* J. it was proved that no notice of the time and place when and where the assessors would be in session, to receive evidence of the qualifications of persons whose names were not on the list of voters, was *inserted in the copies of the warrant* which were posted up, notifying the town meeting.—And the county attorney, *Mr. Fitch*, testified that when he drew the indictment, he gave it as his opinion to the defendant that the law required such notice to be inserted *in the warrant*.

It was also proved that such notice *was* posted up, *on a separate piece of paper*, adjoining to, or near, each of the copies of the warrant put up in the town.

The Judge instructed the jury that if, from the whole evidence, they were satisfied that the defendant knew that the notice was thus posted up, although it was not inserted in the copies of the warrant, and did not state this fact to the grand jury, as he was bound to do, he being a witness before them, and it appearing in evidence that the indictment was found upon his testimony, prob-

able cause was not made out.—But that, if it did not appear that he knew the fact that notice was so posted up, there was then so much color for the prosecution, as well from the terms of the statute, as from the opinion of the county attorney, that probable cause was made out.

On the subject of damages he instructed the jury that there was no fixed rule or standard by which to estimate them. It would be for the jury to determine the amount, in the exercise of a sound discretion, taking into consideration the expense to which the plaintiff had been subjected, his trouble and anxiety, and the ignominy of being arraigned at the bar of justice as an offender against the laws.

It appeared from a vote of the town of *Standish* that they assumed the defence of the indictment against their assessors, "saving to the town all remedies against said selectmen and "assessors for gross and wilful negligence, in the discharge of "their duty as such." And it was thereupon urged by the counsel for the defendant that the plaintiff's expenses in defending himself against the indictment ought not to be taken into the estimate of damages. But the Judge instructed the jury that they ought to be estimated, notwithstanding that vote, if the plaintiff was entitled to any damages.

The jury hereupon returned for the plaintiff a verdict of eight hundred dollars; which was taken subject to the opinion of the Court upon the correctness of the Judge's instructions. The defendant also moved the Court to set aside the verdict because the damages were excessive.

Greenleaf and *Adams*, for the defendant, contended that upon the evidence in the case the plaintiff was indictable, and ought to have been convicted. By the *Stat.* 1821, *ch.* 115, *sec.* 1 and 14, it is made the duty of selectmen and assessors to be in session at some convenient place, and to give public notice thereof "*in the warrant*" for calling the town meeting. The law being thus explicit, an inspection of the warrant was all that was necessary to determine whether it had been complied with, or not. If the defendant was wrong in supposing that a notification posted up in *another* place was not a notice inserted *in the warrant*; yet the

official opinion of the county attorney to the same effect ought to protect him from prosecution. Both these considerations, and the fact that the traverse jury retired and *deliberated* on the case, are relied on to prove probable cause. *Smith v. McDonald* 3 *Esp.* 7. *Lilwall v. Smallman Selw.* 946. *Bull. N. P.* 14. *Leigh v. Webb* 3 *Esp.* 165. 1 *Wils.* 232. *Peckham v. Whitney* 15 *Mass.* 243. *Jones v. Gwynn Gilb. Rep.* 185. *Kirtley v. Deck* 2 *Munf.* 18.

But this was not a point for the defendant to make out. In the matter of probable cause, the *onus probandi* is on the *plaintiff*, to shew the *want of it*;—yet the Judge treated this as the duty of the defendant, which may have led to the verdict against him. *Anon.* 6 *Mod.* 73. *Golding v. Crowle Bul. N. P.* 14. *Purcell v. McNamara* 1 *Camp.* 199. 9 *East* 361. *Sykes v. Dunbar* 1 *Camp.* 202, *note*. *Incledon v. Berry ib.* 203. *Munns v. Dudont* 2 *Brown's Rep. app.* 61. 4 *Hall's Law Jour.* 107. *Cox v. Worrall Yelv.* 105, *note*.

Further, the jury were instructed that the defendant was bound, *at all events* to state to the grand jury that the notice was posted on another paper;—whereas, having good reason to believe it immaterial, it should have been left to them to determine whether he suppressed the fact designedly, or honestly omitted to state it.

They also contended that this was an action not to be favored; —*Savill v. Roberts* 1 *Salk.* 15. 2 *Esp.* 536,—and that the damages were excessive. The town had stipulated to reimburse the plaintiff's expenses; he attended but one term; and the indictment involved no imputation whatever upon his moral character. The term "*ignominy*" was inapplicable to his trial, and tended to mislead the jury. *Sampson v. Smith* 15 *Mass.* 365. *McConnell v. Hampton* 12 *Johns.* 234.

Fessenden and *Deblois*, for the defendant, argued that a literal compliance with the terms of the statute was not in the power of assessors; since they have no control over a warrant for a town meeting, which is issued by the selectmen. The reference therefore in *sec.* 14, to the *first* section of the *Stat.* 1821, *ch.* 115, must be understood to relate to the *convenient place* mentioned in

the latter section, and not to the manner of giving the notice. They did all in their power to give notice; and this the defendant well knew, but wilfully suppressed, as the jury have found.

But the defence is not placed on the existence of facts and circumstances tending to excite a reasonable suspicion of guilt; but on a misconception of the law. This, however, is no ground to justify *any* malicious prosecution. *Waterer v. Freeman Hob.* 266. 1 *Salk.* 14, *note. Robinson v. Chambers* 2 *Stra.* 691. *Goslin v. Wilcock* 2 *Wils.* 302. *Weeks v. Fentham* 4 *D. & E.* 247. *Hewlett v. Crutchley* 5 *Taunt.* 277. The case of *Leigh v. Webb* 3 *Esp.* 165, is different from this, because there the mistake was that of the magistrate, and not of the prosecutor.

As to the *deliberation* of the traverse jury, that fact forms no part of the case reserved; and if it did, it would be of no importance, unless the evidence on which they deliberated was other than that of the prosecutor himself. If it were otherwise, no malicious prosecutor could be punished, while he retained enough of character to induce a single juror to hesitate whether to believe him or not. But the position of the defendant on this subject is not founded in authorities, as is apparent from *Gilbert v. Burtenshaw Cowp.* 230. *Farmer v. Darling* 4 *Burr.* 1971.

Against the motion to set aside the verdict for excessive damages, they insisted that however Judges may have speculated on this question, it would be found that they had never set aside a verdict for excessive damages, unless the case furnished in itself some principles by which they could be estimated by the Court; or unless it was manifest that the jury had grossly misunderstood the case, or had acted from intemperate passion and prejudice, plainly apparent;—traits which this case did not disclose. To this point they cited *Leman v. Allen* 2 *Wils.* 160. *Huckle v. Money* 2 *Wils.* 205. *Gilbert v. Burtenshaw Cowp.* 230. *Beardmore v. Carrington* 2 *Wils.* 244. *Wilford v. Berkley* 1 *Burr.* 609. *Duberley v. Gunning* 4 *D. & E.* 651. *Redshaw v. Brook* 2 *Wils.* 405. *Brun v. Hawkins* 3 *Wils.* 61. *Ducker v. Wood* 1 *D. & E.* 277. 2 *Stra.* 940. *Chambers v. Caulfield* 6 *East* 244. *Coffin v. Coffin* 4 *Mass.* 1. *Benson v. Frederick* 3 *Burr.* 1845. *Tillotson v. Cheetham* 2 *Johns.* 74. *Ogden v. Gibbons* 2 *South.* 538.

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

The counsel for the defendant contends that the neglect charged in the indictment against the piaintiff was a clear and direct violation of a well known law; and as it was not and could not be pretended that notice had been given, in the manner the statute directed, these facts of themselves furnished satisfactory proof of probable cause;—and he further contends that the opinion delivered to the defendant by the attorney for the State was proof of probable cause ; and that it was the duty of the plaintiff to furnish proof of the want of probable cause, and that the *onus* was not on the defendant to show that there was probable cause. In the discussion and application of these principles several questions have been examined. Some of them need not be re-examined and decided by us. For instance, it is unnecessary to determine whether the opinion of the county attorney was, under the circumstances of this case, proof of probable cause; inasmuch as the Judge decided that point in favor of the defendant, if the jury should acquit him of the alleged suppression of an important fact in his testimony before the grand jury; but this they have not done. As the defendant therefore has had the benefit of this principle, so far as the facts of the case would justify the Court and jury in its application to him, he has no reason now to complain on that account.

Nor do we think it of importance in this case to examine particularly the question whether the proof of want of probable cause must always be adduced by the plaintiff; or whether proof of probable cause must be adduced by the defendant. Because it is admitted, though not particularly stated in the report, that the plaintiff introduced proof shewing what was the testimony of the defendant before the grand jury ; the alleged suppression of an important fact well known to the defendant at the time of giving his testimony, was the circumstance relied on to shew a total want of probable cause ; and this fact was proved by the plaintiff. The jury have decided that there was this suppression. But the counsel for the defendant has said that the fact was, or might have been omitted by mistake or forgetfulness ; and then could not be imputed to him as evidence of want of probable

cause. The language of the Judge, however, was that if he "did not state or testify this fact, as he was bound to do ;"—and this language could not have been misunderstood by the jury ; or construed to mean or embrace the case of omission by mistake or forgetfulness. Every man would understand that he was speaking of an intentional and fraudulent suppression of the fact alluded to. We are thus led directly to the point, whether the Judge was correct in his decision that the fact thus suppressed and concealed from the knowledge of the grand jury was proof of the want of probable cause ; and this leads us to the fact itself.

It was proved that no notice of the time and place when the assessors would be in session to receive evidence of qualifications of persons whose names were not on the list of voters, was inserted in the copies of the warrants posted up, notifying the town meeting. But such notice was posted up on a separate piece of paper, adjoining or near to each of the copies of the warrant. This fact, the verdict finds the defendant knowingly suppressed and concealed from the grand jury. The counsel for the plaintiff has argued upon the singular provisions of the law in requiring the assessors to give the notice before mentioned by causing it to be inserted in the warrant for calling the town meeting ; which warrant was issued by the selectmen ; over whom or whose actions the assessors can have no control. This provision is certainly not very reconcilable with the rights, duties and liabilities of selectmen and assessors respectively. We do not, however, deem it essential in the decision of this cause, to pursue this inquiry. And now what is probable cause ? Various definitions of it have been given ; and from the nature of the case there must be a vast variety of facts which may constitute it ; and perhaps in no two cases will the facts be in all respects similar. Hence the necessity of some general character as to the facts which constitute this probable cause. In *Smith v. McDonald* 3 *Esp.* 7, Lord *Kenyon* nonsuited the plaintiff because, at the trial of the indictment, the evidence offered to the jury caused them to pause ; and this he held proof of probable cause. With all due respect we would observe that this seems a most uncertain criterion. In many cases the reason of their pausing may be wholly unknown,—may be accidental, without any motive, and

perhaps from motives of personal convenience ; perhaps from personal feelings on the part of one or more of the jury ; in fact, from reasons of no importance and having no connection with the merits of the cause. In the page of *Buller* to which the Court have been referred, no criterion or rule is given, but only general principles are stated. In *Leigh v. Webb* 3 *Esp.* 165, Lord *Eldon* nonsuited the plaintiff, on the ground that the evidence did not support the declaration ; and that the defendant had never made against the plaintiff a charge of felony. The case has no application here. In *Reynolds v. Kennedy* 1 *Wils.* 232, the sub-commissioners had condemned certain goods on the defendant's information ; and this appeared on the plaintiff's declaration. The cause was decided expressly on the ground that the prosecution was not malicious—not a word is said about the want of probable cause. In *Whitney v. Peckham* 15 *Mass.* 243, there had been a conviction of the plaintiff before a justice of the peace; and an acquittal on the appeal in the Court of Common Pleas. In the absence of all other proof, this conviction was deemed sufficient evidence of probable cause.

The definition of probable cause as given in 2 *Munford*, is founded on and includes the idea of perfect fairness on the part of the defendant in the prosecution, excluding all supposition of art or concealment of material facts. The definition given by *Weston* J. in delivering the opinion of the Court in *Ulmer v. Leland* 1 *Greenl.* 135, is this—" Probable cause in general may be " understood to be such conduct on the part of the accused, as " may induce the Court to infer that the prosecution was under- " taken from public motives." We perceive no reason to question the accuracy of this description or definition of probable cause, nor the sound good sense of it. Testing the conduct of the defendant before the grand jury, in suppressing his knowledge of the fact in relation to the assessors' notice in the manner it was given, by the rule laid down in *Ulmer v. Leland*, we are satisfied, not merely that probable cause has not been proved ; but that the want of it has been proved. For, admitting that the requisitions of the statute had not been in strictness complied with ; still the notice was given, in all probability, as effectually, as if it had been inserted in the warrant of the selectmen. And there is

strong ground for believing, that if the defendant had fairly and frankly testified before the grand jury to all the facts he knew in relation to this subject, no indictment would have been found. On the whole, we are of opinion that the cause was submitted to the jury on proper and legal principles, and that on the grounds which we have been considering there is no foundation to support the motion to set aside the verdict.

As to the motion at common law for a new trial on the ground of excessive damages; we are not disposed, because it is not necessary, to review and examine the merits of the long catalogue of cases in the books wherein similar motions have been made and decided. Numerous cases have been cited and commented upon at large by the counsel. We shall close this opinion with one or two general observations, and by extracting from the cases on this subject the spirit of the decisions and the general principle that must govern.

It has been urged that actions of this kind are not to be favored; that they have a tendency to discourage prosecutions, and thereby indirectly produce an injury to the community. We wish it to be understood that no particular class of actions is to be favored or discountenanced in our Courts of justice. These terms when applied in this manner, we hope will be considered as destitute of meaning, in respect to the administration of the laws, where legal principles are the rules of decision. So far as proceedings in our Courts are governed merely by the discretion of the Judges, it is to be desired that they should always have a steady eye to the substantial justice and equity of the case, and the protection of rights from a particular danger, to which they might be exposed by the rigid application of a general principle of law. What are excessive damages? No answer can be given applicable to all cases. Each cause has some peculiar features, which a Court has in view in deciding whether excessive damages have been given. Different Courts and Judges have labored to find some language adapted to convey the general idea with as much distinctness and precision as possible; so that the decision might be afterwards considered as a rule by which to decide subsequent cases. This uncertainty as to the rule exists principally in cases of tort. In those of contract there is almost in every case a plain

rule by which to estimate damages. The difficulty exists in that class of actions where compensation is sought for injuries arising from passion, cruelty, malice or violence. Thus in *Leeman v. Allen* 2 *Wils.* 160, the Chief Justice says, "if damages "be unreasonable and outrageous indeed; as if 2000*l.* or 3000*l.* was "to be given for a little battery, which all mankind might see to "be unreasonable at first blush; certainly a Court would set "aside such a verdict." And in *Ash v. Ash Comb.* 357, Lord *Holt* says, (speaking of damages in actions for tort) "the Court "must be able to say the damages are beyond all measure unrea- "sonable." In *Huckle v. Money* 2 *Wils.* 205, the Lord Chief Justice says, "it is very dangerous for the Judges to intermeddle "in damages for torts; it must be a glaring case indeed of out- "rageous damages in a tort, and which all mankind at first blush "must think so, to induce a Court to grant a new trial for exces- "sive damages." In *Gilbert v. Burtenshaw Cowp.* 230, Lord *Mansfield* says, when speaking of granting new trials in cases of torts, "it is not to be done without very strong grounds indeed, "and such as carry internal evidence of intemperance in the "minds of the jury; unless it appears that the damages are "flagrantly outrageous and extravagant, it is difficult for the "Court to draw the line." In *Beardmore v. Carrington* 2 *Wils.* 244, in an action of trespass and false imprisonment, the Court say, "we desire to be understood that this Court does not say, or lay "down any rule, that there never can happen a case of such "excessive damages in tort, where the Court may not grant a "new trial; but in that case the damages must be monstrous and "enormous indeed; and such as all mankind must be ready to "exclaim against at first blush." In *Duberley v. Gunning* 4 *D. & E.* 651, the jury gave 5,000*l.* damages. On motion for a new trial it was refused. *Buller* J. says, "the only power which the "Courts now claim is to send the cause back to another jury, "when they think that the damages given are enormously dispro- "portioned to the case given in evidence." In *Bruce v. Rawlins* 3 *Wils.* 61, *Yates* J. says, "the case must be very gross and the "damages enormous, for the Court to interfere." In *Coffin v. Coffin* 4 *Mass.* 1, *Parsons* C. J. says, "before we can set aside "this verdict on account of these damages, we must infer from

"their magnitude, ($2,500) under all the circumstances of the "case, that the jury acted intemperately, or were influenced by "passion, prejudice or partiality." In *Southwick v. Stevens* 10 *Johns.* 443, the Court say, that in actions for libels and torts, they will not set aside a verdict on the ground of excessive damages, unless they are flagrantly outrageous and extravagant. In *McConnell v. Hampton* 12 *Johns.* 234, *Thompson* C. J. says, "that to justify the Court in granting a new trial in "cases of torts, the damages ought to appear outrageous, and "manifestly to exceed the injury, and such that all mankind "would at once pronounce unreasonable, and induce the Court to "believe that the jury must have acted from prejudice or par-"tiality;"—and *Spencer* J. says, "to justify the granting of a new "trial the damages must be flagrantly outrageous and extrava-"gant; evincing intemperance, passion, partiality or corruption." This case was cited by the defendant's counsel. It was an action of assault, battery and imprisonment by the defendant a military commander. The jury gave a verdict for $9,000,—and the Court granted a new trial on the ground that the damages were excessive; it appearing that little or no personal violence and injury had been done, though there was imprisonment and highly abusive language, threats and insults.

Comparing the facts in this case with the principal part of those cases which have been above noticed, and applying the principle of law as to granting new trials for excessive damages, as laid down in those cases, we are to decide whether the present cause is presented to us as coming within the range of the principle. The plaintiff's damages have been estimated by two successive juries in different Courts—and there is a difference of fifty dollars only between the two estimates. The verdict in this Court having been given for the larger sum. The jury had before them all the facts, in relation to the plaintiff's injuries in point of property, character and feelings; and to the defendant's disposition to effect his purpose of causing the plaintiff's conviction; and to the measures which he adopted with a view to accomplish that purpose; and also the evidence in relation to the character and property of the defendant. Looking at all the

facts, we do not feel ourselves authorized to say that the damages are excessive, extravagant, and flagrantly outrageous, or that the jury were actuated by any reprehensible motives; this motion at common law therefore, cannot be sustained.

There is one other idea stated by the counsel when commenting on the Judge's instructions to the jury, on the subject of damages, and the circumstances which they might take into consideration. He instructed them that they might, among other things, notice the ignominy of being arrainged at the bar of justice as an offender against the law. And why might they not? Was it no ignominy to be arraigned on indictment for neglecting a duty which he had solemnly sworn to perform; and on a charge affecting his character as an officer in the town? We see no impropriety in this allusion. He stated only what was a fact, and informed them they might consider it in their estimate of damages. It will thus be seen that it differs from the case of *Sampson v. Smith* 15 *Mass.* 165, cited by the defendant's counsel. There the Judge intimated his opinion to the jury upon a point of law, the natural and obvious tendency of which was to incline the jury to give greater damages than they would otherwise probably have assessed. As the Court on reviewing this intimated opinion were all satisfied it was incorrect, they set aside the verdict and granted a new trial, so that another jury might estimate the damages upon those principles of law applicable to the character and authority of the defendant, as master of a vessel.

Our opinion is that neither of the defendant's motions can prevail, and accordingly there must be judgment on the verdict.

Robison *vs.* Swett & al.

A deed void on its face, if it be registered, and the grantee enter on a part of the land and continue openly to occupy and improve it, is admissible as evidence of the extent of his claim.

Where the acts of ownership, and conduct of a person claiming adversely a title to wild lands, being unknown to the true owner, amount only to successive trespasses, they become, when known and acquiesced in by him who has the right, sufficient to constitute a disseisin.

Where, in trespass *quare clausum fregit*, the question turned upon the nature and duration of the plaintiff's possession of the land ;—it was *held* that evidence of the allegations in the writs in former suits against him, brought for the benefit of the present defendant, in which he was charged as a disseisor, was admissible, in connection with other circumstances, to shew knowledge on the part of the defendant and his grantors of the nature and extent of the plaintiff's claim.

An entry into land, to defeat a disseisin, should be made with that intention ; sufficiently indicated either by the act, or by words accompanying it.

This was an action of trespass *quare clausum fregit*, in which the issues were—1. not guilty ;—2. that the close was the soil and freehold of *Swett* one of the defendants ;—3. that it was the soil and freehold of *Swett* and others, of whom the plaintiff was one.

It appeared in evidence that the lots in question, which were in *Bridgton*, belonged to the original right of *Thomas Poor*, having been drawn to him in 1767, and confirmed in 1783, to hold in severalty, and that he, by deed dated *March* 16th, 1768, and recorded *May* 30, 1811, conveyed the premises to Col. *Poor* ;—that this Col. *Poor* died in *October* or *November* 1804 ;—that his heirs at law executed a deed *March* 12, 1810, which was recorded *April* 21, 1810, conveying the same lots to one *Webb* and *Swett* the defendant, under which the defendants justified ;—and that they were still wild and uncultivated lands, and were never inclosed within fences.

To maintain the issues on his part, the plaintiff offered in evidence a deed dated *March* 4, 1784, and recorded four days afterwards, made by *Benjamin Kimball*, *Enoch Perley* and *James Stevens*, styling themselves a committee of the proprietors of *Bridgton* to make sale of the lands of delinquent proprietors, and conveying to *Thomas Robison*, father of the plaintiff, whose right the plaintiff held, certain lots in *Bridgton*, and among them the

lots in question. To the admission of this deed the defendants objected, because no authority was shewn in the grantors to execute it; but *Preble* J. before whom the cause was tried, admitted it to be read to the jury, instructing them that it did not convey the title of *Poor*, but was evidence of the extent of the plaintiff's claim.

The plaintiff also offered the same *Enoch Perley* as a witness, who was objected to, on the ground of his liability on the covenants in the above deed; but on his producing a release of that liability from the plaintiff, made since the pendency of this action, he was admitted. Testimony was adduced on behalf of the plaintiff, tending to shew that *Robison* the father, and after him the plaintiff, had always maintained an exclusive occupancy of the lots, having an agent in their neighborhood to look after them ;—that the lots lying near the forks of the road, and being therefore exposed, peculiar care had been taken to protect them from trespasses ;—that he had paid all the taxes assessed upon them to the present time ;—and that since the year 1805, he had occasionally taken timber from them. He also endeavored to prove that though *Poor* well knew of the sale of the lots to *Robison*, and of his claim and exercise of acts of ownership over them, he never did *actually* interfere, or disturb the possession claimed by *Robison* under his deed. It appeared, however, that as *Poor* was once passing to *Bethel* along the public highway leading over these lots, he asked his agent, then in company, "if that was the "land which was or had been his ?" This, the defendants contended, was in law an entry on the land. It also appeared that *Poor*, at some time which was not distinctly ascertained, instructed his agent not to pay any more taxes upon these lots, for he should get them back again ;—and the agent said he had paid no taxes on them since 1775. *Poor* was much dissatisfied, and made great complaints of the manner in which he had been treated respecting his lands ; and in 1804, instructed an agent to obtain minutes of the sale of the lands in question, and of others, that he might know the purchasers. It also appeared that *Enoch Poor*, one of the heirs at law of Col. *Poor*, after his father's death, came to *Bridgton* 18 or 20 years ago, and offered to sell these lands, stating that he claimed them, and that the sales were

illegal. But no actual entry, or intermeddling with the possession, by either of the *Poors* or any person in their behalf, was proved, unless the act of Col. *Poor* in riding along the highway over the lots, as above stated, constituted such entry.

Farther to show to the jury that by those interested adversely to the plaintiff he had always been regarded and treated as in the actual possession and occupancy of the lots in question, the plaintiff offered in evidence an original writ of right, dated *June* 4, 1810, prosecuted against him by *Swett*, the defendant, and *Webb*, for their own benefit, in the name of the heirs at law of Col. *Poor*, who was therein alleged to have died *disseised*, and the present plaintiff alleged to be in possession ;—(see *Poor & al. v. Robison* 10 *Mass.* 131)—also a similar writ dated *May* 20, 1813.

These writs, though objected to, the Judge admitted to be read for the purpose above stated; each suit, after pending some time in Court, having been abandoned by the demandants.

The plaintiff also offered in evidence an agreement entered into *in behalf of said Swett* and *Webb*, in a suit instituted by them against *Enoch Poor & al.* and filed in the Supreme Judicial Court at *November* term 1813, in the county of *Essex*; (see *Swett & al. v. Poor & al.* 11 *Mass.* 549,)—in which agreement it is admitted that the present plaintiff was in possession of these lots claiming by an adverse title, at the time of the death of Col. *Poor*, and at the time of the execution of the aforesaid deed from his heirs at law. This also, though objected to, the Judge allowed to be read as evidence, in the nature of a confession on the part of *Swett* of the facts therein stated, so far as the present plaintiff was concerned.

Upon this evidence the Judge instructed the jury that the riding along the highway, as Col. *Poor* was proved to have done, and making the inquiry he did, was not an act which amounted in law to an *entry*;—that the recording of his deed from *Kimball*, *Perley*, and *Stevens*, by the grantee, was notice to *Poor* and all others whom it might concern, of the nature and extent of his claim, and that he intended to hold the land, but that it availed nothing by way of passing *Poor's* title;—that in order that it should avail *Robison*, it was necessary he should go into actual possession under it, and continue to occupy and hold the lands;—that these lands

being wild and uncultivated, the jury were not to expect the same evidence of occupancy which a cultivated farm would present to them;—but that facts and conduct on the part of a person exercising acts of ownership and claiming, adversely, title and possession, would amount in law to possession of the land, and disseisin, if known and acquiesced in by him who has the right; when, if unknown and not acquiesced in by such party, they would not amount to such possession and disseisin, but only to successive trespasses;—that the two writs of right and the agreement were not conclusive evidence, but were proper for the jury to consider as admissions and confessions of *Swett*, that Col. *Poor* died disseised, and that *Robison* was in possession, claiming adversely;—and that if, from the whole evidence, they believed that *Robison* went into possession under his deed, and had maintained a continued possession, exclusive and uninterrupted; and that however Col. *Poor* might complain, he never did actually interfere with the possession of the lots; they would find for the plaintiff;—which they accordingly did; and the Judge reserved, for the consideration of the whole Court, the questions of law presented by his ruling upon the evidence, and his instructions to the jury.

Hopkins, for the defendants. As the case finds that the legal seisin of these lands was once in Col. *Poor*, which was never controverted, it clearly follows, by well settled principles of law, that his heirs and assigns still have the legal seisin of the same land, unless they have been disseised. And this seisin carries with it the possession, unless there has been an adverse possession;—*Proprs. Ken. Purchase v. Call* 1 *Mass.* 484,—and it is always presumed to continue, until a disseisin is *proved*. *Same v. Springer* 4 *Mass.* 416.

The question therefore is, whether the facts in the case shew a disseisin of Col. *Poor*; or *such* a possession in the plaintiff as would enable him to maintain trespass against him who has the lawful seisin?

The deed from *Kimball* and others to *Robison* ought not to have been admitted for either of these purposes, nor for any other purpose whatever;—because 1st. No authority is shewn in the persons styling themselves the proprietors' committee. 2d. Be-

cause it appears that the land had been set off to *Poor in severalty* many years before the assessments; and was not liable to be assessed by the proprietors. *Bott v. Perley* 11 *Mass.* 169. 3d. Nor was it competent evidence to shew the extent of *Robison's* claim, unless it be of a claim accompanied by an actual occupancy, or *pedis possessio*, an open, notorious, visible, and *continued* possession, in defiance of the right owner. *Little v. Megquier* 2 *Greenl.* 276. 4th. Nor for any other purpose; because, on its face, it appears that the proprietors had no seisin which they could convey; and that the lands, being the private property of a third person, were not liable to taxation.

Neither was that deed legal evidence to shew the nature and extent of *Robison's* claim. The intent of the statutes of enrolment is to give notice of the *alienation* of lands, so as to protect *bona fide* purchasers. The recording of a deed could be but presumptive notice, if the statute had not declared it sufficient. But the deed to *Robison* discloses, on the face of it, a prior conveyance or grant from the same proprietors to *Poor*; and places *Robison* exactly on the footing of a second purchaser with notice; whose deed, whatever may be its effect as to strangers, can have none against the prior grantee. To *him* it is no notice of an alienation, because he already himself has the title of the grantors, and could have no possible inducement to examine the registry to see if his grantors had made any subsequent conveyance, when they had no remaining right to convey.

The other parts of the case do not shew any such acts in *Robison* or his agent as constitute an actual disseisin of *Poor* or his heirs. They are at best but equivocal, or are few and solitary instances of trespass, not amounting to an ouster; or, if they should be considered as rising to the character of a wrongful possession, yet still they fall short of the legal evidence of a disseisin which will cast a descent, so as to take away the right of entry.—Here the counsel discussed somewhat at large, the doctrine of disseisin, stating the difference between a disseisin and a wrongful possession, and commenting on the following authorities. *Co. Lit.* 181, *a.* 153, *b. note* 288. *Lit. sec.* 279. *Com. Dig. tit. Disseisin F.* 1, 2. *Atkynsv . Horde* 1 *Burr.* 107. *Mattheson v. Trott Leon.* 209. *Blunden v. Baugh Cro. Car.* 303. A disseisin, to take away the

right of entry, must be a disseisin *in fact*, by which the rightful owner has been expelled by violence, or by some other act which the law regards as equivalent. *Teller & al. v. Burlis & al.* 6 *Johns.* 197. A mere entry and attornment of tenants is not enough. *Livingston v. Delaney* 13 *Johns.* 537. Nor is an inclosure by "lop-and-top" fence sufficient. *Hardenburg v. Schoonmaker* 2 *Johns.* 230. And the doctrine of an adverse possession must be taken strictly, and every fact made out by explicit testimony and not by inference. Every legal presumption is in favor of a possession subordinate to the title. 9 *Johns.* 163. And to maintain trespass, the plaintiff must shew either a legal title, or an *actual and continued possession, known to the true owner. Wickham v. Freeman* 12 *Johns.* 183. *Pray v. Clark* 7 *Mass.* 381. *Propr's Ken. Purchase v. Laboree* 2 *Greenl.* 275.

There being therefore no descent cast upon the heirs of *Thomas Robison*, the plaintiff has nothing in the lands; for the "occasional" entries on the lots, as stated by his agent, not being accompanied with the right, are only detached acts of trespass; and even these were all subsequent to the death of *Col. Poor*, and were unknown to his heirs, who appear to have resided more than 100 miles from their lands. These heirs became seised immediately upon the death of the ancestor;—*Little v. Libby* 2 *Greenl.* 242—and no formal entry was necessary, because there was no adverse actual, visible, or continued occupancy,—no surveys made, nor boundaries marked, nor fences erected, nor any other circumstance to awaken suspicion, except rumors, which existing facts always contradicted. At all events, the evidence of acts done by *Poor* and his heirs is as strongly indicative of actual possession and claim of title, as any on the part of the plaintiff; whose possession being therefore at best but *concurrent* with the heirs of *Poor*, cannot be favored against those who have the right. *Langdon v. Potter* 3 *Mass.* 215.

As to the writs which the Judge permitted to be read to the jury, they ought not to have been received as evidence of any fact alleged in them, because such allegations are not in truth the language of the party, he never being supposed to be versed in the abstruse principles of law on which his case is founded; but are merely the acts of the counsel who advised and drew the

writs. They also were made, as the evidence in this case shews, under a mistake both of law and fact; by which no man is bound. *May v. Coffin* 4 *Mass.* 347. *Warden v. Tucker* 7 *Mass.* 449. At the most, those writs are only instances in which the party *elected* to consider himself disseised, for the sake of the remedy. And if the party in such case so elect, when the wrong done to him is no more than a trespass, it does not thence follow that the trespass is a *disseisin.* The admission of the statement of facts in the case of *Swett & al. v. Poor & al.* is open to the same objections. In cases of this description the statement is always drawn with reference to a single point, every extraneous fact being wholly disregarded, and the statement discharged if found to be erroneous; the admissions being taken as applicable to the particular case, and placed on the same footing with allegations repelled by *protestando.* To give them any greater effect would impair and perhaps ultimately destroy this most useful method of terminating litigation.

Fessenden and *Deblois*, for the plaintiff. The acts of ownership exercised by *Robison* upon the land, connected with the deed from *Perley* and others to him, and with the knowledge of *Poor* and his heirs, and of *Swett*, and their admissions and declarations of the fact, furnish sufficient evidence that *Poor* was *disseised* of the lands in question. To constitute a disseisin, an open and constantly visible possession in fact is not necessary; it is sufficient, in the case of uncultivated lands, that it be such an occupancy as the nature of the subject will admit; and of that notoriety that the owner may be presumed to know that there is a possession, adverse to his title. *Propr's Ken. Purchase v. Springer* 4 *Mass.* 416. *Boston Mill Corporation v. Bulfinch* 6 *Mass.* 229. The adoption of a different rule, as urged by the defendants, would preclude the possibility of any disseisin of uncultivated lands. But with regard to such lands, those claims and acts of ownership, which, if unknown to the true proprietor, would amount only to trespass, become, when brought to his knowledge and acquiesced in by him, sufficient to constitute a disseisin. *Pray v. Pierce* 7 *Mass.* 381. In the case at bar this knowledge in the owner of the land was a question fairly and properly submitted to the jury,

and is found by their verdict. But this fact did not exist in any of the cases cited on this point by the counsel for the defendant, which therefore do not apply to the present.

But the fact of disseisin was sufficiently evident from the admission of the defendant himself, made of record in the case *Poor & al. v. Robison* 10 *Mass.* 131, which is considered as settling the law of this point in the present case. That such admissions are not to be retracted, is decided in *Porter v. Hill* 9 *Mass.* 34.

The doctrine of disseisin by election cannot in this case avail the defendants; because that election, when once made, is binding on the party making it, and he is not afterwards permitted to falsify the admission of record. *Runnington on Ejectment* 54, 55. Hence it is that an action of an higher nature, as a writ of right, is always a bar to one of inferior grade; for the bringing of such a writ supposes a right of entry in the tenant, as the bringing of a writ of entry supposes him in the actual possession.

Neither can it be maintained, that the act of *Col. Poor*, in riding over the land, along the highway, amounted to an *entry*. Any act of the party, to have that effect, must be proposed and designed for such end, and of a character distinctly to denote the intention with which it is done. It must be attended with a declaration of that intention;—not a casual entry;—but one made openly, formally, and *animo clamandi*. 3 *Bl. Com.* 174, 175, 179. 2 *Bl. Com.* 209. 1 *Cruise's Dig.* 13. 3 *Cruise's Dig.* 550. *Ford v. Lord Grey* 6 *Mod.* 44. 1 *Inst.* 245, *b. Plowd.* 92, 93. 1 *Saund.* 319, *note. Bul. N. P.* 103. *Skin.* 412. *Peake's Ev.* 306. *Jackson v. Schoonmaker* 4 *Johns.* 390. *Doe & al. v. Davis* 7 *East* 311. *Runnington on Ejectment* 202. The conduct of *Col. Poor*, having none of these attributes, does not amount to such an entry. The object, moreover, of an entry is to revest the *possession* in the true owner. But here the party was only on that portion of the land over which the public had lawfully acquired the easement of a road, and on which the plaintiff could not have contested his right of entry. Here, both parties had equal rights, and *Poor*, for aught appearing to the contrary, was merely enjoying the common privilege of the public highway.

It is conceded that nothing passed to *Robison* by the deed of *Perley* and others to him; but being registered it was properly

admitted to shew the nature and extent of his claim; and so far as the nature of the case would admit, it was tantamount to an actual occupancy, open and continued.

Hopkins, in reply, commented on the facts in the case, to shew that whatever *Col. Poor* might be bound to infer from the registry of the deed to *Robison*, the existing situation of the land would justify him in the belief that all pretence of claim under that deed was abandoned, there being no survey, mark of boundaries, or other vestige of adverse possession. And he argued that though a deed recorded, *accompanied* by a visible occupancy of *part* of the land, may be received as evidence of the extent of the grantee's claim to the tract *thus occupied*; yet no decision had gone so far as to give that effect to a deed of *wild land*, where the claimant had exercised none of the visible and unequivocal acts of ownership.

He also insisted that the allegations of record in the former suit concerning these lands ought not to be regarded in any other light than as legal fictions, devised for the purposes of justice in those particular actions. If similar allegations in other cases are to be taken as conclusive and binding on the parties, the confession of lease, entry and ouster, in ejectment, might always stand as evidence of an actual demise; and the averment of the loss of a ship, in an action of trover against the master, would support him in a claim against the owner for salvage. Besides, the suit in that case was subsequently discontinued; and it was never supposed that a writ of right, *thus terminated*, was a bar to another action.

The arguments, of which the foregoing is a brief abstract, having been submitted in writing during the vacation, the judgment of the Court was delivered at the ensuing *August* term in *Oxford* by

Weston J. An entry into land, to purge a disseisin, should be made with that intention; and such intention should be sufficiently indicated, either by the act itself, or by words accompanying the act. *Coke Lit.* 49, *b.* 255, *b.* The act of Col. *Thomas Poor*, in riding along the public highway, which passed over these lots,

and there making inquiry about them, seems to have none of the properties of an entry of this description; and this point therefore, though taken at the trial, has not been urged in argument.

Certain objections are made in this case to the competency of a part of the testimony. A release having been given to *Enoch Perley*, by which his interest was removed, his competency as a witness was thereby restored. Evidence of the institution and prosecution of former suits, in relation to the title now in controversy, although by no means conclusive, and certainly open to explanation, was in our opinion admissible, as tending, in connection with other circumstances, to shew a knowledge on the part of *Swett*, and those from whom his title is derived, of the nature and extent of the plaintiff's claim.

The deed from *Kimball* and others to *Thomas Robison*, the father of the plaintiff, although not received as evidence of title, was admitted to shew the extent of the plaintiff's claim. That a deed from a party not having title, if duly registered, and if the grantee enter upon the land under his deed, and continue openly to improve and occupy a part of it may, in connection with such occupation, be considered as a disseisin of the true owner, is admitted as law, both in the case of *Little v. Megquier* and the *Proprietors v. Laboree*, cited in the argument. The tenant in such case, entering under claim and color of title, is regarded by the law with more favor than a mere naked disseisor, and is therefore entitled, as to all the land described in his deed, where there is no opposing possession, to the full benefit and protection of the statute of limitations. The jury in this case having found, under the direction of the Judge, that *Robison* the elder did go into possession of the land under the deed in question, and did continue to occupy it, the deed in our opinion, being duly recorded, was properly admissible as evidence of the extent of the plaintiff's claim.

The presiding Judge instructed the jury "that, if from the "whole evidence, they believed that *Robison* went into posses- "sion under his deed; that he had maintained a continued posses- "sion exclusive and uninterrupted, and that however *Thomas* "*Poor* might complain, he never did actually interfere with the "possession of the lots, they would return their verdict for the

" plaintiff." This direction does not appear to us to be at variance with the principles of law, or of adjudged cases. Whether the jury ought thus to have found, is not one of the questions before us. No motion to set aside the verdict as against evidence, if made, could be sustained, as it appears that a part only of the evidence is reported in this case.

The deed, from which the plaintiff has deduced his title, had been executed for nearly forty years, prior to the commencement of this action; the grantee had exercised acts of ownership under it; these facts were known to those under whom *Swett*, one of the defendants, claims; and no entry was made, or opposing claim effectually set up by them against the plaintiff's title. It might be a question whether, if the case required it, legal presumptions, under these circumstances, in aid of a deed so ancient, might not, in accordance with precedents, be resorted to; but upon this point we give no opinion.

The motion for a new trial is not sustained, and judgment is to be entered on the verdict.

NOTE. The *Chief Justice*, having formerly been of counsel, did not sit in this cause.

LEWIS & AL. *app'ts. vs.* WEBB, *adm'r.*

The Legislature of this State have no authority, by the Constitution, to pass any act or resolve granting an appeal or a new trial in any cause between private citizens, or dispensing with any general law in favor of a particular case.

AT the last *May* term, on opening this case, which was an appeal from a decree of the Judge of Probate, granted by virtue of a resolve of the legislature, it appeared that the appellants were sureties of *Joshua Webb* on his bond, as administrator on the estate of his father, *Jonathan Webb*, deceased ;—that the administrator had become insolvent ;—that after his insolvency, viz. *April* 29, 1819, he was induced to settle an account at the Probate office by a decree of the Judge, charging himself with about nine thousand dollars, for mill rents growing due and received

since the decease of the intestate, and seven years' interest thereon; and for debts due from the administrator to the intestate at the time of his decease, and for interest thereon since that time to the settlement of the account;—that of the nature or existence of this account, or of the decree thereon, the bondsmen had no knowledge till long after the time allowed by law to claim an appeal had elapsed;—that on discovery of their liability by law to pay the amount of the decree so obtained, they applied to the legislature for relief; and procured the passage of a resolve *Feb.* 17, 1824, granting them the right of appeal from the decree of the Judge of Probate, and directing and authorizing him to allow, and this Court to sustain, proceed, and decree in the same, in the like manner as if the appeal had been claimed and granted on the day of making the decree.

Longfellow and *Greenleaf*, for the appellants, were called upon by the Court to shew on what constitutional grounds this appeal could be sustained, if the granting of it was a judicial act; the Legislature being expressly prohibited from exercising any functions of the judiciary, by the constitution, *art.* 3, *sec.* 2.

To this point they argued, that this provision of our constitution was substantially the same with that of the bill of rights, *art.* 30, in the constitution of *Massachusetts*, under which appeals, reviews and new trials had been granted in very many instances, which they cited;—that when a similar provision was inserted in the constitution of this State, it was adopted together with its uniform and well known *contemporaneous exposition*;—and that if this exposition was not intended to have been received together with the article, a different language would have been used.

The case of *Merrill v. Sherburne* 1 *Adams* 199, in *New-Hampshire*, they said was no authority to the contrary; because in that State the practice had not been uniform, the right of the legislature to grant new trials having been denied by the Courts on various occasions ever since the adoption of their constitution in 1792.

Emery, on the other side, denied the validity of the resolve; maintaining that it was unconstitutional, because it disturbed the

rights which were already vested under the decree of the Judge of Probate,—was retrospective in its operation,—and was in effect a repeal, *pro hac vice*, of the general laws. Constitution of *Maine*, *art.* 1, *sec.* 11. It is also a *judicial* act, and therefore transcends the powers of the legislature, to which this authority is expressly interdicted by *art.* 3, *sec.* 1, 2. See *Davis v. Davis* 1 *Pick.* 206. Any change in the common law course of proceedings in trials was viewed with jealousy in *England*, as early as the reign of *Hen.* 4. 3 *Reeve's Hist. Eng. law*, 227,—and all attempts to impair the obligation of contracts, or infringe vested rights by legislation, are resisted with vigor by the Judges both of that country and of this. 2 *Show.* 17. *Couch v. Jeffries* 4 *Burr.* 2460. It is not supposed, for a moment, that the legislature ever intend to give their laws that effect. 1 *Tucker's Blackst.* 416. 5 *Mass.* 534. *Holden v. James* 11 *Mass.* 396. *Merrill v. Sherburne* 1 *Adams* 199. *King v. Dedham Bank* 15 *Mass.* 454. 16 *Mass.* 84, 270. *Dash v. Van Kleick* 7 *Johns.* 477. 8 *Johns.* 520. *Federalist*, *No's.* 33, 44, 47, 81. Whatever may have been the practice under the colonial charters, in which the legislative and judicial departments are frequently confounded, or from whatever causes the same irregularities may have been continued under the constitution of the parent State, the language of our own constitution is too explicit to be misunderstood, and too imperative to be disregarded.

MELLEN, C. J. at the *August* term this year in *Oxford*, delivered the opinion of the Court as follows.

This cause assumes an importance from the very nature of the question before the Court; because it has immediate respect to the boundary lines of those powers which are given by the constitution of this State to the legislative and judicial departments. These lines are not drawn in the constitution with distinctness, but by the use of certain general expressions, which will be presently considered. It seems at the present day to be an established principle in our country, as well as in many other parts of the world, that the three great powers of government, the legislative, the executive, and the judicial, should be pre-

served as distinct from, and independent of each other, as the nature of society, human imperfections, and peculiar circumstances will admit. And the more this independence of each department, within its constitutional limits, can be preserved, the nearer the system will approach the perfection of civil government, and the security of civil liberty. Thus the wisdom and virtue of society are called upon to give strength and support to this vital principle; thereby guarding the system against those disorders and diseases which are too apt to endanger its stability and derange its operations. The science of government has gradually become better understood, by a careful attention to the lessons of experience; and those who framed the constitution of the United States and of this State have acted under the influence and been guided by the dictates of this best of instructors. The same remark is applicable to most of the States in the Union.

The first section of the third article of our constitution is in these words; viz. "The powers of this government shall be "divided into three distinct departments; the legislative, the "executive, and the judicial." The second section of the same article declares that "no person or persons belonging to one of "those departments, shall exercise any of the powers properly "belonging to either of the others except in cases herein ex- "pressly directed or permitted. It is not necessary for us on this occasion, to particularize the cases thus expressly excepted; because none of them are deemed to have any bearing upon the point to be decided in this cause.

The first section of the fourth article of the third part of the constitution authorizes the legislature "to make and establish all reasonable laws and regulations for the defence and benefit of the people of this State, not repugnant to this constitution, nor to that of the United States. Under this grant of power from the people to the legislature all constitutional resolves and public and private, or general and special laws are enacted.

The first section of the sixth article of the fourth part of the constitution declares that "the judicial power of this State shall "be vested in a Supreme Judicial Court, and such other Courts "as the legislature shall from time to time establish."

The nineteenth section of the declaration of rights declares that "Every person, for an injury done him in his person, repu- "tation, property or immunities, shall have remedy by due course "of law."

By the laws in force at the time said resolve was passed, the judicial power was vested in this Court, the Court of Common Pleas, the Court of Probate, and to a limited extent, in Justices of the Peace ; the three latter jurisdictions having been created by the legislature, pursuant to the above cited provision of the constitution. The Court of Sessions has no jurisdiction in cases between party and party. Thus, it appears that all the judicial power, has been distributed by the constitution and the laws, and vested in the manner before mentioned. No judicial power has been left residing in the legislature ; though in cases of impeachment the constitution vests such power in one branch of it, viz. the Senate.

Again by the law in force in *Massachusetts* at the time the decree of the Judge of Probate was passed, and which so continued in force there, and in this State until re-enacted by our legislature, *Stat.* 1821, *ch.* 51, *sec.* 64, it is provided "that any "person aggrieved at any order, sentence, decree or denial of "any Judge of Probate in any county, may appeal therefrom to "the said Supreme Court of Probate, provided such appeal be "claimed within one month from the time of making such order, "sentence, decree or denial, and bond be given and filed in the "probate office by the appellant within ten days after such appeal "shall be claimed, and granted, for the prosecution thereof to "effect at the next Supreme Court of Probate, and for paying "all intervening costs and damages, and such costs as the said "Supreme Court of Probate shall tax against him." As has been before stated, no appeal was granted or claimed according to the above provision ; nor till since the resolve in question was passed.

We have thus collected and arranged the foregoing passages, or extracts from the resolve, and our own constitution ; and also from the statute of this State and *Massachusetts*, on the subject of appeals from decrees of Judges of Probate ; and have also stated how the judicial power of the State has been parcelled out, and

where it has been vested ; and we apprehend that by a careful consideration of these, in connection with certain fundamental principles, we may arrive at a safe and satisfactory conclusion.

The general question submitted to our decision, in this cause, seems to be divisible into three inquiries ; viz.

1. What is the nature of the power exercised by the legislature in passing said resolve : is it of a legislative or judicial character ?

2. If of a legislative character, is the resolve unconstitutional, or retrospective and void, on the ground that it affects, disturbs and destroys the vested rights of third persons ?

3. Is it competent for the legislature in the exercise of their legitimate authority, to suspend the operation of a general standing law, in favor of one or more individuals ; leaving it in full force as to all other persons ?

As to the *first* inquiry, we would observe as has been before intimated, that the terms used in the first section, as to three departments of government are general ; and the phraseology of the second section prohibiting the inteference of the departments, is also general. Hence as in the instance before us a question arises ;—what exercise of power by those belonging to one department, is to be considered as an invasion of the province of either of the other departments ? In reply to this it may be said at once, that if the legislature undertake to exercise judicial power, they invade the province of the judiciary ; because the constitution and the laws have placed all the judicial power in other hands. But the question returns; did the legislature exercise a judicial power in granting to the appellants the right of appeal ? In form they did not, but if it was such in substance and effect, it would clearly be a violation of the spirit if not of the very language of the constitution.

Whatever may be considered the nature and character of the decree, since the appeal was claimed, it is very clear that, at the time the legislature passed the resolve, it was in full force and virtue ; and had been for almost five years. The rights of heirs or creditors in the subject matter of that decree vested when it was passed, and so remained undisturbed until the resolve

professed to grant the appellants leave to disturb them. The ordinary and legal consequence of an appeal is, to vacate at once, the judgment or decree appealed from. Has that effect been produced in the present instance ? Or is the decree of the Judge of Probate in full force now, and the administrator liable to have a second decree passed against him by this Court on the same account ? Such a decree passed in this case by us, would not operate to relieve the administrator from the effect of the existing decree, unless the resolve, and the appeal claimed in virtue of it, have completely vacated that decree ; and if it is not vacated thereby, why is it not a bar to all proceedings in this Court when relied upon as such. In fact this appeal cannot be sustained on any other principles, than that of its having produced the usual effect of an ordinary appeal ; that is, having vacated the decree below. And can the legislature, by a mere resolve, set aside a judgment or decree of a Judicial Court, and render it null and void ? This is an exercise of power common in Courts of law ; a power not questioned ; but it is one purely judicial in its nature, and its consequences. It is one of the striking and peculiar features of judicial power that it is displayed in the decision of controversies between contending parties ; the settlement of their rights and redress of their wrongs. But it is urged that the resolve is not liable to objection on constitutional ground; that the authority exercised by the legislature is not in any degree judicial ; that the resolve goes no farther than to authorize a re-examination of the cause, to empower one judicial Court to review the proceedings of another judicial Court by way of appeal, and thus to do complete and final justice to all concerned. It is true the resolve does not in terms, purport to transfer property directly from one man to another by mere legislative authority ; but it professes to grant to one party in a cause, which has been, according to existing laws, finally decided, special authority to compel the other party, contrary to the general law of the land, to submit his cause to another Court for trial ; the consequence of which may be the total loss of all those rights and all that property which the judgment complained of had entitled him, and those claiming through or under him, to hold and enjoy ; that is to say, it professes to accomplish in an indirect and circui-

tous manner, that which the existing laws forbid, and which by a direct and legal course cannot be attained ; and to perform an act respecting a cause between party and party ; an act therefore of a judicial character, in the simple form of legislation. Can this be correct legislation ? Can such a law be reasonable within the meaning of that term, as used in the constitution in the grant of legislative power ? We trust there is more harmony than this between the principles of morality and those of the constitution and the common law. A law is defined as "a rule of civil conduct." 1 *Bl. Com.* 44. Hence it must in its nature be general and prospective ; a rule for all, and binding on all. It is the province of the legislature to make and establish laws ; and it is the province and duty of Judges to expound and apply them.

In addition to what has been remarked under this head, it may be observed that there is no occasion for this species of particular legislative interposition. The cause of justice does not require it. If the general law which gives authority to the judicial Courts to grant reviews, in special cases, is not sufficiently comprehensive in its terms or provisions, let this discretionary jurisdiction be enlarged, so as to embrace all those cases where a new trial ought to be had ; but let all the citizens be placed on the same level, and discuss the merits of their application before those tribunals where facts can be investigated and principles uniformly applied ;—in that forum where, if a review should be granted, the cause would undergo its final investigation and decision. The genius of our government and the nature of our civil institutions are such as to render it most proper that all questions between litigating parties should be discussed and decided in a judicial Court ; there is the place to settle questions of law ; and though they have often been presented to the legislature for their determination in the form of applications for new trials, nothing but a familiarity with this mode of proceeding prevents our perceiving at once its impropriety and violation of the spirit of our constitutional provisions. The counsel for the appellants have appealed, by way of argument to this practice in *Massachusetts.* To this several answers may be given. The practice commenced under the provincial government ; and the power seems to have been exercised by the legislature at that

time on the same principles as it is by the British Parliament ; no constitutional restraints in either case, existing to prohibit that course of proceeding. After the constitution of *Massachusetts* was adopted, the practice may have been continued. Prior to the year 1788, the Supreme Judicial Court were not authorized to grant reviews ; but they have been ever since, and so has this Court since its first organization. Before that time the power, if it resided any where, was supposed to reside in the legislature; and there is no proof before us that the power was denied. It has, no doubt, been exercised in many cases, and been followed by acquiescence. The legality of this jurisdiction seems not to have been denied till in the case of *Holden v. James* 11 *Mass.* 396. The reports do not furnish us with any other decisions on the point. But mere acquiescence in the exercise of this power is no proof, under existing circumstances of its legitimacy. If in any of those cases where the legislature granted new trials, the question of constitutional authority, had been subjected to the critical examination which was had in the above case of *Holden v. James*, the result would probably have been the same. In this State the question is open, and ought now to be decided on its intrinsic merits, with all due deference to those who have established certain constitutional boundaries, beyond which the public good demands that neither of the departments of government should pass.

It has been urged that a question almost precisely similar to this has been settled by the Supreme Court of the United States in the case of *Calder and wife v. Bull & al.* 3 *Dall.* 386. On examination, the cases differ essentially. At the time the legislature of *Connecticut* granted the appeal in that case, their authority was derived from the charter. The people of the State had formed no constitution, and the legislature of course were not restrained by any constitutional provisions, as is the case in this State. Several of the Judges, in giving their opinion, relied on this circumstance, and the usage shewing that the legislature had long exercised this species of judicial power. Such also was the view of this case taken by the Supreme Court of *New-Hampshire* in the case of *Merrill, adm'r v. Sherburn & al.* 1 *N. H. Rep.* 199. The appellants therefore can derive little or no support

from decided cases. We must settle this case on principles.

As to the *second* inquiry, we perceive that many remarks and arguments particularly applicable to it have been anticipated in our consideration of the subject of the first inquiry. In the case of *Propr's of Ken. Purchase v. Laboree & al.* 2 *Greenl.* 275, we have decided that a law retrospective in its operations, acting on past transactions, and in its operation disturbing, impairing, defeating or destroying vested rights, is void, and can not and must not receive judicial sanction. We refer to that case for the reasons on which our opinion is founded. We have intimated in what manner the resolve is objectionable on this account. The decree of the Judge of Probate had settled all questions in relation to the account of the administrator which was the subject of the decree; and as no appeal was legally claimed, by the law of the land the door of investigation was completely closed; so that the account was not examinable in any form, by any judicial tribunal. Such a decree is a legal title to all claiming under it, or beneficially interested in it. If for instance by that decree the administrator stood charged with a balance in his hands of five thousand dollars, the disturbance of such decree would necessarily endanger and perhaps destroy the vested rights of heirs or creditors, in that sum. If by such a legislative act as the resolve in question, an existing absolute decree or judgment could be vacated, and persons interested therein be deprived of their rights in this summary manner, what security does the citizen enjoy in virtue of the section of the declaration of rights before cited, viz. "Every person for an injury done him "in his person, reputation, property or immunities, shall have "remedy by due course of law?" But, for the reasons before assigned, we need not enlarge on this head of the cause; and therefore proceed to the consideration of the *third* inquiry.

All public laws, from their very nature and effects, are to be considered as rules for future cases, prescribed for the benefit and regulation of the whole community. Laws of this description are considered as the guardians of the life, safety and rights of each individual in society. In these, each man has an interest, while they remain in force, and on all occasions he may rightfully claim their protoction; and all have an equal right to make this

claim, and enjoy this protection; because, according to the first section in our declaration of rights, " All men are born equally " free and independent; and have certain natural, inherent and " unalienable rights, among which are those of enjoying and de- " fending life and liberty, acquiring, possessing, and protecting " property, and of pursuing and obtaining safety and happiness." On principle then it can never be within the bounds of legitimate legislation, to enact a special law, or pass a resolve dispensing with the general law, in a particular case, and granting a privilege and indulgence to one man, by way of exemption from the operation and effect of such general law, leaving all other persons under its operation. Such a law is neither just or reasonable in its consequences. It is our boast that we live under a government of laws and not of men. But this can hardly be deemed a blessing unless those laws have for their immoveable basis the great principle of constitutional equality. Can it be supposed for a moment, that if the legislature should pass a general law, and add a section by way of *proviso*, that it never should be construed to have any operation or effect upon the persons, rights or property of *Archelaus Lewis* or *John Gordon*, such a proviso would receive the sanction or even the countenance of a Court of law ? And how does the supposed case differ in principle from the present ? A resolve passed after the general law, can produce only the same effect as such proviso. In fact, neither can have any legal operation. The case of *Holden v. James* 11 *Mass.* 396, is a direct authority on this point. The Court there decided that the legislature have no authority, under the constitution, to suspend the operation of a general law in favor of an individual. *Holden's* right of action against *James* as administrator, was barred by the statute of limitations, which was enacted for the protection of executors and administrators, in suits against them in these capacities; and the legislature on *Holden's* application, passed a resolve authorizing the Court to try and decide the cause in the same manner, and render the same judgment, as though the action had not been barred by the statute; and suspending the operation of the statute as to *Holden's* demands against the intestate. The Court observed that they could not presume the legislature expected them to render a judgment contrary to law; and as the

statute of limitations was in full force, and unrepealed, it could not be legally suspended as it regarded the plaintiff, and they accordingly nonsuited him. In the case before us, though the legislature by their resolve have not only authorized but directed this Court to sustain the appeal, and proceed and decide the cause in the same manner as though the appeal had been claimed and granted in due season; we cannot suppose they entertained any doubt as to the propriety and legality of such proceedings; or presume that it was expected or desired that we should so sustain the appeal, and decree in the cause, unless warranted by law. The practice which has prevailed in *Massachusetts* in respect to granting new trials by the legislature, has in some instances been followed in this State, though considered by those who have granted them as so sanctioned by usage, as to be a proper exercise of power; yet we are bound by our duty and our oaths to decide the question submitted on its intrinsic merits, when tested by the principles of the constitution and the law of the land. The question is important, and we have examined it carefully. The object has been to ascertain the will of the people, as expressed in that constitution; and the true limits of those powers which they have granted to the three departments of government. This will and these limits being ascertained, the path of duty is plain, and it is the interest of all, that each branch should steadily pursue it. By pursuing this path ourselves, we have arrived at the conclusion, with which we feel satisfied, that, for the reasons stated in this opinion, the resolve in question cannot be deemed constitutional and binding on this Court, or entitled to its sanction; and accordingly we dismiss the appeal.

Appeal dismissed.

After the foregoing opinion was delivered *Preble* J. observed that though he was not present at the argument of the cause, yet he fully concurred in the correctness of the conclusion at which his brethren had arrived; and the question decided, being an important and constitutional one, he thought it proper, on this occasion, to declare his concurrence.

DECKER *vs.* FREEMAN & al.

A vote of proprietors, authorising a committee *to sell* lands, empowers them also to make deeds, in the name of the proprietors.

Of the form of a deed by a proprietors' committee.

THIS was an action of covenant broken, against the defendants, in which the plaintiff claimed to charge them in their individual capacities upon the covenants in a deed which they made in pursuance of a vote of the proprietors of *Pearsontown*; to which they pleaded *non est factum*.

The material parts of the deed were as follows:—"Know all "men by these presents that the proprietors of the township "lately called *Pearsontown*, but now *Standish*—by *Benjamin Tit-* "*comb*, *Samuel Freeman*, and *Joseph Holt Ingraham*, a committee "legally appointed and empowered at a meeting of said proprie- "tors holden *Jan.* 11, 1791, to sell the remainder of the thirty "acre lots laid out to be given to settlers in said town, in con- "sideration"—&c.—"And the said proprietors for themselves, "their heirs, executors and administrators do covenant"—&c. —"In witness whereof the said proprietors by their committee "aforesaid, who subscribe this deed in the name and behalf of "said proprietors, have hereunto set their hands and seals"—&c. The vote referred to in the deed was produced and read, authorizing the committee *to sell* the lands therein mentioned.

WESTON J. before whom the cause was tried, directed the jury to find for the plaintiff, reserving the effect of the deed for the consideration of the whole Court, the parties agreeing that judgment should be entered as the Court should determine.

Adams, for the plaintiff, contended that it was not the deed of the proprietors, because the committee had no authority to *give deeds*, but only to *make contracts* for the land;—and if the authority had been sufficient, it was not pursued, but the deed being signed and sealed by the individuals in their own names and with their own seals, it was their deed. *Elwell v. Shaw* 16 *Mass.* 42. 1 *Greenl.* 339. *S. C. Stinchfield v. Little* 1 *Greenl.* 231. 1 *Dane's Abr.* 297. 1 *Chitty Pl.* 24. 4 *Mass.* 595.

Longfellow, for the defendant, replied that the authority *to sell* necessarily imported a power to make deeds;—*Lambert v. Carr*, 9 *Mass.* and that a deed from *quasi* corporations of this kind, which have no common seal, could not be executed in any other manner than this. *Wilks v. Back* 2 *East* 143. *Paley on Agency* 152, 153, and cases there cited. But if it be not the deed of the proprietors, yet it contains no covenants *in the name of the defendants*, and they therefore are not liable in this action.

WESTON J. at the *August* term in *Oxford*, delivered the opinion of the Court as follows.

The cases of *Elwell v. Shaw* and of *Stinchfield v. Little*, cited in the argument, were well considered, after an elaborate examination of the decisions bearing upon the question, from *Combe's* case to the more modern authorities. Whatever we may think of some of the principles there decided, if the subject were *res integra*, we consider the doctrine deduced and laid down in these cases as now too well settled to be shaken. But we are not disposed to extend it to cases, fairly distinguishable from those, which have been cited.

In *Elwell v. Shaw*, *Joshua Elwell*, having a power from *Jonathan Elwell*, undertakes to convey the land of *Jonathan*, but uses his own name in the deed, as attorney to *Jonathan*; "I the said *Joshua*, by virtue" &c. do hereby &c. At the close he says, "In "witness whereof I have hereunto set the name and seal of the "said *Jonathan*" &c., but it is signed *Joshua Elwell* and a seal.

In *Stinchfield v. Little*, the deed begins, "Know all men" &c. "that I *Josiah Little*, by virtue of a vote" &c. and in behalf of the *Pejepscot Proprietors*, *he* covenants, and at the close says, "I "the said *Josiah Little*, by virtue of the aforesaid vote, do here- "unto set my hand and seal."

But in the case before us, every part of the deed is in the name of the proprietors. They grant; they covenant; and it closes with these words: "In witness whereof the said proprietors, by "their committee aforesaid, who subscribe this deed in the name "and behalf of said proprietors, have hereunto set their hands "and seals." The committee therefore do not act in their own

name; they act in the name of their principal; and that is all which the rule of law requires. In the case of *Wilks v. Back* 2 *East* 142, it was decided that it was immaterial whether the deed was signed A. B. for C. D. or C. D. by A. B. and that "there "is no particular form of words required to be used, provided the "act be done in the name of the principal." The deed in this case has three seals. One would have been sufficient; but if the proprietors affixed their seal three times, instead of once, we are not aware that the validity of the deed is thereby impaired. The committee did not profess to use their own seals, but the seals of the proprietors.

Upon full consideration, this deed does not appear to us to be the deed of the defendants. The verdict is therefore set aside, and a nonsuit is to be entered, and the defendants allowed their costs.

THE INHABITANTS OF THE FIRST PARISH IN FREEPORT *vs.* BARTOL.

Where an agreement concerning the sale of real estate is contained on two separate papers, neither of which contains in itself any reference to the other, parol evidence is inadmissible to prove their connection.

The doctrine of part performance is not admitted except in Courts of equity.

THIS action was *assumpsit*, for the price of two pews in a new meeting house built by the plaintiffs. The first count was a general *assumpsit*, referring to a schedule annexed.—The second count stated that the defendant, in consideration of the plaintiffs' promise to build and finish a meeting house in *Freeport*, and make and finish therein, in a reasonable time, for the benefit and use of the defendant, two pews, one on the lower floor and one in the gallery, promised the plaintiffs "to pay them therefor" one hundred and ten dollars in nine installments, all of which were due; —and that the plaintiffs had performed their said engagement.— The third count was a special *indebitatus assumpsit*, for the same sum and interest, in consideration that the plaintiffs had made, finished and completed for the defendant two pews in their meeting house. The issue was *non assumpsit*.

At the trial, which was before the *Chief Justice*, the plaintiffs produced their book of records, from which it appeared that at a meeting *Nov.* 11, 1817, the defendant was chosen one of a committee to view the old meeting house, and determine whether it was expedient to build or repair, and in what manner;—that *Dec.* 2, 1817, the defendant was again appointed one of a committee to collect subscriptions, or devise some plan for building a new meeting house, on such spot as they might select;—that *Dec.* 13, this committee made a report to the parish, recommending that the materials of the old house be used as far as they would go, that a new plan be drawn, an estimate made of the expense, a proportionate value fixed to each pew, and the pews then sold at auction, each pew being set up at the price marked on the plan; —and designating the spot on which the house should be erected. This report was accepted, and the defendant, with others, appointed a committee to make a plan and estimate, and receive a deed of the land designated, pledging the credit of the parish for the payment. At a subsequent meeting the day of sale of the pew ground was fixed to be on *Jan.* 3, 1818, and the defendant, with *Samuel Holbrook* and *Nathan Nye* were appointed a committee "to transact the business of selling the pews." The defendant was also appointed one of a committee to superintend the taking down the old, and the building of the new house.

It appeared from the testimony of Mr. *Nye*, that at the sale of the pews on the day appointed, he acted as auctioneer, and the defendant as clerk;—that previous to opening the sale, he wrote down on a piece of paper the terms of the sale, which were publicly read, but not signed by any person; and left it on the table, with the memorandum of the sales made by the defendant, and other papers, but it had since been lost or mislaid, and could not be found;—that these conditions were that the purchase money should be paid in nine equal payments at intervals of sixty days, with interest, and that notes should be given to the parish treasurer for the amount;—and that the record of sales was kept by the defendant on a separate paper.—This paper, being produced, was found to be without any title or caption, and to have been written partly by the defendant, without date, and partly by other persons at subsequent periods which were dated. Among the

names on the list set down by the defendant was his own, thus—"*No.* 13, *B. Bartol* $86," and in another place in a column headed "gallery" was "3, *B. Bartol*—24." The others were written in the same manner.

It also appeared that at a subsequent meeting, held *Feb.* 7, 1818, the defendant was discharged at his own request from all the committees on which he had been appointed;—that about the first of *May* following he removed to *Portland*;—that in *April*, before his removal, he paid to *Nye*, the treasurer, twenty-four dollars, being the price of the gallery pew, but gave him at the same time to understand that he should pay no more money;—that he was afterwards often in *Freeport*, having a farm there; but never gave any note, nor was requested to give one, nor was offered any deed, nor demanded one;—nor was any other intercourse proved between him and the plaintiffs or their agents on this subject, except that a letter was sent to him *Nov.* 9, 1821, demanding payment, of which he took no notice.

It was further proved that in *July* 1818, the meeting house, which was then nearly finished, was consumed by fire; and that another was soon after erected on the same site, on a similar plan, except that it was a few feet larger, and that the side pews stood obliquely to the outer walls.

Upon this evidence the Chief Justice directed the jury to return a verdict for the plaintiffs, reserving the questions of law made by the counsel for the defendant for the consideration of the whole Court.

Longfellow and *Greenleaf*, for the defendant, argued in support of the following positions.

1. The case shews no contract in writing; and the suit being for the price of real estate, the defendant is not bound, according to the statute of frauds. The contract is void,—1st. for want of *mutuality*, the plaintiffs not being bound, by any memorandum in writing, to give him a deed; and it is of the essence of an "agreement" that it be so perfect as to give each party a remedy upon it by action. 1 *Com. Dig.* 411. *Agreement* A. 1, cited and approved by Ld. *Ellenborough* in *Wain v. Warlters* 5 *East* 16. *Bromley v. Jeffries* 2 *Vern.* 415. *Armiger v. Clarke Bunb.*

111. *Lawrenson v. Butler* 1 *Sch. & Lefr.* 20. *Haddleston v. Briscoe* 11 *Ves.* 592. *Champion v. Plumer* 1 *New Rep.* 253. *Buckmaster v. Harrop* 13 *Ves.* 456. 1 *Mad. Ch.* 423—4. The opposing cases are only found in those States where a Court of Chancery is open, in which complete justice may be done ; and in Chancery the party seeking performance always offers on his own part to perform. But there being no Court of Chancery in this State, and the contract being made before the statute giving specific remedies in equity, the principle of mutuality ought to be followed, it being confessedly the best founded. *Per Kent* C. in *Clason v. Bailey* 14 *Johns.* 484. If the plaintiffs prevail, and refuse to give a deed, the defendant cannot recover back the money, it having been paid under a judgment. But 2dly, if the contract be mutual, yet it is imperfect, and therefore void ; the paper signed not containing *in itself* any reference to the terms of the sale, nor disclosing the parties ; and parol evidence not being admissible to connect the two papers together. *Clinan v. Cooke* 1 *Sch. & Lefr.* 22. *Hind v. Whitehouse* 7 *East* 569. *Boydell v. Drummond* 11 *East* 142. *Bailey & al. v. Ogden* 3 *Johns.* 399. *Abeel v. Radcliff* 13 *Johns.* 297. *Dodge v. Lean* 13 *Johns.* 508. *Sherburne v. Shaw* 1 *New Hamp. Rep.* 157.

2. Part performance does not render it valid. In the case of lands, the payment of money is not treated as part performance. 1 *Sch. & Lefr.* 41. Nor is any other act which is equivocal, or which easily admits compensation. *Frame v. Dawson* 14 *Ves.* 386. This doctrine, it is already admitted, has been extended too far in equity. 1 *Mad. Ch.* 379. 2 *Sch. & Lefr.* 5. *Grant v. Naylor* 4 *Cranch* 235. And at law its application is totally denied. *O'Herlihy v. Hedges* 1 *Sch. & Lefr.* 123, 130. *Kidder v. Hunt* 1 *Pick.* 328.

3. But if it was a contract, and binding, it related only to the first house, which was destroyed by fire ; and not to the second, which was erected after the defendant left the town, and after he ceased to have any connection with the affairs of the parish.

4. The new house being completed before the last day of payment, and no time having been mentioned for executing the deed, the *reasonable* time was on payment of the last instalment ; and

the action being for *this* instalment, as well as for the others, a deed should have been tendered, and the tender averred.

Orr and *Mitchell*, on the other side, contended, 1st. That the contract at the time of sale of the pews was not an agreement for the sale of real estate, pews being merely qualified property;—*Gay v. Baker* 17 *Mass.* 435,—and the erection of a pew being in the nature of improvements only, which are not within the statute of frauds. *Frear v. Hardenburg* 5 *Johns.* 272.

2. If it were within the statute, it is sufficiently signed, the defendant being the agent of both parties, and his act being obligatory on both.

3. But the true contract is found in the report of *Dec.* 13, 1817, in which the defendant is to be understood as engaging to purchase, and the parish to sell. The after designation of the pew finished the bargain, and perfected the rights of the parties. *Coles v. Trecothick* 9 *Ves.* 250. On the purchase of the real estate by the parish, each member became a *cestui que trust.* The parish holds the property in trust, and is to declare the uses by vote ; and the contract was not that the parishioners should severally receive a deed of real estate, but that the parish should build for each one a pew.

Weston, J. delivered the opinion of the Court as follows, at the ensuing *August* term in *Oxford.*

The statute of frauds provides that no action shall be sustained upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning the same, unless upon an agreement in writing. Pews are made by statute real estate ; and although held in a qualified manner, according to the case of *Gay v. Baker* 17 *Mass.* 435, yet they descend to the heir like other real estate, pass by the same forms of conveyance, and are protected by the same remedies. We can therefore, entertain no doubt that all contracts for the sale of pews are within the statute of frauds.

It has been contended that the erection of the meeting house, and the finishing of the pews by the plaintiffs, takes the case out

of the statute, upon the principle of part performance; but the better opinion is, that this principle is applicable to Courts of equity only. *Cook v. Jackson* 6 *Ves.* 39. *Jackson v. Pierce* 2 *Johns.* 224.

The defendant signed a paper, a copy of which makes a part of this case; but that paper proves no agreement; sets forth no terms or conditions; and is altogether defective as evidence of a contract. It is in proof that there did exist, at the time of the defendant's subscription, a paper now lost, in which the terms and conditions of sale, proposed by the town, were clearly and distinctly set forth; but the paper signed and produced has no reference to the paper lost. Its connexion with it therefore can only be shewn by parol evidence, which, we are clearly of opinion, is inadmissible under the statute. The instrument signed, or others to which it refers, and which are thereby made a part of it, should contain the whole agreement; at least so far as it is intended to affect the party to be charged. The admission of parol testimony to make out and complete such agreement, would defeat the object of the statute, which was intended, by the exclusion of testimony of this description, to lessen the facilities as well as the temptation for the commission of fraud and perjury.

The case of *Boydell v. Drummond* 11 *East* 140, is precisely in point. Proposals had been issued by the plaintiff and his partner, who had deceased prior to the suit, for the publication of a large number of prints from some of the scenes in Shakspeare's plays, upon certain terms and conditions specified. Printed copies of the prospectus of the publishers were lying in their shop for general inspection; but the book, in which the defendant signed his name, had only for its title, "Shakspeare subscribers, their signatures," without any reference to the prospectus. And as their connexion could only be proved by parol testimony, which was not admissible under the statute of frauds, the Court decided that the defendant was not legally charged.

We have not deemed it necessary to examine other points taken in the argument; being satisfied that, for the reasons before stated, the proof adduced is insufficient to sustain the action. The verdict is set aside and a new trial granted.

ROBBINS, *plaintiff in error vs.* BACON.

Where an order is drawn for payment of the *whole* of a particular fund, it is an equitable assignment of that fund to the payee; and after notice to the drawee it binds the fund in his hands.

THIS was a writ of error *coram vobis*, to the Court of Common Pleas, in which the question was upon the validity of the assignment of a book debt.

It appeared from the record sent up, that a book debt, amounting to nineteen dollars and thirty four cents, being due from the defendant to the plaintiff, the latter drew out a bill of the particular items, at the bottom of which he wrote the assignment in question, in the following terms;—"Capt. *Samuel Bacon*—Sir, "For value received please to pay *Wm. R. & C. Stockbridge*, "nineteen dollars and thirty-four cents, and the same shall dis- "charge the above bill. *N. Yarmouth, March* 23, 1824. *Thad-* "*deus Robbins.*"

Soon afterwards one of the assignees called on *Bacon* for the amount, saying that he had an order from the plaintiff for it, but shewing none,—and inquiring if he could pay it; which *Bacon* declined doing till he could see *Robbins*, as he thought the charges too high. The next day *Bacon* was summoned as the trustee of *Robbins*, at the suit of another creditor; after which *Stockbridge* shewed him the order, and requested payment, which was declined on account of the foreign attachment. The original suit in this case was then instituted for the benefit of the assignees; after which *Bacon*, upon his examination in the Court of Common Pleas, disclosed all the foregoing facts, and was there adjudged the trustee of *Robbins*, and paid the amount to the judgment creditor, deducting his own fees for travel and attendance.

Upon this evidence *Whitman* C. J. instructed the jury that as the Messrs. *Stockbridge* did not give the defendant any intimation that they were the owners of the demand in question, or that it it had been assigned to them, other than what was apparent on the face of the account and order, the defendant was not bound

to know that an *assignment* thereof had been intended; and therefore they ought to find for the defendant. To this opinion the plaintiff filed exceptions.

The *first* error assigned was upon that part of the Judge's instructions which related to the sufficiency of the assignment;—and the *second* was upon the point of notice. Plea, *in nullo est erratum.*

Greenleaf, for the plaintiff in error, cited and relied on the case of *Mandeville v. Welch* 1 *Wheat.* 285, and 5 *Wheat.* 286, as decisive of the validity of the assignment, it being a transfer of the *whole* of the fund in the hands of the debtor. And the fact of notice, he argued, was sufficiently apparent from the disclosure of the trustee himself, who appears to have well understood that it was an order for payment of the debt. The time of the notice is not material, provided it be prior to the disclosure.

Neither ought the payment of the money under a judgment to avail the defendant, because it was a judgment to which the *Stockbridges*, the assignees, were not parties.

Fessenden and *Deblois*, for the defendant in error, cited and commented on the decisions in *Massachusetts* and this State, extending the protection of the law to equitable assignments, but observed that in all these cases the whole evidence of debt had been passed into the hands of the assignee; and they were all instances of express contracts. In *Dix v. Cobb* 4 *Mass.* 508, the assignment of a book debt was by deed poll, expressing the consideration, and exhibited to the debtor. But in no instance it is believed, has this favor been extended to a *parol* transfer of an *implied* promise, as in the case at bar.

As to the *second* error, they contended that it was necessary that the debtor should be distinctly notified of the fact of the assignment, its sufficiency in point of form, and that it was upon valuable consideration. But neither of these particulars being made known to him, they could not be stated in his disclosure. He could only disclose such facts as the creditor and his assignee enabled him to relate; and upon these facts he was rightly adjudged trustee. *Decoster v. Livermore* 4 *Mass.* 101. *Foster v.*

Sinkler 4 *Mass.* 450. *Clark v. Brown* 14 *Mass.* 271. *Wood v. Partridge* 11 *Mass.* 491. Besides, that judgment is in full force, and cannot be avoided by plea, but concludes all parties till reversed by writ of error. By the express language of the statute of foreign attachments, the judgment against the trustee, and payment under it, is a perpetual bar to all future actions brought against him by the principal; and of course to all actions in the name of the principal. In *Foster v. Jones* 15 *Mass.* 186, it is said that the validity of such judgment, even if it were erroneous, cannot be collaterally questioned in any other action.

MELLEN C. J. delivered the opinion of the Court, at the ensuing *August* term in *Oxford*, as follows.

In this case the only question presented by the exceptions, which are a part of the record, is whether the instructions given by the presiding Judge of the Court of Common Pleas were correct and legal? If not, the judgment must be reversed and a trial had in this Court; when all the facts in support and defence of the original action may be re-examined and decided upon, according to their merits by the Court and jury. On this writ of error we can only notice the objections raised on the exceptions to the Judge's instructions, in relation to the sufficiency of the assignment made by *Robbins* to the Messrs. *Stockbridge*, for whose use the action was brought, of the debt due to him from *Bacon* the present defendant. The words of the Judge are, that "as the "Messrs. *Stockbridge* did not give the defendant any intimation "that they were the owners of the demand in question, on its "having been assigned to them, other than what was apparent "upon the face of the account and order, the defendant was not "bound to know that an assignment had been intended." It will be admitted that if the account and order at the foot of it, were legal evidence, when unimpeached, of an assignment of the debt due from *Bacon* to *Robbins*; and that the exhibition of it by the Messrs. *Stockbridge* to *Bacon* was evidence, when unimpeached, of their ownership of it, then the defendant was bound to know that an assignment thereof had been intended. The bill of exceptions does not disclose any such impeaching evidence; and *Parsons*

C. J. in the case of *Dix & al. v. Cobb & trustee* 4 *Mass.* 508, says, "The assignment in this case may be fraudulent, but on its face "it appears to be regular, and for a valuable consideration; and "we cannot presume fraud." In the case before us the order is for value received and refers to the account at the foot of which it was drawn. What then is necessary to constitute an assignment of a debt? There is in Courts of law an increasing liberality and disposition to protect the equitable rights of assignees to choses in action, and we have lately had occasion to examine the decisions on this subject in the case of *Vose v. Handy* 2 *Greenl.* 322. It is now settled that an assignment need not be in writing. A bond or note may be assigned upon valuable consideration by mere delivery to the assignee for his use. In those cases the bond or note is evidence of the debt due. When the debt is due on book merely, as a man cannot deliver over to an assignee of such debt his general book of accounts; a copy of the account taken from the book with an order on the debtor, may well be considered as equivalent to a delivery over of a bond or note. Such a copy authenticated by the signature and order of the creditor, is in its nature tantamount. It is an authority to go to the debtor and receive the money for which a valuable consideration has been given; and the possession of a bond or note would give no more authority. In all these supposed cases, a suit, if necessary, must be brought in the name of the creditor for the use of the assignee. We think the analogy is strong; but we do not rest on this merely, and upon the reasoning founded upon it; because in addition to the cases cited and commented upon in *Vose v. Handy* there are some others still more nearly resembling the case before us. In *Gibson & Johnson v. Minet & Fector* 1 *H. Bl.* 602, Lord Chief Baron *Eyre* says—"The theory of a bill of exchange is, that the bill is an assignment to the payee of a debt due from the "acceptor to the drawer; and that acceptance imports that the "acceptor is a debtor to the drawer or at least has effects in his "hands." In the case before us, the acceptance by *Bacon* of the order was not necessary to establish the existence of the debt from him to *Robbins*. The bill of exceptions states this expressly. But a case which seems directly in point is that of *Mandeville v. Welch* 5 *Wheaton* 277. In that case it was decided as

stated by *Story* J. in delivering the opinion of the Court. that, " where an order is drawn for a particular fund, it amounts to an " equitable assignment of that fund; and, after notice to the " drawer, it binds the fund in his hand." But the Court decided that the same principle would not apply to a partial assignment of a fund, unless expressly assented to by the drawee. See also the case of *Adams v. Robinson* 1 *Pick.* 462, and *Crocker & al. v. Whitney* cited by the plaintiff. According to the principles and decisions we have stated, we are led to the conclusion that the instructions of the Judge, to which the bill of exceptions was filed, were incorrect, and accordingly we reverse the judgment of the Court of Common Pleas, and order a new trial of the cause at the bar of this Court.

WOODMAN *& ux. adm'r. vs.* WOODMAN.

Where it was agreed between a debtor and his creditor that the former should give an absolute deed of conveyance of his farm, as collateral security for the debt, and that a bond should be executed by the latter, conditioned to reconvey on payment of the money ; and the deed was executed, delivered and recorded ; but the execution of the bond was deferred to another day, before which the creditor died and so the bond was never made ;—it was holden that this was no bar to a recovery of the debt by the administrator of the creditor.

THIS was an action of *assumpsit* on a note of hand made by the defendant to *Richard Burnham*, the plaintiffs' intestate, *June* 29, 1816, for 324 dollars, payable on demand ;—and it came before this Court upon a case stated by the parties, containing the following facts.

In *June* 1820, the defendant being indebted to *James A. Harmon*, the brother in law of said *Richard*, proposed to *Harmon* to secure both the debts by means of his farm in *Hollis*, called the *Wakefield* place, and to meet them on a certain day at a designated place in *Buxton*, and execute the conveyances. *Burnham* assented to this proposition, but thought it unnecessary for himself to go to *Buxton*, observing to *Harmon* that he might act for them both. Accordingly *Harmon* met the defendant at the place

agreed, where the defendant made and delivered to him an absolute deed, purporting to convey the *Wakefield* place to him and *Burnham* as tenants in common, for the consideration of nine hundred dollars. It was part of the agreement of the parties that *Harmon* and *Burnham* should give back to the defendant a sufficient bond to reconvey the farm on payment of the debts due to them. But *Burnham* not being present, and no means being at hand to ascertain the amount due to him, the preparation and execution of the bond of reconveyance was postponed to another day not specified, on which the parties agreed to meet at the same place and execute the bond ; and in the mean time *Harmon* took the deed and caused it to be recorded. *Burnham* being sick, they did not meet as agreed, but deferred the business from time to time, till his death soon after wholly prevented any farther proceedings. The notes were not to be given up till paid. The defendant then and ever since occupied the farm without molestation ; and *Harmon*, on payment of the debt to him, released his moiety of the estate conveyed. The whole farm was worth nine hundred dollars ; but no consideration-money was paid, it being intended only as collateral security for the payment of the debts.

After the decease of *Burnham*, the guardian of his children took the deed from the registry; but the land was not inventoried as part of his estate.

Greenleaf, for the plaintiffs, argued that the deed, as it appeared by the facts agreed, was intended only in the nature of a mortgage, as collateral security for the debt ;—and this being unpaid, the existence of the deed is no bar to its recovery. Nor is the defendant remediless, if he should be compelled to pay the money. He may have his bill in equity for specific performance of the contract to reconvey, relying on the statement of facts in this case as evidence in writing of the contract. 11 *Ves.* 593. Or he may have an action for the consideration money. *Wilkinson v. Scott* 17 *Mass.* 249. Or he may contest on the ground that it was never delivered, the contract not having been completed. *Stearns v. Barrett* 1 *Pick.* 449. But if he is remediless, it is through his own inattention.

Adams, for the defendant. If the agreement of the parties had been reduced to writing without seal, it would not have controlled the operation of the deed ;—much less can it, being only verbal. *Kelleran v. Brown* 4 *Mass.* 448. And unless the land conveyed to the intestate can be considered as payment of the debt, it is wholly lost to the defendant, the deed estopping him to claim payment of any part of the consideration. *Steele v. Adams* 1 *Greenl.* 1. Nor would any evidence be admitted to shew that the deed was conditional, nothing of that kind appearing on its face. *Loft.* 457. *Albee v. Ward* 8 *Mass.* 83. *Stackpole v. Arnold* 11 *Mass.* 27. *Boyd v. Stone* 11 *Mass.* 342. Neither can it be regarded as a conveyance in trust, the trust not being declared *in writing*, as the statute requires.

If the heirs of *Burnham* were now to bring a writ of entry against the defendant, to recover the land conveyed, the facts agreed in this case could not be admitted in evidence in such suit. 2 *Johns.* 179. 20 *Johns.* 134. 16 *Johns.* 110. *Flint v. Sheldon* 13 *Mass.* 443.

Had the agreement been carried into effect, the intended bond of defeasance would have controlled the deed, and constituted it a mortgage ; which would now have been foreclosed, and the debt of course extinct ;—and this is all which is sought by this defence, though the land is found to be of far greater value than the debt.

At the ensuing *August* term in *Oxford*, the opinion of the Court was delivered by

MELLEN C. J. It is certain that the facts in this case furnish evidence of strange inattention in the parties to the formation of their contract and the arrangements concerning it ; and if legal difficulties exist which may prevent the accomplishment of their intentions, and give to one of the parties an advantage to the prejudice of the other, the law is not answerable for these consequences. All persons are presumed to know the law ; and they must govern themselves by legal principles in their contracts and transactions with each other ; and by such principles must Courts be governed in the construction of these contracts, and in

their decisions upon the rights of parties ; whether the contracts were made discreetly or indiscreetly, or whether such construction will effectuate their real intention, or in some respects defeat it. And we must decide this cause upon the facts which belong to it ; and leave other questions and other causes, which may be consequent upon our judgment in this, to be settled upon their own merits, and the principles which apply to them, when regularly brought before us.

It is not necessary now to inquire whether there has been, or was intended to be, any delivery of the deed or conveyance in question to *Burnham* and *Harmon*, for the purpose of giving it legal effect and operation to pass the estate to the grantees absolutely or conditionally. Because, if it was a valid and effectual conveyance, intended merely as a mortgage or collateral security, as the counsel in the statement seem to have agreed ; still that fact would not constitute a legal defence in this action ; for a mortgagee may elect to sue his personal security, and still hold the mortgage.

Nor can it avail the defendant if the conveyance was valid and absolute, upon the facts before us ; because there is no proof that the deed was given in payment of the debt due from the defendant to the intestate. Indeed, it is stated expressly that it was not ; for the agreement was, that the notes were not to be given up till paid.

Again, if the deed was never delivered to the grantees, that would furnish no defence against the present action.

The consideration is not disputed ; a part of the sum for which the notes were given has been paid ; and the defendant has promised to pay the balance, and this promise was distinctly made more than four years after the deed was given, which is now relied upon as payment in itself, and yet the notes have not been given up. We can perceive no grounds on which a defence to this action can rest. If there are difficulties with respect to the title of the lands in question, under which the defendant labors, whatever remedy he may have in law or equity, must be the subject of consideration in some future proceeding.

Let a default be entered.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE COUNTY OF

LINCOLN.

MAY TERM,

1825.

THE INHABITANTS OF BOOTHBAY *vs.* THE INHABITANTS OF WISCASSET.

The domicil of a fisherman, who usually lived in his boat in the summer, was in this case holden to be in the place to which he most usually resorted in the winter for board.

Where the plaintiff appealed from the judgment of the Court of Common Pleas, and in this Court had a verdict for less than 100 dollars, and the judgment thereon was delayed by the defendant's motion for a new trial, until the interest on the verdict increased the amount for which judgment was to be rendered to more than 100 dollars;—it was holden that the plaintiff, and not the defendant, was entitled to costs on the appeal, under *Stat.* 1822, *ch.* 193, *sec.* 4.

IN this case the question was upon the domicil of one *Aaron Abbot*, a pauper, on the 21st day of *March* 1821.

At the trial before *Weston* J. it appeared that the pauper was by occupation a fisherman, living constantly in his boat from the opening of the spring till the commencement of winter;—that he resided in the house of one *Hunewell*, in *Wiscasset*, from *December* 1820, till about the first of *April* 1821, working for his board, but receiving no wages;—that during this time he was absent but twice, once to procure repairs for his boat, and once to attend the funeral of his sister's child;—that he had no family of his own—that his father had long resided in *Boothbay*;—and that in *March* 1822, the pauper, being frozen and unable to support himself, was carried to the house of his father, who refused to

suffer him to remain there ; whereupon the overseers of the poor placed him in another family where he was nursed and relieved. There was some evidence tending to shew that one of the days when he was absent was the 21st day of *March* 1821 --that his life was purely itinerant, and that when on shore he frequently resorted to *Hunewell's*, coming and going at his pleasure. About the 12th of *April* 1821, he betook himself to his boat, to follow his customary employment for the season.

The Judge hereupon instructed the jury that in order to fix the habitancy of the pauper in *Wiscasset*, they ought to be satisfied, first, that he did in fact reside there on the 21st day of *March* 1821 ; and secondly, that he had his *home* there at that time ;—that within the meaning of the act, *home* would be indicated by residence ; unless it appeared that the party's domicil was elsewhere, and that he had left it for a temporary purpose, with an intention to return ;—that it appeared that the habits of the pauper were vagrant, and that the only place which could be considered as his domicil, prior to his going to *Wiscasset*, was his father's house in *Boothbay* ;—that the pauper being of age, and emancipated from his father, the question whether the house of the latter was to be considered the pauper's home, would depend on the will of his father, who might refuse to grant him this privilege. But if the pauper's home was his father's house prior to his going to *Wiscasset*, they would next inquire whether he went to the latter place for a temporary purpose, with an intention again to return and reside at his father's. If they were satisfied that he resided at *Wiscasset* on the 21st of *March* 1821, and that he had no home elsewhere to which it was his intention to return, they would find for the plaintiffs ;—which they did. And the Judge, at the request of the defendants, reserved the case for the consideration of the whole Court.

Orr, for the defendants, observed that as the domicil of the pauper was once, without question, at his father's house in *Boothbay*, it must be taken to be still there, unless the case shewed that he had abandoned it with the intention of gaining another permanent dwelling elsewhere. He must at least have left it without the *animus revertendi*. In the present case no such evi-

dence appears ;—and the law therefore adjudges his domicil to be in the place of his nurture, his education, his business, and of those objects to which he was bound by the ties acknowledged by mankind. If the father, in his own poverty, referred the pauper to the charities of the town, he was not therefore disfranchised ; and the fact of his being carried thither for relief, shews *what* place was regarded as his home.

Allen, for the plaintiffs.

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

The principal questions on the trial of this cause appear to have been whether the pauper resided in *Wiscasset* on the 25th of *March* 1821; and if so, in what character and with what intention ;—whether it was his home, in the legal sense of the term ; or only the place of his temporary abode during the winter, with the design to return, in the spring, to a legal home elsewhere. The testimony in relation to these points was all submitted to the jury ; and under the instructions given them by the presiding Judge, their verdict has established the following facts ;—1. that the pauper was residing in *Wiscasset* before and on the 21st of *March* 1821 ; and 2dly, that at the time of his going to *Wiscasset* to reside, he had no home elsewhere, to which he had any intention to return. These points are thus settled. If we look to the habits and character of the pauper, and to his conduct and mode of living while in *Wiscasset*, we may ascertain whether, by his residence in that town on the day the act was passed, he gained a settlement there. He was a single man and had no family ;—followed the business of fishing in the summer, living in his boat. It does not appear how long before this time he had left his father's house, or in what places he had usually spent his winters. But during the winter of 1820 and 1821, it seems he lived in the family of one *Hunewell*, and paid for his board by his labor. We do not perceive why, in this respect, he must not be considered as any other boarder, paying for his board in cash. He was rightfully and by contract, one of *Hunewell's* family ; and his house must have been deemed as the pauper's place of abode in respect to the service of legal process. As he had no *home* else-

where, we are of opinion that the facts in the case are such as to shew that the pauper resided, dwelt and had his home in *Wiscasset* within the true intent and meaning of the statute. We are satisfied with the correctness of the instructions of the Judge to the jury ; and accordingly there must be judgment on the verdict.

CLARK *vs.* CLOUGH.

The receipt taken by a deputy sheriff, from the person to whom he delivers for safe keeping the goods by him attached, is a contract for his own private security, which the creditor has no right to direct or control.

But if the officer place such receipt in the hands of the creditor's attorney, to be prosecuted for his benefit ; this is an equitable assignment of the contract, for which his liability to the creditor forms a sufficient consideration.

THIS was an action of the case against the defendant, a deputy sheriff, for refusing to deliver up to the plaintiff an execution in his favor against one *Plummer*, upon tender of all his fees and expenses thereon ; and for not returning the same execution.

At the trial, which was before the *Chief Justice*, the following facts appeared in evidence.

In *May* 1816, *Pitt Dillingham*, having purchased land of one *Norris*, commenced a real action to recover the possession, in the name of *Norris*, against one *Howe*, who claimed it. The writ in that case was served by *Clark*, the present plaintiff, then a deputy sheriff, who attached personal property of *Howe*, which was delivered into the hands of *Plummer*, who receipted for it. Judgment was rendered in that suit in favor of the demandant, and a writ of possession was thereupon duly issued and delivered to *Clark*, within thirty days after judgment rendered. *Clark* forthwith placed *Plummer's* receipt in the hands of Mr. *Williams*, who was the demandant's attorney, with directions to put it in suit, and apply the proceeds to pay the costs recovered in the suit of *Norris* against *Howe*. The suit commenced on this receipt was conducted partly by Mr. *Williams* and partly by Mr. *Barnard*, through some litigation, to final judgment, which was rendered in this Court at *May* term 1823 ; *Clark*, however, having employed

and paid other counsel at one of the terms. The execution which issued on this judgment was the subject of the present suit. Soon after it was delivered to *Clough*, the defendant, for service, *Dillingham*, passing that way, claimed the execution, and was proceeding to give the defendant written orders to pay over the money when collected, and an indemnity for so doing ; when *Clark*, who was in the same vicinity, applied to the defendant for the same purpose. Afterward, on the same day, all the parties being together, *Clark* tendered to the defendant his fees, and demanded the execution, which *Dillingham* forbade him to deliver. The defendant chose to follow the directions of the latter, which he some days after received in writing, and accordingly collected and paid over to him a certain part of the execution, retaining the balance to pay the fees of the counsel concerned in the cause.

While the suit against *Plummer* was pending, in *April* 1822, a suit was commenced in the name of *Norris*, against *Clark*, for neglect of duty in not seizing and selling, under the execution against *Howe*, the property he had attached on the original writ; and judgment being rendered against him at *August* term 1822, he was taken in execution, and subsequently discharged on taking the poor debtor's oath.

The Chief Justice instructed the jury, that the receipt having been placed in the hands of *Dillingham's* attorney, to be collected for his use, he had a right to control the execution, on which the attornies also had each a lien for their fees and expenses;—and that the money received by *Dillingham*, on this execution, might well be considered as payment of the judgment against *Clark*; which being now satisfied, the liability of the present plaintiff on that account was terminated; and he therefore ought not now to be permitted to reclaim the money to his own use.

To this opinion, the jury having found for the defendant, the plaintiff filed exceptions.

Stebbins, for the plaintiff. It was erroneous to instruct the jury that *Dillingham's* receipt of the money on the execution of *Clark* against *Plummer*, was payment of the judgment against *Clark*. The causes of action were distinct and unconnected; the former

being in contract, the latter in tort. *Allen v. Holden* 9 *Mass.* 133. 2 *Greenl.* 345. It could be no payment, without the assent of the debtor, and such assent he has never given.

Nor was it correct to say that the receipt was under the control of *Dillingham*, or to be collected for his use, or that it was wrong for *Clark* to recover, and hold the money. If *Dillingham* had such authority, it must be either that he was party in interest when the receipt was taken, or that it subsequently became his by assignment. But it was not the former; for it was not taken by his direction or consent, but wholly for the protection of the officer, who was liable over to the creditor, and whose sole remedy was upon this contract of his servant or bailee of the goods attached. Nor was it assigned to him;—neither absolutely, for this would be a perfect extinguishment of his liability to the creditor, in the nature of a payment;—*Dole v. Hayden* 2 *Greenl.* 152,—nor conditionally, or by way of collateral security. Had this been so, the claim of the creditor would now have been merged in his judgment against *Clark*. It was in truth merely an expression of what *Clark* intended to do with the money when collected; but it was never given to nor accepted by *Dillingham*, in any sense whatever. The legal presumption is, that he was about to apply the money in discharge of his nearest liability. *Baker v. Cook* 11 *Mass.* 336.

Nor had the attornies any lien on that judgment, or execution. The lien of an attorney in this State is merely the common law right to retain his client's papers, till his fees and disbursements are paid. *Doug.* 226. *Davis v. Bowker* 5 *D. & E.* 488. *Esp. Dig.* 584. *Selw. N. P.* 1162, and it has been extended no farther. But even this lien is of no force till expressly claimed, and notice given. This notice is to go to the judgment *debtor*, to bind him. And if our statute on this subject is construed to continue the lien after the execution is delivered to the officer, the notice must go to him also. But without notice to all concerned, it is of no force. *People v. Hardenburg* 8 *Johns.* 353. *Martin v. Hacker* 15 *Johns.* 405. But here was no such notice given by either of the attornies; and therefore their lien, if it ever existed, was gone.

Allen, for the defendant. The plaintiff had in truth no interest in the execution against *Plummer*. The taking of the receipt was an official act, and it was put in suit for the benefit of whom it might concern. No assignment was necessary to transfer it to *Dillingham*; it was enough if it was delivered to his attorney, to be appropriated to his use, and with his assent. The officer being merely a trustee of the security, no consideration was necessary to give validity to the transfer. And it was an interest which ought to be protected. *Dunn v. Snell* 15 *Mass.* 485. *Jones v. Witter* 13 *Mass.* 304. The real plaintiff, through the whole, was *Dillingham*; who has been the sole party beneficially interested in every remedy which has been sought in the case. *Dunlap v. Locke* 13 *Mass.* 525.

The case stands, in effect, as if *Clough* had collected the money and paid it over to *Dillingham*, against whom this action was brought to recover it back. Clearly that would be the case of a payment by a debtor to his creditor, and as such might be pleaded by *Clark*, in bar to an action of debt on the judgment against him.

Besides, the verdict has done substantial justice between the parties;—and in such case the Court will not disturb it, where the consequence would be only the recovery of nominal damages; —even though the instructions to the jury were erroneous in point of law. *Gerrish v. Bearce* 11 *Mass.* 193. *Cogswell v. Brown* 1 *Mass.* 237.

Weston J. at the following *June* term in *Kennebec*, delivered the opinion of the Court as follows.

The plaintiff in this action, having, in his capacity of deputy sheriff, attached property to respond the judgment which might be recovered by *Pitt Dillingham*, prosecuting in the name of *Josiah Norris* against *John Howe*, became answerable to *Dillingham* to the amount for which he might obtain judgment; not exceeding however the value of the property attached. The instrument given to the plaintiff by *Plummer*, to whom he delivered the property, was taken for his own security, that he might be enabled to discharge the responsibility he had assumed in his official capac-

ity. It was a contract therefore belonging to the plaintiff, which the attaching creditor had no right to direct or control. His remedy was against the plaintiff, or against the sheriff, who was by law answerable for his official acts; and this remedy was effectual and adequate. But it was competent for the plaintiff to place the receipt given by *Plummer* under the direction of *Dillingham*, and it appears that he did in fact put it into the hands of his attorney, that it might be prosecuted for his benefit, in order that he might thus realize the fruits of his judgment against *Howe*. The liability the plaintiff was under to *Dillingham*, and the obligation imposed upon the latter, from the nature of the transaction, to account for the proceeds in discharge of that liability, formed a sufficient consideration for this arrangement. *Dillingham* thereupon became the assignee of the contract, as collateral security for his claim against the plaintiff; or he was clothed with a power in relation to it, so coupled with an interest, arising from this consideration, as well as from his expenditures and disbursements in the prosecution of the suit against *Plummer*, as to be no longer revocable at the will of the plaintiff. No formal instrument executed between the parties, either under seal or otherwise, was necessary to give to the transaction a legal and binding efficacy. These equitable interests, when supported by a sufficient consideration, are recognized and protected by the law and enforced, according to the dictates of good faith and moral obligation.

The cases of *Dunn v. Snell* 15 *Mass.* 481, and of *Vose v. Handy* 2 *Greenl.* 322, exhibit the full developement of this principle, relieved from all technical formalities, and must be considered as settling the law upon this subject.

It was not competent therefore for the plaintiff to interfere with the execution, which *Dillingham* had finally, and at great expense obtained against *Plummer*; and the defendant was well justified in obeying the directions of *Dillingham*, and in disregarding those of the plaintiff. There was no undertaking, on the part of *Dillingham* or his attorney, to abstain from the prosecution of a suit against the plaintiff; although it appears that he did forbear such prosecution for a period of nearly four years, while the suit against *Plummer* was still pending, and until possibly, from the length of time in which it had been controverted, it might be con-

sidered doubtful whether it would be brought to a successful termination. *Dillingham* did not otherwise obtain satisfaction of his judgment against the plaintiff, but the avails of the suit against *Plummer*, having been received after judgment, and having been expressly appropriated to discharge the liability upon which it was founded, may and ought to be considered as received in payment and discharge of that judgment.

The exceptions in this case are overruled; and there must be judgment on the verdict.

ROGERS *vs.* HAINES.

The equitable assignee of a *chose in action* is estopped by the verdict and judgment thereon, in the same manner as if he were a party to the record.

Of probable cause for a civil prosecution.

THIS was an action on the case, in which the defendant was charged, in the *first* count, with maliciously instituting and prosecuting an action against the plaintiff on certain notes of hand, (which had been deposited with him for safe keeping,) in the name of *Thomas G. Clark*, to whom they were payable, knowing the same had been paid. In the *second* count, he was charged with instituting and prosecuting the same action in the name of said *Clark*, without any authority from him, and knowing them to have been paid;—but without the imputation of any malicious motives.

At the trial, which was before *Weston* J. upon the general issue, it appeared that in 1817, the defendant and *Clark* bought of one *Purinton* certain land and privileges, for which they gave their promissory notes, the payment of which was secured by mortgage of the same premises. *Clark* afterwards sold his part of the purchase to the plaintiff and *Charles Eaton*, who, it was first agreed, should give their notes to *Purinton* on account of what was due to him; but upon his declining to receive them, the notes given severally by *Eaton* and *Rogers* were made payable to *Clark*, it being agreed that they should be deposited with the defendant,

and that the proceeds, when collected, should be paid over to *Purinton*. They were accordingly thus made and deposited; and the defendant gave to *Clark* a memorandum in the following terms;—"*Topsham*, *Nov.* 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 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 by him for the "payment of the mortgage deed of the land and privileges bought "by the said *Clark* and *Reuben Haines*, in *May* 17, 1817, *Reuben Haines*."—Then followed a particular description of the notes after which the paper had the signatures of *Clark*, *Rogers* and *Eaton*.

Clark testified that he considered the deposit as made to *Haines*, as well as to *Rogers*; but that they had no view to the interest of *Haines*, who was a mere depositary.

Eaton testified that he sold his part of the purchase; and having given the security of another person as a substitute for his own, *his* notes, deposited with *Haines*, were given up to him, by the order of *Clark*. He said he believed there was no view to *Haines'* benefit, in the original deposit with him; but that *Rogers* said if *Haines* collected the money he should not have to pay it again, for *Haines* would pay it over to *Purinton*.

Purinton swore that after *Clark* had given a discharge to *Rogers*, he asked him why he did so; to which he replied that "he understood from *Rogers* that the thing was all settled."

It further appeared that soon after the notes were deposited, the plaintiff said they were left with *Haines* to be collected and paid on the mortgage to *Purinton*, for fear *Clark* would make way with the money; and that *Haines* had as much interest as the plaintiff had, in having the mortgage paid;—and that the plaintiff after obtaining a discharge from *Clark*, said "he had given *Clark* ten "dollars to sweeten it," and that the latter did not care, he having been for sometime insolvent.

It was also proved by the testimony of *Robert Orr*, Esq. that *Purinton* handed the notes to him, while a clerk in the office of the defendant's attorney; and that in 1818 or 1819 he saw a letter from the plaintiff, which was now lost, in which he acknowl-

edged the receipt of a letter respecting a note in favor of *Clark* against him, and added that *Clark* had no right or interest in the note, which had been put in the hands of the defendant that it might be applied to extinguish the mortgage given to *Purinton*.

The plaintiff, in support of his action, gave in evidence a receipt from *Clark*, dated *May* 19, 1821, particularly describing the notes, and acknowledging satisfaction of the same in full; and containing a direction to the defendant, with whom they had been deposited, to deliver them up to the plaintiff, by whom they had been paid. And he proved that the defendant, when the paper was presented to him, and the notes demanded, refused to comply with the request; and afterwards caused the notes to be put in suit, and prosecuted the action for several terms, both in the Court below and in this Court, till it was finally terminated by judgment in favor of *Rogers*; the defence of which suit had caused him much expense beyond the items legally taxable in costs, and for which he claimed indemnity in this action.

It was contended on the part of the defendant that he had an interest in the subject matter of that action, which *Clark* could not control; that therefore he had a right to commence and prosecute it to judgment, notwithstanding his attempt to discharge it; —and that it was proper for the jury to inquire and determine whether he had such interest or not.

But it being agreed that at the trial of the former action upon the notes before the Chief Justice, this question, which in that action was material, was distinctly submitted to the jury, who, being interrogated as to this point, on their return into Court, said they found that *Haines* had no interest in the notes,—the counsel for the present plaintiff contended that *Haines* was concluded by the finding of the jury in that case, and that the question of his interest in the notes was not open to a second examination. But the Judge, intending to reserve that question, instructed the jury to inquire into and determine the interest of *Haines* in the notes, at the time he put them in suit, upon the evidence before them ;— and further instructed them to find for the defendant, he having probable cause to believe that he was legally authorized to commence and prosecute the former action, though by law he might not have had such authority. The jury hereupon returned

a verdict for the defendant ; and, being interrogated by the Judge, said they found that *Haines had* an interest in the notes, at the time he put them in suit. The verdict was taken subject to the opinion of the Court upon the whole case.

Allen and *Fessenden*, for the plaintiff, directed their arguments chiefly to the case as presented in the second count, insisting that the defendant having without authority commenced a groundless suit against the plaintiff, in the name of *Clark* an insolvent man, to enforce the payment of notes which he knew were already paid, the act was at his own peril, and he ought to respond the actual damages he had thus caused the plaintiff to suffer. It is not for him to say that he had an equitable interest in the notes ; for that point was settled against him in the former suit, brought for his benefit in the name of *Clark*, and it ought not again to be controverted. 1 *Phil. Ev.* 242. *Calhoun v. Dunning* 4 *Dal.* 120.

Orr, for the defendant. The ground of the present action is malice, and the want of probable cause in the former suit. No express malice having been proved, the question now turns upon the existence of probable cause. The jury have found that *Haines* had an equitable interest in the notes, which were assigned to him, though payable to *Clark*, to redeem the property they had jointly mortgaged. Whether *Clark*, under these circumstances, could release the notes, in the hands of *Haines*, was a question of law, on which he could not act but under legal advice and therefore not maliciously. And the point that probable cause existed, for the attempt to enforce the collection of them at law, is established by the case of *Clark v. Rogers* 2 *Greenl.* 143. If the jury in that case found other facts constituting a defence, they have no bearing on the present question. *Johnstone v. Sutton* 1 *D. & E.* 547.

It does not appear that there was either an arrest of the plaintiff, or an attachment of his goods, in the suit complained of ; and in such cases the statute giving costs to the party prevailing, must be considered as providing a sufficient indemnity. It is hardly conceivable that motives of self interest should be stifled by mere malice ; or that malice may be presumed against so natural

and strong a bias. And it is settled that even an arrest for a debt after it has been satisfied, is not sufficient to fix the charge of malice. *Gibson v. Chaters* 1 *Bos. & Pul.* 129. *Scheibel v. Fairbain ib.* 388. *Lindsay v. Larned* 17 *Mass.* 190. *Co. Lit.* 161, *note* 297. *Potts v. Imlay* 1 *South.* 330. *Bieten v. Burridge* 3 *Camp.* 139. As to the matter relied on by way of estoppel, it is not matter of record.

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

This case presents two questions ;—1. whether the verdict in the case of *Clark* against the present plaintiff is conclusive against the defendant as to the question of his interest and property in the notes on which that action was founded, and 2dly, whether the instructions of the Judge touching the other points respecting the defence were correct. As to the first point, it is a general rule that a verdict cannot be evidence for either party, in an action against one who was a stranger to the former proceeding ; who had no opportunity to cross examine witnesses or to defend himself or appeal from the judgment against him. On this point authorities are needless. But the inquiry is, was *Haines* a stranger to the former proceeding ? *Clark* was the plaintiff on record in that case; but it is not denied that the suit on the notes lodged with him and payable to *Clark*, was commenced and prosecuted at the expense and for the benefit of *Haines*. He therefore does not come within the reason of the rule ; inasmuch as he had an opportunity to cross examine witnesses and conduct the suit according to his own judgment. In this view he would seem as much bound by the former verdict, as though he had been an indorsee of the notes and had sued them in his own name ; and that verdict was founded on a want of interest and property in him, which would prevent the operation of *Clark's* discharge of the notes. In the case of *Calhoun v. Dunning* 4 *Dal.* 120, it was decided, that when the parties are really, though not nominally the same in both cases, as when one suit is in the name of the person beneficially interested, and the other is in that of his trustee, the record in the first case was evidence in the last. That case appears to be similar to this, on the point under considera-

tion. But it has been urged that the principle cannot be applicable in this case, because the record of the former case does not show that the question in relation to *Haines'* interest was decided against him ; but that the fact appears only from the statement of the conversation held between the Court and the jury ;—still it appears by the report that the proof of the above facts was introduced without objection and is now before us ; and perhaps we are authorized, on that account, to give it the same effect, as though it was a part of the record ; however, we give no definite opinion on this point ; but place our decision of the cause on another ground; and without reference to the question of *Haines'* interest and property in the notes beforementioned. Supposing he had no such interest, is the present action maintainable ? Do the facts proved support the declaration ? If not, we ought to render judgment on the verdict, even if the opinion of the Judge was erroneous on the point of *Haines'* interest and the conclusiveness of the former verdict. The charge in the first count is that the defendant maliciously instituted and prosecuted the plaintiff, on the notes mentioned, knowing the same to have been paid. The second count states that he prosecuted the suit on the notes without any authority, knowing the same to have been paid to *Clark*. Both counts charge the defendant with gross misconduct and a wanton abuse of legal process. The counsel for the plaintiff, in his opening, waived all observations on the first count and admitted that it could not be maintained ; inasmuch as the case shews no malice on the part of the defendant in the prosecution of the action. He was doubtless satisfied of the propriety of so doing by the authorities, adduced by the counsel for the plaintiff, which seem satisfactory upon that point. But it has been contended that the charge contained in the second count is supported by the proof. The Judge instructed the jury that from the facts, it appeared the defendant had probable cause for believing he was legally authorized to commence and prosecute the suit, though by law he might not have had such authority, and therefore that the defendant was entitled to their verdict. An examination of the facts will shew whether this opinion was correct.

It is true that the defendant knew that *Clark* had given a receipt or discharge of the notes, bearing date *May* 19, 1821; and

because he doubted *Clark's* right to give such a discharge, and the fairness of the transaction, he had refused to deliver up the notes to *Rogers* ;—but some other facts demand attention. It is also true, that at the time said receipt bears date, and before *Clark* was well known to be insolvent, and it appears that after *Rogers* had obtained the receipt, he stated to one of the witnesses that he "gave *Clark* ten dollars to sweeten it ; and that *Clark* did not care." These expressions cannot be misunderstood ; they evidently mean that for such a trifling sum paid to *Clark*, the discharge had been obtained, and an order on *Haines* for the notes. Besides, Mr. *Orr* has testified that he saw a letter from *Rogers*, the plaintiff in 1818 or 1819, in which he stated that *Clark* had no right or interest in the notes ; and yet with this knowledge, he procures the discharge from this very man in 1821. It is true, there is no direct proof that these declarations had been communicated to the defendant, but he certainly knew that the purpose for which they had been deposited in his hands, had not been accomplished, because the debt, to secure the eventual payment of which they had been deposited, had not then been paid, as appears by the report of the case of *Clark v. Rogers* 2 *Greenl.* 143. These circumstances might well give him good cause for believing that the notes were justly due, when he commenced the action, notwithstanding appearances ; and thus the presumption of illegality of intention or conduct is negatived. In addition to all this it may be remarked that *Haines* might have had knowledge of the above declarations of *Rogers*, as to *Clark's* total want of interest in the notes, and as to the manner in which he had obtained the discharge from *Clark* ; and this circumstance becomes important, when we attend to the specific charge in the second count. The averment is that the defendant instituted and prosecuted the suit on the notes, without authority and knowing that they had been paid to *Clark*. It is an entire averment, and the *scienter* alleged, is an important and substantive part of the charge; and this must be proved, as well as the alleged want of authority. Now, on looking into the report, we see no fact, except the discharge itself, which has any tendency to prove such knowledge ; and the other facts proved in this case shew that the discharge amounts to no evidence of payment; for if not fraudulently obtain-

ed the plaintiff of *Clark*, he knew *Clark* had no right to discharge the notes, because he had no interest in them according to his own confession. An action of this kind should be maintained by clear and unsuspicious proof. But upon the evidence before us we think this cannot be. We have not deemed it necessary to attend to the principles of law particularly applicable to this second count ; or to inquire whether its averments go far enough; because we are satisfied that it is not supported by any sufficient evidence, even as it now stands ; and accordingly our opinion is that there must be judgment on the verdict.

The Inhabitants of Newcastle *vs.* Bellard.

The *Stat.* 1821, *ch.* 59, *sec.* 26, empowering the treasurers of towns &c. to maintain suits in their own names upon the securities therein mentioned, does not take away the right of the towns &c. to sue, as before.

Where an attorney had collected monies for the treasurer of a town in that capacity, it was holden that he was liable for the amount, in an action for money had and received, at the suit of the town; and that in such action he could not set off any demand of his own against the treasurer in his private capacity.

In an action of *assumpsit* brought by the plaintiffs for money had and received by the defendant to their use, it appeared that in the course of his business as an attorney he had collected monies on divers securities due to *Charles Nichols as treasurer of the town of Newcastle*; and that the defendant had once admitted that there was due to *Mr. Nichols as treasurer*, $24 71, after deducting all sums paid and bills of costs charged to him *in that capacity.*

The defendant hereupon objected that this action did not lie for the town; but that it should have been brought by the treasurer himself; but *Weston* J. who tried the cause, overruled the objection.

The defendant then offered to prove, that there was an open account between him and *Nichols*, containing their business transactions since the year 1813; during which period the defendant had collected monies due to him both as treasurer, and also

in his private capacity; and from time to time had paid him money, and also had supplied him with goods from a store owned by the defendant, besides transacting professional business for him to a considerable amount; all which accounts were blended together, and shewed a general balance due to the defendant;—and that at the time of delivery of the goods, the defendant had no monies in in his hands, except such as had been collected for *Nichols* as treasurer.

But the admission of the defendant that there was a balance due to *Nichols as treasurer*, appearing to have been understandingly and deliberately made, the accounts being much involved, and *Nichols* not being represented in this suit, the Judge rejected the evidence offered by the defendant, and the jury thereupon returned a verdict for the plaintiff for the $24 71 above mentioned; which was taken subject to the opinion of the whole Court.

Fessenden, for the defendant, contended that the contract in this case was private and personal between him and *Nichols*, upon the faith of which he had made advances and disbursements to the latter who still owed him, and for whom alone he collected the money, and to whom alone he was responsible. Between the town and the defendant there was no privity whatever. All the demands of the town were under the control of the treasurer, who might sue them or not as he pleased, and who alone had power to discharge them. Besides, the authority to sue is given to the treasurer expressly, by *Stat.* 1821, *ch.* 59, *sec.* 26.—And as no one can be accountable for the same sum to two different persons, on an implied contract, the defendant must of course be responsible only to the treasurer. The case is not different, in principle, from that of an administrator, factor, or other person holding securities *en autre droit*, and leaving them with an attorney for collection; in which case the credit given by the attorney is wholly personal; and if he has made advances upon the general fund in his hands, he may retain for the payment.

And here has been no *demand* on the defendant; who was a mere receiver of monies, to account on demand, but not before. To subject an attorney, or other person, who was only a trustee of monies collected in the course of his profession or business, to

the expenses of an action for money, which no one has called to receive at his hands, would be a plain violation of the principles of justice.

Williams, on the other side, was stopped by the Court, whose opinion was afterwards delivered, as follows, by

MELLEN C. J. The provision in the 26th *sec.* of the statute of 1821, *ch.* 59, is " that the treasurer of this State, treasurers " of counties, towns, parishes and other corporations for the time " being, may commence and prosecute in their own names any " suit or suits at law upon any bonds, notes or other securities " which have been or may be given to them or their predecessors " in said capacity." The defendant relies on this section as a bar to the present action. The objection may receive two answers. 1. This action is not brought on any such bond, note or other security;—it is an action for monies had and received. The case does not fall within the language of the provision. 2. But if it did, the objection could not be sustained. The provision only empowers and authorizes such treasurers to sue in their own names; it does not require that they should be plaintiffs, and of course, the principle of the common law remains as before, by which a promise made to an agent or servant, may be declared on as made to the principal. With respect to the other ground of defence, we are very clear that must fail also; for two reasons. 1. It is not competent for the defendant in this action between the town and himself, to offset any demand on account which he has against *Nichols* the treasurer in his private capacity, any more than against any other person. 2. If he had such right, it could not have been allowed in the present instance, as no account was legally filed in offset. The defendant, even without this, has had the benefit of all demands which he had against *Nichols as treasurer*; or, in other words, against the town;—and the verdict has been returned against him for no more than the balance due to the town, or to the treasurer in his capacity, according to the defendant's own confession. There can be no possible reason for sustaining the motion for a new trial.

Judgment according to verdict.

CHAPMAN & AL. *vs.* SHAW.

A plea in abatement that the officer who served the writ was, after his appointment as deputy sheriff, appointed and commissioned as a Justice of the peace, whereby the former office became vacant, is a bad plea, unless it shews not only that he *took* the oaths of the latter office, but that he also *subscribed* them.—*Vid. Constitution, art.* 9, *sec.* 1.

IN this case the defendant pleaded in abatement of the writ, that the officer who served it, after his appointment as deputy sheriff, was appointed and commissioned as a Justice of the peace, "and *took the oaths* prescribed by the constitution and laws of this State, necessary to qualify him to act in that office," and had ever since exercised the same, whereby his office of deputy sheriff became vacant, &c. To which the plaintiffs demurred.

Sheppard, in support of the demurrer, contended that on a plea in abatement the right *de jure* to an office could not be tried. The compatibility of the two offices is a constitutional question, deeply affecting the incumbent, and ought not to be examined in this collateral way; much less decided against him, in a cause to which he is not a party, and where he has not the power to be heard. It is even doubted whether the rights of electors can be gone into upon a trial of the rights of the elected. 3 *Burr.* 1387—but the Courts of this country and of Westminster Hall, seem to be agreed that the right to an office cannot be tried in any other way than by a *quo warranto*, or other process, in which the officer is a party. 3 *Bac. Abr.* 636, 647. *Rex v. Gayer* 1 *Burr.* 245. *Cowp.* 489, 507. 2 *D. & E.* 277. *The people v. Collins* 7 *Johns.* 549. *McInstry v. Tanner* 9 *Johns.* 234. *Fowler v. Bebee* 9 *Mass.* 234. *Com'th v. Fowler* 10 *Mass.* 290.

Allen, for the defendant, insisted that the constitution had settled the question of compatibility, upon a fair construction of its provisions; and that having accepted the second commission, and taken the oath of office, the first was *ipso facto* vacated.

PER CURIAM. If the defendant would abate the writ in this case, he should have shewn in his plea that the officer who served it was disqualified to act in that office, by being commissioned

and qualified to act in another, with which it was incompatible. But this he has not done. The constitution requires not only that the oaths of office shall be taken, but that they also shall be *subscribed*, before the person commissioned shall enter upon the discharge of its duties;—and this latter and essential part of his qualification not being alleged, the plea is therefore bad. Until he was *qualified* to act as a Justice of the peace, his office of deputy sheriff was not vacated.

Respondeat ouster awarded.

GREEN, *plaintiff in error*, *vs.* LOWELL.

If a writ be delivered to an officer with directions to attach property if practicable; otherwise, to make no service; it is his duty to make diligent search for property; and if none is found, to make a seasonable return of that fact, on the writ, in his official capacity, as a reason for omitting to serve the precept.

Where a deputy sheriff, having a writ in his hands for service, undertook to receive the money of the debtor, and make no service of the writ;—it was holden that the sheriff was liable, under a charge for neglecting to serve and return the writ, to the amount of the money and interest; and this without any previous demand on the officer.

IN a writ of error to the Court of Common Pleas, upon exceptions filed there to the opinion of *Smith* J. the case appeared to be thus:—

Lowell, who was the original plaintiff, brought an action of the case before a Justice of the Peace, against the plaintiff in error, who is sheriff of this county, for the neglect of one *Enoch W. Adams*, his deputy, in not serving and returning a writ of attachment. The Justice, on motion of the plaintiff, granted him leave to amend his writ, by adding a new count, charging the default to have been by *Ebenezer W. Adams* his deputy, the name of *Enoch* having been inserted in the first count by mistake. The defendant pleaded before the Justice that *Enoch W. Adams* was not his deputy;—and also the general issue of not guilty; on which pleas issues were joined.

The cause coming into the Court of Common Pleas by appeal, the amendment made before the Justice was allowed. The plaintiff proved at the trial that the writ was delivered to the deputy with directions written on the back of it, to attach property to respond debt and costs, or make no service;—that the officer, before the time of service expired, shewed the writ to the debtor, who paid him the debt and costs, taking the account, which the officer detached from the writ and delivered to him; —and that the officer communicated these facts to the creditor's attorney, adding that he could find no property of the debtor to attach, and requesting him to direct the mode in which he would have the money remitted; which the attorney declined to do. There was evidence shewing that though the debtor had no visible property, yet his credit was good for a greater sum than the value in controversy here, which he could raise at any time; and that his circumstances were not altered since the original writ was sued out against him.

The Judge instructed the jury that upon this evidence it appeared that the deputy had neglected his duty, for which the sheriff was liable; and they found for the plaintiff the amount of his debt, with interest.

The errors assigned were,—1st—that the verdict and judgment were not according to the issues joined;—2d.—that the sheriff was made answerable for the conduct of his deputy when not acting in his official capacity;—3d.—that interest was allowed on the money, without proof that it had been demanded;—4th —that the officer was not bound to serve the writ but upon conditions with which he could not comply, and therefore was not bound to return the writ;—5th—that the officer was ordered to make no service of the writ, which therefore was never in the custody of the law, and the sheriff therefore was not answerable for the omission of his deputy to return a writ or mesne process which the duties of his office did not require;—6th—the general error. Plea, *in nullo est erratum.*

Bulfinch, for the plaintiff in error. The amendment was irregularly allowed, because the name of another deputy being inserted, its effect was to disclose a different cause of action.

and to take the defendant by surprise. The allowance of interest also was irregular, because the money had never been demanded. 7 *Mass.* 464.

The undertaking of the officer to receive the money on mesne process was a matter in no respect resulting from his official duty; and therefore the sheriff was not responsible. 7 *Mass.* 123. Nor did the debtor deliver the money to be attached on the writ, but paid it to be applied to the immediate discharge of the debt, by private contract with the officer. 4 *Mass.* 60. 11 *Mass.* 207. 15 *Mass.* 200.

The orders of the plaintiff to the officer were, to attach property, or make no service. By the terms of these directions he might do either, at his election; and he elected the latter. He was not bound to *return* the writ; for no fees are allowed by law for the return of precepts not served; and the law enjoins no duty, for which it provides no reward.

But if he was liable, the damages should have been merely nominal; because the plaintiff's right of action against his debtor is not impaired by any facts appearing on the record; and the debtor's responsibility is as good now as before.

Evans, for the original plaintiff, to shew that the amendment was regular, cited *Phillips v. Bridge* 11 *Mass.* 246. *Sherman v. The Proprietors of Connecticut River Bridge ib.* 338;—and he said that the first issue was immaterial, so that finding it for the defendant would not entitle him to judgment. Under the plea of not guilty the whole matter of the defence was open to the defendant; and the special plea before the Justice, even if it had been good in form, was improperly put in. 5 *Mass.* 380. 9 *Mass.* 322. 10 *Mass.* 66.

The action, he contended, was for not *serving* and not *returning* the writ, both which the deputy was bound to do; and for neglect of which the sheriff was answerable. The orders of the plaintiff only modified the former branch of his duty, leaving the latter unaffected. But he might have attached the money he received; for the debtor voluntarily placed it in his hands, and could not afterwards object or resist it. And if he could not, yet he should have *returned* the writ, with his doings. Every plaintiff is entit-

led to the return of an officer under the sanction of his oath of office, of all the facts touching the precept in his hands, stating the manner of its service, or the reasons why service is not made. It is only at the place of return that he can look for such information as will enable him to act with prudence in any ulterior measures the case may require him to adopt.

The opinion of the Court was delivered at the ensuing *June* term in *Kennebec*, by

WESTON J. The amendment, first allowed by the Justice and approved by the Common Pleas, was without doubt within their discretion to grant. It did not introduce a new cause of action, but was the mere correction of a mistake in setting forth the only one, which was intended to be prosecuted; and if authority was necessary for its allowance, *Phillips v. Bridge*, cited by the counsel for the defendant in error, is a case in point.

As to the special plea, upon which issue was joined before the Justice, if that had been expressly found for the original defendant at the Common Pleas, it would not have entitled him to judgment; inasmuch as after the amendment, it answered only one count in the declaration. Every advantage, which he could have derived from the special plea, he was equally entitled to under the general issue; and that being found for the plaintiff, the point in controversy between the parties, was sufficiently settled by the verdict to authorize the judgment.

When *Adams*, the deputy, received the original writ, sued out by the defendant in error, it was his official duty to obey its precept; subject however to the control and direction of the original plaintiff. The direction he received was, to attach property, if practicable; otherwise to make no service. If he neglected to make diligent search for the property, or to attach it when found, or otherwise abused his official trust, the original plaintiff had his remedy not only against him, but against his principal, the sheriff. If in fact he did make diligent search for property, and was unable to find any, it was his duty, on or before the return day of the writ, to set forth this fact affirmatively in his official capacity; and to assign it as a reason for his failure to make service;

and, so doing, he would have been justified. But instead of this, he tore from the writ the account annexed, thus defacing and injuring the process, which it was unquestionably the duty of his office to preserve from mutilation. We are satisfied, that the facts proved disclose a failure of official duty, for which the sheriff is responsible; and we perceive nothing in the case, which can be considered as a waiver, on the part of the original plaintiff, of his right to proceed against him.

With regard to the damages, it was a question for the jury, upon which it does not appear that the presiding Judge in the Court below gave them any special instruction; or that he was desired so to do by the counsel for the original defendant. But if however it was a point now open before us, we do not perceive that, under all the circumstances, the damages can be considered as excessive.

The exceptions are overruled; and the judgment is affirmed with costs.

KNOX & AL. *vs.* LERMOND.

Where, in a writ of entry, the tenant prayed for an appraisement of the land, under the provisions of *Stat.* 1821, *ch.* 47, and after verdict for the demandant he abandoned the land to the tenant at the price found by the jury, for which sum judgment was thereupon rendered for the demandant, and the tenant appealed therefrom to this Court, but failed to enter and prosecute his appeal;—upon complaint of the demandant, the judgment of the Court below, for the value of the land in money, was affirmed in this Court, with interest, and single costs.

The facts in this case are stated in the opinion of the Court, which was delivered at *June* term in *Kennebec*, by

MELLEN C. J. This is a writ of entry. In the Court of Common Pleas a verdict was returned in favor of the demandant; and at the request of the parties the premises demanded, and the improvements thereon made, were estimated by the jury, pursuant to the provisions of the statute of 1821, *ch.* 47, commonly called the betterment law; and during the term in which the verdict was given, the demandant made his election on record,

in open Court, to abandon the demanded premises to the tenant at the price estimated by the jury as aforesaid, on which verdict the special judgment, by law required, was duly entered ; and from that judgment the tenant appealed to this Court ; but failing to enter his appeal, the demandant has entered his complaint and prayer for affirmation of judgment ;—and the question is, in what manner, and for what sum we are to render judgment. The provisions of the first section of said act are peculiar. So far as they relate to the point under consideration they are these ;— "The jury which try the same (cause) if they find a verdict for "the demandant, shall, if the tenant so request, also inquire and "by their verdict ascertain the increased value of the demand- "ed premises, by virtue of the buildings and improvements made "by such tenant, or those under whom he may claim ; and (if the "demandant require it) what would have been the value of the "demanded premises, had no buildings or improvements been "made by such tenant, or those under whom he claims. And if "during the term in which such verdict shall have been given, "the demandant shall make his election in open Court to abandon "the demanded premises to the tenant at the price estimated by "the jury as aforesaid, then no judgment for possession shall be "rendered on the verdict ; but judgment for the sum so estimat- "ed. And after one year, a writ of execution may issue for the "same sum with one year's interest thereon, and costs of suit, "unless the tenant shall within one year after the rendition of "said judgment pay into the clerk's office of said Court for the "use of the demandant one year's interest of the said sum, togeth- "er with one third part of the said sum, and the costs of suit, if "taxed ; in which case the said writ of execution shall further "stay." The section contains similar provisions, *mutatis mutandis*, as to the annual payment of the other two thirds of said estimated value and the interest thereon. The foregoing provisions are, in terms, applicable only to those cases in which judgment is rendered on verdict ; and they do not embrace a case like the present. Is the omission to enter an appeal in such cases, a waiver of all the benefits of the act ;—leaving the Court to enter a general judgment on the default in favor of the demandant to recover seisin and possession of the demanded premises as

in common cases ? This would seem to be a harsh construction against the tenant ; and not in conformity to the spirit of the provision in the fourth section of the statute of 1822, *ch.* 193, by which this Court on complaint for the non-prosecution of an appeal, are to affirm the judgment of the Court of Common Pleas, with costs according to the special circumstances of the case.

Another construction may be given more consonant to justice and in unison with the intentions of the legislature. It is true, that by the appeal, the judgment of the Court of Common Pleas, and the verdict on which it was rendered are set aside, and in legal contemplation have ceased to exist ; and therefore, in those cases when no verdict is given in this Court, a judgment of affirmation cannot be rendered by us according to the strict language of the statute. We must therefore give such a construction as may, as far as practicable, effectuate the object in view when it was passed. For this purpose, we may reasonably consider that the tenant, when he fails to enter his appeal, thereby admits that the value of the demanded premises and the buildings and improvements thereon was fairly estimated by the jury in the Court of Common Pleas ; and consents that the demandant should have judgment for the amount of the estimated value of the premises ; and as the delay in obtaining such judgment in this Court is occasioned by the act of the tenant in interposing the appeal, justice requires that he should be charged with interest on the amount of the judgment below ; and as an equivalent for this, the term of credit is extended, because the year within which the costs and one third of the judgment must be paid, will commence at the time of the rendition of such judgment in this Court. The same justice to be sure, would be attained by simply affirming the judgment of the Court of Common Pleas without adding interest ; limiting the commencement of the year, so as to establish its commencement at the time the judgment was rendered on the verdict ; but the language of the statute seems not to warrant this construction. It contemplates the year as commencing at the time judgment is rendered ; and as we consider the judgment of this Court as a final judgment virtually rendered on the verdict in the Court of Common Pleas, and an adoption and affirmation of it, the year must commence at the

time we render the judgment. Hence the justice of charging the tenant with interest on the judgment below, by way of additional damages. In this case, therefore, the Clerk will cast interest on the amount of the estimated value of the demanded premises, for which sum judgment was rendered in the Court of Common Pleas, up to the time of entering judgment at this term in this Court; and for the total amount, enter such conditional judgment as the statute requires, with additional single costs only. In this manner the respective rights of the parties are preserved and the objects which they both have had in view are accomplished.

THORNDIKE *vs.* BARRETT.

Of the conveyance of proprietors' lands by their committee and clerk, under authority given to them by votes of the proprietors.

THIS case having been tried again in this Court, [Vid. 2 *Greenl.* 312,] the demandant regularly deduced his title to the demanded premises from *William Molineaux*, who held the same under a deed of the following tenor:—

"To all people unto whom these presents shall come: *John* "*Molineaux* of *Boston*, in the county of *Suffolk* and commonwealth "of *Massachusetts*, merchant, in the capacity of clerk to the pro- "priety known by the name of the Twenty Associates of the "Lincolnshire Company, sends greeting. Whereas the said pro- "priety at a legal meeting on the twenty third day of *September*, "in the year of our Lord one thousand seven hundred and eighty- "five passed the following vote, viz: 'Voted, that *Beauchamp* "*Neck* be sold by the standing committee, either by public or "private sale, as they shall think most for the interest of the pro- "priety, and the money arising therefrom be put into the hands "of the treasurer, to be disposed of as the proprietors shall di- "rect; and that public notice be given of this vote thirty days "before the sale;'—and at another meeting of the standing com- "mittee of the Twenty Associates of the Lincolnshire company, "on the thirty first day of *October*, in the year of our Lord one

" thousand seven hundred and eighty-five, ' The clerk having in-
" formed the committee that the intended sale of the lands on
" *Beauchamp Neck* and *Leverett's Neck* have been duly advertised
" in *Adams' & Nourse's* Independant Chronicle, of the twenty
" ninth day of last *September*, agreeably to the votes passed the
" twenty-third day of last *September*; and of the several offers that
" have been made for *Beauchamp Neck*, supposed to contain about
" five hundred acres, and Mr. *William Molineaux's* offer of six
" shillings per acre being the highest, whereupon *voted*, that this
" committee, by virtue of power vested in them, do accept
" the offer made by Mr. *William Molineaux*, and engage to sell
" him all the unappropriated land on *Beauchamp Neck*, in the
" township of *Camden*, lying within the patent to *Beauchamp* and
" *Leverett* he paying six shillings per acre for the same;'—and at
" another meeting of the standing committee of the Twenty Asso-
" ciates of the Lincolnshire company, on the twelfth day of *De-*
" *cember* in the year of our Lord one thousand seven hundred and
" eighty-nine passed the following vote, viz: 'Whereas the Twenty
" Associates of the Lincolnshire company, at their meeting on the
" 23d day of *September* in the year of our Lord one thousand seven
" hundred and eighty-five, *Voted*, that *Beauchamp Neck* be sold
" by the standing committee either by public or private sale as
" they shall think most for the interest of the proprietors;' and
" whereas the standing committee at their meeting on the thirty
" first day of *October*, one thousand seven hundred and eighty-five
" did agree with and make sale of the said neck of land to Mr.
" *William Molineaux* on certain conditions, which conditions said
" *Molineaux* has complied with, as per an account settled the fourth
" instant; therefore, *voted*, that the clerk of this propriety do, as
" soon as may be, execute a good and lawful deed of said *Beau-*
" *champ Neck*, agreeably to the usual forms in like cases practised,
" unto Mr. *William Molineaux*;'—And whereas the said propriety
" at their meeting on the thirteenth day of *May*, *Anno Domini*
" one thousand seven hundred and sixty-eight, passed the follow-
" ing vote, viz: ' That the proprietors' clerk be, and hereby is
" empowered to make and execute any deed or deeds the stand-
" ing committee shall judge necessary, for granting and conveying
" any of the lands belonging to this propriety, to any person or

" persons, which deed or deeds shall be approved of by at least " two of the committee, and expressed on the same in writing " under their hands;' as by the proprietors' records, reference " thereto being had, the foregoing votes will fully appear:—Now " know ye, that I the said *John Molineaux*, in my capacity before " mentioned, for and in consideration of the sum of one hundred " and twenty pounds lawful money, to me in hand paid before the " ensealing hereof, by *William Molineaux* of *Boston*, in the coun- " ty of *Suffolk* and commonwealth of *Massachusetts*, merchant, the " receipt whereof I do hereby acknowledge, have, and by these " presents do, in my capacity aforementioned, by virtue, power " and authority to me granted in and by the vote last recited, " grant, bargain and sell unto the said *William Molineaux*, all " that tract or parcel of land called and known by the name " of *Pitts* or *Beauchamp Neck* lying and being in the township of " *Camden* and county of *Hancock* and commonwealth of *Massa-* " *chusetts*, butted and bounded as follows, viz:—Northwest on " land of *Abraham Ogier* and land of *Robert Thorndike*, containing " fifty acres, and a pond, south west on *Goose Harbor*, south-east " and north-east on the ocean, containing five hundred acres more " or less, and now belonging to the said propriety, and all the im- " provements and advantages that now belong to the same; pro- " vided, that the said *William Molineaux*, nor his heirs, nor any " person or persons under him or them, shall not work into lime " any quarry or parcel of lime rock within the land before de- " scribed, agreeably to the deed of indenture made between the " heirs of Brigadier *Waldo* and this propriety, bearing date *April* " the seventh, *Anno Domini* one thousand seven hundred and sixty- " eight; and that the said *William Molineaux*, or his heirs, or any " person or persons under him or them, shall not erect any kilns " for the purpose of burning lime on the land before described; " and that the said *William Molineaux*, his heirs and assigns, be " subject to all the covenants and conditions expressed in the " same deed of indenture; to have and to hold the aforesaid " granted premises, with the privileges and appurtenances there- " of, unto the said *William Molineaux*, his heirs and assigns, to his " and their only proper use and behoof forever; and I the said " *John Molineaux*, in my capacity before mentioned, do hereby

" covenant with the said *William Molineaux*, his heirs and assigns, " that by virtue of the power granted me as aforementioned I " have good right to sell and convey the premises in the manner " aforesaid; and that in my capacity aforesaid, I will warrant and " defend the same to him and his heirs and assigns forever, against " the lawful claims and demands of all persons claiming by, from " or under the propriety aforesaid, or me or my heirs. In wit- " ness whereof, I the said *John Molineaux*, in my capacity afore- " said, have hereunto set my hand and seal, this fourteenth day of " *September*, in the year of our Lord, one thousand seven hundred " and ninety.

" JNO. MOLINEAUX, *P. Clerk.* (*Seal.*)

Signed, sealed, and delivered
in presence of us
" JAMES S. LOVELL.
" SAM'L COOPER.

" *Suffolk, ss. Boston, Sept.* 14, 1790.

" Personally appeared Mr. *John Molineaux*, and acknowledged " this instrument by him subscribed, to be his voluntary act and " deed. Before SAM'L COOPER, Justice of the Peace.

" We the subscribers being of the standing committee of the " within mentioned propriety do, agreeably to the vote of said " propriety at a meeting the 13th *May*, 1768, hereby approve of " the written deed of sale.

" NATH'L APPLETON,
" JOSEPH BARRELL, } *Standing Committee.*"
" SAM'L COOKSON.

The execution of this deed not being denied, the only question made in the case was, whether the deed was sufficient evidence of a conveyance of the land therein described, from the Twenty Associates to *William Molineaux*; and this question *Weston* J. who tried the cause, reserved for the consideration of the whole Court, a verdict being returned for the demandant.

Orr, for the tenant, argued against the deed, that in every part, whether of conveyance or of covenant, it spoke the language, not of the Twenty Associates, but of *John Molineaux*; and thus,

not being excuted in the name of the principal, it was void. *Elwell v. Shaw* 16 *Mass.* 42. *Stenchfield v. Little* 1 *Greenl.* 231.

Allen, *Greenleaf*, and *Thayer*, for the demandant, contended that the votes and the deed, taken together as a conveyance, ought to be so construed as to carry into effect the intent of the parties, of which they afforded sufficient evidence. The signature of the clerk is evidence of the truth of the recitals in the deed, no particular form of attestation being necessary; and the long acquiescence of the proprietors evinces their intent to convey to *Molineaux*. *Browning v. Wright* 2 *Bos. & Pul.* 12. *Ellis v. Welch* 6 *Mass.* 250. 9 *Mass.* 514. *Bott v. Burnell* 11 *Mass.* 167. *Shep. Touchst.* 82, 83. *Co. Lit.* 49, *a*. The votes of the proprietors may be considered as sufficient, of themselves, to pass the estate; and may operate either in the nature of a covenant to stand seised to uses; or as a grant to such person as the committee shall appoint; in which case the deed, with the indorsement of their approval thereon, is a *designatio personæ*. *Mayo v. Libby* 12 *Mass.* 339. *Wallis v. Wallis* 4 *Mass.* 136. *Springfield v. Miller* 12 *Mass.* 417.

Orr, in reply, said that this was a case, not of a public corporation, but of certain private individuals, seised in fee of lands, and *delegating to a third person* the power to convey the estate. This power was to be executed by *making a deed*, conforming to the settled principles of law. Having expressed *this* mode of conveyance, all others were excluded; and this part of their intent being as clearly expressed as the determination to convey, both parts of the vote must stand or fall together. If the estate did not pass *by deed*, it was not conveyed at all.

The cause being continued *nisi* for advisement, the opinion of the Court was delivered at the ensuing *August* term in *Oxford*, by

Mellen C. J. The only question is whether the deed from *John Molineaux* to *William Molineaux*, bearing date *Sept.* 14, 1790, and recorded *May* 13, 1793, the execution of which was admitted, and which was offered in evidence without objection, is legal proof of a conveyance of the land therein described. A

verdict has been found for the demandant, and he is entitled to judgment, unless the deed is to be pronounced inoperative as a conveyance of the premises demanded. We are to form our opinion upon the deed before us. Having been executed almost thirty five years ago, and then approved by the standing committee of the proprietors, it is entitled to a liberal construction, and ought to be sanctioned as an effectual conveyance, unless legal principles strictly forbid it ; and upon the most careful examination, and comparison of it with those cases which have been supposed to be similar to it, we are satisfied that it is legal evidence of a conveyance of the land therein described. It appears by the deed that the Twenty Associates, *Sept.* 23, 1785, voted that *Beauchamp's Neck*, of which the premises demanded are a part, should be sold by the standing committee, at public or private sale ;—that at a meeting of said committee *Oct.* 31, 1785, the clerk informed them that said *William Molineaux* had offered six shillings per acre, being the highest offer ; that there upon the committee accepted the offer made by him ;—that at another meeting of the committee *Dec.* 12, 1789, the clerk of the propriety was authorized by them to execute a good and lawful deed of said *Beauchamp's Neck*, agreeably to the usual forms in like cases practised, to the said *William Molineaux* ;—the form of which deeds according to a vote of the proprietors of *May* 13, 1768, was to be such as "the standing committee should judge necessary" for the purpose of granting and conveying the lands of the company; which deed or deeds should "be approved "of by at least two of the committee, and expressed on the same "in writing under their hands." It is a principle of law, well established in *Massachusetts* and this State, that towns and proprietors of common lands may alienate their lands by vote. *Adams v. Frothingham* 3 *Mass.* 352. *Codman v. Winslow* 10 *Mass.* 146. *Springfield v. Miller* 12 *Mass.* 415. Such a vote would clearly have been sufficient. This is the usual mode of proceeding among proprietors of lands in common. In the same manner by a vote of such proprietors, and a draft of lots, their common lands are considered as legally divided. All the conveyances of property in severalty by the proprietors of the *Kennebec* purchase are effected by their vote, by which, as they express it, they "vote,

grant and assign" to A B, &c. ;—and by another vote, a mode of certifying such vote or grant and perpetuating the evidence of it, for the use and in the possession of the grantee, or person to whom the land is voted, is designated ; to which mode the clerk of the proprietors conforms, by giving an instrument, in the nature of a certificate of the vote, and, in some degree, resembling a deed ; being under the seal of the company, and signed, and acknowledged by the clerk before a Justice of the Peace. These modes of conveyance, various as they are, have been adopted and sanctioned, in virtue of a provision contained in successive statutes relating to this subject, by which proprietors of lands in common "are empowered to order, manage, improve, divide and "dispose of [their common lands] in such way and manner as shall "be concluded and agreed upon by the major part of the inte-"rested present at any legal meeting ; the votes to be collected "and accounted according to the interests." Under this statute authority the above mentioned vote of 1768 was passed by the twenty associates, as to the sale of their lands, and mode of conveying the same, and perpetuating the grant or sale. It is proper here to observe that this power given to proprietors is a peculiar one ; a power of agreeing on the mode of dividing and disposing of their property ;—a power which persons in their individual capacities do not possess ; they must conform to those principles and modes of conveyance which our statutes have distinctly and explicitly prescribed. The difference is important. Viewing these principles, in connection with the several votes of the Twenty Associates, the proceedings of the standing committee in making the contract of sale, and in writing approving of the deed, in behalf of the proprietors, which the clerk had made "agreeably to the usual forms in like cases practised," we are well satisfied that they can never be permitted to deny that the title to the lands described in the deed passed to the grantee. We are confirmed in this opinion by the case of *Mayo & al. v. Libby* 12 *Mass.* 339. The Court there held that a resolve, releasing to "each settler" in *Hampden*, who was on the land before a certain day, one hundred acres in severalty, to be laid out so as to include his improvements, although it did not give any bounds or description of the same, was sufficient to pass the estate in the

hundred acres ;—leaving those particulars to be afterwards settled by a surveyor. Is there any essential difference between that case and this? There the name of each settler was to be ascertained and the bounds of his lot fixed by a surveyor, after the resolve was passed. Here the name of the purchaser and the price were to be ascertained and fixed by the standing committee, after the vote of sale was passed; and the evidence of the whole to be preserved and delivered to the purchaser by a deed or instrument, made, executed and sanctioned in the manner and form prescribed by the vote of the proprietors; and which was carefully observed and adopted with respect to the deed in question. This case differs from *Stinchfield v. Little* 1 *Greenl.* 231. There the question was, whether the instrument declared on was the deed of *Little*. The only question arose upon the plea of *non est factum*. In the present case the question is whether the estate passed from the Twenty Associates to *William Molineaux* by the deed under consideration. In that case *Little* was held answerable because he had bound himself by some of his covenants in the deed; covenants into which he need not to have entered. In the present case, there is no question of covenants. The lapse of time since the deed was executed may be considered of importance also in another point of view. We have had occasion once before to examine this cause: see 2 *Greenl.* 312. Several questions were presented by the former report of the Judge who sat in the trial of the cause, and the verdict was set aside because certain proposed testimony was rejected; a part of which had relation to an asserted disseisin of *William Molineaux*. By the report now before us it seems that all other questions were satisfactorily disposed of, except that as to the effect of the conveyance from the company to *Molineaux*. The deed to him, as we have before stated, has been registered more than thirty-two years. And now, by the statute of limitations, the Twenty Associates are barred of all remedy by action to recover the demanded premises; because ever since the conveyance, *William Molineaux* and those claiming under him have held all, or a part the lands openly and adversely to the proprietors. Such we must consider to be the fact, since the second verdict has put a negative upon all pretence of disseisin committed upon him. The

case before us has several peculiar characteristics, which distinguish it from all those with which it has been compared; and not deeming the decisions in those cases as necessarily applicable this, we feel authorized, as well as disposed, to pronounce the deed, under all the circumstances attending it, as a conveyance of the land there indescribed. Such was the unquestioned belief of all concerned at the time; and we perceive no principle of law which should prevent our giving it the operation and effect intended. We are all of opinion that there must be judgment on the verdict.

THE INHABITANTS OF WISCASSET *vs.* THE INHABITANTS OF WALDOBOROUGH.

Where a son, having received a conveyance of all his father's property, gave a bond to the town, conditioned to support him and another son during life; this was held not to be "supplies or support indirectly received from some town as a pauper," so as to prevent the father, and with him the other son, from gaining a settlement by residence, under *Stat.* 1821, *ch.* 122.

The settlement of a person *non compos*, though of full age, will follow that of his father, with whom he resides.

IN this case, which was stated by the parties, the question was upon the domicil of one *Charles Acorn*, a pauper, *non compos* from his infancy, and now upwards of forty years of age. He always lived in the family of *John Acorn*, his father, whose residence and lawful settlement were in *Waldoborough* till the year 1816. In that year the father, upon an inquisition regularly made by the selectmen of *Waldoborough*, was adjudged *non compos* by reason of extreme old age, and a guardian was duly appointed over his person and estate, which consisted of a considerable farm and stock, sufficient, if properly managed, to support him and his wife and *Charles*, during their lives. Soon afterwards, upon application of his children, and on condition that they would maintain him, the letter of guardianship was repealed by the Judge of Probate; and on the 27th day of *February* 1816, *George Acorn* of *Wiscasset*, a son of *John*, received a conveyance and

assignment of all his father's property, and thereupon gave to the inhabitants of *Waldoborough* a bond, conditioned for the support and maintenance of his father and mother during their lives, and for the like support of *Charles*, the pauper, for the term of eight years then ensuing; and removed them all to his own house in *Wiscasset*, where they dwelt at the time of the passing of the act of *March* 21, 1821. The pauper never owned any property.

Sheppard, for the plaintiff, contended, upon these facts, that neither the pauper nor his father acquired a settlement in *Wiscasset* by residence there at the passing of the act. The domicil is changed, not merely by removing to another place, but by the *intention* of always staying there. But this implies the power of volition, which a person *non compos* does not possess. He stands in the situation of an infant, a *feme covert*, or a slave, neither of whom can gain a settlement by any act of their own. *Upton v. Northbridge* 15 *Mass.* 237. *Watson v. Cambridge ib.* 286. *Hallowell v. Gardiner* 1 *Greenl.* 101. *East Sudbury v. Waltham* 13 *Mass.* 460. This principle applies as well to the father as the son, his incapacity, caused by extreme age, not being removed by the repeal of the guardianship.

He further contended that the son being supported, at the time of the passing of the act, under a special contract with the town of *Waldoborough*, and without any consideration on their part, he must be regarded as "indirectly receiving supplies as a pauper" within the provisions of the act, and so did not acquire a settlement under the clause respecting domicil.

Reed, for the defendants, said it had been settled that a person *non compos*, having no estate, and living with his father, might have the settlement of the father, as one of his family, though of full age. *Upton v. Northbridge* 15 *Mass.* 237. The father in this case being capable of conveying his estate, was capable of choosing his own place of abode; and if resident in *Wiscasset* with his own consent, for life, at the passing of the act, his domicil, and with it the settlement of the pauper, were there fixed. The fund out of which they were supported was the estate thus conveyed to *George Acorn*, and of course was not furnished, even

indirectly, by the town of *Waldoborough*. The taking of the bond was merely a measure of precaution, to guard against a possible danger, which the subsequent passage of the statute has forever prevented.

THE COURT said that the pauper, though incapable of gaining a settlement in his own right, by reason of mental imbecility, might acquire one derivatively from his father; whose residence being in *Wiscasset* at the time of passing the statute, his settlement and that of his son were thereby transferred to that place. The bond, they said, could in no view be regarded as supplies furnished by *Waldoborough*, that town having neither paid money nor suffered damage to obtain it.

Judgment for the defendants.

THE INHABITANTS OF ST. GEORGE *vs.* THE INHABITANTS OF DEER ISLE.

The incorporation of a town fixes the settlement of all persons having their legal home within the territory incorporated; whether they be actually resident thereon at the time of the incorporation, or not.

If, at the time of the incorporation of a town, a person having a legal home, there, be resident in another town, at service, with the intention of returning at some future day, which intention was afterwards abandoned; such subsequent abandonment of the purpose of returning does not affect the question of settlement.

THIS was an action of *assumpsit* for the support of certain paupers. It was briefly argued by *Thayer*, for the plaintiffs, and *Abbot* for the defendants. The facts are stated in the opinion of the Court, which was delivered at *August* term in *Oxford*, by

MELLEN C. J. The only question in this cause is, whether *Sally Pressy*, the grandmother of the paupers, gained a settlement in *Deer Isle* by virtue of the act by which it was incorporated as a town, passed *January* 30, 1789. She was then about seventeen years of age. Her father died in 1773 or 1774, and her mother was married about 1775, to one *Curtis*; and after his death, was again married to one *Sheldon* about 1786 or 1787. *Sally Pressy*

continued to live with her mother, on the same farm on which her father had lived, until *June* 1788. She then went to *Thomaston*, and lived a few months as a hired servant with one *Coombs*; then returned to her mother's house at *Deer Isle*, and stayed a few months; then went back to the house of *Coombs*, where she continued to live as before till *July* 1789, when she was married to one *Welch*, of *Thomaston*, where she has lived ever since. *Welch* was a foreigner. While living at *Coombs'*, *Sally Pressy* called *Deer Isle* her home, and frequently spoke of returning to it. If at the time of the incorporation, she had a legal home in that town, her absence from it, while living in *Thomaston* in the manner before described, would not change or affect her domicil; such absence being temporary, and accompanied with the intention of returning; and which intention seems only to have been abandoned when she was married. Had she then a home in *Deer Isle* at the time of its incorporation? It is true *Sheldon* was not bound to maintain her, merely because he had married her mother; and therefore she had no legal right to remain in his family on his expense. Upon her mother's marriage with *Sheldon*, *Sally Pressy* must be considered as having resided in his family *by permission* only. Her mother gained a settlement with her husband *Sheldon*, because he was an inhabitant of *Deer Isle* at the time of its incorporation; but this settlement was not communicated to *Sally Pressy*. To this point see *Freetown v. Taunton* 16 *Mass.* 52, and *Plymouth v. Freetown* 1 *Pick.* 197. Upon the facts we have thus far stated, *Sally* seems to have had no home in *Deer Isle* in *January* 1789; and never to have gained a settlement there. But there is another fact deserving consideration. *Sally Pressy's* father died seised of the above mentioned farm, and left a son and two daughters; of course *Sally* was entitled to one quarter part of the farm; her brother taking a double share; and she and her sister taking each a quarter. Though *Sheldon* and his wife lived on the farm, it did not belong to them. *Sally* had a legal estate in it, and a legal right to enter and occupy it, after her father's death. This estate she owned until after the act of incorporation was passed; and she then sold it for $100. These facts shew that she had a house and home in *Deer Isle*, from the time of her father's death, until the time she sold her

share. Though the farm was subject to her mother's dower, that could not affect her legal rights as to the residue; and even as to this point, it does not appear that the dower was ever assigned to her. Having this legal home at *Deer Isle*, we have before said, that *Sally Pressy's* absence at service in *Thomaston* at the time of the act of incorporation, can make no difference. The last inquiry is whether she, though having her home in *Deer Isle* at that time, was capable of gaining a settlement by virtue of the act, she then being a minor. In the case of *Hallowell v. Gardiner* 1 *Greenl.* 93, we decided that a minor child, *residing with her parents and under their care and nurture*, did not gain a settlement by the incorporation of *Gardiner*. The present case differs from that. *Sally* did not reside with her parents at their expense, after *June* 1788; and had no right so to do. Then do the facts of this case shew that she was emancipated before the incorporation? If so, then she could gain a settlement in the manner supposed as well as though she had been of full age. A father-in-law is not obliged to maintain his children-in-law, which his wife had by a former husband, and consequently is not entitled to their earnings; but in such cases the minor children are entitled to their own earnings, and may maintain an action to recover them. *Freto v. Brown* 4 *Mass.* 675. *Commonwealth v. Hamilton* 6 *Mass.* 273. Upon these principles *Sally Pressy* was independent of her mother; entitled to her own wages, and free to pursue her own course of life; having no claims on others, others had none upon her. She was thus emancipated and capable of gaining a settlement in her own right. See also *Lubec v. Eastport ante p.* 220. The conclusion is, that by the act of incorporation *Sally Pressy* gained a legal settlement in *Deer Isle*; and there must be judgment for the plaintiffs.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE COUNTY OF

KENNEBEC.

MAY TERM,

1825.

KEITH *vs.* REYNOLDS.

Where a tract of land was granted fronting on a brook, a nd extending back *by a given course*, two miles; it was held that by this description each side line should be two miles in length; and that the rear line must be parallel with the front.

Where a parcel of land is conveyed as being the whole of a certain farm, which is afterwards described in the deed by courses and distances which do not include the whole farm; so much of this description will be rejected, as that the whole may pass.

IN this case, which was an action of trespass *quare clausum fregit*, the question arose upon the construction of the plaintiff's title deed, and the consequent location of the dividing line between his land and that of the defendant. By this deed one *Breed Newell* conveyed to the plaintiff "a certain tract of land, "or farm, lying in *Winslow*, it being included in that tract which "was granted by the *Plymouth* company to *Gamaliel Bradford*, "Esq. and five others, and which was granted by the proprietors "of the above said tract to *Ezekiel Pattee*, Esq. and lately own- "ed by *John Bran*; said farm is bounded as followeth;—begin- "ning on the easterly side of the mile brook so called, and thence "on an easterly course parallel to" a certain line described, "one mile; thence northerly at right angles fifty rods; thence

" westerly, parallel with the first side line, until it comes to said " mile brook; thence southerly, by said brook, fifty rods, to the " first mentioned bounds; containing one hundred acres."

The defendant proved that an admeasurement from the brook eastward, by the courses and distances mentioned in the deed to the plaintiff, would not include the land on which the trespass was said to have been committed. And it appeared from a plan referred to in a deed from *Henry Warren* to *Paul Bailey*, under whom the defendant claimed, his land being bounded westerly by the plaintiff's land, that the brook did not run at right angles with the side lines of the lot, but passed somewhat obliquely; and that the south side line, as described in the plaintiff's deed, would be the longest.

It also appeared that by running the end line, opposite to the brook, at right angles with the side lines, and making allowance for the oblique direction, so that the whole lot should average one mile from the brook, the *locus in quo* would not be included in the plaintiff's lot.

The plaintiff then proved that the proprietors of *Winslow* granted to *Ezekiel Pattee* " the westerly half of a tract of land, " extending from the mile brook two miles eastward;"—and that the lot thus granted to *Pattee* was the same now owned by the plaintiff.

Hereupon the jury were instructed by *Weston* J. before whom the cause was tried, that the plaintiff was entitled to all the land granted to *Pattee*, though it would embrace somewhat more than would be included in the lot by an admeasurement according to the particular courses and distances given in the plaintiff's deed; and that by the true construction of the grant to *Pattee*, the rear or easterly line of the lot ought to be extended as far as it could be extended eastward, taking care that no part of the east line should be more than a mile from some part of the westerly line of the lot as bounded on the brook. And they returned a verdict for the plaintiff, which was taken subject to the opinion of the Court whether they were properly instructed or not.

Allen, for the defendant. The parties having given a specific description of the land conveyed in the deed, this is to be adopt-

ed in preference to another, more general and uncertain. Though the description contained in another deed may be taken, by reference, as part of deed referring to it; yet such reference ought to be plain and explicit, and such as to shew evidently that the parties had that deed before them. And the cases in which a separate deed is thus adopted as part of one subsequently made, are where no courses or monuments are given, or where they are imperfectly stated, and the prior deed is referred to for a more particular description. But if such courses and monuments are given in the deed, it is rendered evident that the parties had these in view, and had been upon the land. This therefore should be taken as evidence of their intent; rather than the general allusions to the grant from the proprietors to *Pattee*, which must here be treated as mere recital by the grantor, designating the general tract by the name of its former owner, but not adopting its boundaries, the deed not being in his possession.

If the plaintiff's claim be supported, then he would hold all the land which belonged to *Pattee*, though it should exceed, to any extent, the limits expressly given in his deed;—and if it should prove to be but half as large as the tract thus clearly and expressly defined, he would have no remedy on his covenants. Either of these consequences shew the construction contended for to be extravagant.

The rule of construction of deeds requires that all the parts of the description be retained, if they can stand together. Upon this principle the plaintiff can be confined to the distance expressed in his deed, and yet no part of it be rejected. The tract thus bounded and thus limited *will be* land conveyed to *Pattee*, and by him to *Bran*, and by him to the plaintiff; for it is not said, in the deed, to be *all* the tract, nor the *same* tract which belonged to *Pattee*; but only to have once been his land. But if the particular description in *Pattee's* deed be adopted as designating the bounds of the land conveyed to the plaintiff, then every part of the plaintiff's deed, inconsistent with that description, must be rejected.

But if the description in *Pattee's* deed be adopted as controlling the limits expressed in the conveyance to the plaintiff; yet by a reasonable construction the *locus in quo* will not be included.

For this is not a case of construction of the exterior bounds of a public grant, as in *Winthrop v. Curtis* [*ante p.* 110,] but is merely the subdivision of a lot between two owners; in which case, the rear line of a lot fronting a river, being expressly stated to be at right angles with the side lines, as is invariably the construction when not so expressed, is to be removed back, if no monument be designated, till the quantity intended to be granted is completed.

R. Williams, for the plaintiff, argued from the words of the deed, that it contained a plain and distinct adoption, by reference, of the boundaries contained in *Pattee's* grant from the proprietors; and it shewed that in the contemplation of the parties, that tract, and the land conveyed to the plaintiff, were identically the same. If the two descriptions do not thus coincide, the grantee is entitled to hold by that which will give him the most land and the greatest estate. *Jackson v. Blodget* 16 *Johns.* 172.

As to the extent from the brook eastward, he considered the rule as settled by the case of *Winthrop v. Curtis*; by which the eastern boundary would be carried back one mile from any part of the brook. And by this rule the plaintiff and defendant would take the original two-mile-lot, in equal moieties.

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

This case presents two questions.—1. Does the *locus in quo* fall within the true limits of the tract of land granted by the proprietors of *Winslow* to *Ezekiel Pattee*? 2. If it does, is it embraced and conveyed to the plaintiff by the deed of *Breed Newell*?

The proprietors granted to *Pattee* the westerly half of a tract of land, extending from the mile brook eastward two miles, and fifty rods in width. By a plan exhibited it appears that the brook is not at right angles with the side lines of the lot; and the first question is, how the easterly end line is to be run across the lot; whether at right angles with the side lines of the lot; or so as to conform to, and be parallel with the oblique course of the brook. If in the former manner, then the *locus in quo* will not be included in *Pattee's* grant; if in the latter manner; then, it will be included. We are satisfied that the easterly end lines across the westerly and easterly half of the two mile grant, must be run on

the same principles and in the same manner, so that both halves will be of the same form. And from the language of the grant, we are of opinion that those lines must not be at right angles with the side lines, but conforming to, and parallel with, the course of the brook; and thus the *locus in quo* is embraced within the limits of the *Pattee* grant. And if upon the principles of fair and sound construction the *locus in quo* is also found to be within the tract conveyed to the plaintiff by *Newell's* deed, we should not disturb the verdict, even if the language of the Judge in his instructions to the jury, was not perfectly distinct and precise; which, however, is not admitted, as the course of the admeasurement must be considered as implied in his instructions, as to the mode of ascertaining the true position of the easterly end line across the lot. It is said he used the same language which was employed by him in delivering the opinion of the Court in the case of *Winthrop v. Curtis*, when speaking of the true mode of settling the exterior lines of the *Plymouth patent*. We do not, however, consider the cases as similar. In that case, by the terms of the deeds of conveyance to the proprietors of the *Kennebec* purchase, the exterior lines on each side of *Kennebec* river were to be in all places fifteen miles distant therefrom; but such distance was not required to be measured on any particular given course; for if such had been the case, then if the river be considered as running due south, and the distance should be measured on a west and by north, or west-north-west course, it is very clear that the end of the line so measured, would be considerably less than fifteen miles distant from the river. But in the case before us, the *course* of the side lines of the grant to *Pattee* is given; and it is admitted that such course is not at right angles with the brook; but extends easterly from it in an oblique direction; and so the grantee, *Pattee*, had a right to extend his lot easterly to the length of one mile from the brook on each side of the lot; without any reference to the distance of the easterly end of it from other parts of the brook, measuring in the nearest possible direction. We are therefore, as we before said, of opinion that the *locus in quo* is within the grant to *Pattee*.

The second question is whether it is also within the tract or farm conveyed by *Newell* to the plaintiff. Here it is important to attend

to the language of *Newell's* deed. There is a want of accuracy, and indeed a repugnance, in some parts of this language. We must gather the intention of the parties from the whole of the descriptive language used. It is contended that all that part of the deed in which reference is made to the grant of the *Plymouth* company to *Bradford* and others, and the grant of the proprietors of *Winslow* to *Pattee*, are merely matter of recital, and of course cannot be taken into consideration in ascertaining the true extent and boundaries of the plaintiff's land. We cannot accede to this position. We consider all the above particulars as parts of the description of the land conveyed; and some of them very important parts. In this deed *Newell* describes the premises conveyed as "a certain tract of land or farm"—included in the tract granted to *Bradford* and others—"and which was granted by the "proprietors of the above said tract to *Ezekiel Pattee*, Esq."—and it is then stated "said farm is bounded as followeth"—and yet in the description of the lines and courses, the course of the easterly end line is stated to be at right angles with the side lines of the lot. Such a line contradicts that part of the description in which it is declared to be the same farm granted to *Pattee*; and will restrict the deed so that it would convey only *a part* of said farm, and leave a small triangle at the easterly end, contrary to his declared intention. Certain monuments govern courses and distances which are less certain.

We think that upon the true construction of *Newell's* deed, it must be considered as embracing the *locus in quo*; and of course, the instructions of the Judge to the jury were correct, and there must be judgment on the verdict.

NANCY TURNER, *libellant*, *vs.* JOHN TURNER.

JOHN TURNER, *libellant*, *vs.* NANCY TURNER.

Where, in cross libels between husband and wife for divorce *a vinculo* for adultery, each respondent pleaded in bar that the other party had committed the same crime; it was held that these pleas could not be received as admisssons of the facts alleged in the libels.

IN each of these cases, which were libels for divorce *a vinculo* for adultery, the respondent pleaded in bar that the libellant had

committed the crime of adultery with a person named in the plea, and with others to the respondent unknown; and relied on the provisions of *Stat.* 1821, *ch.* 71, *sec.* 4, which enacts that if it shall appear that both parties have been guilty of adultery, no divorce shall be decreed.

A question was hereupon raised, and shortly discussed, by *Williams*, for the husband, and *Sprague*, for the wife, whether the plea was such an admission of the facts charged in the libel, as rendered further proof by the libellant unnecessary.

And THE COURT, the next morning, said they were of opinion that it was not;—observing that whatever might be the effect of such pleading in other cases, yet in libels for divorce *a vinculo* for adultery, they would not receive the confession of the party, whether of record or otherwise, unaccompanied by other corroborating circumstances, as conclusive evidence of the facts charged in the libel: for this would put the contract into the power of the parties, and would encourage collusion between them to obtain divorce.

CHADWICK *vs.* PERKINS.

Where the parties have reduced their contract to writing, the written instrument alone is to be resorted to, for the measure of their liability;—and if the writing amounts to a declaration of trust, its extent is to be gathered from the writing only, unaffected by parol testimony.

THIS was an action for money had and received, at the trial of which, before *Weston* J. the following facts appeared.

One *John Carlton* 2d, being indebted to the defendant in about 150 dollars in the year 1817, gave him an absolute deed of his farm, by way of security, taking back a writing some days afterwards, by which the defendant stipulated to reconvey to him the farm, on payment of his debt. This writing was never registered.

Afterwards, in *May* 1819, the plaintiff, having an execution for $226,75 against *Carlton*, caused his right in equity of redemp-

tion of the same land to be seized and sold at a sheriff's sale where it was struck off to the plaintiff himself for twenty-five dollars. On the day following this sale, it was agreed between the plaintiff, and the defendant, and *Carlton*, that the plaintiff should abandon his title under the levy, and discharge his execution, which he did;—the defendant giving a bond to *Carlton*, conditioned to reconvey the farm to him, upon his paying the defendant his debt, being $198 27, and the further sum of $261 73 in one year;—and the defendant giving another bond to the plaintiff, conditioned that if the plaintiff should, upon demand, after six months, pay the defendant the said sum of $198 27, the defendant would thereupon, within one year from the date of the bond, either convey to the plaintiff all his title and interest in the farm, or refund to him the sum so paid, and pay him the further sum of $261 73. The plaintiff never paid to the defendant the sum due to him as above, although, eighteen months after the execution of the bond, he was particularly requested by the defendant so to do, and to close the business; the defendant then offering to convey the land to the plaintiff, if he would pay him that sum.

The bond made to the plaintiff was deposited with *P. H. Washburn*, Esq. it being agreed that if Col. *Peter Chadwick*, brother of the plaintiff, who held a note against the defendant due in *July* following, for about $160, should call on the defendant for payment, the bond should be given up to the defendant. And the defendant's declarations were proved, that as long as the plaintiff procured his brother's forbearance of calling for payment of the note due him, so long the bond should be good against the defendant. And it appeared that the plaintiff did procure such forbearance, and that the plaintiff finally paid the note to his brother, about the middle of *April* 1822. Mr. *Washburn* testified that he should not have delivered up the bond to the plaintiff without receiving payment of the note due to his brother.

The plaintiff further proved that the defendant conveyed the farm to *Jonathan Carlton*, *March* 15, 1822, for the consideration of five hundred dollars expressed in the deed.

John Carlton 2d, being called by the defendant, testified that he had failed to comply with the condition on his part to be performed, as stated in the defendant's bond to him; and that although

the consideration expressed in the deed from the defendant to *Jonathan Carlton* was $500, yet in truth he paid only $203, being the amount due to the defendant. This part of his testimony was objected to by the counsel for the plaintiff, as contradicting the deed; but the Judge admitted it; and he received other evidence tending to shew that the farm, when sold by the defendant, was worth much more than the amount due to him.

Upon this evidence the Judge directed a nonsuit, with leave to the plaintiff to move to set it aside, if, in the opinion of the Court, the action could be supported.

Allen, for the plaintiff, now argued that the evidence reported was sufficient to maintain the action. He contended that the plaintiff had no remedy on the bond; for it was never in his possession within the year; and the first act was to be done by the defendant himself, by demanding the money, which he omitted to do. There being no debt due from the plaintiff, and he having no means of knowing that *Carlton* had not already paid the money, he was guilty of no neglect in not offering to pay it before demand; though from the peculiar terms of the condition the penalty was not forfeited. The bond therefore having become inoperative, the remedy is open by this form of action, which is in the nature of a bill in equity. *Appleton v. Crowninshield* 8 *Mass.* 358. *Stratton v. Rastall* 2 *D. & E.* 366. It further is manifest from the evidence, that the defendant held the property merely as trustee for whom it might concern; and to compel the execution of such trust, this action is the proper remedy. *Newhall v. Wheeler* 7 *Mass.* 198. 16 *Mass.* 221.

That the defendant has received money in trust for the plaintiff, sufficiently appears from the consideration in the deed, which he cannot be permitted to deny. *Steele v. Adams* 1 *Greenl.* 1. *Schermerhorn v. Vanderheyden* 1 *Johns.* 139. 7 *Johns.* 342. 2 *H. Bl.* 1249. The only exception to this rule is where the action is between the original parties to the deed, both of whom are equally conusant of the fact;—but here the plaintiff was no party to the conveyance; and to allow the defendant to contradict what he has put on record as true, under his hand and seal, is to permit him to practice fraud on the innocent.

But if he had received no money for the property sold, or not so much as its value, yet he is accountable for all, which, in the exercise of common care, diligence, and good faith, he might have obtained. *Floyd v. Day* 3 *Mass.* 403. *Randall v. Rich* 11 *Mass.* 494. *Heard v. Bradford* 4 *Mass.* 326. And though the plaintiff has paid no money directly to the defendant, yet he has done what imposed on the defendant an equal obligation, by releasing his lien on the land, and discharging his execution. *Newcomb v. Bracket* 16 *Mass.* 161. 8 *Johns.* 257. 14 *Johns.* 453.

Boutelle, for the defendant. As the parties reduced their whole contract to writing, the only remedy is by action on the bond. *Richards v. Killam* 10 *Mass.* 239. 2 *D. & E.* 100. 2 *Taunt.* 145, 183. 1 *Dane's Abr. ch.* 9, *art.* 22.

If this remedy has failed, it is not the fault of the defendant. He has neither waived the contract, nor refused to perform any of his stipulations. Eighteen months after it was made, he demanded his money of the plaintiff, and after waiting as much longer for payment, and waiting in vain, he conveyed the land, for the amount of his own debt, and no more.

But if the special contract were waived or rescinded by consent of parties, yet the plaintiff is not entitled in equity to recover. For if the land be considered as a fund for payment of the two debts, there was a duty for the plaintiff to perform, before he was entitled to the benefit of the fund; and this duty he not only neglected, but refused to comply with. The defendant was therefore no longer bound to connect his debt with that of the plaintiff, but was at liberty to seek his own separate indemnity by a sale of the land.

To shew the admissibility of parol evidence to prove the sum actually received, he cited *Rex v. Scammonden* 3 *D. & E.* 474. *Davenport v. Mason* 15 *Mass.* 85. 2 *D. & E.* 12. *Maule & Selw.* 387. *Wilkinson v. Scott* 17 *Mass.* 249.

And he contended that if the bond is to be treated as a nullity, then the contract is void, by the statute of frauds, being an entire contract, for the sale of land, and not in writing. 7 *D. & E.* 201. 8 *Johns.* 253.

WESTON J. delivered the opinion of the Court.

It appears that in *February*, 1817, *John Carlton* the second, conveyed a certain farm to the defendant. The object of the parties was, to secure to the defendant a debt of about one hundred and fifty dollars, due to him from *Carlton*. That the latter might have the benefit of what the farm might be worth more than sufficient to pay the debt, the defendant gave to *Carlton*, sometime after the conveyance, a writing, which was not recorded, and which does not appear to have been under seal, wherein he undertook to reconvey said farm to him, upon payment of what was due to himself. Afterwards, in *May* 1819, the plaintiff, having an execution against *Carlton*, seized and sold upon the same an equity of redemption; which it was assumed *Carlton* had in the farm. From the small sum of twenty five dollars, for which this interest was sold, it may fairly be presumed that strong doubts were entertained whether there did then remain to *Carlton* any interest in the farm, which could be sustained at law, as an equity of redemption. And in point of fact and of law, *Carlton* had no such interest in the farm; but his right and remedy rested in action only against the defendant; after payment to him of his debt, in virtue of the writing by him given to *Carlton*. But the defendant manifested a willingness, as in good faith he was bound to do, to give to *Carlton*, or to his creditor the plaintiff, every reasonable facility, whereby they might avail themselves of the property, after his own claim upon it had been satisfied. Accordingly an arrangement was made between the parties, satisfactory to all concerned. The plaintiff thereupon abandoned his claim under the seizure of the supposed equity of redemption, which he could not enforce, and received from the defendant a bond, having a legal and binding efficacy, by which, first paying to the defendant his debt, he became assured, upon certain terms and conditions, of the payment also of his own, if the farm was of sufficient value, as the plaintiff now insists that it was. The defendant it appears held himself in readiness to fulfil the condition of his bond to the plaintiff, and eighteen months after its execution called upon him to pay the debt due to himself, and to close the business. But the plaintiff neglected so to do; nor did he at any time, while the

defendant held the land, offer to perform the stipulations on his part, and thus entitle himself to the fulfilment of the conditions, inserted for his benefit. This it is said however is owing to the neglect of the defendant, to demand of the plaintiff payment of the debt due to him, after six months and within a year ; but if the defendant did not, within the period limited, make the demand, yet the plaintiff was at liberty to tender the money. And it is frankly admitted by his counsel that his remedy upon the bond is gone.

The defendant's contract with the plaintiff, being proved by an instrument under seal, it would seem that upon legal principles, that instrument alone ought to constitute the measure of his liability. All prior conversation and stipulations were merged in the subsequent written contract. And it would be a violation of a well settled rule of the law of evidence, to suffer the written contract, especially if under seal, to be enlarged, varied, or explained by parol testimony.

But it is contended that, by reason of the bonds executed by the defendant, operating in the nature of a declaration of trust, the defendant thereafterwards held the land in trust for the plaintiff, to the amount of his debt. It is possible that, while the benefit of the bond remained to the plaintiff, according to its conditions, the land might have been held charged with the fulfilment of these conditions, in the hands of the defendant, or of any other person, to whom it might be conveyed, with a knowledge of the trust. Upon this point however we give no opinion ; because we are satisfied that if these instruments do amount to a declaration of trust, the measure and extent of such trust is to be gathered from the papers alone ; unaffected by any parol testimony. Now the defendant no where stipulates to hold the land in trust for the plaintiff; or to perform any other duty to him ; unless his debt should first be paid by the plaintiff or by *Carlton* ; or unless *Carlton* should pay him that debt, and also the debt due to the plaintiff. Neither of these was done ; although the defendant requested the plaintiff to pay him, after the time limited, and thus put himself in a condition to avail himself of whatever the farm might be worth, beyond the defendant's claim.

In the case of *Appleton v. Crowninshield*, cited for the plaintiff, it was decided by two judges against one, that although the plaintiff's remedy on his bottomry bond was gone; yet that, under the peculiar circumstances of that case, money afterwards received by the defendant was deemed to have been received in part to the plaintiff's use; inasmuch as the defendant's claim to a portion of that money originated from funds, furnished by the plaintiff. Admitting that the defendant in this case has received more than sufficient to pay his debt, which is denied, and has been disproved, if the testimoney was competent, it was not derived from property furnished by the plaintiff, but by *John Carlton*; and whatever may be his liability to the latter, we perceive no evidence of any engagement on the part of the defendant to hold the surplus for the plaintiff's benefit; nor are we satisfied that any such obligation rested upon him by implication of law. Entertaining this view of the questions presented, it becomes unnecessary to decide how far the testimony objected to, was or was not competent.

The nonsuit is confirmed; and the defendant is allowed his costs.

NOTE. In the revision of the statutes in the year 1821, there was no re-enactment of the *third* section of the *Stat.* 1783, *ch.* 37, directing the mode of transferring real estates, &c. by which all declarations of trusts, created by act of the parties, were required to be in writing; so that on this subject there is not any statutory provision in *Maine*, unless the statute of *Massachusetts* be regarded as yet in force.

BISHOP *vs.* LITTLE.

Where money has been paid more than six years, for a consideration recently discovered to be false and of no value; and no fraud is imputable to the party receiving the money; the statute of limitations is a good bar to an action brought to recover it back.

THIS was an action of *assumpsit* for money had and received, to which the defendant pleaded the general issue, and the statute of limitations. At the trial, which was had before *Weston* J. the following facts appeared in evidence.

Sometime prior to *Dec.* 18, 1805, the plaintiff was in possession of certain land claimed by the *Pejepscot* proprietors, being one of the class of settlers described in a resolve of the legislature of *Massachusetts* authorising the Governor and Council to appoint certain commissioners, to settle and adjust the controversies between those proprietors and the persons settled on lands claimed by them. These commissioners had awarded that the plaintiff should pay to the agent of the proprietors $166, for one hundred acres of land on which he lived. On payment of this sum to the defendant, who assumed to act as agent for the proprietors, the plaintiff's agent expressed his fears that the title of the proprietors did not extend so far as to include the land occupied by the plaintiff; but the defendant affirmed that it did, and said that if the deed he was about to give to the plaintiff should not convey to him a good title thereto, he would make it good. Upon this assurance the money was paid, and a deed of release and quitclaim was made to the plaintiff *Dec.* 18, 1805, reciting the resolve and the proceedings of the commissioners under it.

Within six years prior to the commencement of this action it was ascertained that the title of the proprietors did not extend so far as to cover the plaintiff's farm; and he thereupon brought this suit to recover back the purchase money and interest. The Judge directed a verdict to be returned for the plaintiff, reserving the question whether, upon the whole case, he was entitled to recover.

Orr, for the defendant, argued that as the contract was made *bona fide*, the statute of limitations began to run from the moment the money was paid. The engagement of the defendant was, that the facts then existing were such as he then represented them to be; and if he was guilty of no fraud, the case only presents a remediless misfortune on the part of the plaintiff; the facts recently discovered being as much a surprise to the defendant as to himself. *Bree v. Holbeck Doug.* 654. The discovery of the true limits of the *Pejepscot* claim was as well within the power of the plaintiff as of the defendant, who, it is now to be presumed, has paid over the money to his principals, and ought to be protected. The plaintiff adventured in a lottery, and has drawn a blank. *Gates v. Winslow* 1 *Mass.* 66.

R. Williams, for the plaintiff, contended that the statute ought not to be applied to cases where the party was wholly ignorant of the existence of his right of action, as was the case here. He had continued in the peaceable occupancy of the land, till recently evicted by a paramount title. The defendant had represented that no such title existed; and the plaintiff was justified in believing him, since it was his duty to know. Hence the false representation of the defendant, at the time of the conveyance, was a fraud, and the statute attaches itself only to the time of its discovery. *First Mass. Turnpike Corp. v. Field* 3 *Mass.* 201. *Homer v. Fish* 1 *Pick.* 435. 13 *Johns.* 325.

But if there was no fraud, yet here is a total failure of the consideration; and on this ground the plaintiff is entitled to recover.

MELLEN C. J. delivered the opinion of the Court at the succeeding *August* term in *Oxford*.

When one man purchases of another real estate, and receives a deed of it, containing no covenants as to seisin, title, or warranty; and it turns out that no title existed in the grantor, and so none passed to the grantee; the right of the grantee to recover back the purchase money will depend on the particular circumstances of the case. In some circumstances he may recover it back; in others he cannot. In the case before us, however, we do not consider it necessary to examine the facts with a view to that question; because as the defendant has pleaded the statute of limitations, that of itself furnishes a complete bar to this action. The facts present to us a case of hardship on the part of the plaintiff; and so far as a Court of law could give him aid, it would be readily disposed to do it; but as the defendant not only relies on the merits of the cause, but insists on the statute for his protection, we are bound to administer the law to him, without any reference to the question of hardship. When the deed was made and delivered to the plaintiff in the year 1805, the proprietors had no title to the land therein described. If the plaintiff ever had a right of action to recover back the consideration, he had one then; there was at that moment, if ever, a failure of consid-

eration. In *Miller v. Adams* 16 *Mass.* 456, a judgment was reversed for a fault of the officer who served the writ; and within six years after the reversal the action was commenced, but not within six years from the time the fault or mistake of the officer was committed. The court decided that the right of action then accrued, and so the statute of limitations was a good bar. In the present case there is no pretence of a fraudulent concealment on the part of the defendant, or of the *Pejepscot* proprietors. They supposed the title was good, and the legislature of *Massachusetts* acted under this belief and understanding in the measures they adopted, respecting a large tract of land, of which the land described in the deed is a part. All were mistaken, and not undeceived till within six years next before the commencement of this suit. It is urged by the plaintiff's counsel, that as this want of title was not discovered till within six years, the statute is no bar; that it did not commence running until the discovery was made. Such, however, is not the law. No case can be found where the statute has been avoided at law or in equity, unless on the ground of fraudulent concealment on the defendant's part. *First Mass. Turnpike Corp. v. Field* 3 *Mass.* 201, was a case of such concealment. The case of *Bree v. Holbeck Dougl.* 654, was in all essential particulars similar to the present. The facts were that a sum of money had been paid for certain estate, more than six years before the commencement of the action; and the estate sold was mortgaged property, as the defendant believed, when he sold the interest, he being an administrator. The mortgage deed was afterwards found to be a forgery;—but as the defendant had been innocent, and never concealed any facts within his knowledge, relating to the title, the Court held the statute of limitations to be a good bar. We perceive no principle of law which can save this cause from the operation of the statute.

Though Judge *Preble* was not present at the argument of this cause, he has been consulted; and, having examined the opinion now delivered, concurs in the result, that the action is completely barred by the statute of limitations.

Verdict set aside and a new trial granted.

Barstow *vs.* Gray.

Where a party who had contracted to furnish a quantity of goods, afterwards admitted another to aid him in supplying the requisite quantity, for which he was to receive the same price, and was paid accordingly ;—it was held that the person thus subsequently admitted was a competent witness for the party with whom he had contracted, in a suit brought by the latter to recover the price of the goods sold.

A dormant partner, or subcontractor, subsequently admitted to participate in the benefit of a contract, without the privity of the party sought to be charged, need not be joined as plaintiff in an action brought to recover payment for the goods delivered or labor done.

If a contract in writing be signed by the party sought to be charged, it is sufficient to take the case out of the statute of frauds, though it be not signed by the party seeking the remedy.

In this action, which was *assumpsit*, brought to recover damages for the breach of a contract respecting the sale and delivery of a quantity of wheat, by the plaintiff, who resided in *Hallowell*, to the defendant, at the city mills in *Boston*, the evidence of the contract was contained in certain letters which passed between the parties.

It appeared that after some previous intercourse between them, the tenor of which was not in evidence, the plaintiff wrote to the defendant, *May* 2, 1822, in these terms :—

"Sir, I have sent you a sample, being six bushels, of wheat, "from three lots, and I suppose it may be a fair average ;—shall "think there is very little inferior or superior to the extremes. "In order to be able to buy the wheat, should you want, I have "been under the necessity of sending it to Messrs. *Rice & Thaxter*, instead of doing it directly to yourself, who will apprise you "when it arrives. Should you conclude to purchase, the sooner "it is done, the better. I think from 3000 to 8000 bushels "might be had, at said price, if no opening appears before I hear "from you."

To this the defendant, on the 24th of *May*, replied thus ;—"I "have received your letter of *May* 2d, with three sacks of "wheat, which proves good ; weight 59, 60, 61 lbs. per bushel. "I should have answered your letter sooner, but did not get a

"report of the quality till yesterday. The wheat will be worth "one hundred and thirty cents per bushel, delivered at the mills "called the city-mills in this town."

The plaintiff answered this letter on the 31st of *May* as follows;—"Yours relative to the wheat not coming to hand so soon "as was expected, I had written to *Alexandria* before I received "it, and expect an answer very soon. Should the offer be a bet- "ter one than yours, I should like at the same price to give you "the preference, and will advise you;—otherwise shall ship it "to you with all possible despatch. *Postscript.* Contracts for "about 5000 bushels wheat have been made this week; it may "not come in."

The plaintiff, at the trial before *Weston* J. called one *Ebenezer White* as a witness; to whose competency an objection being made on the ground of interest, he stated, upon the *voir dire*, that in the spring of 1822, after the plaintiff had purchased at *Hallowell* a considerable quantity of wheat, with a view to send it to the defendant at *Boston*, the plaintiff proposed to the witness that he should furnish wheat at *Hallowell*, to be sent to the defendant, saying that he had made a contract for that purpose at 130 cents the bushel;—that accordingly the witness furnished part of a parcel of 2700 bushels, for which he was to receive of the plaintiff the same price the plaintiff might obtain of the defendant;—that this parcel, and 800 bushels more, in which the witness had no interest, were delivered at the city mills in *Boston* and paid for by the defendant, in *July* 1822, at the price of 130 cents per bushel; out of which the plaintiff paid the witness for his part of the 2700 bushels;—that the wheat now in controversy was purchased by the plaintiff prior to that time; and that the witness was not a party to the contract with the defendant, and had no interest in the suit. Being thereupon admitted to testify in chief, he stated that about the time of the arrival of the 3500 bushels in *Boston*, in *July* 1822, he informed the defendant that the plaintiff had been purchasing wheat for him, and wished to know if he was ready to receive it. To his inquiry respecting the quantity of wheat purchased for him by the plaintiff, the witness answered that he had bought between four and five thousand bushels, and expected the defendant to receive it at the price before stated.

The defendant replied that he was sorry, but said he would, or supposed he must take it, though his mills were very full. The witness then informed the defendant that one shipment from the plaintiff had arrived, and that another vessel was then on the passage to *Boston* ; but he did not intimate to the defendant, nor did the witness know, that these two shipments did not contain the whole quantity contracted for.

It further appeared that on the arrival at *Boston* of the vessel which carried the wheat now in controversy, about the 4th of *August* 1822, the master informed the defendant, and his agent at the mills, that he had brought from the plaintiff the residue of the wheat, which was on board his vessel ; and that he would bring it to the mills ; but the defendant told him it was of no use, and that he should not receive it. The master then landed and stored the wheat at another place in the city, where he again offered it to the defendant, who still refused to receive it. The wheat being then sold for the most it would bring, the plaintiff brought this action to recover the difference between the price sold for, and the price agreed.

The counsel for the defendant objected that the wheat ought to have been tendered at the city mills ; and that *White*, the witness, should have been joined with the plaintiff in the action. But these objections the Judge overruled ; and the jury returned a verdict for the plaintiff, which was taken subject to the opinion of the Court upon the admissibility of the witness, and upon the points raised at the trial.

Allen, for the defendant, contended that the letters did not furnish any evidence of a contract, and were nothing more than the ordinary correspondence of two merchants, concerning the state of the market, and the prospect of profit upon a shipment of the article in question. The plaintiff himself did not consider the defendant bound to receive the wheat at all events, nor hold himself obliged to ship it to *Boston*, as is evident from his last letter, in which he intimates his intention not to send it to that place, if he could do better at *Alexandria*. It is true he chooses in that letter to speak of the defendant's "offer;" but this does not fix the character of the communication ; and if it had been an offer

to purchase, the plaintiff was not at liberty to speculate upon it till he could receive advices from distant ports. To bind the defendant, it should have been instantly accepted.

But if the evidence of the contract is contained in the letters, then the admission of parol testimony to explain it was irregular, there being no latent ambiguity.

And if parol evidence could be received, yet *White* was incompetent to give it, because of his interest in the suit. He was to receive such price as the plaintiff should receive of the defendant; which it was plainly his interest to increase. But if his testimony was rightly admitted, it disproves the declaration, and destroys the plaintiff's right to recover, by shewing a partner not joined in the suit. It is the case of two joint owners of a chattel sold, and to be paid for in two installments; where, though one owner receives the first payment in full for his share, and even releases to the other, yet both must join in an action for the residue, because both were interested in the subject of the contract.

Neither was the contract fulfilled on the part of the plaintiff. He was bound to deliver the wheat at the city mills; which the defendant did not disable nor prevent him from doing. The dissuasive language used by the defendant to the master of the vessel, could operate no farther than to exonerate the plaintiff from any action at the suit of the defendant for not delivering the wheat; but could not vest in him a right of action for the price; to entitle himself to which, he should first do all he had stipulated previously to perform. *Morton v. Lamb* 7 *D. & E.* 123. 5 *Com. Dig.* 262. 2 *Com. Dig.* 452. *Doug.* 684. *Phillips v. Fielding* 2 *H. Bl.* 123.

And the contract was void for want of mutuality, there being no engagement on the part of the plaintiff to deliver any quantity of wheat, which the defendant could enforce at law. He was perfectly at liberty to sell it at the best bargain he could make, having only intimated his intention to send it to the defendant if he could do no better.

Sprague, for the plaintiff. The letters contain in themselves sufficient evidence of an agreement between the parties. If there is any ambiguity, it is of the defendant's own creation; and

the rule is that the party using language of doubtful meaning is bound by the interpretation which he knows the other party has given it. Here the defendant knew the plaintiff's interpretation of the contract, to which he made no objection or reply. The amount of his undertaking was, that if the plaintiff would send the goods, he would receive them at the agreed price ; and the plaintiff did send them. He might have retracted his offer before any act done by the plaintiff in execution of the contract ; as a bid at auction may be retracted before the hammer is struck down ; but not afterwards. *Mason v. Pritchard* 12 *East* 227. *Sturgis v. Robbins* 7 *Mass.* 301. *Egerton v. Matthews* 6 *East* 307. *Adams v. Lindsall* 1 *Barnw. & Ald.* 681.

If the contract were not in writing, still it would not be void by the statute of frauds, because it was a contract of labor and service to be performed by the plaintiff, in the purchase and transportation of goods, and not for the sale of a specific parcel then in his hands. *Towers v. Osborne* 1 *Str.* 506. 4 *Burr.* 2101. Here was also a part performance of the contract by the delivery and acceptance of the first shipment. *Damon v. Osborn* 1 *Pick.* 480. *Ricker v. Kelley* 1 *Greenl.* 117.

It is true as a general rule, that performance of the whole contract must precede the right to compensation. But the exception to this rule is where performance is prevented or excused by the party entitled to it ; and the case at bar is within the exception. 3 *D. & E.* 683. *Jones v. Barkley Doug.* 688.

It was not to vary or explain a written contract, but to shew its performance, that the testimony of *White* was admitted. And he was not a party to any stipulation with the defendant, but only to a sub-contract with the plaintiff.

Weston J. delivered the opinion of the Court at the succeeding *August* term in *Oxford*, as follows.

There is no small obscurity in the written correspondence adduced as evidence of a contract on the part of the defendant, for the breach of which damages are sought to be recovered in this action. But we are of opinion that, upon a fair analysis, it does import a contract, and that each of the parties must have been apprized that the other so understood it.

The first letter of the plaintiff to the defendant, under date of the second of *May* 1822, advises that from three to eight thousand bushels of wheat might be had at *Hallowell*, of an average quality with a sample forwarded to *Rice* and *Thaxter*, as the letter states, " in order to be able to buy the wheat, should you want." And the letter further states, " should you conclude to purchase, the sooner it is done the better." This letter contains a proposition to sell to the defendant, or to purchase for his use at *Hallowell*, from three to eight thousand bushels of wheat, corresponding with the sample. The defendant replies on the twenty fourth of the same month of *May*, apologises for the delay, approves of the sample, and subjoins, " the wheat will be worth one hundred and thirty cents per bushel, delivered at the mills, called the city mills in this town." These mills belonged to the defendant. This letter appears to us to be tantamount to saying, on his part, " I have " attended to your proposition, have examined the wheat, approve " of it, and will pay you therefor one dollar and thirty cents per " bushel, delivered at my mills in *Boston*"; and by the wheat, must be understood that which the plaintiff had proposed to sell to him or to purchase for him, namely, from three to eight thousand bushels, equal in quality to the sample. The plaintiff, by his letter to the defendant, dated the thirty first of the same month, states that in consequence of the delay on the part of the defendant, he had written to *Alexandria* for a market, from which he expected an answer very soon; and adds, " should the offer be a " better one than yours, I should like, at the same price, to give " you the preference, and will advise you; otherwise shall ship " it to you with all possible despatch"; and in a postscript, he advises the defendant that contracts for about five thousand bushels of wheat had been made. The plaintiff thus apprizes the defendant that he considers his letter an offer for the wheat, and that unless he very soon receives a better one from *Alexandria*, of which he will advise him, he will accept his offer, and forward the wheat as soon as possible. If the defendant was misunderstood by the plaintiff in considering his letter an offer, it was very easy for him to have disclaimed such intention; and if he had done so, before the plaintiff had actually accepted, either in express terms, or by some act done, the defendant could not have

been charged. Instead of which, although he had reason to believe from the plaintiff's last letter that, unless he was otherwise advised within a reasonable time, the wheat would be sent by the plaintiff, in expectation of obtaining therefor the price stated in his letter, he remains silent, and actually receives the greater part of the wheat forwarded.

It has been insisted in argument, that both of the parties must be bound or neither. In order to take a case out of the statute, a note or memorandum in writing must be made and signed by the party to be charged. In *Egerton v. Matthews & al.* where the defendants agreed in writing to buy of the plaintiff, thirty bales of *Smyrna* cotton, and they signed, but the plaintiff did not, it was decided that the defendants were bound; they being the parties sought to be charged. The same doctrine is held in *Allen v. Bennet* 3 *Taun.* 169; and it is there considered that the party who does sign is liable, although he has no legal means of enforcing the contract against the other. *Mansfield* C. J. in the same case says, " every one knows it is the daily practice of the court of " chancery to establish contracts signed by one person only, and " yet a court of equity can no more dispense with the statute of " frauds than a court of law can."

But it is by no means certain that the plaintiff was not equally bound; and that the contract might not have been legally enforced against him. By his letter of the thirty-first of *May*, he virtually accepts the defendant's offer, unless he otherwise advises him soon; and if, after a reasonable time had elapsed, having had no better offer from *Alexandria*, and giving no notice to that effect to the defendant, wheat had in the mean time risen in value, and he had not forwarded it to the defendant, it is far from being clear that he might not have been held answerable to him in damages for his failure so to do. However this may be, we are of opinion that the defendant's letter, connected with the first letter of the plaintiff, was an offer to purchase upon certain terms; and that the second letter of the plaintiff, and the act of forwarding the wheat, was an acceptance of that offer by him; by which the contract became operative and binding on the part of the defendant, the acceptance of the plaintiff forming a sufficient consideration therefor; more especially as it appears that the defendant

was advised of the manner in which his letter was understood by the plaintiff, and by his silence, as well as by his receipt of the greater part of the wheat, acquiesced in that construction.

White, the witness, who is objected to as incompetent in consequence of interest, being at the request of the defendant's counsel examined upon that point, disclaims all interest in the event of this suit. He admits that he was permitted by the plaintiff to participate, to a limited extent, in the benefit of the contract; but states that that portion of the wheat, in which he was concerned, having been received by the defendant, according to his engagement, and he having been fully paid and satisfied, he has no interest whatever in the controversy between these parties. The objection to his competency therefore, upon the ground of interest, is not supported.

But it is urged that, from the facts disclosed by his testimony, *White* ought to have joined in bringing the action; and that the plaintiff, instead of being entitled to a verdict, ought to have been non-suited. There was no privity whatever between *White* and the defendant. The plaintiff, when he made the contract, had no connection with *White*. The bargain, afterwards made between them, merely fixed the terms upon which the latter would furnish a part of the wheat, which the plaintiff was to procure for the defendant.

In *Mawman v. Gillet*, reported in a note, 2 *Taunt.* 326, the plaintiff had employed the defendant to print certain works for him, which was the consideration for the assumpsit set forth in the declaration. The plaintiff was the only person known to the defendant in the contract, but others had been permitted by the plaintiff to share in the benefit of it, among whom was one *Evans* offered by the plaintiff as a witness, and an objection, made to his admissibility as such, was overruled by the Court.

In *Lloyd v. Archbowle* 2 *Taunt.* 324, a dormant partner, who participated with the plaintiff in the benefit of the contract, was not joined in the action, which it was insisted he should have been. But the Court decided otherwise; and *Mansfield* C. J. who delivered the opinion of the Court, says "there is a material distinc-
"tion between the case, where partners are defendants, and
"where partners are plaintiffs; if you can find out a dormant

" partner defendant you may make him pay, because he has had " the benefit of your work; but a person with whom you have no " privity of communication in your contract shall not sue you."

To entitle the plaintiff to maintain this action, it was necessary for him to aver and to prove that he delivered or offered to deliver the wheat, at the city mills, unless such delivery or offer to deliver was prevented or waived on the part of the defendant. The wheat arrived on ship board in the harbor of *Boston*; the master of the vessel had orders to deliver it at the city mills; this he was ready and desirous to do, and called on the defendant at the mills, offering to deliver it, and requesting him to receive it. This the defendant refused; declaring to the master that it was of no use for him to bring it any nearer to the mills. As much as to say, it is entirely unnecessary for you to pass through the several bridges, and to bring your vessel round, in order to go through the useless ceremony of tendering the wheat at the mills; for I shall not receive it. Had the defendant been passive, doing no act and making no declaration, excusing or waiving the delivery at the mills, the wheat must have been tendered there to entitle the plaintiff to recover. But this condition being expressly waived, the plaintiff has all the rights which would have accrued to him, if he had actually delivered or tendered the wheat at the mills. *Jones v. Barkley* 2 *Doug.* 684. *Rawson v. Johnson* 1 *East* 203. *Waterhouse v. Skinner* 2 *Bos. & Pul.* 447. *West v. Emmons* 5 *Johns.* 179. *Miller v. Drake* 1 *Caines* 45.

Judgment on the verdict.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE COUNTY OF

SOMERSET.

JUNE TERM,

1825.

ARCHER *vs.* NOBLE & ALS.

If a constable, having given bond for the faithful performance of his duties and trust as to all processes by him served or executed, seize the goods of A. under an execution against B, it is not merely a private trespass, but is a breach of his bond.

THIS was an action of debt on a bond given by the defendant *Noble*, and his sureties, to the town treasurer, conditioned for the faithful performance of his duties and trust as to all processes by him served or executed, in his office of constable of the town.

The defendants put in a general plea of performance of the condition; to which the plaintiff replied that *Noble*, having in his hands a writ of execution issued in due form of law against one *Pishon* by some court or magistrate of competent authority, and in favor of some creditor, to the plaintiff unknown, did, under pretence of his office of constable, and under pretence of executing said writ, but without right, with force and arms seize and carry away the property of *William Richards*, for whose use and benefit this action was brought, and who for that injury had recovered a judgment against *Noble* which was yet unsatisfied, &c. To this replication the defendants demurred, assigning for causes, that it did not appear therein from what court or in favor of what creditor the writ of execution was issued; nor that the seizure of the goods was in violation of his duty as to any process to him deliv-

ered for service as constable ; nor that *Richards* had indorsed the writ in this action, so as to entitle himself to the benefit of any judgment to be rendered thereon ; and that it was too general and uncertain.

Sprague, for the plaintiff.

Boutelle, for the defendants.

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

The pleadings in this case present only one question of any importance ; and that is whether a sufficient breach of the condition of the bond is assigned in the replication. We do not perceive any valid objections against it as to form. The trespass as alleged was a violation of official duty and trust as to the process named. Nor do we think that the omission to set forth the name of the creditor in the execution against *Pishon*, or of the court from which it issued, is a circumstance deserving of much consideration. These facts were unknown to the plaintiff; but the demurrer admits the execution was issued from a court of competent jurisdiction. Neither do we consider the want of the indorsement of the name of *William Richards* on the writ as affording an objection to the action in the present stage of it. Advantage should have been taken of this at the first term, on motion, or by plea in abatement ; and we must now consider the objection as waived. 2 *Mass.* 102. 5 *Mass.* 97. No injury is done to either party by this omission ; because the replication states that this action was commenced, and is prosecuted, for the use and benefit of *William Richards* ; and therefore judgment may be properly made up, as well by looking at the replication to ascertain the name of the real plaintiff in interest, as though that name was indorsed on the writ, as it is contended it should have been. The inquiry then is as to the sufficiency of the breach assigned. By our statutes, a coroner must give bond "for the "faithful performance of the duties of his office." A sheriff must give bond "for the faithful performance of the duties of his "office, and to answer for the neglects and misdoings of his deputies." And a constable must give bond "for the faithful per- "formance of his duties and trust as to all processes by him served or executed."

The law is perfectly settled that a principal is answerable for the wrongful acts of his deputy, while acting under color of his office, and in the pretended discharge of his duty. *Grennell v. Phillips* 1 *Mass.* 530. *Bond v. Ward* 7 *Mass.* 123. *Marshal v. Hosmer* 4 *Mass.* 60. *Theobald v. Crichmere* 1 *Barnw. & Ald.* 227. In all these cases the principal is answerable for his deputy, because the acts complained of were so done.

If the present action was against the sheriff of this county, and the trespass which was committed by the defendant *Noble*, in taking away and converting to his own use the property of the plaintiff, had been committed by him as a deputy of the sheriff and under color of his office as such; it is very clear the action could be maintained. To this point the case of *Ackworth v. Kempe* 1 *Dougl.* 40, is a direct authority. It was there decided that if, on a *fieri facias* against A, a bailiff takes the goods of B, trespass lies against the sheriff; because such conduct of the bailiff was a misfeasance, under color of office, and pretence of authority. And indeed, independent of authority, it seems clear that a third person, as B was in the above cited case, may maintain an action for such an official injury, as well as either of the parties to the original process. In both cases a wrong is committed under color of office and authority; to guard against the abuse of which, the principle of law above stated is established, and bonds by law are required. Now, as *Noble*, the constable, and his sureties, were bound for his faithful performance of the duties of his office, the condition of the bond must be construed to embrace all those instances of malfeasance, misfeasance and nonfeasance, in the execution of his office, which would subject a principal to responsibility for similar wrongful acts of his deputy; and we have seen how far this responsibility extends. The statute expressly gives to all persons, suffering by the defaults and misdoings of a constable, the same remedies on his bond as on sheriffs' bonds, *mutatis mutandis*. On the whole, we are not able to perceive any merits in the defence. Our opinion is, and we accordingly adjudge, that the replication is good and sufficient in law; and judgment must be entered for the amount of the penalty of the bond declared on.

DOLBIER *vs.* WING.

An award by arbitrators, written on the back of the arbitration bond, stating that they had "met according to appointment on the within business," was held to be an award "of and concerning the premises," and therefore good.

Where a submission is of divers subjects distinctly enumerated, if it appears from the whole award that all the matters submitted have been adjudicated upon by the arbitrators, it is sufficient, though each particular is not specified in the award.

Whether arbitrators, not constituted under the statute, or by rule of Court, can award costs, without express authority,—*quære.*

This was an action of debt on a bond; from the condition of which, as set forth on *oyer*, it appeared that the plaintiff was in possession of a lot of land of which the defendant was the owner; the plaintiff claiming, under the statute, the amount of the increased value of the land by reason of his buildings and improvements made thereon; and the defendant insisting that in consequence of what the plaintiff had done, the whole lot was made worse;—that the parties submitted their respective claims and demands to arbitrators, with power to determine and settle all disputes between them relative to the premises; and also whether the defendant should convey to the plaintiff any and what part of the land, and how much the plaintiff should pay for the same.

Hereupon the defendant pleaded in bar, that the referees, made their award in the following words on the back of the bond, viz—"Met according to appointment, on the within business, and "agreed that *Joseph Wing* pay *Charles Dolbier* for his betterments "on the within lot thirty-eight dollars and interest, in *February* "next; also six dollars for our trouble":—that they made no award or determination of, or concerning the damages claimed by the defendant against the plaintiff for injury by him done to the land; nor whether the defendant should convey to the plaintiff any part of the land; and that they had not, by their award, settled nor determined concerning the respective claims and demands of the parties relative to the matters submitted to them.

To this plea the plaintiff demurred, assigning several causes, the purport of which was that the plea stated no facts proper to be tried by the jury, and none but what appeared on the face of

the award; and that it tended to draw to the jury the trial of questions and inferences of law.

Allen and *Belcher*, in support of the demurrer, argued that from inspection of the award it was manifest that the arbitrators had in fact considered every matter submitted to their decision. The award of a sum of money to the plaintiff, proved that in their judgment the land was made better by his labor; and their silence as to the conveyance of any part of the land, shewed that in their opinion it was inexpedient to exercise this discretionary power entrusted to them. Their certificate that they met on the business of their appointment was sufficient, under the liberal rule of exposition universally applied to this species of remedy. *Gray v. Gwennap* 1 *Barnw. & Ald.* 106. *Kyd on Awards* 171—173. If the award was not good for the costs, this part of it might be rejected.

Boutelle, for the defendant, contended that the award was bad, not being *super præmissis*. It is true that where the submission is general, of all matters in dispute, the award is presumed to be upon all matters submitted, unless the contrary appear. But it is not so where the submission is of subjects distinctly enumerated, as in the present case. Here the arbitrators were to determine the questions whether the defendant should convey any land to the plaintiff; how much; and at what price; yet these subjects are not mentioned in the award, and do not appear to have passed under their examination. *Randall v. Randall* 7 *East* 81.—It is also bad as to the costs, for want of express authority in the arbitrators to allow them. *Peters v. Pierce* 8 *Mass.* 398.

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

On the special demurrer in this case the *first* question is whether the plea is not bad in point of form, and for the causes assigned. The correct course of pleading would have been for the defendant, after setting forth the condition of the bond, and the award, as he has done, to have demurred. This would have presented to the Court the simple question whether the award is

legal and good; and had the demurrer of the plaintiff been general, that would be the only question now. But called on, as we are by this special demurrer, to pronounce our opinion as to the sufficiency of the plea in point of form, as well as substance, we feel bound to sustain the demurrer. 1 *Chitty Pl.* 216, 519. *Cowper* 684. No issue could have been taken on any of the averments of the plea, proper for the jury to try; they consist of nothing but denials of those things which had not been alleged on the part of the plaintiff; and of the legality of the award; because those facts, thus denied, were not expressly stated in the award. The plea professes to do nothing but to draw questions of law from the proper tribunal, for the purpose of submitting them to the decision of the jury. Such a plea cannot be maintained.

But if the demurrer had been general, we think the plea must have been adjudged insufficient, on the ground that the award is good and legal. It is true, it is very concise and informal; but as awards are made by judges elected by the parties, courts should sustain them when the principles of law do not clearly forbid it. The general objection to the award is, that it does not comprehend all the subjects submitted. The arbitrators commence their award on the back of the bond by saying that they "met according to appointment on the within business and agreed," &c. This expression seems equivalent to the words " of and " conccerning the premises,"—or " pursuant to the submission." which have been deemed sufficient—*Kyd* 221, 222. The cross claims for damages, are of such a peculiar nature that the allowance of one, necessarily proves that the other could not be allowed, nor have any legal nor equitable existence. Hence it is clear that as the arbitrators found that the labor of *Dolbier* had rendered the land more valuable than it was before; they have thereby decided that *Wing* could have no claim against him for damages on the ground of his having injured it. Thus as to every dispute and claim existing at the time of submission, the award is as broad as the submission. The other subject on which the arbitrators were authorised to make their award was whether *Wing* should sell and convey any part of the land to *Dolbier* at a price to be fixed by them and paid by him. It does not appear that there was any previous contract or obligation express or implied in

relation to this subject; but even if there was, we must presume they considered all the business on which they met; and the silence of the award as to a sale and conveyance, amounts to evidence that they did not mean that he should make any such conveyance. Thus all the subjects submitted have been expressly or virtually decided by the arbitrators; and the award is good, as to all but the costs, according to the principles laid down in *Kyd on Awards* 172, 182, and authorities there cited. See also *Buckland v. Conway* 16 *Mass.* 396, and 1 *Barnw. & Ald.* 106. As to the costs, the law seems unsettled; and the sum being small, the plaintiff is willing to waive the inquiry as to its allowance, and consents to its disallowance. As to the damages the award is good.

Plea in bar adjudged insufficient.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE COUNTY OF

PENOBSCOT.

JUNE TERM,

1825.

HASKELL & ALS. *vs.* GREELY.

Where the conveyance of a chattel is not invalidated by fraud, the mere want of possession in the vendee will not so defeat his rights, as to justify an officer in seizing it as the property of the vendor ; if he have previous notice of the conveyance.

In the sale or mortgage of an undivided portion of a chattel, in which the vendor has only a minor interest, and the other owners have the actual possession ; a symbolical or constructive delivery to the vendee or mortgagee is sufficient, even against creditors.

THIS case, which was trespass *de bonis asportatis*, came before this Court upon exceptions taken to the opinion of *Perham* J. before whom it was tried in the Court below.

It appeared that the plaintiffs were sureties in a promissory note, for one *Sanborn*, at the *Bangor* bank ; and that to secure them against damages by reason of their liability, he conveyed to them one third part of a carding machine, which he owned in common with *S. & D. Kimball.* The conveyance was made in the form of a common bill of parcels, with a memorandum at the bottom expressing that it was to be void if *Sanborn* should pay the debt ; otherwise to remain in full force. The delivery was made by an agent, who went with one of the plaintiffs to the mill where the machine was set up, and there delivered the paper to him, at the same time pointing to the machine, and declaring that

he delivered to the plaintiffs *Sanborn's* undivided third part of it.

At the time of this delivery, and for some months afterwards, the machine was occupied by another person, under a parol lease from one of the *Kimballs*, acting in behalf of all the owners, to whom he accounted for all the rent ; the plaintiffs having interposed no claim for rent, and *Kimball* agreeing to indemnify the lessee against any claim from them. After this the *Kimballs* claimed the whole machine as their own. The plaintiffs, before the trespass complained of in this suit, had been obliged to pay the note abovementioned ; after which the defendant, being a deputy sheriff, seized the machine by virtue of an execution against *Sanborn* and the two *Kimballs*, and proceeded to sell the whole of it at auction, though he was made fully acquainted with the nature and evidence of the plaintiffs' title, and was forbidden to sell their share in the property; one of the *Kimballs*, however, denying their right, and directing him to proceed. This act of sale was the tresspass complained of.

The defendant's counsel objected that the evidence did not support the title of the plaintiffs; and that all the owners of the machine ought to have joined in the action; both which points the Judge ruled against him.

Mc Gaw, for the defendant, contended that the transaction, as stated, did not amount to a legal sale to the plaintiffs. There was no consideration paid nor secured at the time, and no engagement on their part to extinguish *Sanborn's* liability to the bank. As soon as they paid the note, they might have sued him for the money thus paid, and against such suit the facts of this case would not have furnished any good defence. Neither was it valid as a mortgage or pledge; for this must always be accompanied by actual delivery of the chattel mortgaged, which in this case was never done.

T. A. Hill, for the plaintiffs.

Mellen C. J. in delivering the opinion of the Court, after stating the facts, proceeded as follows.

On these facts the question is whether the action is by law maintainable. As between *Sanborn* and the plaintiffs, the con-

veyance of the third part of the machine was valid, though not followed by actual possession on the part of the plaintiffs; and though the earnings were received by *Sanborn* and the other original owners till *March* 1822. *Badlam v. Tucker & al.* 1 *Pick.* 389. It is, however, contended in the present case, that an actual delivery to and continued possession by the plaintiffs of the property pledged was essential; and that for the want of this, they have no foundation for this action. It must be remembered that *Sanborn* owned but one third part of the machine; and, being a minor owner, he could not control the rights or the possession of *S. & D. Kimball*, who owned the two thirds. *Sanborn*, therefore, could not give to the plaintiffs any other delivery and possession of his third part than he did give. The law does not require that which is impossible or unreasonable. A formal delivery was given in *Oct.* 1821. In *Jewett v. Warren*, 12 *Mass.* 30, the mortgagor of logs lying in a boom, went in sight of them and pointed them out to the mortgagee; and this was held to be a delivery to the vendee; being the only one which could be made without extreme inconvenience. It is true that the Court say in the case of *Portland Bank v. Stubbs & al.* 6 *Mass.* 425, that it may be doubted whether the owner of a chattel can pledge an undivided part of it, without delivering the whole; though even this is only a doubt; but in the case before us *Sanborn* mortgaged the whole that he owned; and could not control the residue, as in the case last cited. In the above case of *Badlam v. Tucker & al.* one question was whether the want of possession on the part of the mortgagee was not a fatal objection to the plaintiff's claim. *Wilde* J. in delivering the opinion of the Court, says, "If the "mortgagees had appeared chargeable with neglect in not taking "possession seasonably, it would have been only evidence of "fraud, and might have been explained, if submitted to the con- "sideration of the jury. It has been always held in this State, "that the possession of the vendor, after sale, is only evidence of "fraud, and not such a circumstance as *per se* necessarily invali- "dates the sale." All these observations were made as applicable to a case of mortgaged personal property. Now in the case at bar, the Judge left all the evidence to the jury; and their verdict shews that they considered the whole transaction fair and

bona fide ; in fact, in the argument of the cause, a contrary idea has not been intimated. The reason why possession by the vendee or mortgagee of chattels is deemed of such importance is that it gives notice to the world of a change of property ; and we all know that open possession of real estate secures the grantee's title under his deed, as effectually as the act of recording the deed. But even in the case of a pledge, possession need not be taken by the pledgee, if in the conveyance it is agreed that such possession shall remain with the pledgor. To this point may be cited the case of *Badlam v. Tucker & al.* and the cases there collected. In the case before us a formal delivery was made. Actual possession could not be delivered to the plaintiffs by *Sanborn*, because he was a minor owner ; and though for more than a year, *Sanborn* continued to receive the earnings of the share he had mortgaged to the plaintiffs, still this circumstance can make no difference, as the transaction was fair and honest. As the conveyance was by way of mortgage or pledge ; as the plaintiffs, nearly three years before the defendant seized and sold the machine, had paid the debt themselves, to secure them against the payment of which, the conveyance in mortgage was made ; and as the defendant, before the sale, was distinctly notified of the plaintiffs' claim, and furnished with the proof to support it, and directed not to sell their third ; we cannot but consider such notice as equal to open possession by the plaintiffs ; and of course, that the defendant was a trespasser. Such must be the consequence if the title had become absolute in the plaintiffs ; and if it continued to be only the conditional title of a mortgagee, still the defendant had no right to take the property, so mortgaged, by execution, and sell it, unless the money had been paid or tendered to the mortgagee. To this point also, see 1 *Pick.* 389. Where a conveyance is not invalidated by fraud, the mere want of possession in a vendee, will not so defeat his rights as to justify an officer in seizing the property as belonging to the original vendor; more especially when such officer is seasonably notified of all the facts and forbidden to proceed. The plaintiffs have paid the value of the property, and can now have no other redress than by way of damages against the defendant who has deprived them of it. The objection grounded on the non-joinder of *S. & D. Kim-*

ball with the plaintiffs, cannot now be sustained ; it should have been taken in abatement; the authorities are clear on this point.

The exceptions are overruled and the judgment of the Court of Common Pleas is affirmed.

THORNDIKE *vs.* GODFREY.

Implied ratifications extend only to such acts of the agent as are known to the principal at the time.

This was an action of *assumpsit* on a promissory note, made by the defendant, payable to *Seward Porter*, and by him indorsed to the plaintiff; and it came before this Court upon exceptions taken to the opinion of *Perham* J. before whom it was tried in the Court below.

It appeared that the plaintiff, being owner of the steam boat *Maine*, duly constituted *Porter* his attorney, "to sign certificates "entitling the holders to shares of the net proceeds and income "of the" boat, "so long as the owners of such shares shall on de- "mand pay their proportion of proper repairs and expenses; and "to agree that said boat shall be employed in such manner as "may from time to time be directed by the owners of a majority "in interest of the shares in the profits of said boat; and that "dividends of the profits shall be made annually, at such time as "the owners of a majority in interest of the profits of the said "boat shall direct." Under this power *Porter* gave certificates of shares to the defendant and several others at *Bangor*, taking their notes payable to himself or order in ninety days; which period was fixed to give him time to ascertain if other shares could be sold at *Castine*, *Belfast*, and other places on the *Penobscot* river, so as to insure the establishment of a line of steam boats to *Bangor*. If this could not be effected, it was agreed that the notes should be given up, and the enterprize abandoned. And the boat did cease to go to *Bangor* before the notes became due. The power of attorney was exhibited, at the time, to the defendant and others who took shares in the boat, and a copy of it left with one of them, for the use of all concerned.

The Judge was of opinion that the plaintiff, by receiving the note, ratified *Porter's* agreement concerning it; and that the facts constituted a good defence to the action. To which the plaintiff excepted.

Gilman, for the plaintiff, contended that the note having been regularly indorsed to the plaintiff before its maturity, the matter alleged in defence was not admissible to avoid it. *Adams v. McIntier* 1 *Mass.* 69. *Richards v. Kilham* 10 *Mass.* 239. *Revere v. Leonard* 1 *Mass.* 91. *Townsend v. Weld* 8 *Mass.* 146. *Murray v. Hatch* 6 *Mass.* 477. *Hunt v. Adams* 7 *Mass.* 518. But if it were admissible, it did not constitute a good defence; because the defendant, having the power of attorney in his hands, must have perceived that the agent exceeded his authority in agreeing to the condition; no knowledge of which is proved ever to have been communicated to the plaintiff. And at all events the defendant could not rescind his part of the contract, without restoring the certificate of stock which he received; and which in this case he has not done. He seeks to avoid the note, while he still retains the consideration for which it was given, and is still entitled to his share of the profits of the business.

T. A. Hill, for the defendant, argued that the authority to annex such a condition to the contract, though not expressly given in the letter of attorney, yet was necessarily incident to the nature of the transaction. But if *Porter* did exceed his authority, the acceptance of the note, and the bringing of this action, amounted to a ratification of his doings; the relation of principal and agent between them, and the taking of the note for the plaintiff's use, giving to the transfer of this note a character very different from that of indorsements in the ordinary course of business. If the plaintiff was at liberty to repudiate the contract, he must do it *in toto*. But electing to accept it, he takes the note and the condition together.

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

As the note in question was given to *Porter* for the plaintiff's use, and then indorsed to him, we apprehend the defendant is en-

titled in this action to the same defence, by way of impeaching the consideration, as though the note had been made payable to the plaintiff himself. And if it had been, and the plaintiff had transacted all the business in person in relation to the certificate and note, and the conditions on which it is said the note was given, we should not be prepared to say that the defence might not be maintained. But as this was not the case, we must examine further. Here the first inquiry is, what were the powers delegated by the plaintiff to *Porter*, by the letter of attorney? This question must be answered by an examination of it. It was exhibited to the defendant at the time the note was given and a copy of it left for the benefit of all concerned.

By this letter of attorney it appears that *Porter* was authorized;—1. To sign certificates entitling the holders to shares of the neat proceeds and income of the steam boat *Maine*, for a certain conditional term of time;—2. To agree as to the manner in which the boat should be employed; i. e. as a majority in interest in the shares should direct; and 3d. That dividends should be made annually at such time as a majority in interest should direct. These were all the powers with which he was clothed by the letter of attorney; and as these were given expressly, in writing, and under seal, all implied authority is out of the question. *Porter* gave a certificate of a share to the defendant at the price of $50, and in payment for it, received the note declared on; and then, according to the testimony of the defendant's witness, he agreed, though the note was absolute on the face of it, that it should be considered void and should be given up, if certain anticipated events should not take place, and certain conditions should not be complied with; and the exceptions state that those events have not taken place, nor those conditions been performed. It is a principle of law perfectly clear, that when an attorney acts beyond the limits of the power given to him, the constituent, as to this excess, is not bound; and it would be mischievous and unjust if he should be; more especially in those cases where he who deals with such attorney has full knowledge of the extent of his delegated powers. Now in the present case, when *Porter* had given the certificate thus conveying valuable rights to the defendant, which he now holds and may enjoy, and received the note in ques-

tion for the price of the certificate, he had no power to make any conditions that the purchase money should not be demandable, except in certain specified events. In this particular he undertook to waive or destroy the rights of his constituent, without any power so to do. This principle is too plain to need authorities or illustration.

But it is said that *Thorndike* has ratified the doings of *Porter* even if he has exceeded his authority. If he has, the effect is the same as if a previous and sufficient authority had been given. But where is the proof of this ratification? It is contended that the plaintiff, by accepting the note and pursuing the present action, has given decisive evidence of his approbation of his attorney's conduct; and in this manner has ratified it. Still there is not a particle of proof that *Thorndike*, when he received the note of *Porter*, knew that he, by any of his verbal conditions and arrangements, had destroyed the effect of the notes and rendered it irrecoverable, as the counsel for the defendant contends he has done. We can never consider consent and ratification as implied, in those cases where there is not any knowledge of the facts, to which it is said the consent and ratification extend. This would be an effect without a cause. Had the defendant, when he gave the note, insisted that the before mentioned conditions should form a part of it; and had they been inserted in the note accordingly; then the acceptance of it by *Thorndike* would have been a distinct ratification of the power of *Porter* to make those conditions and arrangements, although beyond his legitimate authority under the letter of attorney. But on the facts before us, we are of opinion that the instructions of the Judge who presided at the trial in the Court of Common Pleas were not correct. Of course, the exceptions are sustained; the verdict is set aside, and a new trial must be had at the bar of this Court.

TAYLOR & UX. *vs.* HUGHES & AL.

A bond given in a prosecution under the bastardy act, conditioned that the accused shall appear and abide the order of Court, obliges him to the payment of such money as the Court shall order for the maintenance of the child, as well as to the giving of a new bond for the performance of such order.

THIS was an action of debt on a bond, given in a prosecution under the bastardy-act, conditioned that the principal defendant should appear at the next Court of Common Pleas, and from day to day during the term, and *abide the order of Court* in the prosecution against him, &c. The order was in the usual form, after a judgment of filiation, that the defendant should pay a certain sum for the past support of the child, and a fixed weekly rate for its future maintenance; and that he should give security with sufficient sureties for the performance of the order, and the indemnity of the town. The defendants pleaded in bar that the party prosecuted was present during the sitting of the Court, and was then and ever since had been ready and willing to surrender himself to prison, had the Court so ordered. To which the plaintiffs demurred.

Godfrey, being called on by the Court to support the plea in bar, said that the original defendant had done all in his power, by appearing and submitting to the jurisdiction of the Court. Not being able to find sureties in a new stipulation, he should have been committed to prison; but no order being made by the Court to that effect, he was at liberty, at the end of the term, to depart.

Mc Gaw, for the plaintiffs.

The opinion of the Court was delivered as follows by

MELLEN C. J. The single question in this case is, whether the condition of the bond declared on has been broken. To determine this question we must ascertain the meaning and extent of the condition. The statute of 1821, *ch.* 72, in the first section, provides that when a person is charged in the manner the section prescribes, he shall be held to give bond with sufficient sureties to appear at the next Court of Common Pleas, "to answer to such accusation and abide the order of Court thereon."

In another part of the section a further provision is made that, if the accused is found guilty by the jury, or he by default or plea acknowledges himself to be so, "he shall be adjudged the reputed "father of such child, and stand charged with the maintenance "thereof, with the assistance of the mother, as the Justices of "the same Court shall order; and shall give security to perform "the said order, and to save the town or place which might oth- "erwise be chargeable with the maintenance of such child, free "from charge for its maintenance; and may be committed to "prison until he find sureties for the same." The condition of the bond in this case goes farther than the language of the statute; but we do not in our decision, take this circumstance into consideration. By the declaration it seems that the accused did appear at Court according to the condition, and attended upon it during its continuance in session; and by the plea it further appears that he was always ready to be committed to prison, if such had been the order of the Court; but it is not alleged or pretended that he ever complied with the order of Court as set forth in the declaration. The question then presents itself, what is the meaning of "abiding the order of Court;" or does it not mean any thing? The condition is that he shall appear at Court and answer to the complaint; and abide the order of Court thereon. Now, we know that in such cases the Court pass no order till after the guilt of the accused has been established, in one of the modes pointed out in the statute. To what, then, can the condition be applicable, but the order of Court as to the maintenance of the child? But it is urged that the meaning of the above expression must be considered as controlled, and confined to those acts which the accused is to perform during the session of the Court on which he attends; because the Court are authorized to demand of him security for the maintenance of the child and indemnification of the town or place, which would be otherwise chargeable; and may commit him to prison until he shall give such security. To this it is replied that this new security which the Court may require, is only a superadded one; and one, which for various reasons may not be obtained or offered; as in those instances in which the accused does not even appear at Court; and, if he does, leaves it again without appearing after

the verdict, to hear or obey the order which they may pass. It seems by the record in the present case, that though the Court passed the order as to the security to be given, and payments to be made towards the maintenance, there was no order for the commitment of the accused until it should be complied with. We do not feel at liberty to decide that the words in the condition " and abide the order of Court thereon" have no meaning, and are to be rejected as surplusage ; especially, when the facts before us present us a case where the clause seems all important to the plaintiff. But we do not rest our opinion on this reasoning. We think the question before us has been considered and a construction given to such a bond as that we are considering. We allude to the case of *Merrill v. Prince* 7 *Mass.* 396. This was *scire facias* on a recognizance taken by a justice of the peace of *Prince*, when charged by the plaintiff as being the father of a child with which she was pregnant, which, if born alive, would be a bastard.

The Court decided that the action could not be maintained, because the magistrate should not have taken a recognizance but a bond. *Parsons* C. J. in delivering the opinion of the Court and comparing the two kinds of security, and the advantages of a bond in preference to a recognizance, says, " The party or his sure- " ties cannot be relieved against the condition of a recognizance; " but they may against the penalty of a bond." "If he be " bound by bond, although the condition may be broken at law, " yet the Court can relieve against the penalty on payment of " merely nominal damages, if the complaint be found false, or if " the putative father otherwise give security for his contribution " to the maintenance of the child ; or the penalty may be reduc- " ed, so as to cover and be a security for that maintenance." This language of the Chief Justice is all founded on the principle that the condition of the bond extends to a performance of the order of Court consequent on the adjudication of the accused as the reputed father of the child ; and seems to establish the construction for which the plaintiffs' counsel has contended. On the whole, we are of opinion that the plea in bar is bad and insufficient in law.

The Inhabitants of Hampden *vs.* The Inhabitants of Fairfield.

A residence in any town for a temporary purpose, on the 21st day of *March* 1821, does not fix the settlement in that town, under *Stat.* 1821, *ch.* 122, *sec.* 2.

The question in this case was upon the domicil of *Patience Bailey*, a pauper. She came hither from *Vermont*, in the year 1811, and resided for several years in the family of *Oliver Beale*, her sister's husband, who lived in various places, and lastly in *Fairfield*, till *August* 1820. About that time, her health having declined, she went on a visit to *Gardiner*; and during her absence Mr. *Beale* removed to *Hampden*, informing her by letter that his circumstances had become too much reduced to allow him to support her as a member of his family any longer, but that he would render her any other aid, if in his power. After this, she resided in various towns in the county of *Kennebec*, and from *January* to *June* 1821, in different families in the town of *Fairfield*.

In the summer of that year she went to *Hampden* by invitation from her brother in law, on a visit only; where she fell sick, and was relieved by the town. The friends with whom she sojourned in *Fairfield*, all testified that their doors were opened to her as a visitor only, and from motives of charity, she being in a low state of health, destitute of the means of support, and a member of the same church with themselves.

A verdict was returned for the plaintiffs by consent, subject to the opinion of the Court.

Brown, for the plaintiffs, relied on the fact that the pauper was resident in *Fairfield*, at the passing of *Stat.* 1821, *ch.* 122, and he argued from the evidence in the case that her domicil was there, she having no intention of departing. She had a permanent dwelling in that town till the removal of her brother in law to *Hampden*; after which she was not wholly forisfamiliated, a home being provided for her among the friends of her own communion. Whether her board cost much, or nothing, the principle of the case was the same.

Greenleaf, for the defendants, to the point of domicil, cited *Vattel*, *b.* 1, *ch.* 19, *sec.* 218. *Putnam v. Johnson* 10 *Mass.* 501. *Case of the Venus* 8 *Cranch* 278, 279, 295, 296. 2 *Peters' Adm.* 450. *Guier v. O'Daniel* 1 *Bin.* 351, *note*. *Granby v. Amherst* 7 *Mass.* 1. *Lincoln v. Hapgood* 11 *Mass.* 350. *Abington v. Boston* 4 *Mass.* 312. *Billerica v. Chelmsfoad* 10 *Mass.* 394. *Bruce v. Bruce* 2 *Bos. & Pul.* 230, *note*.

And he contended that the pauper had no domicil in *Fairfield*, because she had no fixed habitation there; nor any expectation of remaining; but was a mere visitor; not protected from arrest in any of the houses in which she sojourned; *Oyster v. Shed & al.* 13 *Mass.* 523; for she was not entitled to the *jus domi*; and because, if of the other sex, such residence would have conferred no civil rights, as, to vote, &c. *Taylor v. Knox* 1 *Dal.* 158; nor any civil liabilities, as to pay taxes, or to do military duty. *Stat.* 1821, *ch.* 164, *sec.* 1.

The opinion of the Court was delivered at the ensuing *August* term in *Oxford*, by

MELLEN C. J. Although the pauper in 1812 was a member of the family of Mr. *Beal*, her brother-in-law, and so continued till the autumn of 1820; yet she then ceased to be such; because, while preparing for his removal to *Hampden*, he dissolved her connection with his family, as he had an unquestionable right to do. Since that time it has not been renewed, and there has been no place which she could call her home. She visited in different towns; and in different families in the town of *Fairfield*, by express invitation, she being destitute and feeble. It was under such circumstances as these that she resided in *Fairfield* on the 21st of *March* 1821; when the act was passed; having no house or family in that town which she considered, or had a right to consider, or even to call her home; but on the contrary being received into the several families, where she visited for short periods, from feelings of christian fellowship, and motives of mere benevolence and humanity. We are perfectly satisfied that a residence of this character can never be considered a dwelling and a home, within the fair intent and meaning of the statute. This action cannot be maintained.

Verdict set aside, and plaintiffs nonsuit.

HARLOW *vs.* PIKE.

The regularity of the proceedings in the location of a town way, may be contested in an action of trespass *qu. cl. fregit*, against the surveyor who proceeds to open and make it; no *certiorari* lying to quash such proceedings.

It is necessary to the legality of a town way, that due notice be previously given by the selectmen to all persons interested in the location;—that they make a return of their doings under their hands, to the town;—and that it be accepted and allowed by the town, at a legal meeting, called for that purpose. The two latter facts may be proved by the record; but the return of the selectmen is not sufficient evidence of the notice.

Where a town way has been opened, publicly used, and acquiesçed in, the legal presumption is, that the owners of the land were duly notified of its location.

IN an action of trespass *quare clausum fregit*, the defendant justified as surveyor of highways for the town of *Bangor*, and shewed that the *locus in quo* was laid out by the selectmen as a town way, and accepted as such by the inhabitants, at a legal meeting. Various objections were made by the plaintiff, against the regularity of the proceedings; among which was this, that no notice was given to him by the selectmen, prior to the laying out of the way, nor any opportunity to be heard before them, against the location of the way, or upon his claim for damages. These objections were overruled by *Perham* J. before whom the cause was tried in the Court below; and the plaintiff thereupon brought the cause into this Court, under exceptions, pursuant to the statute.

Gilman, for the plaintiff, now insisted upon the objection, contending that the report of the selectmen ought to be founded upon a full hearing of all the parties in interest; and that the owner of the lands ought to have an opportunity of adjusting the amount of his damages with them by compromise.

Godfrey, for the defendant, said that the notice in the warrant for calling the town meeting was sufficient for all the objects contended for; and that of this all ought to take notice, at their own peril.

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

Though several objections have been made against the opinion of the court of Common Pleas, we are well satisfied that there is

no weight in any of them, except that which relates to the want of notice to the plaintiff of the intended location of the town way; but after mature consideration, we are satisfied that this objection must prevail. As such notice was necessary to the legal establishment of the way, the want of it may be taken advantage of in this summary manner; because in case of a town way, no *certiorari* lies, as it does to the court of sessions to quash irregular proceedings on their part in a location of a county road. It is true the statute of 1821, *ch.* 118, does not require that the selectmen, or the person by them appointed, should give notice of the intended location of a town way, to those through whose lands it is laid; still those persons are always more or less affected by such location, because they are entitled to damages occasioned thereby; and common justice requires that they should have notice that the town are about appropriating a portion of their lands for public use, so that they may take measures for their legal indemnity. This is a sound principle which must not be forgotten or disregarded. The law of *Massachusetts* of *Feb.* 27, 1787, did not require the court of general sessions of the peace to give notice to those towns through which a county road was prayed for, prior to an adjudication of its common convenience or necessity; and yet in many instances the proceedings of that court have been quashed on *certiorari*, because such notice was not given and because the plain principles of justice demanded that it should have been given. *Commonwealth v. Chase* 2 *Mass.* 170. *Same v. Coombs ib.* 624. *Same v. Cambridge* 4 *Mass.* 627. *Same v. Peters* 3 *Mass.* 229. When the above statute of *Massachusetts* was re-enacted in this State, a clause was inserted requiring such notice to be given previous to an adjudication. It has been urged that the reasons for giving notice to individuals in case of county roads, do not exist in case of town ways; that in case of a county road the return is made to the court under whose authority the committee proceed; and that unless they give notice to the persons interested (as they are by their warrant commanded to do) and through whose lands the road is located, they may have no knowledge of the fact, in season to apply for damages; but that in the case of a town way, as the return of the location must be laid before the town and be approved and allowed in a town

meeting called for the purpose, before the way can be established; all persons must be considered as notified of the way, because all are notified of the meeting. This argument seems plausible, so far as it respects those who are inhabitants of the town; but as to those who own lands in the town, but live in other towns, the argument has no application. A principle should be adopted which will apply to all owners; and we know of none so just and fair and equitable as that which requires the selectmen, or the person by them appointed, to give notice to the owners of land over which a town way is about to be laid, in the same manner as a committee of the court of sessions are bound to do. In this manner justice will be done to all concerned, by placing at their command the means of obtaining it. When the legality of a town way, therefore, comes in question, there must be proof offered that the selectmen, or the person by them appointed, gave due notice to all individuals interested in the location; that they or he made a return of the way to the town; and that the town, at a legal meeting called for the purpose, or in the warrant for calling which, an explicit article was contained in relation to the acceptance of the return, and the approval and allowance of the way, did accept, approve and allow it. All these facts are to be proved by the records of the town; except the fact of notice; but this must be proved like other facts; as the return of the selectmen, even if it states the notice to have been given, is not made under oath, and does not bind others any more than the recitals of notice in the deed of an executor, administrator, guardian or collector. In those cases where a town way has been opened and used and publicly known as a road, and acquiesced in in by all, the legal presumption would be that such notice had been given; and this, if uncontradicted by proof, would be sufficient. Nothing of this kind appears in the present case; and on a view of the facts and application to them of the principles above stated, our opinion is that the decision of the Court of Common Pleas on the point in question, was incorrect; and, of course the plaintiff's exception is sustained and the verdict set aside. A new trial is to be had at the bar of this Court.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE COUNTY OF

HANCOCK.

JUNE TERM,

1825.

HILL *vs.* DYER.

A grant by the provincial government of *Massachusetts*, under the charter of *William* and *Mary*, conveyed no seisin to the grantee, against the province, without the approbation of the crown.

Under a power to execute a *release* of title to lands, a deed purporting to "grant, sell, and quitclaim" is a substantial execution of the authority.

The State, by virtue of its prerogative, is always seised of the lands to which it has title; and may therefore convey them by release, notwithstanding the intrusion of strangers upon them.

THIS was a writ of entry on the seisin of the demandant, brought to recover possession of part of a mill-site in the town of *Sullivan*. In a case stated by the parties it appeared that the General Court of *Massachusetts* by a resolve dated *March* 4, 1803, appointed Gen. *Cobb* to cause a survey to be made of the township of *Sullivan*, and to make a report of the condition of the lands, and of the claims and situation of the settlers thereon; which was accordingly done; and a plan returned, with his report, designating the lots which, in his opinion, ought to be assigned to the respective settlers. This report was accepted by the resolve of *March* 8, 1804, by which the selectmen of *Sullivan* were authorised to release to each settler, mentioned in the report, the interest of the Commonwealth in the lot therein assigned to him. Under this resolve the selectmen, by deed of quitclaim, dated

Sept. 15, 1804, conveyed the premises to the demandant, as the assignee of *Asa Dyer*, one of the settlers named in the report. The demandant, long before this, was in possession of the residue of the lot of which the mill-site was a part; and soon after the date of his last mentioned deed he built a grist mill adjoining the demanded premises, which he had ever since occupied.

It further appeared that the General Court of the late province of *Massachusetts*, by a resolve passed *March* 2, 1762, granted the same township to *David Bean* and eighty one others; which was duly located in 1763, and confirmed by resolve *Jan.* 27, 1764;—and that the tenant's grantors built a saw mill on the demanded premises, and that they and he had continued in the open and exclusive possession thereof, claiming title in fee, from the year 1770 to the present time. It was also admitted that *Ephraim Dyer*, the father and grantor of the tenant, and all the other owners of the saw-mill, had accepted deeds from the selectmen, of other lands, as settlers, under the resolve of *March* 8, 1804.

Abbot and *Greenleaf*, for the tenant. The Commonwealth had parted with its seisin of the lands, by the resolve of 1762; and it could not be re-seised but by inquest of office, or other legal process. Hence its deed of release could not take effect in favor of the demandant, there being, at the same time, an exclusive adverse seisin and possession of the premises demanded. *Mayo v. Libby* 12 *Mass.* 343. *Green v. Watkins* 7 *Wheat.* 27. Such a deed creates no seisin in the grantee. 1 *Mass.* 483. But if it did, yet the deed of the selectmen to the demandant is not valid, because not made pursuant to their authority. They were directed only to "release" the title of the Commonwealth; but they have assumed to "grant, sell, and quitclaim." The object of the resolve was merely to quiet *settlers* in the enjoyment of their actual possessions, by placing them in the situation in which they would have been, if the lands had been owned by private persons, and sixty years had elapsed. Hence, the title of the tenant had ripened into an indefeasible estate, by lapse of time. *The Proprietors of No. Six v. Jones* 12 *Mass.* 336.

Orr and *Deane*, for the demandant.

WESTON J. delivered the opinion of the Court.

By the resolve of *March* fourth 1803, it appears that certain of the inhabitants of *Sullivan* holding their lands by an uncertain tenure, the legislature took measures to quiet them in their possessions ; and, with this view, appointed *David Cobb*, Esq. to cause a survey to be made of the township, and to report the state and condition of the lands, and the claims and pretensions of the settlers thereon. In pursuance of this authority, the agent, after causing an actual survey, made a return of the same, accompanied with a plan, designating particularly the lots, which in his opinion should be assigned to the respective claimants. His report was accepted ; and the selectmen of *Sullivan* were authorized by the resolve of the eighth of *March*, 1804, to release to each settler, according to the return of the agent, the interest of the Commonwealth in the lot to be assigned to him. Thereupon the said selectmen of *Sullivan* did, on the fourteenth of *Sept.* 1804, by their deed, professing to act under the authority delegated to them, " grant, sell, and quitclaim" to the demandant the interest of the Commonwealth in one hundred acres of land, embracing the premises demanded, he claiming, by certain mesne conveyances, under *Asa Dyer*, the first settler on said lot.

Various objections are taken to the title of the demandant. First, that the Commonwealth had no interest remaining in the land, at the time of the passage of the resolves before mentioned; they having previously granted the same to others. Secondly, if they had, that the tenant, and those under whom he claims, having been many years in the actual possession of the demanded premises, claiming title thereto, the interest of the Commonwealth could not pass to the demandant by a naked release ; and thirdly, if it could, that it did not pass in this instance ; the selectmen of *Sullivan* not having pursued their authority.

That the provincial government of *Massachusetts* had previously divested themselves of all their interest in lands in the town of *Sullivan*, is attempted to be shewn by three resolves of the General Court, passed prior to the revolution. By the resolve of *March* second, 1762, a township was granted to *David Beane* and eighty one associates; by that of *January* twenty ninth, 1763, the

township was located, and, by the resolve of *January* twenty seventh, 1764, the present township of *Sullivan* was confirmed to the said *David Bean* and others.

By the charter of King *William* and Queen *Mary* of 1691, under the authority of which the General Court then acted, and by which the colonies of *Massachusetts* and *Plymouth*, the province of *Maine*, territory of *Acadia* or *Nova Scotia*, and all that tract of land lying between the said territories of *Nova Scotia* and the said province of *Maine*, were united under one provincial jurisdiction, it was among other things provided, that "no grant or "grants of any lands, lying or extending from the river of *Saga-* "*dahock* to the gulf of *St. Lawrence* and *Canada* rivers, and to the "main sea northward and eastward, to be made or passed by the "governor and general assembly of our said province, be of any "force, validity, or effect, until we, our heirs or successors, "shall have signified our or their approbation of the same." Accordingly, in the grant before mentioned to *Bean* and others, it is expressly provided that the same shall be of no force or effect, until his majesty, his heirs and successors, shall signify his or their approbation thereof, within eighteen months of the date of the grant. This assent it is agreed has never been obtained ; but on the contrary, the resolves of 1803 and of 1804 before stated, being passed by the legislature of *Massachusetts*, which, at and after the revolution, succeeded to the rights of the crown, must be considered a virtual disaffirmance of the before mentioned grant. It results therefore that at the time of their passage, the Commonwealth had a good and valid title to the township of *Sullivan*.

The origin of the title of the tenant does not appear. By the grant to *Bean* and others, they acquired a defeasible seisin in the tract granted, embracing the demanded premises, and they might have been disseised of the latter, by those under whom the tenant claims. But although *Bean* and others might be disseised; yet by a well established principle of law, the Commonwealth could not be, and the grant to *Bean* being void, as well by its express provisions, as by the virtual disaffirmance of the Commonwealth, the actual possession of the tenant, or those under whom he claimed, interposed no legal obstacle to tho conveyance of the interest of the Commonwealth, to whomsoever they might think proper

to grant it. A release made by a party not seised, in the case of an individual or a corporation, is inoperative to pass an interest in lands, unless made to a party actually seised or possessed of the same. But the Commonwealth, in virtue of its prerogative, notwithstanding the intrusion of others without right upon the premises, was seised, and might therefore pass their interest by release, without violating the principles of the common law. Besides, it was quite within the the scope of legislative power, for the General Court of *Massachusetts*, to prescribe a valid mode of conveying their interest, if they had deemed it expedient so to do, which might have been ineffectual or inoperative, if used by an individual or private corporation.

It is contended that the selectmen of *Sullivan*, using in their deed the terms "grant, sell, and quitclaim," have not thereby released the interest of the Commonwealth; but we are of opinion that their authority is substantially pursued, the word "quitclaim" being of equivalent meaning with the term "release."

There is nothing in the case of the *Proprietors of No. Six v. Jones*, cited in the argument, which is at variance with the opinion here given. The tenant in that case made out a title by disseisin; but it was a disseisin, not of the province, or of the Commonwealth of *Massachusetts*, but of their grantees.

The opinion of the Court is, that upon the state of facts agreed, the demandant is entitled to judgment.

HASKELL, *plaintiff in error*, *vs.* THE INHABITANTS OF KNOX.

The surveyor of highways cannot, under *Stat.* 1821, *ch.* 118, employ persons to labor at the expense of the town, without the consent of a majority of the selectmen.

THIS was an action of *assumpsit*, for labor done under the direction of a surveyor of highways, in rebuilding a bridge which had been suddenly destroyed by fire. And it appeared that the surveyor, having no unexpended monies in his hands, obtained the consent of one of the selectmen, who was brother to the plaintiff, to employ him to rebuild the bridge; which was done accordingly.

Whitman C. J. before whom the cause was tried in the Court below, ruled that this evidence was not sufficient to charge the defendants; to which the plaintiff excepted.

Ashmun, in support of the exceptions, relied on the peremptory language of *Stat.* 1821, *ch.* 118, *sec.* 13, that in case of any sudden injury to bridges or highways, the surveyor shall cause them to be repaired; and he cited *Wood v. Waterville* 5 *Mass.* 204.

Wilson, for the defendants, contended that this section was to be expounded in connection with the fifteenth, which requires the surveyor to act under the direction of the selectmen.

WESTON J. delivered the opinion of the Court, as follows.

The right of the plaintiff to recover in this action, will depend upon the question, whether the services performed by him, for which he claims compensation, were directed by persons competent to procure them to be done, at the expense of the town. By the thirteenth section of the act for the making and repairing of highways, it is provided that "in cases of any sudden injury to "bridges or highways he (the surveyor) shall, without delay, "cause the same to be repaired." The ordinary means provided, to enable the surveyor to perform this and other duties appertaining to his office, are the sums assigned to him to be expended in virtue of the same thirteenth section. And when this provision shall not fully answer, it is, by the fifteenth section, made "lawful for the surveyor, with the consent of the select-"men, or the major part of them, where such deficiency happens, "to employ such of the inhabitants of the town, upon the repair "of the ways in his limits, as shall make up that deficiency; "and the persons thus employed shall be equitably paid out of "the town treasury therefor." We find no authority in the law empowering the surveyor, without the consent of a major part of the selectmen, to employ any of the inhabitants of the town to labor at their expense.

As the selectmen are a board, having the management of the prudential concerns of the town; as access may at all times be had to them; and as the respective towns are bound, at their

peril, to keep the highways in a state of constant repair; the provision made in the fifteenth section, was deemed fully adequate to the exigency therein contemplated. It was not considered expedient to give this discretion to the surveyor alone; but he is required to act, under the advice and direction of the selectmen. That this is the true construction of the power and duty of surveyors, is corroborated by the provisions of the eighteenth section, by which surveyors are made liable to a presentment or information for any deficiency arising within their limits, or to refund any fine or costs, which may be imposed upon their respective towns, only in case they shall not have duly expended the money in their bills, or having so done, shall not have given notice of such deficiency to the selectmen, in case the sum raised for the repair of the highways shall be found insufficient for that purpose. If the surveyor may proceed upon his own authority, without consulting the selectmen, as is assumed by the counsel for the plaintiff, the provisions of the fifteenth section will be defeated, as often as any sudden injury may arise to bridges or highways.

The case of *Wood v. Waterville*, cited by the counsel for the plaintiff, was decided upon the eighth section of the statute of *Massachusetts* of 1786, *ch.* 81. That statute has been repealed within this State; and in the revised laws upon the subject of highways, the provisions of the eighth section have not been re-enacted. Their omission not only renders the case of *Wood v. Waterville* inapplicable as an authority in support of this action; but is expressive of a determination, on the part of the legislature, to withhold from surveyors the power recognized by that case, as derived from the eighth section of the statute of *Massachusetts*.

The judgment of the Court below is affirmed; with costs for the defendants in error.

Palmer *vs.* Sawtell.

After the execution of a bond for the debtors' liberties, the sheriff is not liable if the debtor escape.

This was an action of debt against the late sheriff of *Somerset*, for the voluntary escape of a debtor committed in execution. It

appeared from the plea in bar that the debtor was liberated from close custody, on giving a bond duly approved, with sufficient sureties, conditioned, according to the form of the statute then in force, that he should continue *a true prisoner in the custody of the gaoler*, and within the limits of the prison, *without committing any manner of escape*, until he should be lawfully discharged, &c. which condition he had broken. To this the plaintiff demurred.

R. B. Allyn, for the plaintiff, argued from the language of the statute, and the terms of the condition of the bond, that the relation of gaoler and prisoner still continued, after the giving of bond for the debtors' liberties, as before; and that while the debtor stood charged as a prisoner, the sheriff remained liable if he should escape. *Baxter v. Taber* 4 *Mass.* 361.

Abbot, for the defendant, contended that the bond was a substitute for the custody of the sheriff, and discharged him from all further responsibility. *Cargill v. Taylor* 10 *Mass.* 206.

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

Since the time when the bond in this case was given, the laws in relation to debtors in execution, and to the nature and degree of the indulgences granted to them on giving bond for the liberties of the prison, have undergone several important changes; and all these changes have been made in favor of debtors. As this spirit of liberality towards them has increased, changes have also been made in the condition of the bond required to be given to obtain the liberties of the prison. In the statute of *Massachusetts* of 1811, *ch.* 85, the condition of the bond required is that the prisoner, from the time of executing such bond, "will not depart "without the exterior bounds of the goal yard or debtors' liberties "until lawfully discharged." In the additional act of 1811, *ch.* 167, the condition required is that the debtor, from the time of executing the bond, "will not depart without the exterior bounds "of the debtors' liberties until lawfully discharged." By the statute of this State of 1822, *ch.* 209, the condition of the bond for the liberation of a prisoner in execution for debt is that "he "will not depart without the exterior bounds of the gaol yard until

" lawfully discharged, and that he will surrender himself to the " gaol keeper and go into close confinement as is required " by law." By the act of *Massachusetts* 1784, *ch.* 41, the condition required was that the debtor from the time of executing such bond should " continue a true prisoner in the custody of the " gaoler and within the limits of the said prison until he should be " lawfully discharged, without committing any manner of escape." The counsel for the plaintiff has relied upon the averments in the declaration as to the defendant's having freely and voluntarily discharged the debtor, from his imprisonment, and suffered him to escape and go at large. These averments can have no legal meaning, if the debtor, after having given the bond mentioned in the plea, ceased to be a prisoner, subject to the coercive power of the sheriff; and we are clearly of opinion that such was the fact. In *Call v. Hagger & al.* 8 *Mass.* 423, which was an action on a prison bond, the defence was that the sheriff himself deceived the prisoner as to the proper limits of the gaol yard; by means of which he had committed the alleged escape; but the Court decided that such deceptive instructions could not avoid the effect of the bond. The changes which have been made in the condition of prison bonds, have occasioned no change in the law as to the liability of the obligors, where the prisoner has passed the limits by law established. In the action *Cargill v. Taylor & al.* 10 *Mass.* 206, the bond declared on, was dated *Aug.* 10, 1810; and, of course, was similar to the one in the case before us. The Chief Justice, in giving the opinion of the Court, says, " bonds " given to entitle a prisoner to the liberties of the prison yard, " are in effect a substitute for the custody of the sheriff,"—af- " ter enlargement of the prisoner upon the acceptance or allow- " ance of the bond, his restraint, the custody in which he remains, " is altogether of a moral nature. A bond regularly taken and " allowed discharges the sheriff from any further responsibility " for the prisoner's remaining within his custody. The restraint " to which he is subject is indeed called the custody of the gaoler; " not, however, as expressing his power of control, or a confine- " ment within the walls of the prison, but the bounds and limits " prescribed by law, in which he is kept by the penalty of the " bond." In the case of *Codman v. Lowell*, [*ante p.* 52.] this

Court has proceeded on the same principle, and declared that after a bond is given and approved, the sheriff has no authority over the prisoner, and cannot exercise any control over his actions. These cases shew that the debtor, when he had given the bond in question, ceased to be a prisoner in the custody of the defendant, in the legal acceptation of the terms; and therefore he could not discharge him from his custody; he had ceased to be an imprisoned debtor, and so the defendant could not permit him to escape from imprisonment. Whatever remedy the plaintiff has, must be obtained by a suit on the bond.

We accordingly adjudge the plea in bar sufficient in law.

THE INHABITANTS OF SEARSMONT, *plaintiffs in error*, *vs.* FARWELL.

The superintending school committee have no power to dismiss a schoolmaster, unless for one of the causes mentioned in *Stat.* 1821, *ch.* 117, *sec.* 3;—and this must be by writing, under their hands, specially assigning the cause of dismissal.

IN a writ of error to the Court of Common Pleas, in a cause in which the plaintiffs in error were defendants, the case was thus;—

The son of the original plaintiff, having obtained the testimonials required by the statute, was regularly employed as a schoolmaster, in one of the districts in *Searsmont*, for three months. During that period, a number of the inhabitants, becoming dissatisfied with him, addressed to the superintending school committee a petition for his discharge, alleging that for want of natural abilities, he was not qualified to instruct their school; which petition the committee sent to him, with a note, stating that in consequence of the petition, and because it was manifest to them that where much excitement and disaffection existed between the instructer and the parents of the scholars, but little benefit could result from a continuance of the school, they were of opinion that he ought to be discharged, and accordingly discharged him from the school. He continued, however, to instruct the school for another month, completing the term originally contracted for;

and to recover pay for the service of the last month this action was brought, the two former months having been paid for.

At the trial in the Court below, the defendants offered the depositions of divers inhabitants of the district to prove the incapacity and cruelty of the plaintiff's son, as well as the disaffection against him;—but this evidence was rejected by *Whitman* C. J. before whom the cause was tried; and he instructed the jury that the order of discharge given by the committee, not containing any express adjudication respecting the fitness or unfitness of the instructer, was not sufficient to dissolve the contract. To which the defendants excepted.

Crosby, for the plaintiffs in error, contended that the committee were not bound to render any reasons for the dismissal of a schoolmaster; the law having made the contract subject to their discretion. The sole object of the law is to provide for the education of youth; and many cases may be supposed in which the continuance of an instructer, of sufficient learning, and of good morals, may be not only unprofitable, but destructive of the object sought;—as, if he be lax in discipline, or disgusting in his manners, &c. These cases must necessarily fall under their observation, it being made their duty to visit the schools; and of course the merits of the instructer are continually under a course of trial, and upon them the committee may adjudicate whenever they are satisfied, without a more formal notice or hearing.

But if it is necessary that causes should be specially assigned for the dismissal of a schoolmaster, they are sufficiently apparent from the petition and certificate of discharge, taken together. The proceedings, under a statute so highly beneficial, ought, if possible, to be supported.

He contended further that without any adjudication by the committee, the town had a right, at the trial, to resist the plaintiff's demand, by shewing him incapable to teach. For the contract on his part amounts to an undertaking that he is able to do what he proposes, and if this is false, the contract is void.

Ashmun and *Abbot*, for the original plaintiff, said it was as important to the community that schoolmasters be protected from unfounded popular caprice and disaffection, as that none but fit

teachers be employed. And they argued that the powers granted to school committees were to be interpreted as all other limited powers, and, like them, to be strictly pursued. The committee might, upon proper application, summon the party before them, and after due hearing and examination, might for good cause dismiss him; but these proceedings ought to appear on the face of the order of dismissal. *Rex v. Croke Coup.* 26.

WESTON J. delivered the opinion of the Court.

In this case it appears that the son of the plaintiff, having first procured from the superintending school committee of the town of Searsmont, and also from some person of liberal education, literary pursuits, and good moral character, residing within the county, certificates that he is well qualified to instruct youth in reading, in writing the English language grammatically, and in arithmetic, and other branches of learning usually taught in public schools; and also a certificate from the selectmen of the town, where he belongs, that, to the best of their knowlege, he is a person of sober life and conversation, and sustains a good moral character, in conformity with the fourth section of the act providing for the education of youth; was employed by the school agent for school district number one in said town, to keep a school in said district, for the term of three months, for a certain stipulated price per month. He having kept a school for the period agreed, and payment having been made only for two months; this action is brought by the plaintiff, who was entitled to the earnings of his son, for the services performed during the third month.

The contract having been fairly made, and in pursuance of law, and the services having been performed, the plaintiff is entitled to recover; unless the defendants have shewn themselves legally discharged from the contract.

It appears that, at the expiration of two months, certain inhabitants of the school district represented to the superintending committee that, in their opinion, the plaintiff's son, for the want of natural abilites, is not qualified to instruct their school; and they thereupon pray that he may be discharged. In pursuance of this representation, the superintending committee addressed a

letter to the master, discharging him from further service, by reason of the excitement and disaffection, existing between himself and the parents of the children; and the little benefit which might result from the further continuance of the school.

The third section of the law before cited, provides that "the "said committee shall have power to dismiss any schoolmaster "or mistress, who shall be found incapable, or unfit to teach any "school, notwithstanding their having procured the requisite "certificates." This, being an authority given to those who represent one party only, to vacate a contract, must in our opinion be strictly pursued according to the provisions of the act, to have that effect. The superintending committee, not finding or assigning the reasons, which by the act would authorize them to discharge the master, he cannot therefore be considered as having been discharged, by any adequate or competent authority. The statute having pointed out a mode by which the contract might be dissolved, and that by a board elected by the defendants, by reason of the incapacity or unfitness of the master, the testimony, by which the question of his unfitness or incapacity, was attempted to be submitted to the jury, was in our opinion properly rejected.

The superintending committee are constituted by the statute a tribunal, to adjudicate upon the unfitness or incapacity of the master. While acting fairly, in the exercise of this authority, they have upon these points a visitatorial power, which cannot be taken from them, and transferred to others.

The exceptions in this case are overruled; and the judgment of the Court below is affirmed with costs.

The Inhabitants of Belmont *vs.* The Inhabitants of Pittston.

The town in which a pauper has his settlement, is not liable to an action by the town relieving him, until the expiration of two months after notice given pursuant to *Stat.* 1821, *ch.* 122.

In this case, which came before the Court upon a statement of facts agreed by the parties, the only question was whether the town in which a pauper had his settlement, was liable to an action

at the suit of the town relieving him, until the expiration of two months after notice given pursuant to *Stat.* 1821, *ch.* 122.

This question was briefly spoken to at this term by *Wilson* for the plaintiffs, and *Allen* and *J. Williamson* for the defendants; and the opinion of the Court was delivered at the ensuing *August* term in *Oxford*, by

WESTON J. By the eleventh section of the act for the relief and support of the poor, *Stat.* 1821, *ch.* 122, it is made the duty of the overseers, in their respective towns, to provide for the immediate support of persons found therein, standing in need of relief; the expenses whereof, incurred within three months next before notice given to the towns where they have their settlement, may be recovered in a civil action against such towns. Notice is thus required to be given, prior to the commencement of an action; and proof of such notice has been uniformly required, in the trial of all actions of this description. By the seventeenth section, the period of two months, after notice given, is allowed to the town notified, to make inquiry as to the facts; to pay for the expenses incurred, and to remove the pauper; or to decline doing either. And if no answer is given by the town notified, within the two months limited, the town notified is estopped to deny the settlement of the pauper in their town. The period of two months in the case of a corporation, appears to be a reasonable time; affording an opportunity for the overseers of the poor to take the sense of the inhabitants in town meeting, if they think proper, as to the course which it may be deemed expedient for them to pursue.

Although it is not provided in the eleventh section, that a notice of two months shall be given, prior to the commencement of the action; yet as that is the period limited in the seventeenth section; and as that period appears manifestly allowed to the town notified to make inquiry, we are satisfied, upon a full consideration of the whole statute, that an action, brought before the lapse of two months, is premature.

According to the agreement of the parties, the plaintiffs are to become nonsuit; and the defendants are to be allowed their costs.

THE INHABITANTS OF KNOX *vs.* THE INHABITANTS OF WALDOBOROUGH.

An absence of five years was holden not to change the domicil of the party, he having left home to seek temporary employment, and there being no evidence that this purpose had been altered.

An alien is capable of acquiring a settlement in this State, under the provisions of *Stat.* 1821, *ch.* 122.

IN this case the question was upon the domicil of *John Braddock*, an alien, whose wife was the pauper for whose support the action was brought. She had her legal settlement originally in *Waldoborough*; was married to *Braddock* in 1790; and removed to *Knox*, where they resided at the time of its incorporation, and until the year 1819; when he left her, and went into the *British* provinces, "for the purpose of laboring," and had not since returned. About the time he departed, she visited her friends in *Waldoborough*; among whom she remained till the spring of 1820, when she returned to *Knox*, where she has since continued to reside. They had no family.

Upon these facts *Perham* J. in the Court below, ruled that her settlement was in *Waldoborough*; to which the defendants excepted.

Abbot, in support of the exceptions, argued that the provisions of *Stat.* 1821, *ch.* 122, extended as well to aliens as to citizens; and that *Braddock* acquired a settlement under that act, for himself and his wife, by having his domicil in *Knox* on the 21st of *March* 1821. His absence from the town on that day does not affect the question; as the case finds that this was only for the temporary purpose of seeking employment. *Granby v. Amherst* 7 *Mass.* 1. *Abington v. Boston* 4 *Mass.* 312. 11 *Mass.* 432. *Vattel, book* 2, *ch.* 19, *sec.* 218.

If he had wholly abandoned his wife, there seems no good reason why she may not have acquired a settlement for herself, in the same manner. The principle upon which it has been enacted that a wife shall take the settlement of her husband, is that they ought not to be separated. But if he has abandoned her, that reason fails; and as in that event she is treated in some other respects as a feme sole, why not in this also?

Further, it was the intention of the legislature to fix, by one act of legislation, the settlement of every person, except paupers, resident in this State on the day the statute was enacted. The wife was thus resident, within the express terms of the act; and of course settled thereby in *Knox*. Her husband, being an alien, could acquire no settlement under the laws of *Massachusetts*; and if he had abandoned the country, he could not be affected by those of *Maine*.

Wilson, for the plaintiffs, contended that an alien was not capable of acquiring any settlement in this State, unless by express statutory provision; and that the general language of the statute respecting the settlement of the poor, ought not to be construed to include aliens; it being in most instances only a transcript of *Stat.* 1793, *ch.* 34, which had already received a judicial interpretation excluding them.

But if they were thus capable, yet *Braddock* gained no settlement under the act of 1821, he having abandoned the country long before it was passed, and returned to the government to which his allegiance was due.

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

Mary Braddock, the pauper, at the time of her marriage with *John Braddock*, had her legal settlement in *Waldoborough*; and as her husband is an alien and has never been naturalized, she retains that settlement still, unless he has gained a settlement in some other town in this State in virtue of the act of *March* 21st 1821. It is clear that he gained none by his residence in *Knox* at the time of its incorporation, in consequence of his being an alien. *Jefferson v. Litchfield* 1 *Greenl.* 196. But it is contended that he gained one in *Knox* by his dwelling in that town on the said 21st of *March* 1821. The language of our statute of 1821, is different from that of *Massachusetts*; it being so general as to embrace aliens as well as citizens; and such was the intention. We have had occasion to examine this point before; and we are all satisfied that *John Braddock* was a person by our law capable of gaining a settlement by residence, dwelling, and having his home in a particular town in this State on the day the act was

passed. The only remaining question is whether, according to the true intent and meaning of the law he did reside and dwell and have his home in *Knox* on that day. By the report it appears that in the latter part of 1819, he went into the *British* provinces for the purpose of laboring; and has not yet returned. It does not appear what family he had, except his wife. He left her in *Knox*. Soon after, she went on a visit to her friends in *Waldoborough*, and returned to *Knox* in the following spring of 1820, where she has continued to reside ever since. From these facts the legal conclusion must be drawn. It was his home in the fall of 1819. It has continued the home of the wife ever since; for she merely made a visit at *Waldoborough*. It does not appear that he has any other home in any particular place with intent to remain there; or that he had on the 21st of *March* 1821. The case states that *Braddock* is an alien; but does not state his national character. If in fact he is an *Englishman*, and if the case had been silent as to his motive and object in going to the *British* provinces, his having continued there so long would furnish a strong ground of presumption that he left this part of the country with an intention never to return. But we are not at liberty in this case to make any inferences as to his motive and object, because the report expressly states that he went to the provinces for the purpose of laboring. And from this circumstance, the legal presumption is that, when the above named act was passed, he was there *animo revertendi*, rather than *animo manendi*; and the continuance of his wife in the place where they had dwelt prior to his leaving the town, comes in aid of the legal presumption arising from the other circumstances which we have mentioned. We ought not to presume that a man has abandoned his wife and family and absconded to a foreign country, merely from such an absence, especially when it is stated to have been for purposes of business. For these reasons we are of opinion that *John Braddock* must be considered as having resided, dwelt and had his home in the town of *Knox* on the 21st of *March* 1821; and of course he thereby gained a settlement there; and his wife gained one there also with him, and thus lost her former settlement in *Waldoborough*.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE COUNTY OF

WASHINGTON,

JUNE TERM,

1825.

FOSTER *vs.* TUCKER & AL.

Before conviction of the felon, no civil action lies at the suit of the party injured, for goods stolen.

After conviction he may have an action of *trover*, but not *assumpsit*.

THIS was an action of *assumpsit* for goods sold, and for money had and received; to which the defendants pleaded the general issue, and the statute of limitations; and the plaintiff replied, alleging a new promise within six years.

At the trial, the plaintiff proved that sometime since, the defendants were charged by him with having stolen his goods; were examined by a magistrate, and ordered to recognize for their appearance at this Court for trial; and that after having so recognized, the defendant *Tucker* asked the plaintiff what he should give him to settle the business; saying he could not pay him in money, but would pay in neat stock.

He also proved that recently the other defendant said, in the absence of *Tucker*, that "he and *Tucker* actually stole *Foster's* "clothes; but that he should not have taken them, if it had not been for *Tucker*."—He also produced a copy of an indictment found in this Court at *June* term 1822, against these defendants, for stealing the goods of the plaintiff, *April* 30, 1809, being part of the goods now sued for.

Hereupon, by consent of parties, the cause was taken from the jury, and the question submitted to the Court, whether the evidence was sufficient to maintain this action.

Wilson and *S. Emery* for the plaintiff.

Orr and *Greenleaf* for the defendants.

WESTON J. delivered the opinion of the Court.

This is an action of *assumpsit* for goods sold and delivered. The defendants plead, first, the general issue, which the plaintiff joins; secondly, the statute of limitations. To the second plea, the plaintiff replies a new promise within six years, upon which issue is also joined. The case made by the plaintiff is, that in *April* 1809, the goods in question, being his property, were stolen by the defendants; and a new promise by each is attempted to be proved by certain declarations and admissions on their part. Upon the question, whether these declarations and admissions are sufficient or not to take the case out of the statute of limitations, we give no opinion; as we are well satisfied that the plaintiff's action is not sustained by the facts agreed.

The action of *assumpsit* depends upon a promise, express or implied, arising from a sufficient consideration. Where such consideration exists, if there be no express promise, the law will imply one; unless the circumstances of the transaction altogether exclude and negative such implication. Of this description is the case before us. The principle of law is, that where a felony is committed which generally, and perhaps uniformly, includes a civil injury, the latter is merged in the public offence. The claims of the public are deemed paramount to those of individuals, who are not permitted even to reclaim their own property, known and identified, which has been taken possession of by the officers of justice, where a felony has been committed, unless restitution shall have been ordered by the competent authority, after the conviction of the offender, or where it may be done consistently with the public interest. After conviction however, the purposes of public justice being accomplished, the law permits the individual injured to vindicate his rights by an apt civil remedy. As the injury itself is founded in wrong, the remedy to

be pursued must be one which is applicable to this class of injuries. It would ill accord with the symmetry or with the analogies of the law, and would be confounding well settled distinctions, to permit the party injured, at his election to convert a transaction of this kind into a matter of contract. The modern principle of waiving the tort, and proceeding as upon a contract, has been sufficiently extended; and we are not disposed to apply it to new cases.

In *Buller's Nisi Prius*, 130, 131, the idea of maintaining *assumpsit* for goods stolen is treated as an absurdity. He says that in *assumpsit* for goods sold, if the evidence be that the defendant has agreed with the plaintiff's servant to pay him half price, which the servant is to have to his own use, this will not maintain the action; for here arises no contract to the plaintiff; he might as well bring *assumpsit* against one who steals his goods; and he cites Lord *Holt* as an authority. In another case, he states that in *assumpsit* for money received to the plaintiff's use, proof that a lamb of his was driven to *London*, and sold there by the defendant, will be sufficient, unless it appear to have been stolen; for then trover would be the only proper action.

It being the opinion of the Court, that the action cannot be supported in this form; according to the agreement of the parties, the plaintiff is to become nonsuit, and the defendants be allowed their costs.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE COUNTY OF

OXFORD.

AUGUST TERM,

1825.

HOWARD *vs.* CHADBOURNE.

The mortgagor, though not liable on any covenants in his deed, cannot be a witness for the mortgagee in an action brought to recover possession of the land; where the possession sought by the demandant would be a payment, *pro tanto*, of the debt.

THIS was a writ of entry, upon a mortgage deed with covenants of general warranty, &c. made to the demandant by one *Levi Sawyer*, *June* 10, 1817, and recorded *April* 1, 1819. The tenant claimed the premises under a deed of release, without any covenants whatever, made to him by *Sawyer July* 3, 1818, and recorded *July* 27, 1818; and the question was whether the tenant, at the time of receiving his deed from *Sawyer*, had notice of the existence of the mortgage to the demandant. To prove this fact, the demandant offered the deposition of *Sawyer*, which was objected to on the ground of his interest by virtue of the covenants in his deed; but the Chief Justice, before whom the cause was tried, considering this interest as not affected by the point in contest, admitted the deposition *de bene esse*, subject to the opinion of the Court; a verdict being returned for the demandant.

Fessenden and *Chase*, for the tenant, now insisted on the objection taken at the trial;—and further contended that as the land was collateral to the debt, and an entry for condition broken was

payment *pro tanto*, the witness was directly interested on the side of the demandant, whose success in this suit would in fact extinguish the debt.

Greenleaf, for the demandant.

The opinion of the Court was delivered in *Cumberland*, at the adjournment of the ensuing *November* term, by

MELLEN C. J. In this case the only question is whether *Sawyer* was properly admitted as a witness on the part of the demandant, to prove that the tenant had knowledge of the existence of the mortgage deed to the demandant, at the time he purchased of *Sawyer*, whose deed to the tenant contains no covenants, though the mortgage deed does. At the trial, the only objection made to the admission of the witness was placed on the ground of his liability on his covenants to and with the demandant ; but, as *Sawyer* had a title at the time he executed the mortgage deed, and could not be liable on his covenants if the demandant had lost it by his own inattention in not causing the mortgage to be registered prior to the registry of the deed to the tenant ; the witness was admitted ; appearing, as he then did, to stand perfectly indifferent as to the point of interest. But in the argument before us the objection has been placed upon a new ground. It is now contended that if, by the testimony of *Sawyer*, the demandant's title under the mortgage should be established, the execution of the writ of *habere facias possessionem* would completely vest the title of the demanded premises in him, absolutely, if not redeemed ; and this would at once amount to payment of the debt, to secure which the mortgage was made ; or so much of it as the land is fairly worth ; and hence it is argued that *Sawyer* had a direct interest to establish the mortgage ; and thus, in whole or in part, pay his debt with the land ; knowing that the tenant could have no claim upon him, because the deed of release which he had given him contained no covenants on which he could be rendered liable in damages ; whereas, if the mortgage deed should be defeated, the premises would belong to the tenant, and *Sawyer* must pay his debt to the demandant. Such is the argument of the tenant's counsel, and the reasons urged in its support;

and we do not perceive that it is capable of refutation. We admit its force, and are all of opinion that the verdict must be set aside and a new trial granted.

MERRILL *vs.* MERRILL.

Where a creditor for goods sold and delivered became the surety of another in a promissory note not negotiable, payable to his debtor, which note was assigned by delivery ; and being afterwards required by the assignee to pay the note, referred him to the other promissor as the real debtor, *but said nothing of the debt due to himself*, as a subsisting claim in offset ;—it was held that this was a waiver of such claim, as against the assignee, and that the latter was entitled to recover of the surety the whole amount of the note.

Assumpsit on a promissory note not negotiable, brought in the name of *Humphrey Merrill* against *Andrew Merrill* and *Nathaniel Merrill*, for the benefit of *Uriah Holt*, who claimed the amount as assignee of the note by delivery only, for a valuable consideration paid by him to the nominal plaintiff. The defendants claimed, by way of offset, the value of certain neat stock and a horse, delivered by *Nathaniel Merrill* the defendant to *Humphrey*, his son, about three years before the date of the note.

At the trial in the Court below before *Smith J.* it appeared that *Andrew*, in the year 1819, had bought a parcel of land on credit, of *Humphrey*, his brother, and being a minor, their father was requested to sign the notes as his surety ;—and it being suggested that the father might possibly be put to inconvenience, by being compelled to pay, *Humphrey* replied that if he should ever be troubled in that way, he might protect himself by claiming in offset the value of the stock and horse for which *Humphrey* owed him ; whereupon he signed the notes.

It further appeared that these notes, in *August* 1819, were sold by *Humphrey* to *Holt*, in part payment for a farm, *Humphrey* declaring that they were good, and that his father would pay them when due ;—that *Holt*, at the maturity of the first note in *May*, 1820, sent *that*, and a paper containing a calculation of the interest due on the second note, which is now in suit, to *Nathaniel Merrill*, requesting payment to *Holt* ;—that the defendant said *he*

could not pay it ; and that as *Andrew* was under age, *he* signed the notes merely to secure *Humphrey*, but that it was agreed that *Andrew*, when he became of age, should take up the notes and save his father harmless ;—but he claimed no offset, and said nothing of any demand in his own favor against *Humphrey*. The first note was paid by *Andrew*. At the time of the delivery of the notes to *Holt*, and long afterwards, *Humphrey* was in good circumstances, and able to have paid the amount of this note to his father ; but was since insolvent. *Holt* had no knowledge of any offset, till it was filed in this action.

Upon this evidence the Judge instructed the jury that the account in offset could not be allowed against the note, if they believed that the note was assigned to *Holt* before he had notice of the existence of the counter demand. To this the defendants excepted, the verdict being for the plaintiff for the amount of the note.

Greenleaf, for the defendants, relied on the principle recognized in all the cases on this subject, that the assignee could claim no other or greater rights than the assignor had before him ; and that as between the *parties to the record*, the demand filed in offset was unquestionably a good bar to the action.

L. Whitman, for the plaintiff, admitted the general doctrine ;—but contended—1st, that the demand filed in offset being due to only one of the defendants, was not available in this action ;—*Walker v. Leighton & al.* 11 *Mass.* 140. 2d, that the defendant, by not claiming the benefit of the offset, or giving notice of it to the assignee while *Humphrey* was able to have responded to him for the amount of the note, deserved to sustain the loss himself ; and that the direction of the Judge in this respect was correct. *Jenkins v. Brewster* 14 *Mass.* 291.

After this argument, which was had at *August* term 1824, the cause stood continued for advisement ; and the opinion of the Court was now delivered as follows, by

MELLEN C. J. On the 26th of *April* 1819, the defendant signed the note declared on as surety for his son *Andrew*, for $62 60 payable in four years with interest annually. The note was not

negotiable; but in *August* following was assigned by the plaintiff for a valuable consideration to *Uriah Holt*, for whose benefit the present action is prosecuted. About three years prior to the signing the note, the plaintiff was indebted to the defendant for a horse, and a pair of steers, in the sum of $76 on account; which circumstance was mentioned to the defendant, when the note was signed, as a reason why he should not apprehend danger or any serious loss, inasmuch as he could file his account in offset, should he be troubled or sued on the note. The account was duly filed against the note in this action; but as *Holt* had not been notified of its existence, until at or just before the trial, the Court of Common Pleas rejected it; or, in other words, decided that it could not be allowed in offset against the note;—and on exception to this decision the cause comes before us, and the first question is, whether the opinion is correct. The principle is well settled, that negotiable securities, indorsed before they are over-due, are not liable to be impeached in the same manner as between the original parties, with a few exceptions; such as gaming and usurious notes, &c.; which are declared void by the statute. In other cases the indorsee, who is such *bona fide*, is not affected by contracts, conditions or equities, of which he had no notice, that existed between the promissor and promissee. The principle is founded on the importance of negotiable and negotiated securities in the commercial community. A different doctrine would essentially check their circulation and embarrass mercantile operations. In *Peacock v. Rhodes* 2 *Dougl.* 632, *Lord Mansfield* lays down the principle in these words. "The holder "of a bill of exchange or promissory note is not to be considered "in the light of an assignee of the payee. An assignee must "take the thing assigned subject to all the equity to which the "original party was subject. If this rule be applied to bills and "promissory notes, it would stop their currency." But the same law is not applicable to notes which are not negotiable, and to bonds, &c. As these cannot be legally indorsed or assigned, so as to enable the indorsee, or assignee more properly called, to maintain an action in his own name; the interest which in these cases is assigned, is only an equitable interest. But this is now protected in courts of law as well as of equity, when assigned

upon valuable consideration. In the case before us the counsel for the defendant does not deny that whatever equitable rights the assignee has, ought to be protected; but he denies that he has any, because the plaintiff had none which he could assign to him. He contends that nothing more can be recovered for the benefit of *Holt* the assignee, than could be rightfully recovered, provided there never had been any assignment; or, in other words that nothing can be recovered, because the amount of the offset is greater than the amount of the principal and interest of the note. In *Chute v. Robinson* 2 *Johns.* 595, *Kent* C. J. says, "There "is no rule of equity better settled than that a bond or other "chose in action is liable to the same equity in the hands of the "assignee, which existed against it in the hands of the obligee." In *Dunning v. Sayward* 1 *Greenl.* 366, the Court observed that "the law does not interpose and protect any but an equitable in- "terest" in case of assignment. It seems to be plain that before the assignment of the note in question was made, the defendant had a legal right to offset his account against it if then due, when sued; and it deserves consideration whether he can be deprived of that right without his consent. He may relinquish it expressly or by implication. The case does not find that he did it expressly; the debt filed in offset was fully proved, and also the defendant's reliance upon it before the assignment, by way of indemnity, if called on for the note which he signed. The very protection of an equitable interest in an assignee, presupposes danger and the need of protection; it pre-supposes a power in the assignee or debtor, or both, to defraud the assignee unless he is protected by courts of law. Now in cases where there is not any such power, legal protection is unnecessary, and the principle of law is inapplicable. Hence it would seem to follow, that if in the present case the action could not be maintained if there had been no assignment; then the assignment cannot create a right of action, and confer an equitable interest, if the assignor had no interest of any description as against the defendant. In fact, this principle, of which, we are speaking, requires no more nor less than this; that in case of an assignment, the cause shall be tried and decided upon the facts as they existed at the time of the assignment; without regard to any acts of the assignor after

such assignment, or any acts of the debtor, injurious to the assignee, after notice of it. The application of these rules, founded in justice and good faith, appears to shew that the offset should have been admitted as a good defence against the action, if not waived. The counsel for the plaintiff has relied, among other cases, upon that of *Jenkins v. Brewster* 14 *Mass.* 291. The Court have not given us the reasons of their opinion, but in general language speak of the " peculiar circumstance of the case" as having deprived the defendant of the benefit of his offset. The opinion is certainly shorter than it is clear. The Court however acknowledge the general right of offset of a debt, existing prior to the assignment; but consider the facts of that case as taking it out of the general principle. They observe that " after the " assignment of the contract, and notice thereof to the defendant, " he could not, by any act of his, deprive the assignees of their " rights under the assignment." Certainly not. The act they refer to must be the contract made with the plaintiff after the assignment; in virtue of which he relied on his offsett. It was decided that it could not be allowed. The cases of *King v. Fowler & al.* and *Fowler & al. v. King* 16 *Mass.* 397, presented a question as to the right of offseting the damages in one action against those in the other, where there had been an assignment; but on examination it appears that the question was decided upon the ground of waiver and acquiescence in the assignment. But the right of offset, in cases similar to the present, has been recognized and sanctioned by repeated decisions in *Massachusetts* and *N. York.* The cases of *Hatch v. Green, admr.* and *Green, admr. v. Hatch* 12 *Mass.* 195, came before the Court on a rule upon *Green* to shew cause why his judgment should not be offset, and deducted from *Hatch's* judgment against *Green.* It was opposed on the ground that *Green's* judgment, or the debts for which it was recovered, had been assigned to *J. & W. Smith,* creditors of *Green,* and by them assigned to certain other creditors, for whose use the action was prosecuted. *Parker* C. J. in giving the opinion of the Court says, " The Court would " undoubtedly protect an assigned debt in the hands of the as- " signee against a judgment obtained by the debtor upon a de- " mand subsequent to notice of such assignment. But when the

" judgment claimed to be set off is founded upon a demand coeval " with the one against which it is offered, equity would not re- " quire that an assignee should enforce the judgment, against the " rights and interest of the judgment debtor. The assignee ought " to be placed in as good a situation as the assignor would have " been without the assignment, but no better. In an equitable " point of view, where there are counter demands subsisting, " liable to be set off against each other, one only is the debtor, " viz. he against whom a balance would remain." In the above case the Court directed the offset to be made. In *Mowry v Todd* 12 *Mass.* 281, the principle relied on in this case is clearly stated. *Todd* made a written promise to *Fisher*, who, by an unsigned and incomplete indorsement transferred his interest in the contract and delivered the same to *Mowry*; and *Todd* afterwards, expressly promised to pay the debt to him. On this ground the Court sustained the action in *Mowry's* name. The Chief Justice proceeds, " With respect to the right of the defendant to set off any " demand against *Fisher*, we think his engagement to pay the " plaintiff effectually precludes him. When notified of the as- " signment, if he had stated his counter claims, and promised to " pay only such balance as might be due, his debt would have " been protected; or if he had not promised at all, the action " must have been brought by *Fisher*; and he would have had a " right to set off according to the statute, if legally and equitably " entitled; but his promise to pay amounts to a relinquishment of " his right." In the case of *Jones v. Witter* 13 *Mass.* 304, which was cited by the plaintiff's counsel, the principle is stated with equal clearness. The Chief Justice in giving the opinion of the Court says, " The contract between assignor and assignee " is operative between them only, until some act takes place " which brings the maker of the note into the contract; this act " is notice to him; and after such notice it becomes entirely " immaterial to him which shall be his creditor; as all payments " or lawful offsets, existing before such notice, will be allowed " him." The case of *Gould v. Chase* 16 *Johns.* 226, in all its material facts is precisely similar to the one under consideration, with this exception; that in the former, *Chase* had distinctly acknowledged the rights of the assignee and promised to pay him

the debt. The Court decided that the age of his offset, taken in connection with this express promise to the assignee, must be considered as a complete waiver of his right of offset. But every thing in the case shews that had it not been for this promise and waiver, the offset ought to have been allowed. Neither Court or counsel intimated a doubt as to the general principle. This review of the cases in relation to the subject of assignments and offsets, we have deemed useful; and it will aid us in arriving at a proper conclusion in the decision of the cause. According to these, the defence should have been sustained, unless it has been lost on the principle of waiver. It does not appear on the report that the defendant ever promised *Holt* to pay him the note; or expressly admitted his rights as assignee; but there are some other circumstances in the case which deserve attention, and which have been relied upon to shew a consciousness on the part of the defendant, that he had no claim on account against the plaintiff; and that the offset was at a late hour relied on as a defence. These we will notice presently. The account has been proved; and there is no direct evidence that it has ever been paid. The opinion of the Court to which the exception was alleged, was, "that the said account in offset, though proved, could not be "allowed against the note declared on, if the jury believed that "said note was assigned to said *Holt* before he had notice of the "existence of the account." We apprehend that the authorities are clearly against this opinion, and uniformly so; and the question of *scienter* on the part of the assignee, in respect to existing equities on the part of the debtor, is of no kind of importance; the demand assigned must be taken subject to all such equities, known or not known. We apprehend also that the variance discoverable in the decisions on this subject arises from the circumstance of waiver of the right of offset, which in some of the cases was satisfactorily proved. In this case, each party has his equities; and we must impartially protect both; and in so doing we must inquire whether, from all the facts before us, the legal inference is, that the right of offset has been waived; if so, it would be useless and improper to send the cause to another trial, although the instructions of the Judge to the jury, on the point of notice, as we have already mentioned were incorrect.

We will now notice the facts in the case which are relied upon by the assignee as shewing, or amounting to, a waiver of the right of offset; and shewing also such an understanding and management between the father and the son as in legal contemplation amounts to collusion; and therefore, entitled to no countenance in a court of justice. The horse and steers were sold in the fall of 1815 or 1816. The note in suit was signed in *April* 1819. *Humphrey* was then in good circumstances, and able to pay the debt due on account of the horse and steers for a long time afterwards, but failed before the commencement of this action. In *May* 1820, *Holt's* agent called on the defendant, and informed him of the assignment and requested payment of one note and interest on this. The defendant replied that he could not pay the note; that as *Andrew* was under age, he signed the note to secure *Humphrey*; and that *Andrew*, when of age, would take up the notes and clear said *Nathaniel*. The defendant did not claim to have any offset to the note, and said nothing about any account he had against *Humphrey*. And now what is the legal inference to be drawn from these uncontested facts? We are here presented with the declarations and the conduct of the defendant, in relation to the demand in suit; and it does not appear that from *April* 1819, until the offset was filed in the clerk's office, after the action was commenced, any notice was taken of its existence. Is this conduct and are these declarations natural? Do people transact business in this manner? Are they in the habit of paying debts which they do not owe, and when a balance is due them from those who are asking for payment? If the account for the horse and steers had not, in some way or other, been settled and satisfied before *May* 1820, or if the defendant had relied upon it by way of offset, can it be believed that the defendant would not then have named his offset, given notice of it to *Holt's* agent, and claimed its allowance, instead of saying that he could not pay, but that *Andrew* would, as soon as he should be of age? This conduct may all be explained by the insolvency of *Humphrey*. After his failure the defendant could obtain no reimbursement of what he might be compelled to pay for him as his surety; and then to avoid such an eventual loss, and thereby at once to relieve himself even from liability, he set up his old claim on the account in bar of

this action. The facts naturally lead the mind to this conclusion, and such a conclusion is fatal to the defence of this cause. For several years after the assignment, the assignee was kept in ignorance of this asserted debt on account; a circumstance which, connected with the insolvency of *Humphrey*, renders the transaction suspicious, and gives it a collusive character, as well as the operation of a waiver of the right of offset. The defendant has not in his own conduct, displayed that fairness and equity on his part, which entitles him to establish his claim as an equitable one against the plaintiff. We are all of opinion that the exceptions must be overruled; and the judgment of the Court of Common Pleas affirmed.

HOWARD *vs.* WADSWORTH & AL.

In the conveyance of a mill-site, falls, and privileges, &c. "exclusive of the grist "mill now on said falls, with the right of maintaining the same," this reservation secures to the grantor no title to the soil, but only a right to the use of the mill then standing, so long as it is kept in repair.

THIS was a writ of entry on the seisin of the demandant, brought to recover possession of "a certain grist mill, with the "privileges and appurtenances thereof, standing on a mill-priv-"ilege" in *Brownfield*.

Both parties claimed under *Samuel* and *Thomas Howard*, who, in 1807, conveyed to the tenants "one undivided half of a cer-"tain mill lot lying in *Brownfield*, beginning at a bridge on ten "mile brook, containing all the falls, with the privilege of flow-"ing the pond for the benefit of the mills on said falls," &c. "together with one undivided half of the dam, saw-mill, and slip, "with all the privileges and appurtenances thereunto belonging. "But *exclusive of the grist mill now on said falls, with the right of* "*maintaining the same*, and *also the dwelling house and sheds now on* "*the premises.*" The same grantors afterwards conveyed the residue of their interest in the premises to the demandant; who, in 1816, conveyed to the tenants the other undivided half of the estate which they purchased by the deed of 1807, by the same description, and with the same exceptions.

At the time of the first conveyance there was a saw-mill standing on the premises, within which, and under the same roof, was the grist mill mentioned in the deeds, having a separate water wheel and floom ; which continued in the occupation of *Samuel Howard*, one of the original grantors, till *October* 1818 ; when the tenants took it down, and built a new saw mill on the same site ; *Samuel Howard* assisting in the taking down, and taking into his own custody the gearing and other materials pertaining to the grist mill.

The Chief Justice, before whom the cause was tried, directed a nonsuit, by consent of the parties, subject to the opinion of the Court upon the question whether this evidence, was sufficient to maintain the action.

Dana, for the demandant, contended that by the reservation in the deeds a fee simple remained to the demandant, in the grist mill and the land on which it stood. By the deeds it is apparent that something beneficial was intended to be reserved to the grantor ; but as the reservation is not limited, nor any lesser estate described, it must be taken to be a fee simple ; otherwise it would be useless. For if it is restricted to the occupancy of the mill then standing, it would be in the power of the tenants to destroy its identity, and thus terminate the estate, at their pleasure. This construction is fortified by the language of the reservation, which gives the grantor the "right of maintaining" the grist mill ; which must be understood to mean the right of continuing it at his pleasure forever. And this language not being applied to the other buildings on the land, it is manifest that a different estate was intended.

Greenleaf, for the tenants. By the grant of all the falls, the grist mill would have passed, if not specially excepted. The exception is to be taken most strongly against the party introducing it. *Shep. Touchst.* 75, *note* 2, 10 *Co.* 106 *b.* And it does not include the land. The grant of a mill conveys only the waters, flood-gates, and gearing, necessary to work it ; *Shep. Touchst.* 86, 87 ; and the exception of the mill can include nothing more. Moreover, it was the grist mill then standing, which was reserved. If the tenants took it down while it was useful

to the demandant, his remedy should have been sought by action on the case.

MELLEN C. J. delivered the opinion of the Court, at the adjournment of the following *November* term in *Cumberland*.

By the report it appears that *Samuel* and *Thomas Howard* were in *Oct.* 1807, owners of the whole of the mill privilege, mills, mill-dams and privileges therein mentioned; that *Oct.* 8, 1807, they conveyed to the tenants one undivided half part of the same in fee simple, "but exclusive of the grist mill now on said falls, "with the right of maintaining the same, and also the dwelling-"house and sheds now on the premises;"—that *Nov.* 27, 1807, the same grantors conveyed to the demandant in fee "a certain "mill privilege of the ten mile brook in *Brownfield*, with the "mills thereon, &c. except such part of said privilege as we "have lately sold to *Peleg* and *Charles Wadsworth*;"—and that *Oct.* 7, 1816, the demandant conveyed to the tenants in fee the other undivided half of the same lot mentioned in the deed of said *Samuel* and *Thomas Howard* of *October* 8, 1807, and with the same exceptions. The claim of the demandant in this action is founded on the exception in the deed last mentioned; and the question to be decided is, what is the true construction of that clause in the deed. According to a well known rule of law, as an exception operates by way of a restriction upon the general language of a grant, if it is in ambiguous language, it must not be enlarged by construction; but rather be construed strictly. The demandant contends that by the exception, the grist mill therein named, and the land on which it stood, and its appurtenances, remained in the grantors; and that the fee thereof never passed by the deed to the tenants. The tenants contend that nothing was embraced in or intended by the exception, other than the mill and the right of maintaining it so long as it should stand on the premises; and the dwelling house and sheds standing thereon. Upon a careful examination of the language of this deed, we are all satisfied that the tenants' construction is the true one. The exception relates to the mill, house and sheds, then standing on the premises; the grantors repeat the word "now" twice, in des-

cribing what is excepted. Besides, there is a material variance between the language of the grant and of the exception. The grant describes the mill, privilege, &c.; but the exception is silent as to privileges and appurtenances; and refers only to the mill itself. Again, if the land on which the mill stood was intended to be conveyed, why should there have been a grant of a right to maintain the mill on the same ? Has not any man a right to erect or maintain a mill on his own land, without a special authority from his grantor so to do ? A grantor may annex conditions to his grant ; but it is certainly unusual, to say no more, for him to add to the language of his conveyance, permission to the grantee to go on and manage and improve his land by building houses and mills. All this he can do without such permission. The exception must not be extended beyond the plain language of it. Now it appears by the report that the mill described in the deeds was taken down, and had ceased to exist before the commencement of this action ; and of course, so far as the exception related to the grist mill, it has had its effect and ceased to operate. As to the house and sheds, we have no connection with them in this action. If the tenants have done the demandant an injury by taking down the old grist mill, and thus destroying, so far, the benefits of the exception, he may maintain an action for damages ; but on the facts before us, we are all of opinion that the nonsuit was proper and must be confirmed.

Morrison *vs.* Keen.

Where one owning land through which a mill stream flowed, granted all that part of it which was *situated east and north of the stream ;* it was held that the boundary was the centre or thread of the water.

In this case, which was a writ of entry, it appeared that the tenant had mortgaged to the demandant a certain tract of land in *Turner*, being part of his homestead farm, and "being all the "land which he owned *east and north of the mill-stream*,"—"with "all privileges and appurtenances." Afterwards he conveyed to *John Keen*, jr. all that part of the same lot "that lies on the

"south and west side of said *Martin-stream*," being the mill-stream, and opposite to the first mentioned tract, "together with "all the mills and mill privilege on said lot," excepting certain portions of mills previously conveyed to third persons. And the question was, whether the first deed conveyed the land to the thread or channel of the stream, including a mill standing there; or whether it extended only to the bank or margin of the water.

The Chief Justice, before whom the cause was tried, adopting the more enlarged construction, directed a verdict to be returned for the demandant, subject to the opinion of the Court.

Fessenden, for the tenant, contended that by the conveyance of the land north and east of the mill-stream, the stream itself was necessarily excluded; for this term could not be taken to mean a mere invisible line, or *filum aquæ*; but included the water necessary to carry a mill. And the land conveyed was that which laid north and east adjoining this boundary, which was obviously considered as a distinct portion of estate. The cases of *Lunt v. Holland*, and *King v. King* differ from this, because in them it is evident that the grantor intended to convey all the land he owned, which, it is equally clear in the present case, he did not.

N. Emery and *Belcher*, for the demandant, said that the meaning of the word "stream," as a boundary of land, was already fixed by legal decisions, as indicating the thread or centre of the water; by which the owners of adjoining opposite closes were uniformly bounded, unless the contrary was expressed in their deeds. *King v. King* 7 *Mass.* 496. *Lunt v. Holland* 14 *Mass.* 149. *Storer v. Freeman* 6 *Mass.* 435. *Hargr. tr.* 5. *Holt* 499. The only exception to this rule is the case of grants and cessions of territory among nations, in which sovereignty is concerned. 5 *Wheat.* 374—379.

MELLEN C. J. delivered the opinion of the Court at the adjournment of the ensuing *November* term in *Cumberland*.

Persons owning lands on opposite sides of a river and adjoining the same, own to the central line or thread of the river, as was decided in *King v. King* 7 *Mass.* 496. Land granted as bounded

by a river, extends to the thread of the river, unless from prior grants on the other side of the river, such a construction is negatived. So say the court in *Lunt v. Holland* 14 *Mass.* 149. These principles seem to be settled and familiar. In the case before us it appears that the tenant formerly owned lot No. 238, lying on both sides of a stream called *Martin*, or *Mill-stream*, and conveyed to the demandant all that he the tenant owned on the east and north side of the stream with all privileges and appurtenances; and about three years afterwards conveyed all that part of the lot lying on the south and west of said stream, (with one or two unimportant exceptions) to *John Keen*, Jr. From this statement it appears that the thread of the river must be the boundary line between the owners on the opposite sides of it, inasmuch as the river itself was constituted as one of the boundaries in each conveyance. The consequence is that there must be judgment on the verdict.

APPENDIX.

No. I.

IN THE HOUSE OF REPRESENTATIVES.
MARCH 3, 1821.

Ordered, That the Justices of the Supreme Judicial Court be required to give to this House, according to the provision of the Constitution in this behalf, their opinion on the construction of the following extract of the Constitution of this State, to wit,—"the "number of Representatives, shall, at the several periods of "making such enumeration, be fixed and apportioned among the "several counties, as near as may be, according to the number "of inhabitants, having regard to the relative increase of popu- "lation."

To the Speaker of the Hon. House of Representatives of the State of Maine.

SIR—An order of the House of Representatives has been presented to us by their committee, requiring the Justices of the Supreme Judicial Court to give to the House their opinion on the construction of the following extract of the Constitution of this State, to wit:

"The number of Representatives shall, at the several periods "of making such enumeration, be fixed and apportioned amongst "the several counties, as near as may be, according to the num- "ber of inhabitants, having regard to the relative increase of "population."

The undersigned Justices of said Court, in the absence of Judge *Weston*, whose distance from this place precludes us from receiving the aid of his views and reflections, have in compliance

with the requisition thus communicated to us, given to the subject the best consideration in our power; and now have the honor of transmitting to the house the result of our examination and deliberations.

In order to arrive at a correct understanding of the clause in question, it is necessary to attend to the whole section of which it forms a part; and also to examine it in connection with other provisions of the Constitution.

It will aid our inquiries, as to the true exposition of this clause, if we first advert to the principles upon which the representation in the Senate is predicated. By article 4th, part 2d. sec. 2, it is provided, that on or before the fifteenth day of *August* next, " and at every subsequent period of ten years," the State shall be divided into senatorial districts; and the senators " shall be " apportioned according to the number of inhabitants." The words " having regard to the relative increase of population," are as it were, studiously omitted; and the reason of this omission seems apparent upon a moment's reflection. The old and comparatively thick inhabited parts of the State, bear, according to their population, a much larger proportion of the public burthens than is borne by the more recently settled and thinly inhabited parts. And as in regulating, equalizing and determining the valuation of the State, in pursuance of article 9th, sec. 7th of the Constitution, no regard is to be had to the relative increase of polls and estates; so, in apportioning the senators, no regard is to be had to the relative increase of population. For however between the periods of enumeration or valuation the polls and estates may have relatively increased, the apportionment of taxation continues unaltered and the same. But we advert to this provision of the Constitution, respecting the apportionment of the Senate, merely with a view of establishing and illustrating this position, that as the words " having regard to the relative increase of population" are omitted, when speaking of the apportionment of the House, they must where inserted, have been inserted with design.

It is also an established rule of construction, that all the words used in any instrument, and especially in so important an instrument as a Constitution, should be considered as inserted for some good purpose—as intended to have some legal and sensible operation :

of course, words or sentences are not to be rejected as surplusage or of no importance if any sensible meaning to them can be discovered. If we now turn our attention to the provisions of the section that was taken, the design in inserting the words " having " regard to the relative increase of population," and the meaning intended to be conveyed by that expression, will we apprehend become apparent.

It was unquestionably the intention of the framers of our Constitution, that each of the counties should be fairly and equally represented according to its population; but it must have been foreseen that no arrangements could produce a representation precisely proportioned to numbers. It was doubtless contemplated also, that in the advancing settlement and population of the State, some counties would increase in numbers more rapidly than others. And it was readily perceivable, that as every apportionment made by the legislature must continue five years, and may continue ten, in the intervals of successive apportionments an inequality of representation in the House of Representatives would necessarily arise. The provision in the Constitution on the construction of which our opinion is required, we therefore apprehend was introduced with a view to obviate, in some degree, this inequality, by anticipating its progress and guarding against its effects.

The Constitution has given to the legislature the power, and made it their duty, to ascertain at certain periods the number of inhabitants in the State, and in the several counties. By means of the facts thus obtained, they can ascertain the relative increase of population in the several counties, and it is enjoined upon them in making the apportionment of representatives to " have regard to the relative increase of population,".by anticipating what will be the amount of population in a given county at the proper intermediate period, between two periods of enumeration, and allowing to such county an additional representative, if by comparison with the ratio of increase in other counties, such anticipation will not encroach on the right to equal representation in such other counties. But this anticipated relative increase, though highly probable in event, is nevertheless contingent and uncertain in amount; depending principally on emigrations, which in the nature of things are unsteady and fluctuating. We are therefore inclin-

ed to the opinion that the power given to the legislature by the provision in question has respect only to those fractions which must necessarily exist in such general apportionments; and is to be exercised by duly estimating the relative increase of population in the several counties; and where the ratio of increase will allow, giving a just and proper effect to these fractions by converting a fraction into a total as a basis of calculation. We are the more inclined to the opinion that the "relative increase" mentioned in the Constitution, regards fractions and not totals, because it is in the power of the legislature, if the relative increase should in the course of five years prove so considerable as to produce essential inequality, to new apportion the representation, and conform it to the change of population which shall in the mean time have taken place.

If it should be inquired by what precise rule this apportionment according to relative increase is to be made, we should reply that we know of none more definite than that which has already been mentioned. The Constitution has prescribed none; and perhaps none could have been prescribed. It has confided the power contained in the provision in question, to the legislature, presuming that it would be exercised with sound discretion, in a spirit of justice and impartiality to the whole people, and with the sole view of insuring that equality of representation and those beneficial effects which it was intended to produce.

We will only add, that unless the expression "having regard "to the relative increase of population" admits of a construction of the nature which we have endeavored to explain and illustrate, we know not for what purpose it could have been engrafted into the Constitution.

PRENTISS MELLEN,
WILLIAM P. PREBLE.

PORTLAND, MARCH 6, 1821.

No. II.

PORTLAND, FEB. 15, 1822.

To the Governor of Maine :

SIR—Your letter of the 7th instant, addressed to the Justices of the Supreme Judicial Court, has been received, in which you request their opinion on the following question, viz. "Is the office "of agent under the resolve of the sixth instant, authorizing the "governor to appoint one or more agents for the preservation of "timber on the public lands and for other purposes, a civil "office of profit under this State, within the meaning of article "4th, part 3d, section 10th of the constitution, so that no Sena- "tor or Representative of the present Legislature can constitu- "tionally be appointed as agent?"

We have examined the subject with as much attention as was in our power, and consulted Judge Weston and obtained the benefit of his opinion, which agrees with our own; and which is now respectfully submitted in compliance with your request.

By the constitution of this State the sovereign power resides in three distinct departments, viz. the *Legislative*, *Executive* and *Judicial*; and in the second section of the third article of the declaration of rights, it is declared that "no person or persons, belong- "ing to one of these departments, shall exercise any of the powers "properly belonging to either of the others, except in the cases "herein expressly directed and permitted." With this provision in view, it seems proper to give such a construction of the constitution, as will be necessary to effect the object contemplated, which was to preserve the powers abovementioned entirely distinct, except in the cases specified. And we deem it incorrect to extend the construction any further than to effect such object; because, in a republican government like ours, the qualifications for offices, either those depending on the suffrages of the people, or the appointment of the executive, ought not to be taken away or limited by mere implication.

On this principle, and by this rule of construction, the incompatibilities mentioned or alleged to exist in different parts of the constitution should be examined and understood.

On a careful view of those sections in which the term "office" or "offices" is used, it will be found from the connection in

which it stands, to have reference to the division of the sovereign power which has been before stated, into the legislative, executive and judicial departments; and that the provisions of those sections in which either of those terms occurs, were introduced for the purpose of guarding against the danger of encroachment by one department upon the proper province of another. It is believed that the correctness of this remark will be seen by an examination of the second, fourth, fifth and sixth sections of the sixth article of the fourth part of the constitution, and also the second, fifth and sixth sections of article ninth of the same part.

The same idea seems embraced in the section of the constitution submitted to our consideration, and also in the section next following; which also contains a provision intended as a guard against any improper influence on the part of the general government, by excluding from the government of this State all persons, except post-officers, holding any office under the United States. By thus ascertaining the object which the framers of the constitution had in view, in the distribution of powers or division of the sovereign power, we apprehend the true construction to be given to the terms "office" and "offices" as used in the constitution may also be ascertained. There is a manifest difference between an office, and an employment under the government. We apprehend that the term "office" implies a delegation of a portion of the sovereign power to, and possession of it by the person filling the office;—and the exercise of such power within legal limits, constitutes the correct discharge of the duties of such office. The power thus delegated and possessed, may be a portion belonging sometimes to one of the three great departments, and sometimes to another; still it is a legal power, which may be rightfully exercised, and in its effects it will bind the rights of others, and be subject to revision and correction only according to the standing laws of the State. An employment merely has none of these distinguishing features. A public agent acts only on behalf of his principal, the public, whose sanction is generally considered as necessary to give the acts performed the authority and power of a public act or law. And if the act be such as not to require such subsequent sanction, still it is only a species of service performed under the public authority and for the public good, but not in the execution of any standing laws,

which are considered as the rules of action and the guardians of rights. By giving this construction to the term "office," the meaning of the first section of the ninth article and fourth part of the constitution appears plain, and the word office therein contained becomes intelligible as to the extent of its import.

An office being a grant and possession of a portion of the sovereign power, it is highly proper that it should be guarded from abuse as far as possible ; and to this end, that every person holding an office should be under the obligation of the oath in that section specified. It appears then, that every "office," in the constitutional meaning of the term, implies an authority to exercise some portion of the sovereign power, either in making, executing or administering the laws. Examined by the foregoing test, the office of agent created by the resolve of February 7th, 1822, seems to be nothing more than a service or an employment under executive authority ; and not essentially different from the office or employment of state printer, or a contractor to build a state house, or a state prison. The agent mentioned in the resolve is not to be employed in carrying into effect any of the standing laws of the State. He is to be clothed with no powers, but those of superintending the public lands, and performing certain acts in relation to them under the discretionary regulations of the governor.

Neither the resolve, nor the reason of the thing, requires that an agent in such circumstances should be under the obligations of the oath prescribed in the constitution.

We do not perceive any reason why the term "office" should receive a construction in one section different from that which seems proper and natural in another.

The conclusion to which the foregoing reasoning conducts us, we believe to be correct and proper ; and accordingly we answer the question which you have been pleased to submit to us, in the negative.

Most respectfully,

PRENTISS MELLEN,
WILLIAM P. PREBLE.

No. III.

To the Honorable the Senate of Maine :

In compliance with the request expressed in your order of the 11th instant, we, the undersigned, Justices of the Supreme Judicial Court, have considered the three several questions proposed to us, viz.

"1st. Can any person, according to the third article of the "constitution, of right hold and exercise, at the same time, the "several offices of deputy sheriff and justice of the peace ?"

"2nd. Can any person of right exercise, at the same time, the "several offices of sheriff and justice of the peace ?"

"3d. Can any person of right exercise, at the same time, the "several offices of coroner and justice of the peace ?"—and now in answer, respectfully submit our opinion.

The first section of the third article of the constitution declares "that the powers of this government shall be divided into three "distinct departments."

The second section of the same article declares "that no per- "son or persons, belonging to one of those departments, shall "exercise any of the powers properly belonging to either of the "others, except in cases herein expressly directed or permitted." We have found in the constitution only the two following provisions expressly limiting the generality of the foregoing inhibition; viz. article 4, part 3, section 11, which allows justices of the peace, notaries public, coroners, and officers of the militia to hold seats in either branch of the legislature ; and article 5, part 2, section 4, which allows justices of the peace and notaries public to be counsellors. But neither of these two last named provisions particularly relate to the questions under consideration.

We are thus carried back to the third article ; and our opinion must be founded upon the construction of both sections of that article, viewed in connection with several other sections of the constitution.

Article 4, is entitled "Legislative power."

Article 5, is entitled "Executive power."

Article 6, is entitled "Judiciary power."

Article 4th, is divided into three parts.

Article 5th, is divided into four parts.

These divisions were probably made for the sake of method and arrangement, and for the purpose of distinctly marking out the qualifications, mode of election or appointment, powers, duties, and tenure of office of the persons or officers named in such respective subdivisions. But there is nothing in article 5th, declaring or shewing that the governor, council, secretary and treasurer, exclusively compose and exercise all the powers belonging to the executive department; or that such divisions of article 5th were ever intended or understood to mark distinctly the utmost boundaries of that department. On the contrary, section 8, part 1, of said article authorizes the governor, with advice of council, to appoint, among other officers, sheriffs and coroners; and each part of that article contains provisions having little or no connection with powers and duties merely of an executive character. It seems that a justice of the peace belongs to the judicial department. Article 6, section 1, declares that "the judicial "power of this State shall be vested in a Supreme Judicial "Court, and such other Courts as the legislature shall from time "to time establish." And by law a part of the other courts named in the above section are justices' courts. Besides, the 4th section of article 6, provides that "all judicial officers except "justices of the peace, shall hold their offices during good beha- "vior, but not beyond the age of seventy years." Here the exception proves the judicial character of the justice. Sheriffs, deputy sheriffs and coroners, cannot be considered as belonging to the legislative or judicial department; they possess no powers and perform no duties belonging to either of those departments. The question is whether they belong to the executive department. Article 5th, part 1, section 1, declares "that the supreme "executive power of this State shall be vested in a governor." Section 12 declares that "he shall take care that the laws be "faithfully executed." The faithful administration of them devolves on another department. Article 9th, section 2, places the office of sheriff and deputy sheriff on the same ground in respect to incompatibility with certain other offices therein enumerated.

The council aid the governor with their advice. The secretary aids them both by recording their proceedings and keeping their records, and those of the legislature. The treasurer aids in

causing all the State taxes to be collected and paid into the treasury for the public use. In doing this important service, the power of sheriffs and coroners must be resorted to, when legal coercion is necessary ; in which case they are expressly aiding the governor in the execution of the laws, and acting under his commission. In fact, in all cases, their power, when lawfully exercised, is in aid of the governor, and to enable him to do his duty in causing the laws to be executed faithfully. These duties he cannot perform. These powers he cannot exercise in person. Such a performance, such an exercise was never contemplated. There can be no question that sheriffs, deputy sheriffs and coroners are executive officers ; and for the reasons we have assigned, we think they must also be considered, though not named under a distinct head, as belonging to the executive department ; the limits of which are no where in the constitution expressly defined. In addition we would remark, that the advantages intended to be secured by the third article cannot be realized and fairly enjoyed, nor the inconveniences and dangers intended to be avoided by it effectually guarded against, but by giving to it the construction above stated. If the offices are not incompatible, a person holding both, might, as a justice of the peace, issue a process, serve it as a sheriff, deputy sheriff or coroner, decide the cause in his judicial capacity, and then, in his other capacity, execute his own judgment ;—a course of proceeding which we apprehend is not in unison with the true spirit and intent of the inhibition.

We are therefore of opinion that the cases stated in the proposed questions, fall under the general principle contained in the second section of the third article ; and that the office of justice of the peace is incompatible with that of sheriff, deputy sheriff or coroner.

We accordingly answer to the first question, that no person can, according to the third article of the constitution, of right hold and exercise, at the same time, the several offices of deputy sheriff and justice of the peace.

We answer the second question, that no person can of right exercise, at the same time, the several offices of sheriff and justice of the peace.

We answer the third question, that no person can of right exercise, at the same time, the several offices of coroner and justice of the peace.

Judge Weston has been furnished with a copy of the questions proposed, and his opinion requested. His reply has been received, but having had no means for a personal interview and consultation with him, and perceiving that his impressions and conclusions do not at present correspond with ours, we are not authorized to state the foregoing, except as our opinion.

PRENTISS MELLEN,
FEBRUARY 18, 1825. WILLIAM PITT PREBLE.

No. IV.

The Hon. the Senate of the State of Maine, having by their order of the 26th of *February*, 1825, requested that the opinion of the Justices of the Supreme Judicial Court should be given on the following question, viz:—

" *Are the first section of the Act, chapter one hundred and twenty-*
" *seventh, and the eighth section of the Act, chapter one hundred and*
" *twenty-fourth, or either of them, so far as they provide that certain*
" *expenses therein mentioned shall be at the charge of the State,*
" *changed, annulled or repealed by the eighteenth section of the Act,*
" *chapter one hundred and twenty-second* ;"—and that such opinion might be communicated to the Secretary of State for publication.

The undersigned, Chief Justice of said Court, in the absence of Mr. Justice *Preble*, who is now on a voyage to the West Indies, has by letter consulted Mr. Justice *Weston*, on the question proposed; by whom he is authorized to state the following, as the opinion of a majority of the Court.

The Act chapter 127, was passed *March* 10, 1821. The 1st section authorizes selectmen to make provision for sick persons arriving from infected places, and to remove them to safe places; and that the necessary expenses thus incurred shall be paid by the " parties themselves, their parent or master, (if able) or

" otherwise by the town or place whereto they belong; and in " case such person or persons are not inhabitants of any town or " place within this State, then at the charge of the State."

The Act chap. 124, was passed *March* 15, 1821. The 8th sec. provides that idle and indigent foreigners, or other persons, not legal inhabitants of any town within this State, may be confined to the workhouse by the overseers of the poor, who shall once in every year exhibit a fair account of the charge of supporting such persons " to the legislature for allowance and payment."

The Act chap. 122, was passed *March* 21, 1821; and the 18th section makes it the duty of overseers of the poor " to relieve and " support, and in case of their decease decently to bury all poor " persons residing or found within their towns, having no lawful " settlement in this State, when they stand in need;"—and provides that they may employ them as other paupers, "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:"—and the section further provides that " all " monies accruing for licences granted to retailers, innholders " and victualers, shall be paid into the respective town treasuries " where such licences are granted, for the benefit of the poor " of said town."

These are the several provisions referred to in the question proposed. It is of importance to attend to the dates of the three acts before stated. The two former, so far as they have any relation to the point to be decided, it is believed were enacted by the legislature in the very language in which they were digested and reported by the board of jurisprudence; no change of principles or provisions being deemed necessary. But the case is very different in regard to the last act. Several essential alterations were made by the legislature, introducing and establishing some principles entirely new, as to the settlement and support of the poor. The change alluded to, in respect to the support of the poor, is that by which the expense of such support is thrown upon the towns in the State, in which it is incurred; and by which the right of reimbursement from the State treasury is taken away from such towns, where the paupers supported have no legal settlement in any town in the State. The legislature have deemed

this a wise course of policy, and calculated to diminish the number of paupers in the State. The principle being thus known and established by the act of *March* 21, 1821, it is proper that such a construction should be given to it as will produce the intended effects. This act, having been passed after the other two, which had been re-enacted in this State without alteration, must be considered as virtually repealing any provisions and controling any principles, contained in either of them, at variance with its own provisions and principles. It is manifest that the legislature intended that after the passage of the last mentioned act there should not be in *Maine* any State paupers. The act speaks this language so intelligibly, that the Court perceive no reason why it should not be so understood and construed; some express provisions in the other two prior statutes to the contrary notwithstanding. In aid of this construction, it is proper to notice the other new principle introduced in the last, appropriating the monies received for licences; which seems intended as a species of indemnity furnished to the towns in the State, against the liabilities thus permanently imposed upon them in the support of paupers who have no legal settlement in the State.

The opinion now given is, that the statute of *March* 21st, 1821, containing, in the eighteenth section, provisions repugnant to those in the recited sections of the acts of *March* 10th, 1821, and *March* 15th, 1821, has changed, annulled, and repealed the provisions contained in those sections "so far as they provide that "certain expenses therein mentioned shall be at the charge of the "State."

It is for the legislature, in their wisdom, to decide whether the general health and safety would not be more effectually preserved from the sudden dangers arising from contagious and infectious diseases, by rendering the necessary expense incurred by towns in preventing or checking their progress, a charge against the State.

PRENTISS MELLEN.

To the Secretary of State.

A TABLE

OF THE PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.