REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE.

BY SIMON GREENLEAF,
COUNSELLOR AT LAW.

VOLUME IV.

Portland:
PRINTED AND PUBLISHED BY JAMES ADAMS, JUN.
1828.

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**, } *Justices.*
The Hon. **NATHAN WESTON, Jr.** }

Attorney General, **ERASTUS FOOTE**, Esq.

The Reporter is informed that in the copy of record which he followed in the case of *Low v. Ross*, *ante*, *Vol.* 3, *p.* 256, the ground on which the action was dismissed from the Court of Common Pleas was not clearly stated. As no close was described in the declaration, in that case, *Whitman C. J.* regarded the plea of soil and freehold, filed by the defendant, not as putting in issue the title to any close, but merely as a preliminary proceeding to draw from the plaintiff a designation of the *locus in quo ;* and being therefore of opinion that there should have been a new assignment, by the plaintiff, and a title pleaded by the defendant to the place thus newly assigned, before the cause was sufficiently matured to be taken from the jurisdiction of the justice, by recognisance, within the meaning of the statute, he dismissed the action as not regularly brought up.

A TABLE

OF THE CASES REPORTED IN THIS VOLUME.

ERRATA.

In page 43, line 11, for *irrevocable* read *irrecoverable*—page 91, *l.* 25, for *prescribed* read *preserved*—page 119, *l.* 8, for *freely* read *surely*—page 191, *l.* 15, read *of* after *grantee*—page 271, head of page, for *Oxford* read *Lincoln*—page 273, *l.* 17, dele *New*—page 377, line 4 from bottom, dele "not"—so that it may read "was sufficiently proved"—page, 392, *l.* 6, for *defendant* read *plaintiff*—page 519, line 12, for *highest*, read *high*.

In Volume 3, page 147, *l.* 28, for *drawees* read *payees*—page 153, line 14, for *drawer* read *drawee*.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

YORK.

APRIL TERM,

1826.

CLEAVES, *by guardian, vs.* FOSS.

After a sale of lands at auction, by license of Court, it is the duty of the seller to make and tender a deed within a reasonable time. Two days after the sale is a reasonable time for this purpose. And the purchaser is justified in delaying to complete the contract till he has had a reasonable time to take legal advice respecting the formality and validity of the deed tendered.

In a declaration upon a contract required by the statute of frauds to be in writing, it is not necessary expressly to allege that the contract was reduced to writing.

The auctioneer, in a sale of lands, is the agent of both parties; and his entry of the name of the purchaser on his book or memorandum containing the particulars of the contract, is a sufficient signing, within the statute of frauds.

THIS was an action of the case, which came before the Court upon a general demurrer to the declaration, in which were recited the following facts.

The plaintiff's guardian having obtained license of the Supreme Judicial Court to sell a certain lot of land for his benefit, and having given bond, and complied with the requisitions of law in such cases, and having duly advertised the land; it was exposed to sale at public vendue, and struck off to the defendant at the sum of two hundred and ten dollars, he being the highest bidder. The name of the defendant was immediately entered as the purchaser, in the sales-book kept for that purpose, by the clerk of

the auctioneer, and by his direction, together with the number and description of the lot, the price at which it was struck off, and for whose account it was sold; and at the close of the sales, there being other property sold, the sales of the day were examined and attested by the auctioneer, by subscribing his name to the account entered in the book. Two days afterwards the guardian tendered to the defendant a deed of conveyance of the land, with covenants that he had observed the directions of law relative to the sale and proceedings, and that he had good right and lawful authority to make the sale ; and thereupon demanded the consideration money; which the defendant refused to pay. Afterwards the land was again advertised, and sold at auction to another person, for one hundred and sixty dollars. The declaration concluded by charging the defendant as liable for the difference between the first and last sales, with the expenses of the latter, amounting in all, to fifty-four dollars.

The arguments of the counsel were furnished to the Court in writing, of which the following is a brief abstract.

N. Emery, in support of the demurrer. No promise is formally alleged against the defendant, that he would become the purchaser of the land; nor are any conditions of sale stated; nor any terms of payment; nor the nature of the security to be given; nor the time for executing the deed; nor does it appear that any abstract of title was exhibited; nor that it was declared that the highest bidder should be deemed the purchaser. Neither is it stated that there was any agreement or condition in writing that on failure of payment of the money by the defendant a new sale should be made; nor that he should pay the difference between the two sales; nor that he ever signed any memorandum or note in writing, engaging to become the purchaser and to pay the money alleged; nor that any other person made the contract by his authority.

Under these circumstances the defendant considers himself protected by the statute of frauds ; the first section of which is similar to the fourth section of *Stat. 29 Car. 2, cap. 3.*

Sales at auction are within the statute of frauds. *Hinde v. Whitehouse* 7 *East* 558. *Blagden v. Bradbear* 12 *Ves.* 466. *Buckmaster v. Harrop* 7 *Ves.* 341. The auctioneer, by entering the name of the purchaser in writing, is not thereby an agent authorized by him to sign an agreement. *Stansfield v. Johnson* 1 *Esp.* 101. *Walker v. Constable* 1 *Bos. & Pul.* 306. 1 *Jacob & Walker* 350. The cases on the other side are such as have adopted the opinion that an auctioneer, by his character as such, became agent for both parties, upon the knocking down of the hammer. This opinion is founded on the case of *Simon v. Motivos*, as reported in 3 *Burr* 1921. But there is nothing in our statute encouraging such a conclusion; nor is there any thing in the employment of an auctioneer, which should make him an agent for the purchaser. In the report of that case in *Bull. N. P.* 280, it is said that the auctioneer wrote on the catalogue the defendant's name, and the price, by the order and assent of the defendant. And in *Burrow's* report it is said that the buyer's coming the next day and seeing the goods weighed was an additional circumstance, that deserved attention. This fact of the defendant's express order to write his name on the catalogue, provided the conditions of sale were annexed, might have gone far to influence the decision of the Court. In *Emmerson v. Heelis* 2 *Taunt.* 45, the Chief Justice thought it a great misfortune that the case of *Simon v. Motivos* was not overturned before any others were decided upon it.

The case of *Coles v. Trecothick*, as reported in 9 *Ves.* 250, has not fairly represented the meaning of Lord *Eldon* as to there being no distinction between the 17th and 4th section of the English statute of frauds. He meant that he did not consider the auctioneer an authorised agent in either case. 1 *Jacob & Walker* 350. See 4 *Wheat.* 96, *note*. In England brokers are regulated by statute. Not so here. But an auctioneer is not necessarily a broker, even there. His business is to sell publicly; not to buy and sell, like a broker. *Wilkes v. Ellis* 2 *H. Bl.* 555.

This is a mere parol contract; and many cases have been decided in equity in favor of parties who proposed to sell, and made some entries in writing, and did other acts, and for whom auctioneers have done acts; as strong as the present case. *Whaley*

v. Baguel 1 *Bro. Parl. Ca.* 345. *Mason v. Armitage* 13 *Ves.* 1. *Buckmaster v. Harrop* 13 *Ves.* 456. *Mortlock v. Butler* 10 *Ves.* 310. *Symonds v. Ball* 8 *D. & E.* 151. Judicial sales in England, under a decree in Chancery, even when confirmed by a master's report, are not invariably binding; but on special circumstances the Court will open the bidding. *Ryder v. Gower* 6 *Bro. Parl. Ca.* 306. An entry by a clerk, of a purchaser's name, has been holden insufficient. *Blore v. Sutton & als.* 3 *Meriv.* 237.

In New-York, a sheriff's sale of lands is deemed within the statute of frauds. *Jackson ex dem. Gratz v. Cotlin* 2 *Johns* 248. Writing a name, and affixing a seal, on the back of a lease, is a nullity. *Jackson v. Titus* 2 *Johns.* 480

The Courts in the United States do not appear disposed to go the length of the English decisions on this subject. *Webster & al. v. Hoban* 8 *Cranch* 399. See also *Stackpole v. Arnold* 11 *Mass.* 27. *Winslow v. Loring* 7 *Mass.* 392. The relaxation of the statute of frauds has been the occasion of much perjury and fraud; and it is a subject of regret that the statute has not been rigorously observed. *Lindsay v. Lynch* 2 *Sch. & Lefr.* 1 *Grant v. Naylor* 4 *Cranch* 235.

Against the position that the auctioneer is the agent of both parties, it may be observed that in a point of fact the auctioneer writes down the name of the buyer in furtherance of his own views, or by direction of the seller. No man bids at an auction under the idea that the auctioneer is to become his agent to make a contract for him, and finally bind him by knocking down the hammer and writing his name. The bidding is made upon the impulse of the moment, to which a *locus penitentiæ* ought to be allowed; and if the bidder is not called on to confirm his offer by writing his name to the conditions of sale, or giving express directions that it should be done, he ought not to be bound. He could not suspect that the auctioneer, who is not of his own selection, was to be forced upon him as his own agent. The whole address of the auctioneer is always exerted to get the best possible terms for the seller, whose will and interests are his own.

The character of an agent implies responsibility to his principal. But could the purchaser of land maintain an action against

the auctioneer for not writing his name, after the hammer was knocked down ? And might not the auctioneer with propriety contend that he struck down the hammer to signify that his employer the seller was satisfied with the offer, and that the bidder might perfect the contract by writing his own name, or calling on some one to write it for him ?

It seems the most correct conclusion, that whenever an omission is made at an auction to state in writing the conditions of the sale, and the last bidder does not sign or expressly authorize the signing of an agreement to become the purchaser, the case should be governed by the rule laid down by the Court in *Winslow v. Loring* 7 *Mass.* 392:—that "when the highest bidder at a sheriff's "sale refuses to take and pay for the article he has bid off, the "officer has authority to set up the article again at auction, and "to sell it to the highest bidder." This mode terminates the controversy at once, neither party being bound if the purchaser neglects to take and pay. There is no difference in principle between the cases of the sheriff and the guardian. Both wish to raise the money. Indeed it seems more important that here the liberty should be given to the party bidding for land to remain unbound till he signs an agreement; because it is not the practice in general to give abstracts of the title, and therefore time should be allowed to look into it. And if an abstract were exhibited at the sale, still the purchaser ought to be permitted to recur to the records and satisfy himself that the title is good; and to consult counsel respecting both the land and the deed proposed to be given ; as well as to examine the actual condition of the land.

The plaintiff, therefore, if every thing relating to the subject of the supposed contract had been binding, has been much too precipitate. It is true he was bound to tender the deed on the day of sale. *Hagedorn v. Laing* 6 *Taunt.* 162. *Berry v. Young* 2 *Esp.* 640. *Cornish v. Rowley* 1 *Selw. N. P.* 160. But the defendant was entitled to a reasonable time to determine whether it was prudent for him to accept it, and the length of this period may perhaps be determined by reference to the notice to quit, allowed to tenants at will. Such notice from the 17th to the 30th of September was decided in Massachusetts to be insuffi-

cient. *Ellis v. Paige & al.* 1 *Pick.* 43. In the present case the deed was tendered on the 15th of November, and the land resold on the 27th of the same month. The plaintiff having thus, before the lapse of reasonable time, chosen to seek his redress in a new sale, he ought not to be admitted to another remedy.

By the declarations and pleadings on these subjects, so far as they appear in the English books of reports, it seems usually to be one of the conditions of sale that the highest bidder shall be the purchaser, and shall sign an agreement to complete the conditions of sale; and the plaintiff alleges a compliance with all the requisites to make out his case. But the case at bar is manifestly an attempt to make the most of one altogether defective. 16 *East* 44.

As the conditions of sale did not set forth the kind of deed to be given, it was natural for the purchaser to conclude that he was to be protected by a general warranty; such deeds being often given by guardians in similar cases. And the want of such covenants in the deed offered, may constitute another reason to justify the defendant in refusing to complete the parol agreement.

E. Shepley for the plaintiff. The only question in this case is whether an action can be maintained for a refusal to perform a contract for the sale of real estate at auction; the purchaser's name having been written down against the lot, at the time, by the auctioneer.

In 1794, *Eyre C. J.* in the case of *Stansfield v. Johnson* 1 *Esp.* 104 held the negative of this question, considering the contract as within the statute of frauds, and therefore not binding, because not signed by the party or his agent. This was only a *nisi prius* decision, without consideration or argument.

In 1798 the case of *Walker v. Constable* 1 *Bos. & Pul.* 306 was decided in the same way, and rests principally on the authority of *Stansfield v. Johnson.* It is only a brief note by the reporter of what the Court decided; and the case appears to have received very little consideration.

The case of *Buckmaster v. Harrop* 7 *Ves.* 341 was decided in 1802 by Sir William Grant upon the authority of these two pre-

ceding cases, and without any examination of the principle upon which they were determined.

In New-York in 1804, the English authorities, as they then stood, were followed in *Simonds v. Catline* 2 *Caines* 61, *by Kent C. J.* who held that sheriffs' sales of real estate at auction were within the statute of frauds. And upon the authority of this case were decided those of *Jackson v. Catlin* in 1807, in 2 *Johns.* 248, and in 1811 in 8 *Johns.* 520.

Thus has been reared a superstructure of imposing appearance, having no foundation in principle, and very little in authority; resting upon nothing more than the *dictum* of a single Judge at *nisi prius.* It had never received an examination by the powerful minds of the gentlemen then at the bar, and on the bench; until that of the Lord Chancellor was applied in 1804 to a revision of the principle of the former decisions in the case of *Coles v Trecothick* 9 *Ves.* 249, in which their authority was deliberately rejected. And several years after this decision, in the case of *Emmerson v. Heelis* 2 *Taunt.* 38, the principle of *Coles v. Trecothick* was adopted in the Common Pleas upon full argument and great consideration; and was followed in 1811, by that of *White v. Procter* 4. *Taunt.* 209. And in 1814 Sir Wm. Grant, in the case of *Kerneys v. Procter*, 3 *Ves. & Beame.* 57, retraces his own steps, and decides that sales at auction are not within the statute of frauds. Thus it is finally settled in England, both at common law and in chancery. In New-York the doctrine holden in chancery is at variance with their decisions at common law. *McComb v. Weeks* 4 *Johns. Chan.* 659. Will this Court decide this question in accordance with the later authorities, which have been settled upon principle, after argument, and upon mature deliberation; and which have overruled the earlier decisions; or in accordance with decisions of an older date, which had been made without argument, or deliberation; which would not stand the test of principle, and have therefore been repudiated?

Weston J. delivered the opinion of the Court.

The first point taken against the declaration is, that it contains no distinct averment of a promise on the part of the defendant to

become the purchaser of the land, which was offered for sale. But the facts relied upon, by which to charge him, are set forth, his liability thereupon and an *assumpsit* in consideration of that liability averred, which is sufficiently formal in this particular, if such promise can be raised or implied by law from the facts. It is objected that it does not appear, from any conditions of sale, that the highest bidder was to be the purchaser ; but this is implied from the nature of the transaction. It is also urged that the terms of payment or security required were not agreed: it must then be understood that payment was to be made, when the conveyance should be executed. It is further objected that no abstract of title was furnished ; but this is not practised among us. It was in the power of the purchaser to satisfy himself upon this point at the register's office, or by other inquiries. It is insisted that, notwithstanding what was done, a *locus penitentiæ* remained to the defendant, until he could satisfy himself as to the title, and as to the condition of the land ; but in regard to these particulars, he should have satisfied himself, before he offered to become the purchaser. He had an opportunity to do so ; and it was a course suggested and required by common prudence.

It is contended that the defendant was justified in refusing to complete the purchase and to accept the deed because it contained no covenant of general warranty ; but the plaintiff was under no obligation to enter into such covenant ; it would be unreasonable to require it ; its omission therefore could not discharge the defendant from the performance of his engagement.

The plaintiff, before he could entitle himself to this action, was bound to perform, or offer to perform, whatever it was incumbent on him to do on his part ; and this within reasonable time ; and we are of opinion that the tender of a deed within two days of the sale was within reasonable time. The law would justify the defendant in delaying to complete the contract, until he should have had opportunity to take advice, as to the formality and validity of the instrument tendered. Whether a reasonable time had been afforded for this purpose, before the plaintiff again proceeded to sell the land, might possibly have been called in question, if the defendant, instead of requesting time to take

advice, had not promptly refused to accept the deed and to pay the money, without making any objection to the form of the conveyance.

It has been argued by the counsel for the defendant that, by the statute of frauds, the memorandum, required to be made by its provisions, should appear by the declaration to have been in writing. This position is not warranted by the authorities ; and if it was, it does appear by this declaration that the contract relied upon was made in writing, if signed by a party authorized to do so, as the agent of the defendant.

But the principal point presented in this case is, whether in a sale of real estate at auction, the auctioneer is to be regarded as the agent of the purchaser, and as such competent to charge him by his signature. This is a question of great importance ; and one which does not appear to have been decided, either in this State or in Massachusetts.

It may be urged that the auctioneer, who is directly employed and deputed to act for the seller, ought in no case to be regarded as the agent of the purchaser. If this were *res integra*, strong reasons might be and have been offered in support of this position. But since the case of *Simon v. Motivos*, 3 *Burr*. 1921, 1 *W. Bl.* 599, it has been uniformly held that in sales of goods at auction, the auctioneer is to be considered as the agent of both parties ; and that his memorandum, stating the price and conditions of sale, with the name of the buyer, is a sufficient signing to charge him within the statute of frauds. This is a principle generally known to the commercial part of the community ; and has become too firmly established to be shaken. In regard to the question, whether the auctioneer is to be deemed the agent of both parties in the sale of land, or any interest therein, there has been less uniformity of opinion. The origin of the cases in which the negative has been adopted, and their history and progress, together with a series of later cases in which the affirmative has prevailed, as it would seem upon more mature consideration, has been clearly exhibited by the counsel for the plaintiff. We adopt the latter as the better opinion. There does not appear to be any good reason, why the auctioneer should be viewed as the

agent of the purchaser in the sale of goods, which does not equally apply in the sale of land. The manner of conducting sales at auction must be presumed to be well known to all who resort to them in the character of bidders. Whoever bids, does in effect authorize the auctioneer to sign his name as purchaser, if no other person bids a higher sum. The *locus penitentiæ* may be considered as continuing until this is actually done, or at least until his offer is accepted. But if the bid is not seasonably retracted, the memorandum of the auctioneer may be considered as deliberately authorized ; and this is all which the statute requires.

The declaration is adjudged good.

Holmes *vs.* Chadbourne & al.

In *Stat.* 1821. *ch.* 67, requiring the insertion of the names of bail in the margin of the execution, applies to bail taken by the gaoler, after commitment on mesne process, as well as to bail taken by the officer who served the writ.

When a debtor, committed on mesne process, is enlarged on bond before the return day, the condition should be for his appearance at Court, and not for his remaining within the debtor's limits.

This was a *scire facias* against the defendants as the bail of one *Hodgdon*. It was alleged in the writ that the original debtor being arrested on mesne process and committed to prison *Aug.* 9, 1822, the defendants six days afterwards became bail for his appearance at Court ; that judgment was rendered against him in due course of law, and that execution was regularly issued, and delivered on the same day to a deputy sheriff; that the debtor avoided ; and that the officer returned the execution at the return day, certifying thereon that he could find neither the body nor property of the debtor. But it was not stated that the bail had been notified by the officer, nor that he had the execution in his hands thirty days before the return day, as provided in the *Stat.* 1821, *ch.* 67.

The defendants pleaded *first*, that they never became bail ;—*secondly*, that the officer did not notify the bail fifteen days before the expiration of the execution; and *thirdly*, that he did not certify on the execution that it had been in his hands during thirty days next preceding the return day. To the *second* plea the plaintiff replied that the defendants never gave bail to the officer upon the writ, the debtor having been committed by him to prison for want of bail ; nor was any bail bond returned to the clerk's office, so that the clerk could insert the names of the bail in the margin of the execution. To which the defendant demurred because it was a departure from the declaration.

To the *third* plea the plaintiff demurred, because it contained no averment that the defendants gave bail to the officer who served the writ, and that they were so entered of record ;—nor that the same officer returned the bail bond to the clerk ;—nor that the clerk entered the names of the bail and their residence on the margin of the execution.

N. Emery and *H. Holmes* for the plaintiff, being called upon by the Court to support the demurrer to the third plea, said that they considered the case as not touched by *Stat.* 1821, *ch.* 67, regulating bail; and therefore as standing upon general law. The statute, requiring the officer to return the bail bond *with* the writ, can apply only to bonds taken by *that* officer, and not to those taken by the gaoler after a commitment for want of bail. *Stevens v. Bigelow* 12 *Mass.* 434. The present is one of the cases for which the legislature has not thought it expedient to make special provision, but has left it under the operation of 23. *H.* 6. *c.* 10. which is part of our common law. The cases of writs served by constables and coroners, where bail is given to the sheriff after commitment, are of similar character; in which, as the officer who served the writ has no control of the bond, it is impossible for him to return it. And the reason does not apply to these cases; for where the bail have given bond to the gaoler, they can always know to whom the principal is to be surrendered, and therefore suffer no damage. The general language therefore of the statute, which directs that the names of the bail shall

be written by the clerk in the margin of the execution, that they may be notified by the officer, must be taken with reference to those cases only in which the bond, having been taken by the officer who served the writ, is returned by him to the clerk.

If the provision which requires that the sheriff should certify that he has had the execution in his hands thirty days before the return day is applicable to this case, it is sufficiently apparent from the declaration that such was the fact.

J. and *E. Shepley*, on the other side, relied on the general and express provisions of the statute, which, they contended, rendered bail chargeable in no case, unless the bond was returned with the writ, and the bail duly notified. After commitment, they insisted, no bail could be taken for appearance at Court; but only a bond for the liberties of the prison. This bond, therefore, not being authorized by statute, no *scire facias* lies upon it. The remedy is at common law. And at common law the bond is void, being given for ease and favor.

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

Several questions might be raised upon the pleadings in this case, but the decision of the cause in favor of the defendants upon either of the pleas in bar will entitle them to judgment. Without particularly examining the merits of the second plea, we are satisfied that the third contains matter sufficient in law to bar the action, and that the causes of demurrer are of no importance. The language of the 2d *sec.* of the statute of 1821, *ch.* 67, is peremptory. It declares that "no return of *non est inventus* made by any officer on any execution shall be considered as "evidence of the debtor's avoidance, so that the bail may be rendered liable on *scire facias*, unless such officer shall certify on "such execution that he has had the same in his hands at least "thirty days before the expiration thereof." The third plea, in the language of the act, denies that there was any such certificate indorsed on the execution against *Hodgdon*—and the demurrer admits the truth of the plea, if well pleaded. We consider the causes of demurrer assigned as having no connection with this

plea, whatever connection they may have with the second; for although the bail bond was not returned, still the declaration avers that bail was duly taken; and though the names of the bail were not inserted in the margin of the execution, still these circumstances could not excuse his omission to make the certificate by law required, if the fact would warrant it; if he could not make the certificate with truth, it was the plaintiff's own fault in not placing the execution in his hands in due season;—if he could, he may be answerable to the plaintiff for the neglect, and the damages thereby occasioned. We therefore consider the third plea good and sufficient. As to the second we give no opinion.

The plaintiff considers the new and special provisions of the statute of 1821 as inapplicable to the present case, in as much as *Hodgdon* was committed to prison six days before the bail bond was given; and that in its language it has reference only to those cases where bail is taken before commitment, because the first section requires the bond to be returned to court, with the original writ, by the officer who served it; whereas the bail bond after commitment may not be taken till the return day is past, and then it cannot be so returned. Still, as the provisions of the act were introduced for the benefit and protection of the bail, and to guard them against any improper management on the part of a creditor with a view to implicate them; we are inclined to give a liberal construction and apply the provisions in the same manner in both classes of cases, because the reason, equity and design of those provisions are the same in both.

The plaintiff in his writ has treated the defendants as bail duly taken; and they have not placed their defence upon a denial of that fact in either of the special pleas in bar, but claim the protection which the statute of 1821 has provided for them as such ; if they are not bail according to law, then the plaintiff has no right to the present process of *scire facias* against them; and if they are, then they must be so considered throughout. In this light we consider them, and accordingly they are entitled to judgment for their costs.

WILLARD & AL. *vs.* MOULTON.

Where one owning a farm, which he held by two deeds, the one conveying to him an undivided third part, and the other the residue, made a mortgage deed of a tract of land, described as being the same land mentioned in his *first* deed, to which he referred, and as being his whole farm ;—it was held that this reference to the first deed must be intended for description of the land only, and not for the quantity of estate or interest conveyed ; and that the mortgage extended to the whole farm.

THIS was a writ of entry in which were demanded two undivided third parts of a parcel of land in *Sanford.*

In a case stated by the parties it was agreed that they both claimed under deeds from *Abner Hill*; and that the point in controversy arose upon the construction of their several deeds.

It appeared that on the 14th of *May*, 1811, *Joseph Hill*, being the owner of the demanded premises, and twenty acres more adjoining the same, which composed his farm, conveyed to *Abner Hill* one undivided third part of all his lands. Afterwards, by deed dated *March* 26, 1813, he conveyed to *Abner* the remaining two thirds in fee; and *Abner* released to him the twenty-acre parcel, and another tract of the same quantity, by metes and bounds. Then, by deed dated *Nov.* 27, 1821, *Abner Hill* conveyed in mortgage to *Moulton* the present tenant, certain parcels of land particularly described by reference to the title deeds of various dates, some of which adjoined his farm, but all of which he had previously alienated to other persons;—" also one other parcel " of land situate in the same *Sanford*, with the appurtenances, " particularly described and mentioned in another deed from said " *Joseph Hill* to me, dated *May* 14, 1811;—said parcels of land " being all the farm on which I now live." *Abner Hill* at that time occupied the whole of the demanded premises, with some other parcels, as his farm; and it was conceded at the bar that the description, in the deed to *Moulton*, of lands to which the mortgagor had no title, was probably inserted by a mistake of the scrivener, in selecting the wrong deeds from a number before him.

The demandants' title was a deed of mortgage from *Abner Hill* dated *March* 4, 1822, conveying "all the tracts and parcels of "land situate and being in *Sanford*, which are particularly men- "tioned in a mortgage deed dated *Nov.* 27, 1821, conveying the "same to *Jeremiah Moulton* in mortgage," &c. "Also all and "every parcel of land mentioned in a deed from *Joseph Hill* to "me dated *March* 26, 1813,—reference thereto to be had," &c.

Emery and *Butler*, for the demandants, contended that nothing passed by the deed to the tenant, except what was conveyed to *Abner Hill* by the deed of *May* 14, 1811, which was only a third part of the farm; and that the general words in this deed to the tenant, like general words in a power of attorney, were to be taken, with reference to the particular description, by which they were limited and controlled. And they cited *Connolly v. Vernon* 5 *East* 51. *Worthington v. Hylyer* 4 *Mass.* 205. *Jackson v. Clark* 7 *Johns.* 217.

Greenleaf, for the tenant, argued that his mortgage was upon the whole farm; for which he cited *Worthington v. Hylyer* 4 *Mass.* 196. *Vose v. Handy* 2 *Greenl.* 322. *Jackson v. Clark* 7 *Johns* 217. *Cate v. Thayer* 3 *Greenl.* 71. If it was not, then he was tenant in common with the demandants; and a writ of entry would not lie against him, without an actual *ouster*.

Mellen C. J. delivered the opinion of the Court at the ensuing term in Cumberland.

The only question in this cause is, whether the demanded premises were conveyed to the tenant by the mortgage deed of *Abner Hill* to him dated *Nov.* 27, 1821; for if so, the present action cannot be maintained. To answer this question correctly we must look back to prior transactions. On the 14th of *May*, 1811, *Joseph Hill* was the undisputed owner of the tract of land described in the writ (two undivided third parts of which are demanded in this suit) and twenty acres adjoining the same. On that day said *Joseph* conveyed one undivided third part of it to *Abner Hill*; and *March* 26, 1813, said *Joseph* conveyed to said

Abner the remaining two third parts, and on the same day *Abner* reconveyed said twenty acres to *Joseph* by metes and bounds. *November* 27, 1821, *Abner Hill* conveyed in mortgage to the tenant several pieces of land, not in dispute in this action, and also "one other tract of land situate in said *Sanford* with the "appurtenances, particularly described and mentioned" in the above deed from *Joseph* to *Abner* dated *May* 14, 1811. The deed purports to convey to the tenant "the tract of land described" in the deed of 1811; not the premises or estate conveyed to him in and by that deed, but the mortgagor refers to that deed for the particular description of the "tract of land" he is mortgaging to the tenant; and in order to make himself more clear and intelligible, and to exclude the idea of his meaning to convey only an undivided third part of the tract described in the deed referred to—he adds "said parcels of land being all the farm on "which I now live". It is agreed that this tract, with some other small pieces, constituted his farm. This part of the description is correct and true, on one supposition, and would be false on the other. We ought not to reject either, unless one is false and the other true and sufficient in itself; according to the principles laid down by the court in *Worthington v. Hylyer* 4. *Mass.* 205, and some other cases cited. Placing the facts in this simple point of view, the conclusion seems very clear that by the mortgage deed to the tenant of *Nov.* 27, 1821, the demanded premises, being two thirds of said tract were conveyed, as well as the one third part, which the demandant admits passed by that conveyance. The result is that this action cannot be maintained and a nonsuit must be entered.

GOOKIN *vs.* WHITTIER.

Where two persons entered as tenants in common into lands, under a deed which, being defectively executed, did not pass the estate, their occupancy, being open and actual, operated a disseisin of the grantor; so that a creditor of one of them having extended his execution on a moiety of the land, the original owner could not convey the whole land by deed to the other, to defeat the extent, without first avoiding the disseisin by a re-entry, or by judgment of law.

IN this case, which was a petition for partition of certain lands in Lyman, the petitioner claimed to hold an undivided moiety in

common with the respondent, who defended the whole tract, under the plea of sole seisin.

At the trial, before the Chief Justice, the petitioner derived his title by extent, made *March* 15, 1823, by virtue of an execution in his favour against one *Jonathan Parker*. It appeared that one *Perkins* was formerly the owner of the whole tract, containing about 300 acres, principally wild land; and that on the 7th day of *December* 1820 his attorney made a deed, intended as a conveyance of it to *Parker & Whittier* the respondent; but so defectively made and executed that it did not operate to pass any estate. The grantees, however, entered under this deed; and *Parker* inclosed and cultivated several acres of the ground, and built a house, in which he continued to dwell, claiming title to the land, up to the time of the extent. It also appeared that *Parker* and *Whittier*, in *September* 1822, joined in a deed of conveyance of about twenty-five acres of the land to another person; and that *Whittier* had at another time requested a neighbor to protect it against trespassers.

The extent of the petitioner's execution on the land was well known to *Whittier*; who was also advised by counsel that nothing passed by the deed of *Dec.* 7, 1820. And on the 24th of *October* 1824, the day before the entry of this petition in court, he procured a release from *Perkins* purporting to convey the whole land to himself alone, in fee; for the purpose, as he professed, of protecting himself, *Parker* having paid but a very small fraction of the purchase money, and having then become insolvent.

The Chief Justice ruled that the actual occupancy by *Parker*, and the extent on a moiety of the whole by the petitioner, which was duly recorded nearly fifteen months before the deed of *Oct.* 24, 1824, from *Perkins* to the respondent, operated a disseisin of *Perkins*; so that nothing passed by this last deed, and the plea of sole seisin was not supported. But he reserved the point for farther consideration, a verdict being returned for the petitioner.

Emery, for the respondent, argued that by the deed of 1820, *Perkins* was not disseised. The grantees entered in submission to his title, under which, and not against which, they professed to

hold. They were in by mistake, supposing that they had title when in fact they had none; and acknowledging, by necessary implication, that if the land was not theirs by the deed, it belonged to *Perkins*. The utmost that *Gookin* could claim by his extent, was the estate which his debtor had; and this not being a title by disseisin, the creditor could not thereby become a disseisor. *Parker*, therefore, not being disseised, might lawfully convey the land, which accordingly passed to the respondent by the deed of 1824. And it ought to operate to him only, he having paid nearly all the purchase money, for which he can have no other effectual remedy. *Portland Bank v. Hall* 13 *Mass.* 207. His title is in the nature of a tenancy by statute merchant. *Co. Lit.* 273. *a. note.*

This is not the case of a release to one of two joint disseisors; because they did not claim as joint tenants, but as tenants in common; and moreover there was no disseisin.

E. Shepley, for the petitioner, contended that *Perkins* was disseised; both by *Whittier* and *Parker*, who entered under their deed in 1820, claiming the land as their own, maintaining an open, actual and exclusive occupancy, and conveying part of it in fee; —and also by *Gookin* who acquired an actual possession by his extent. *Langdon v. Potter* 3 *Mass.* 215. *Ken. Proprs. v. Laboree* 2 *Greenl.* 275. These acts would be enough to disseise even a co-tenant. *Chapman v. Gray* 15 *Mass.* 446. *Bracket v. Norcross* 1 *Greenl.* 88. Hence nothing passed by the release to *Whittier* in 1824; certainly nothing to the prejudice of the petitioner, who stands in the place of a purchaser from *Parker*, without notice of any equitable consideration between him and his co-tenant. The release therefore, so far as it is attempted to be set up against the petitioner, is a fraud on him, and cannot prevail. *Norcross v. Widgery* 2 *Mass.* 506. 1 *Pick.* 164. *Warren v. Child* 11 *Mass.* 222. So far as it can have any effect, it enures to the benefit of both parties. *Com. Dig. tit. Release. B.* 4.

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

The respondent in this case pleads sole seisin in himself of the lands, whereof partition is prayed, upon a traverse of which, issue has been joined and a verdict having been returned for the petitioner, under the direction of the judge who presided at the trial, a motion has been made to set aside the verdict and to grant a new trial, on account of a misdirection of the judge in a matter of law.

The determination of the cause will depend upon the question whether, at the time of the execution of the release from *Elias Perkins*, upon which the respondent relies, *Perkins* was so seised of the moiety claimed by the petitioner, as that his title thereto could, consistently with the rules of law, pass to the respondent.

It is insisted that although the deed executed by the attorney of *Perkins* to *Jonathan Parker* and to the respondent, in *December* 1820, was inoperative to convey the estate of *Perkins*, it not having been executed in the manner required by law, yet that *Parker* having entered under color of that title, and thenceforward claiming the land described therein as his own, is to be considered as holding by disseisin. We have not deemed it necessary to consider how far this position is sustained by the facts, inasmuch as we are satisfied that the levy of the petitioner's execution upon the estate in possession of and claimed by *Parker* put the petitioner into the legal seisin of the land, of which *Perkins* would therefore, by the same act, be divested. The case of *Langdon v. Potter* 3 *Mass.* 215, and of the *Ken. Proprietors v. Laboree* 2 *Greenl.* 275 are authorities to this point. It is true that *Perkins* might at any time, within the period limited by law, by an entry into the land, put an end to the seisin of the petitioner, and thus reinstate himself in the possession as well as the title, so as to be in a condition to pass both to a third person; yet until this is done the law will not permit him to convey land continuing in the seisin of another. From the time of the levy the statute of limitations begins to run for the protection of the title of the petitioners, which may, by lapse of time, become indefeasable; unless it is seasonably vacated by peaceable entry,

or by judgment of law. It results that the petitioner, being legally seised by his levy, the right alone remained to *Perkins*, which he could not by law convey to the respondent. He could not therefore be sole seised, as he has alleged in his plea, and the jury having been instructed to this effect, there must be

Judgment on the verdict.

PORTER *vs.* COLE.

In a writ of entry counting on a disseisin by the tenant, the objection that the disseisin was committed by his grantor, under whose deed he entered, should be taken in abatement.

Where a deed was placed in the hands of referees, to be delivered to the grantee if their report should be accepted by the Court; and one of the referees afterwards, but before the report was returned to Court, and in anticipation of its acceptance, delivered the deed, in presence of the grantor, who did not object; this was held to be a good delivery of the deed, though the grantee afterwards procured the rejection of the report.

If a deed come to the possession of the grantee without the assent of the grantor, and he afterwards demand and receive of the grantee the price of the land, this is a good ratification of his possession of the deed, and amounts to a delivery.

So, if he sue the grantee for the price, and have judgment for it at law. And the record of such judgment is admissible, though not conclusive evidence, in an action between persons not parties to that record.

If a second purchaser is informed of the existence of a prior title to the land, it is enough to prevent the operation of his deed to defeat such title; without regard to the manner in which such information was obtained.

THIS was a writ of entry brought against *Daniel Cole, jr.* to recover possession of one twenty-fourth part, called one day, in a certain saw mill; in which the demandant counted on his own seisin and a disseisin by the tenant.

At the trial, which was before the Chief Justice upon the general issue, the demandant read to the jury a deed from *Daniel Cole*, father of the tenant, to himself, dated *March* 19, 1809, recorded *Sept.* 22, 1824, and conveying the premises in fee.

It was proved that in 1809, certain matters in dispute between the demandant and *Cole* the father having been submitted to arbitration, this deed was left with the referees, to be delivered to *Porter* if the report of the referees should be accepted by the Court, and become a settlement of all demands between them, and not otherwise. Before the session of the Court to which the report was returnable, one of the referees, not apprehending that there would be any objection to its acceptance, delivered the deed to *Porter*, in the presence of *Cole*; after which *Porter* appeared at Court and objected to the report, and thereupon it was set aside. After this, *Cole* sued *Porter* on an account annexed to the writ for $1023,77, and on a note on which about 75 dollars were due; inserting also in his writ the common money counts for 500 dollars. In the account annexed, *Porter* was charged with 65 dollars for one day in the saw mill. In 1812 judgment was rendered in this suit against *Porter*, for $1285,94; but there was no proof by any juror that the charge for the mill was allowed. The tenant objected to the admission of this judgment in evidence in the present action, he being no party to that record; but the objection was overruled.

The tenant claimed under a deed from his father, dated *Aug.* 6, 1819, and recorded *June* 10, 1824, conveying the demanded premises to him in fee. And it appeared that *Cole* the father, in *May* 1819, had taken possession of the premises, which he kept till the conveyance to his son, who entered and occupied under his deed.

The demandant proved that he told one *Staples*, a witness, that he had a deed of one day in the mill and had paid for it; of which *Staples* soon after, in *June* 1819 informed the tenant; advising him not to get into difficuly about the mill, as *Porter* intended to hold it.

The counsel for the tenant objected that the proof did not maintain the declaration against him as a disseisor, he having entered under a deed from his father. But the objection was overruled, on the ground that it should have been taken in abatement.

He also contended that the deed from *Cole* to *Porter* had never been delivered, the possession of it having been obtained improp-

erly, and without the consent of the grantor. On this point the Chief Justice instructed the jury that if they believed from the evidence, that *Cole* had charged *Porter* and recovered judgment against him for the value of the demanded portion of the mill, as on a contract of sale, and received the money, the deed, though improperly delivered to *Porter* by the referee, was from that time rightfully in his possession; and that *Cole's* charge of a day in the mill in his account, and the recovery of judgment and satisfaction therefor, were in legal contemplation equivalent to a formal delivery of the deed, and an assent of the grantor that it should be considered as a legal conveyance. He also instructed them that if they believed the testimony of *Staples*, the information he gave to the tenant was sufficient notice of the demandant's title, and prevented the deed from *Cole* the father to the tenant, though first recorded, from operating to defeat it. And a verdict was taken for the demandant, subject to the opinion of the Court.

N. Emery, for the tenant, maintained the point taken at the trial, that the evidence of a disseisin by the father or a stranger did not support the allegation of a disseisin by the tenant himself, who, it appeared, entered lawfully, under his deed from a grantor in actual possession; and that on this ground the demandant was not entitled to retain his verdict.

He also insisted on the objection to the admissibility of the judgment obtained by the father, it being *res inter alios*. But if admitted, it ought to have no application to this case, as it did not appear that the jury allowed the charge of a day in the mill, the other items sued for being larger than the sum recovered; nor was there any evidence to shew that it was the same day demanded in this action.

As to the deed to the demandant, it was never delivered. He was never to receive it as conveying title, until after the acceptance of the report. It was entrusted to him for a particular purpose; and like the possession of the deed by the grantee in *Chadwick v. Webber* 3 *Greenl.* 141, it cannot avail him. His detention of it after the rejection of the report was a fraud ; and to permit

him to derive a benefit to himself from such a transaction, does not comport with the purity of public justice. But if it were otherwise, yet under the circumstances of this case the notice to the tenant was not sufficient ; being merely general hearsay. After the demandant had silently acquiesced in the possession of *Cole* ten years, pocketing his deed, the tenant, even if he had previously known the facts, was justified in concluding that he had abandoned all pretence of claim, and was entitled to distinct and particular notice to the contrary, from the demandant himself. *Farnsworth v. Child* 4 *Mass.* 636. *Jolland v. Stainbridge* 3. *Ves. Jr.* 478. 2 *Atk.* 275.

E. Shepley, for the demandant, to the first objection, cited *Co. Lit.* 238. *b. Stearns* on real actions 149, 173, 214, 465, to shew that it could be taken only in abatement.

To the admissibility of the judgment he cited *Com. Dig. tit. Estoppel B.* 1. *Phil. Ev.* 226, 227. 3 *East* 346. 17 *Mass.* 365, 432, to shew that it was conclusive on the tenant as a privy in estate. But if not, yet it went as one of the circumstances shewing a delivery of the deed, or the assent of *Cole* to *Porter's* possession of it as a conveyance.

The delivery of the deed by the referee, in the presence of *Cole*, he contended was an absolute delivery, not being qualified by any words of limitation or restriction. For without such express qualification, every delivery of a deed is taken to be absolute. *Com. Dig. Fait. a.* 3. *Shep. Touchst.* 58, 59. *Wheelwright v. Wheelwright* 2 *Mass.* 447. *Fairbanks v. Metcalf* 8 *Mass.* 230. *Hatch v. Hatch* 9 *Mass.* 307. *Goodrich v. Walker* 1 *Johns. Ca.* 250. And if it was not good at the time, it was made so by the subsequent ratification of *Cole*, in charging the consideration money as the price of property actually sold. *Co. Lit.* 295, *b.* 301, *a. Milliken v Coombs* 1 *Greenl.* 347. Of this title of the demandant, the tenant had sufficient notice to put a prudent man on his guard; and if he afterwards saw fit to take a deed, he took it subject to the demandant's title.

MELLEN, C. J. delivered the opinion of the Court at the ensuing term in Cumberland.

Several objections have been made to the decisions and instructions of the Judge who sat in the trial of this cause. We will give them a distinct consideration. 1. It is said there is a fatal variance between the count and the proof disclosed on trial; —that the count charges the tenant as the disseisor ; and it appears by the facts reported that he entered under a deed from *Daniel Cole* and that of course the count should have been in the *per*. Admitting this to be correct, the question is whether the objection is good under the general issue. And we apprehend it is not. The tenant by his plea admitted himself to be tenant of the freehold ; and as such has defended the cause ; claiming to hold the premises by title. In this view, the objection is merely a formal one ; it is founded on the principle that, though he may be liable to a judgment on the merits, still he is not liable to the demandant in the precise character and form of counting, which the record discloses. Such an objection is in its very nature in abatement, and so should have been pleaded. A tenant may have entered, claiming title under a deed not recorded. How is a demandant to know this, and frame his count accordingly, but from information of the tenant ? If he wishes to avail himself of the exception, he may plead it in abatement, and therein give the demandant a better writ, by stating how and in what character he entered. Every principle of policy and justice requires an adherence to this course of proceeding, to prevent that delay and expense which might be the consequence of permitting a tenant to lie by and conceal this objection, until he had found all other grounds of defence fail him ; and then by means of it, surprise and nonsuit a demandant. But we need not rely on mere reasoning. The law appears settled upon this point. Lord *Coke*, speaking of the writ of entry in the *quibus*, in the *per*, in the *per* and *cui*, and in the *post*, says, 'These are called degrees, which are to be observed ; or else the writ is abatable. See *Co. Lit.* 238. *b. Rast.* 249 *a. Booth* 179, and *Stearns* on real actions 173. This objection, therefore, cannot be sustained. 2. The second

is that the demandant's title deed from *Daniel Cole* was never delivered, and so never had any legal operation. The report states "that on a certain reference in 1809, between said *Porter* and "*Daniel Cole*, said deed was left with the referees on the ex- "press condition only that it should be delivered to said *Porter* if "the report of the referees was accepted and became a settle- "ment of all demands between them." But on *Porter's* objection it was set aside. However, prior to its rejection, "one of the "referees delivered said deed to said *Porter*, in the presence of "said *Cole*." It is evident that the above condition was annexed for *Cole's* benefit and therefore he might at his pleasure waive it, and assent to the delivery of the deed before performance of this condition; and upon such a delivery it would at once become the deed of *Cole*. At the time the deed was so handed to the demandant by the referee, *Cole* must have known that the report was not, and could not have been accepted. Under such circumstances his presence and silence may well be considered as his assent, in the absence of all explanatory proof and evidence of improper conduct on the part of *Porter* in obtaining it. It may be supposed that he anticipated no objection; and thus assented to a delivery of the deed before acceptance of the report. If such was the fact, he cannot now recall his assent, and destroy the efficacy of his own deed, because he reposed his confidence unwisely and was deceived.

But without placing the decision of the cause merely on this ground, we think the after transactions disclosed in the report clearly shew the correctness of the judge's instructions to the jury, as to the operation of *Cole's* action and recovery of judgment against *Porter* for the price of the very day in the saw-mill conveyed by said deed; and payment of that judgment. There is nothing mysterious in the law on this subject, nor any thing magical in the formal delivery of a deed from the hand of the grantor to the hand of the grantee. If, without any form or ceremony, it reaches the possession of the grantee by the consent of the grantor, it is sufficient for all legal purposes. So, if the grantee takes the deed without the consent of the grantor, to-day, and to-morrow he discovers the fact, and then informs the gran-

tee that he may retain it to his own use, we should be sorry to believe that the law could not and would not sanction the transaction as a good and effectual delivery of the deed. We are all of opinion that as *Cole*, by the charges in his account, relating to the day in the mill, considered it as sold by him to *Porter*, and as he recovered the price of him, he thereby assented to consider the deed as lawfully in the hands and possession of *Porter*, and as having the operation of a legal conveyance of the property therein described. It is true that the counsel for the tenant has objected to the admission in evidence of a copy of the record of the above suit and judgment, but such an objection cannot be sustained. Parol proof would not have been admitted, to establish these facts; nothing short of the record was proper; it was admissible, though not conclusive. It is not a case within the principle of *res inter alios acta*. A similar objection was made and overruled in *Henderson vs. Seavy* 2 *Greenl.* 139.

The last objection to the verdict is that the deed from *Daniel Cole* to the tenant, though executed long after that from said *Cole* to the demandant, was registered before it, and that therefore the better title to the demanded premises was in the tenant; but the jury have decided that the tenant had knowledge of *Porter's* conveyance from *Daniel Cole*, before he received his own deed from him; and therefore the demandant's title deed has the priority, unless the cases relied on by the counsel for the tenant have established principles which require us to draw a different conclusion. It is contended that the principle of the decision in *Farnsworth v. Child* 4 *Mass.* 637 is applicable to this. In that case the second purchaser, two years before he received his deed, had read the deed from the same grantor to the demandant; and the court decided that after so long an interval, the tenant might well presume that there had been a reconveyance ; and that in consequence of that, the orginal grantor had always remained in possession; that is, the court considered that the legal effect of notice two years before, had ceased, for the reasons mentioned. There the grantor's continued possession was notorious and uninterrupted ; but in the case before us, the possession of one day in a saw-mill is of such a peculiar character as to

exhibit to third persons no distinct *indicia* ; such is the nature of the property and the mode of its use and enjoyment. Besides, it appears that the demandant's possession under his deed was not interrupted till *May* 1819, when *Daniel Cole* took possession of said day in the mill, and kept it till he sold the same to the tenant ; who neglected also to register his deed for nearly five years ; though he complains of *Porter* for his neglect of a similar nature. But though the demandant's deed was not registered when the tenant received his deed, yet the jury have found that in the *June* preceding its date, the tenant was distinctly informed by *Staples* that the demandant had a deed of the said day in the mill of *Daniel Cole*, and had paid him for it, and the tenant was advised not to get into any difficulty about it. The law requires no particular mode of notice. In *Connecticut v. Bradish*, *Jackson J.* says, "a person who takes a conveyance of "land, with knowledge, that the grantor had previously convey-"ed it to another, cannot hold it against the first purchaser."— So in *Trull v. Bigelow* 16 *Mass.* 418. *Parker C. J.* says, "a "second purchaser shall not set up a title under a registered "deed, against the first purchaser, whose deed was not regis-"tered, if he had knowledge of the prior conveyance." To this point also see *Davis v. Blunt* 6 *Mass.* 487, *Prescott v. Heard* 10 *Mass.* 60. The case from *Vesey* differs from this in several circumstances : it was a decision in chancery: whereas the numerous decisions in the court of Massachusetts have settled the principles of law upon the subject ; and those principles should be our guide. The great object is to prevent the success of fraud. No reasons appear in the case why the two deeds in question remained so many years unregistered ; if one had any personal reasons for the omission, so might the other have had. We are not to impute improper motives to either. The jury have found, that, though *Porter's* deed was not registered, when the tenant received his deed ; still that it was known to him to exist ; and that *Porter* had paid for the property conveyed by that deed ; and this knowledge being distinctly proved, the legal consequence is that the demandant's title is better than the tenant's, and therefore there must be

Judgment on the verdict.

Leigh *vs.* Horsum.

Where one borrowed money, for which he engaged to give a note signed by himself and his father, and in the interim gave his own note, for which the joint note was to be substituted ; and the joint note was accordingly signed, but was never delivered to the lender, the son being killed while in the act of carrying it to him ; and afterwards, the note falling into the father's hands, he destroyed it ;—it was held that the father was not liable for the money.

This was *assumpsit* on a promissory note made by the defendant *March* 1, 1823 for $190 payable to the plaintiff in eight months ; with a count for money had and received. At the trial before the Chief Justice the following facts were proved.

On the first of *March* 1823, *Jonathan Horsum*, a son of the defendant, applied to the plaintiff for a loan of 190 dollars, for eight months, on the credit of himself and his father the defendant; to which the plaintiff assented. As the defendant was not present, but resided several miles distant, and the son's necessity for the money was pressing, the plaintiff delivered the money to him, taking his own note for the amount, payable in ten days ; and at the same time prepared and delivered to him a joint and several note payable in eight months, to be signed by him and his father, according to the terms of the loan. This note the son agreed to take home to be signed by his father and himself ; and to return it in a few days to the plaintiff, in exchange for the note he had then given. This agreement was performed so far as to have the note signed by his father and himself ; but on the eleventh of *March* 1823, while on his way to the plaintiff's house, with the note in his pocket book, for the purpose of delivering it to the plaintiff, he was accidentally killed. The next day the plaintiff sent to the defendant, requesting him to exchange the notes as had been agreed ; which the defendant refused to do ; and on the day following destroyed the note which he had signed, by cutting out his own name. After this the plaintiff filed his claim under the first note, signed by the son only, with the commissioners on the son's estate, it being represented insolvent ; by furnishing them with a copy of the note ; and at a subsequent meeting, on

producing the original note in proof of his demand, the plaintiff told the commissioners that there was another note, given for the same debt, and signed by the father and son, but which the father retained; and as the son was dead, he did not know that he could do any thing with it. In *August* 1824, the plaintiff received a dividend of $73,73 out of the son's estate.

Upon these facts the defendant consented to a default; which was to be taken off, and a nonsuit entered, if, in the opinion of the court, the action was not maintainable.

J. Shepley, for the defendant, argued that the second note was not intended to take effect till it should be exchanged for the first; and this had never happened. It was therefore without consideration. Had the son been sued upon the first note, the existing facts would not have furnished any bar to the action, because nothing had been offered, much less accepted, in payment. As therefore the second note had never been delivered to the plaintiff, but the whole contract was arrested, while yet *in fieri*, by the death of the son, the defendant was not bound.

Nor can the action be maintained on the ground that the delivery of the second note to the son was a delivery to him as agent for the plaintiff; for one party cannot be the agent of another, to carry into effect any agreement. *Paley on Agency p. 2. Wright v. Dannah 2 Campb.* 203. And as to the money count, no liability attaches itself to the defendant, because no money came to his hands; it was borrowed by the son for his own use.

Hayes and *Cogswell* for the plaintiff. The plaintiff advanced the money upon the joint credit of the defendant and his son; the latter of whom was expressly constituted his agent, so far as this defendant was concerned, to receive a note with the defendant's signature. As soon as the defendant signed the note, and placed it in the hands of this agent, and beyond his own control, the contract, as between him and the plaintiff, was complete. The note was no longer the property of the defendant; and no one had authority to withhold it from the plaintiff. Nor had the defendant a right to require the delivery up of the first note; since that did not belong to him, but to the son's administrator.

The substance of the contract was the loan of money upon the security of both parties. This loan formed the consideration as well of the second note, as of the first. And it was a claim for this money which was filed with the commissioners; and which, upon the facts proved, may be considered as allowed upon the second note, since the plaintiff had a right to claim it of either party. The signature of the defendant to the note was, to all intents, a ratification of the terms on which the loan was obtained; and rendered him liable as a joint borrower, whether the note ever reached the plaintiff or not.

The opinion of the court was delivered at the succeeding term in Cumberland, by

MELLEN C. J. Upon the facts before us the present action cannot be maintained, unless *Jonathan Horsum*, as the son of the defendant, can be legally considered as the agent of the plaintiff, in undertaking to procure the note declared on, to be signed by him and the defendant, and returned to the plaintiff and exchanged for the note given by the son alone at the time he received the money. It is true that the plaintiff principally relied on the expected liability of the defendant, and the joint note which the son engaged to procure; but still the note signed by the son only, was to be considered as the plaintiff's security until the joint note should be substituted in its place, and that was never done. The plaintiff has unquestionably been disappointed in his expectations, and deprived of the security intended for him, by an act on the part of the defendant which morality can never sanction; but still we do not perceive how the deceased son can be considered as the plaintiff's agent in the above transaction; he was employed in accomplishing an object for his own benefit, that is in procuring a note to be signed by his father and himself payable in eight months, to be substituted for his own note payable in ten days; and he was killed before the object was accomplished. By the terms of the agreement, the joint note was not be considered as the plaintiff's property, until delivered to him in exchange for the note signed by the son only. We are therefore of opinion

that the action cannot be maintained upon the count on the joint note. Nor can the general count be considered as in any manner proved by the evidence in the case; because it does not appear, nor is it pretended that any part of the money loaned by the plaintiff ever came to the hands or use of the defendant. Accordingly the default must be stricken off, and a nonsuit entered, pursuant to the agreement of the parties.

WITHAM *vs.* CUTTS.

Where commissioners, appointed by the Judge of Probate to divide an estate among heirs, undertook to divide a lot of land between two of them; and supposing it to contain one hundred acres, they assigned to one fifty five acres on the northerly part of the lot, to extend southward till the quantity should be completed; and to the other they assigned forty five acres, being the southerly part of the lot; but made no survey or actual location of either parcel; and afterwards the lot was found to contain one hundred and thirty acres;—it was held that the surplus belonged to the two assignees, in the proportion of fifty five to forty five.

THE question in this case, which was trespass *quare clausum fregit* arose upon the division of *John Dennett's* estate in the year 1660, between his son *John* and the heirs of his son *Thomas*. It was divided by commissioners appointed by the Judge of Probate, whose return was in these words—

"The committee set off to *John Dennett*, the son of the said "*John Dennett* deceased, fifty five acres of land lying at the upper "end of *Bonnybeag* pond, being the northerly part of a lot of land "belonging to the deceased, numbered fifty six in the second "checker of the division of the common land of the proprietors "of *Kittery*; and to extend in said lot southerly till fifty five "acres are completed."

"Set off to the heirs of *Thomas Dennett* deceased, son of the "said *John Dennett* deceased, forty five acres of land, being the "southerly part of lot numbered fifty six in the second checker "of the division of said commons."

At the trial of this cause upon the general issue, before the Chief Justice, it appeared that neither of these tracts was actually surveyed and located by the commissioners. The plaintiff derived his title under *Thomas Dennett's* heirs, and the defendant under *John Dennett*; and it appeared that the lot, instead of containing only one hundred acres, as the commissioners supposed, included in fact one hundred and thirty. The question now was upon the title to this surplus. The Chief Justice ruled that it belonged to each party, by a line dividing the whole lot in the proportion of forty-five to fifty-five; and as by such a line of division, the act complained of was not done on the plaintiff's land, he directed a nonsuit, subject to the opinion of the court.

The question was briefly spoken to by *D. Goodenow* for the plaintiff, and *E. Shepley* for the defendant; and the opinion of the Court was delivered by

Mellen C. J. From an inspection of the record of the division of *Joshua Dennett's* estate, referred to in the report of this case, we must gather the intention of the committee who made the division. It seems clear that they considered the lot as containing 100 acres; and equally clear that they intended a division of the whole. The northerly part they assigned to *John Dennett*, and the southerly part to the heirs of *Thomas Dennett*. They have thus settled the proportion in which the assignees were to hold what was then supposed to be a lot containing one hundred acres. It is found to contain one hundred and thirty. If the fifty-five acres assigned to *John Dennett* had been actually run out and the boundaries established by monuments which could now be recognized, those boundaries would be conclusive as to the extent of such assignment. But there was no actual location of either of the tracts assigned. We must then resort to the next best evidence; which is the return of the committee, and their evident intention as disclosed by that return. By adopting this principle and rule of construction, we arrive at once at the same conclusion at which the Judge, who tried the cause, arrived; and we fully confirm his opinion. The principles settled by this

court in the case of *Brown v. Gay* 3 *Greenl.* 126, are applicable in all essentials, to the case at bar. It is contended that the return describes the fifty-five acres with so much precision, that it cannot be misunderstood, or by construction extended beyond the number of acres specified; and that the forty-five acres named in the return, are not so described; but that this portion being said to be the southerly part of the lot, the assignment of it should be construed to embrace all except the fifty-five acres. Such a construction might be given, if no number of acres had been named; and perhaps the plaintiff and defendant would both be limited to the specified number of acres, had the original owner of the lot conveyed the two parcels by deed to different persons. But, as before observed, the lot was supposed, at the time of division, to contain only one hundred acres; and the commissioners evidently intended to divide the whole. And they clearly intended that the share of *John Dennett* should be less by ten acres than the share assigned to the heirs of *Thomas Dennett*; yet, on the plaintiff's construction, they would hold twenty acres more. Such a construction cannot be admitted.

If both assignees should be limited to the exact number of acres mentioned in the return, the *locus in quo* would belong to neither of the parties. But the assignment is a single transaction and must be so considered; and such a consideration leads to the result above mentioned.

Accordingly the nonsuit is confirmed and there must be judgment for the defendant.

Emery *vs.* Gowen.

A father may have an action for the seduction of his minor daughter, though she resides out of his family; if he has not divested himself of the right to control her person, or to require her services.

So if, being bound an apprentice, her master turns her away; or if, with his consent, she returns to her father, and is seduced, the father may have this action.

This was an action of trespass on the case for seducing the plaintiff's daughter; and it came before this court upon exceptions filed in the court below.

It appeared at the trial in that court, that the daughter was then between twenty and twenty-one years of age ;—that at the age of 15 or 16, after the death of her mother, she was bound by her father, with her own consent, as an apprentice to her uncle, till she should be twenty-one years old ;—that she remained with him six or eight weeks, but being severely beaten by him, she left him, with her father's consent as well as with his own ; that she had since that period, with permission of her father, lived at service in different families, particularly in her grandfather's, where she was hired, though for no fixed term of service, at the time that the defendant, by persuasions and promises, seduced her. When she left her uncle she did not expect nor intend to return to her father's house, he not then being a house keeper ; but she went to her grandfather's by his consent, and returned to her father's house as soon as he commenced house keeping again, which was during her pregnancy, in the spring of 1824. At the time she was beaten by her uncle, he was intoxicated and illnatured. It took place at her grandfather's house ; and her father directed her to return to her uncle's which she did ; but remained but a few hours ; soon after which her uncle told her father he would not receive her again, and the father agreed to take care of her himself. The indentures still remained in the possession of the respective parties, uncancelled.

The uncle himself testified that the beating was severe and done with violent passion ; and that he considered that he had by that act broken the indentures on his part ; and had never since claimed any control over her person, or right to her services ; and deemed the writings of no more force than blank paper.

Upon this evidence *Whitman C. J.* ordered a nonsuit, to which the plaintiff filed exceptions.

Appleton, in support of the exceptions, contended that upon the facts disclosed the action was maintainable. If the daughter be a minor, the question whether she resided with her father or not is not material ; for though abroad or absent he is still entitled to her service, and may sustain an action of this kind, *Peakes Ca.* 55. 233. *Reeve's Dom. Rel.* 292. 3 *Dane's Abr.* 504. *Martin v.*

Payne 9 *Johns.* 387. *Nicholson v. Stryker* 10 *Johns.* 115. The only decision to the contrary is that of *Dean v. Peel* 5 *East* 45, in which the reason assigned by *Ld. Ellenborough* for his opinion is, that the daughter who dwelt in the house of her brother in law at the time of her seduction, had no *animus revertendi* ;—as if the secret intent and determination of the daughter could affect the rights of the father, or change the relation in which she stood to him. But this case is a departure from the principle of the prior decisions, and is contradicted by those more recent in New-York. See also Mr. *Christian's* note to 3 *Bl. Com.* 143, where in the case of a female, seduced while absent from her father's house, it was held that in support of the action she might be considered as still in the service of her father. It is also observable that in *England* the remedy is sought by action of trespass *vi et armis* ; but in this country by trespass on the case. 5 *Bos. & Pul.* 476. 3 *Wils.* 18.

The existence of the indentures forms no barrier against the maintenance of this suit by the father ; because they were cancelled by the consent of the parties. The uncle himself had expressly renounced all right to control the daughter, and consented to her final departure from his service ; the father, at his request, had agreed again to take her under his protection ; and all parties had for years treated the writings as blank paper. If this does not shew a sufficient cancelling, yet it proves a parol licence to depart forever from his service ; and this, as some authorities hold, is good till revoked ; *Lewis v. Wildman* 1 *Day* 153. *Reeve's Dom. Rel.* 344 ; but others admit that it cannot be revoked. 6 *Mod.* 69, 70. 3 *Vin. Abr.* 27. *tit Apprentice H. pl.* 14. So in an action of covenant against the apprentice, it is a good plea in bar that the master turned him away, and that he had faithfully served up to that time. 3 *Dane's Abr.* 595. And had the uncle brought an action of covenant upon the indentures in the case at bar, it could not, upon the evidence, have been supported. But whether they were cancelled or not, was a question properly for the jury, to whom it ought to have been submitted.

If, however, they were not cancelled, but still existing in all their original force; yet they were void, as they contained stipulations

contrary to the statute, and against the policy of the law. By the statute, males may be bound till the age of twenty-one ; but females only till their arrival to the age of eighteen. But in the present case the daughter was bound till twenty-one ; and the binding not being pursuant to the statute, the parties could derive no benefit from its provisions. *Day v. Everett* 7 *Mass.* 145. Neither could the indentures avail at common law, as they impose restraints upon the female to which the law does not lend its sanctions. By law she may contract matrimony at the age of eighteen, without the consent of her father or guardian ; but by the indentures she cannot do this until twenty-one. It is a contract in restraint of marriage, and therefore void ; 4 *Burr.* 2225 ; and is also within the principle of bonds taken by a sheriff for his fees ; 1 *Esp.* 136, or by a gaoler for his prisoner's board ; 10 *Co.* 100 *b.* 12 *Mod.* 683 ; or bonds in restraint of trade ; which it is against the policy of the law to support. *Mitchell v. Reynolds* 1 *Esp.* 194. *Colgate v. Batchelder Cro. El.* 872. But if the contract was not void *ab initio*, yet it was of no force after the daughter's arrival at the age of eighteen. At that period she was emancipated from service, by the operation of the statute ; the force of all the covenants in the indentures was expended ; and the father's right to her services was restored as before. It was after this period that the injury complained of was done.

But if the parent, at the time of the seduction, was not legally entitled to the services of his daughter, yet this action may be maintained. The loss of service is merely a fiction of law; the real ground of the action being the disgrace of the family, and the injury to their feelings. It is a rule founded in common sense, as well as in strict justice, that fictions of law shall not be permitted to work injustice. Where the daughter is bound at service and living with her master, a rigid adherence to the rule that the loss of service is the ground of action, would prevent the father's recovery ; but if the foundation of the remedy is laid in the other and better principle, the apprenticeship of the daughter would form no objection. *Reeve's Dom. Rel.* 291. And it seems unnecessary, and even absurd, to require proof of any service to the

father, since this often forms no part whatever of the ground of damages, which are frequently the largest where the least service is proved. In the case put by *Spencer J.* of a gentleman's daughter at a boarding school, the relation of master and servant, and the loss of service, are purely fictitious. The actual damage is precisely the same as if the daughter were an indented apprentice ; and if the action lies in the one case, why not in the other ? The father is entitled to this action because he is the protector and guardian of the morals and virtue of his child. And if he has, for a time, relinquished his right to her services, are his obligations and his affections suspended? Must he be supposed insensible to circumstances so deeply affecting his own happiness and the peace of his family ? Shall this action be given to a person of elevated rank, whose daughter was absent for the purposes of education ; and be denied to one of a grade less elevated, whose child was removed from him to be instructed in subjects pertaining to humble life ; but to whom an unblemished reputation and virtuous character were equally dear ? Any person standing in the relation of a parent, may support this action ; as, an uncle, or an aunt ; *Edmondson v. Machell* 2 *D & E.* 4, 5, and if this remedy is thus given where there is no obligation to support, no legal claim to service, and no actual loss of service ; does not the case of a parent, with its various, great, and continued obligations, present a claim which the law will protect ? 2 *Selw. N. P.* 1001. 3 *Rep.* 119. 2 *Phil. Ev.* 160.

J. Shepley and *D. Goodenow*, for the defendant, insisted that in all cases of this kind, the loss of service was a material allegation, and therefore must be proved. To this they cited 1 *Chitty Pl.* 47. 2 *Chitty Pl.* 267, *note u.* 2 *Phil. Ev.* 157. 3 *Selw. N. P.* 967. *Irwin v. Dearman* 11 *East* 22. 3 *Bl. Com.* 142, *note* 14. *Dean v. Peel* 5 *East* 49. 2 *Ld. Raym.* 1032. 3 *Burr.* 1878. 2 *D. & E.* 166. *Nicholson v. Stryker* 10 *Johns.* 115. If it were not so, the father might have an action for slandering his daughter; or for any injury to her person or character destructive of his own happiness. It is true that proof of slight acts of service is deemed sufficient ; but to require some proof, shews that the relation

of servant must actually exist. If wounded feelings alone could support the action, without this relation, it might be maintained by any relative, as a brother or sister, and even by each of them.

At the time of the seduction the father was not entitled to the services of the daughter; but they were due to the uncle, who alone has a right to maintain the action. The indentures were not cancelled, either by any of the methods recognized in books; or by the conduct of the parties; for there was no concurrent act to that effect. The father had done nothing to impair his own rights against the uncle; and the license given by the latter could be of no avail, unless in an action by him against the daughter for leaving his service. Nor can his single act of cruelty have this effect. The remedy for that, if any existed, was by complaint and due process under the statute respecting apprentices; or, at most, by an action on the covenants; for they are manifestly independent of each other. *Powers v. Ware* 2 *Pick.* 451.

If the indenture was not good under the statute, to entitle the master to the peculiar remedies therein provided; yet it was valid at common law, as an assignment of the services of the daughter, to which the assignee was still entitled. *Day v. Everett* 7 *Mass.* 145.

Greenleaf in reply, maintained that where the indenture of apprenticeship was void, all the covenants made to secure performance, being but ancillary covenants, were void also. *Guppy v. Jennings* 1 *Anstr.* 256;—and that these indentures were void *in toto*, because they were against the provisions of a statute; though if some of the covenants had only been void at common law, the others might have stood. *Norton v. Sims Hob.* 12. *Lee v. Coleshill Cro. El.* 529. *Laying v. Paine Willes*, 571. 5 *Vin. Abr.* 98. *Condition Y. pl.* 7, 8. *Wheeler v. Russell* 17 *Mass.* 258.

The only cases in which actual service is proved, are those in which the daughter was over twenty one at the time of the injury; as was the case in *Nicholson v. Stryker.* And even there, proof of menial service is not required, any act of duty being sufficient. But where the party was under twenty one, as was the case here, service is always presumed.

WESTON J. at the succeeding term in *Cumberland*, delivered the opinion of the court, as follows:

The foundation of this action is the supposed loss of service to the father, occasioned by the seduction. But in the estimation of damages, the wounded honor of his family and the laceration of his parental feelings are principally regarded. When the daughter is of age, it must appear that she resided in her father's family; and some acts of service, however slight, must be proved, in order to maintain the action. If the child be under twenty-one, no acts of service need be proved.

In the case of *Dean v. Peel* 5 *East* 45, the action was not maintained; the child, though a minor, not residing in her father's family; but the case appears to have turned rather upon the fact that she had no intention of returning, than upon the circumstances of her happening to reside elsewhere. *Spencer* J. in delivering the opinion of the court, in *Martin v. Payne* 9 *Johns.* 387, says, that he considers this case of *Dean v. Peel* as the only one, which has ever denied the right of the father to maintain an action for debauching his daughter, while under age; and he deems it a departure from all former decisions on this subject. And he clearly held, upon a view of the authorities, that where the daughter is a minor, though she resides out of the family, if the father has not divested himself of the power to reclaim her services, she remains his servant *de jure*, though not *de facto*, and the action is maintainable. And we are satisfied upon examination, that the weight of authority is in favor of this position.

The decision of this cause will depend then upon the question, whether the father, at the time of the seduction, had so transferred his parental rights, as to have no control over his daughter. If he had not, she being a minor, although not actually residing at the time in the family, the action is maintainable.

It is contended that in this case, the father having by indenture assigned the services of his daughter, with her consent, when she was fifteen or sixteen years of age, to her uncle, until she should be twenty-one, his control over her had ceased. We are very clear that this was not a binding out under the statute; it extend-

ing beyond the period of eighteen years ; and that therefore neither of the parties could be entitled to the special remedies therein provided. If the father refused to suffer the child to serve, or the child had left his service without his permission and against his will, the uncle had no means of getting possession of the person of the child; but his only remedy would be a suit at law against the father, upon the contract.

The statute does not however make void indentures, or assignments of the services of a child, not executed in the manner prescribed. They may be good at common law, during minority; and so they were held to be, by *Parsons C. J.* in the case of *Day v. Everett* 7 *Mass.* 145. If in pursuance of the indentures, although they did not conform to the statute, the daughter had gone into the service of the uncle, and had continued with him up to the period of the seduction; although the uncle, standing *in loco parentis*, might have maintained this action, the father could not. But it appears that the uncle, being conscious that he had treated his niece harshly and improperly, by acts of unjustifiable violence, and conceiving that the indentures were thereby broken, permitted her to leave him, after she had continued with him only six or eight weeks, and refused to receive her again; and that in point of fact she has never resided with him since. And although the uncle still retained the indentures in his possession, yet he told the father that he considered them at an end, and thereupon he consented to receive his daughter back again, and she has since been under his direction; working at different places by his consent ; and being, by his permission, at her grandfather's, at the time of the seduction.

But it is insisted that the indentures must be considered as still in force in contemplation of law, having been executed under seal; and that they could not therefore be legally discharged by parol. After what had taken place by mutual consent between the parties, it might be difficult for either party to maintain an action upon the covenants; and if in strict law, and upon technical principles, it could be done, nothing more than nominal damages could be recovered. If the parties regarded the contract as at end, and waived all remedies under it, we are not aware

upon what ground third persons can insist upon its existence. The father had the control of his daughter in fact; and no person certainly, except the uncle, could question his right thereto; which he is so far from doing, that he expressly declined receiving her, and had given up for many years all interference with her. But suppose the indentures still in force, and that the father not only had a right to insist, but did insist, upon the performance of the covenants contained in the indentures on the part of the uncle; he could only recover damages for the breach of them; having no legal means of enforcing specific performance. In the mean time, the uncle refusing to receive and protect his niece, and to fulfil towards her the parental duties, she is not to remain a vagabond in the street, and the father turned over to his contract; but the parental duties again necessarily devolve upon him, and, as incident thereto, and to enable him to discharge them, he is again reinstated in his parental rights. In every view which we can take of this case it appears to us that, at the time of the seduction, the plaintiff did control, and had a right to control, the person of his daughter, and that he may therefore legally maintain this action. The exceptions are accordingly sustained; the nonsuit is set aside; and the action is to stand for trial, at the bar of this court.

Porter *vs.* Hill.

To take a demand out of the operation of the statute of limitations, there must be either an absolute promise to pay the debt;—or a conditional promise, accompanied by proof of performance of the condition;—or an unambiguous acknowledgement of the debt, as still existing and due.

Assumpsit on a promissory note, dated *Feb.* 15, 1810, to which the statute of limitations was pleaded.

At the trial of this cause in the court below, before *Whitman C. J.* the plaintiff, to take the case out of the operation of the statute, called a witness; who testified that in a conversation,

about a year before the commencement of this suit, the defendant said that his debts had all been cancelled by the Lord about four years since, at which time he had received new light. He also observed that the plaintiff, a few days previous, had called on him to pay a note which he held against him, but that he should not pay it ; and being asked whether he owed the note or not, he said—"I did owe the note to *Porter*, for his services as "a physician in my family, when I lived in *Biddeford* ; but the "Lord has forgiven me my debts." The defendant was a deluded follower of one *Jacob Cochran*, a fanatic, who committed many excesses in this county a few years since.

Upon this evidence a case being made for the opinion of the court, the Judge ruled that it was sufficient to take the case out of the statute, and entered judgment for the plaintiff, from which the defendant appealed to this Court.

D. Goodenow, being about to argue for the defendant, was stopped by the court ; whose opinion being pretty strongly intimated, the cause was submitted by *Thacher & Fairfield* for the plaintiff without argument.

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

In the case of *Perley v. Little* 3 *Greenl.* 97, we collected and examined the principal decisions upon the statute of limitations, so far as they have reference to the point as to what will amount to a new promise, or such an acknowledgement as will take a case out of the statute ; and to that case we refer. We need do no more on this occasion than merely to state that according to the opinion there delivered, nothing short of an absolute promise; or a conditional promise accompanied by proof of a performance of the condition ; or an unambiguous acknowledgement of the debt as existing and due at the time of such acknowledgement, will save a case from the operation of the statute. That case was not known when this cause was decided in the C. C. Pleas. Is there in the case before us any proof of this description? The debt was contracted by the defendant in 1810. Since that time it seems he has become and now is one of the followers of the

fanatical *Jacob Cochran*, and under the delusion peculiar to that infatuated sect; according to the defendant's account, when he became a convert to their strange religion, he received new light; and, at the same time, the Lord cancelled and forgave him all his debts; and when speaking of the note in question, he said he should not pay it. Now, however wild and whimsical were the opinions entertained and expressed by the defendant, in relation to the alleged forgiveness and cancellation of his debts; yet, in searching for his intentions in the use of the language above mentioned, we may and ought to apply the maxim "as a man thinketh, so is he." He considered his debts as all irrevocable, for the reasons he assigned; and though he did not deny that he once owed the plaintiff, yet his expressions in regard to the note in question, as well as his other debts, are at least as strong as if he had said that his debts were all barred by the statute of limitations, and that he should rely on that defence. The defendant shewed his sincerity and consistency by going on and saying that he should not pay the note. Taking the circumstances of this case and all the declarations of the defendant together, we see no proof of any thing amounting to a new promise or acknowledgment of the debt sued for; but on the contrary, he avows his perfect absolution, and his determination to resist the plaintiff's claim. The present case falls within the range of our decision in the before named case of *Perley v. Little*; and consequently the action cannot be maintained.

Plaintiff nonsuit.

Moor *vs.* Newfield.

A school committee of three, appointed by a district, has no authority to hire a school master; that power being vested in the school agent by *Stat.* 1821 *ch.* 117.

Parol evidence is inadmissible to prove the transactions of a school district meeting; the only legal evidence being the record itself, or an attested copy.

Where a town has directed the mode of calling the meetings of school districts, it is necessary, in proving their transactions, to shew that such directions have been pursued. To shew that a meeting was held *de facto* by all the inhabitants who were qualified to attend, is not sufficient.

In a writ of error to the Court of Common Pleas, to reverse a judgment rendered in favor of the present defendants, in an action of *assumpsit* brought by the present plaintiff, the case was thus:—

The plaintiff, being duly qualified as a schoolmaster, was employed to keep the school in district No. 2, in *Newfield*, for the month of *April* 1824, at the agreed price of fifteen dollars, which he accordingly did; and for which this action was brought. He was employed by a person claiming to be one of the school committee, or school agent, at the request of two other persons claiming to act as school committee-men of the district for that year.

A legal meeting of the inhabitants of *Newfield* had been called to be holden *April* 7, 1823, for the purpose, among other things, of determining whether the town would authorize the school districts to choose their own agents; and at this meeting it was determined in the affirmative. At the same meeting it was also voted that the standing clerk of each district should notify the several district meetings, by giving public notice at the most public place within the district, ten days, at least, previous to the meeting. But these votes, respecting the manner of calling the district meetings, were passed without any article in the warrant for that purpose; and apparently without any request of the district.

The plaintiff, at the trial, offered to prove that the persons who employed him were chosen a committee, at a meeting of the

inhabitants of the school district No. 2, in *Newfield*, held on a notice given to them by the then acting clerk of the district, who had acted as such for several years previous; and that all the legal voters, who were not incapable of attending, did attend and vote at the meeting.

He also offered to prove that the money of the district, to the amount of more than forty dollars, remained unexpended, because a person who had been employed before him to keep the school, was not qualified as a schoolmaster, and had been indicted and convicted for presuming to act in that office without the legal qualifications, and dismissed from the school; and that the inhabitants making complaints because the school was not supplied with an instructer, the plaintiff was employed for that purpose.

This evidence was rejected by *Whitman C. J.* who tried the cause; and being of opinion that the plaintiff had not made out his case, he ordered a nonsuit; to which the plaintiff filed exceptions and brought up the case by writ of error at common law. The errors assigned were, 1st—the rejection of evidence offered; 2d—that the evidence admitted was adjudged insufficient, and the plaintiff nonsuited; 3d—the general error.

N. Emery for the plaintiff in error.

E. Shepley for the defendants in error.

MELLEN, C. J. at the ensuing term in Cumberland, delivered the opinion of the court.

The first section of the act of 1821, *ch.* 117 provides, that all monies for the support of schools shall be raised by towns and plantations. The third section requires every town, &c. to choose a school-committee, and an agent for each district; and makes it the duty of such agent to hire school masters, &c. but by the first section of the act of 1822 *ch.* 196, towns may authorize school districts to choose their own agents; but it does not make any change in the duties of such agents, when so chosen. The eighth section authorizes the inhabitants of any school district at a district meeting, called according to the provisions of the eleventh sec-

tion, to raise money for certain specified purposes ; viz. for "erecting, repairing or removing a school house, and of purchasing "land on which the same may stand, and utensils therefor." And at the close of the eleventh section a district is empowered to choose "a committee to superintend the laying out and ex- "pending the money raised by such district, agreeably to their "vote for the purposes aforesaid." The eleventh section appoints the mode in which towns are to call district meetings ; and also authorizes towns, at the request of such districts, to determine how notice of future district meetings shall be given ; and provides that at such district meetings a clerk may be chosen who shall be sworn and keep a record of all votes. Such being the law, the question is whether the parol evidence, which was offered and rejected was legally admissible. The plaintiff offered to prove that at a meeting of those of the district who were able to attend, a committee was elected ; and that such committee employed him as a school-master. But the law has appointed the district school agents to hire school-masters ; and not a district committee, whose duties are of a different character ; neither the legislature nor the town have reposed confidence in them as to the hiring of school-masters. The plaintiff offered to prove that on a notice given, all the legal voters in said district, who were not incapacitated to attend, did attend the meeting ; but it does not appear how they were notified; whereas the vote of the town required that public notice should have been given at the most public place within the district. But in addition to these objections, if the acting clerk had been duly sworn, of which there was no proof offered, it was his duty to record all votes passed at the meeting ; and the only legal mode of proving facts on record, is by the record itself, or an attested copy of it. It is said that such a decision must operate severely upon a person contracting with municipal officers, supposed by him to be acting lawfully under competent authority. Such may be the case ; but he who attempts to charge a corporation on a contract, must prove a contract legally made, or it cannot be binding. It is urged that in the circumstances of this case the law will imply a promise on the part of the town ; as they must have

known the plaintiff to have been in their service ; and thus assented to it. The answer to this argument is that, as his employment, according to the provisions of the law, was a matter of district jurisdiction and concern, the assent of the town to his employment cannot be inferred ; it was a subject in which they had no particular interest or feelings ; in fact the relation in which the town stood to the plaintiff seems to discountenance all presumption of assent or implied promise on their part.

The Court perceive no error on the record, and accordingly the *Judgment is affirmed with costs.*

THE INHABITANTS OF PARSONSFIELD *vs.* THE INHABITANTS OF KENNEBUNKPORT.

Minor children follow the settlement which their mother acquires by a second marriage.

The domicil of a minor is not changed by absence from the parent's house seven years, at service in different places, there being no evidence of any intention not to return.

THIS case, which was *assumpsit* for the support of a pauper, was brought up by the defendants who appealed from a decision of *Whitman C. J.* rendered against them in the Court below, upon a statement of facts agreed by the parties.

The question was upon the settlement of the pauper, who was a female under twenty one years of age, having a mother living, but no father. It was agreed that the mother of the pauper formerly had her settlement in *Parsonsfield*, and was there married ; but her husband had no lawful settlement in this State, and he died previous to the year 1811. In *January* 1811 the mother, while the pauper resided with her, married a second husband, whose dwelling and legal settlement were in *Kennebunkport*, in which town she has ever since resided. After this marriage the pauper continued to live with her mother till 1816, at which time she left *Kennebunkport*, and has ever since resided in *Parsonsfield*

and *Cornish*, working out by the week. In one of these towns she dwelt on the 21st day of *March* 1821, engaged in her usual employments, and so continued till the supplies in this case were furnished.

The cause was submitted to the Court upon written arguments furnished in the last summer vacation, of which the following is an abstract.

McIntire, for the plaintiffs. The settlement of the pauper in *Parsonsfield*, was changed to *Kennebunkport* in one of two modes;—1st. by following the settlement of her mother, as is provided in the second mode in *Stat.* 1793, *ch.* 34, *sec.* 2 ;—or, 2d. by having her domicil in *Kennebunkport* at the time the statute of *March* 21, 1821, was passed, from which place she was then absent only for the purpose of labor.

1. It has often been decided, under the statute of 1793, that the settlement of legitimate children, changes with that of the father, until they are emancipated. And recently in *Massachusetts*, in a case parallel with the present, the settlement of the mother, acquired by a second marriage, has been holden to transfer the settlement of her minor children by the former husband. *Plymouth v. Freetown* 2 *Pick.* 197. If it be objected, that the marriage of the mother was an emancipation of the children, by rendering her incapable to do any act affecting their settlement or conduct ; it may be replied that the settlement was changed by the act of marriage, which was perfect and complete before the power of the husband commenced ; and of course before she could have parted with any of her own rights. And moreover the change of settlement in the children is effected not by the act of the mother, but by the operation of law upon the marriage itself ; in the same manner as it operates upon the acquisition of a freehold estate either by purchase or descent ; or upon the incorporation of a plantation. In either of these cases, the settlement of the mother would, without any volition of her own, affect the settlement of the children ; and her settlement acquired by a second marriage, as it rests on the same principles, ought to be attended with the same consequences. But the

minor child is not emancipated by the marriage of the mother ; even in the case of an illegitimate child ; *Wright v. Wright* 2 *Mass.* 110 ; much less in the case of those born in wedlock. *Petersham v. Dana* 12 *Mass.* 429. *Dedham v. Natick* 16 *Mass.* 135; and with good reason, too, is it so held; because the mother, as well as the father, is bound to support them, by *Stat.* 1793, *ch.* 59, and at the marriage of a widow, having children, the second husband assumes all her pecuniary as well as personal responsibilities. The pauper therefore, followed the settlement of her mother. 2. But if she was emancipated by the second marriage of her mother, she was capable of gaining a settlement by the statute of *March* 21, 1821 operating upon her domicil ; and this, as the case shews, she had fixed at the house of her mother in *Kennebunkport.* This place, according to the decision of this court in the case of *Parsonsfield v. Perkins* 2 *Greenl.* 411, must be considered as her home, until she manifests her intention of fixing one in some other place. But no such intention appears, and is not to be presumed. On the contrary she was absent only for temporary purposes of labor.

Dane, for the defendants. 1. At common law, minor children, though they are removed with the mother to the place of settlement of her husband, did not thereby acquire a derivative settlement under her ; though they might be continued with her for the purposes of nurture. *Freetown v. Taunton* 16 *Mass.* 52. *Cumner Parish v. Milton Parish* 3 *Salk.* 259.

2. This rule of the common law is not changed by *Stat.* 1793 *ch.* 34, which enacts that legitimate children, if their father have no settlement, shall follow that of the mother ; because this is not to be referred to her settlement gained by a second marriage but to one acquired in some other way, consistent with her right to control the persons of her children. This limitation of the rule is considered as fully supported by *Parsons C. J.* in *Springfield v. Wilbraham* 4 *Mass.* 493. The foundation of derivative settlements is the parental right to control the person, and to receive the earnings of the child. But neither of these rights being permitted to the father in law, he communicates no new rights to the children of his wife. As to him, they are emancipated, and

therefore capable of acquiring settlements of their own. For every minor is emancipated who is not bound to yield his person nor the avails of his labor to the control of another. The settlement of the pauper therefore remained in *Parsonsfield*, unaffected by the second marriage of the mother. *Freto v. Brown* 4 *Mass.* 675. It can hardly be necessary to add that the mother retained no legal right over the child, where her husband had none; since her rights are commensurate only with his.

If the father in law acquired by the marriage no right over the person of the pauper, neither did she thereby gain a right to the protection of his house as her domicil or home. And therefore she was settled by the operation of *Stat.* 1821, *ch.* 122 in the town where she then dwelt and had her home; which, as the case finds, was either in *Parsonsfield* or *Cornish.*

The case of *Plymouth v. Freetown* 1 *Pick.* 197, may seem to militate with these positions; but that case, it will be observed, was decided without argument, and does not appear to have received much consideration; and the point now made was not presented to the court.

Mellen C. J. delivered the opinion of the court at the ensuing *November* term in *Cumberland*, as follows:

By the second marriage of the pauper's mother in 1811, she lost her original settlement in *Parsonsfield* and gained a new one in *Kennebunkport*; the pauper being then about five years of age. The first question is whether she thereby gained a derivative settlement in that town also under the mother; and if she did, second, whether she ever lost it by gaining another. Prior to the statute of 1793, *ch.* 34, minor children, having the settlement of their mother, did not acquire a new settlement gained by her marriage, although they removed with her to the place of such new settlement. Such was the common law. See *Freetown v. Taunton* 16 *Mass.* 52, and cases there cited. But that statute altered the common law in this respect, and provided that "legit-"imate children shall follow and have the settlement of their "father, if he shall have any within the commonwealth, until "they gain a settlement of their own; but if he shall have none,

"they shall in like manner follow and have the settlement of their "mother, if she shall have any." The decision in the case of *Plymouth v. Freetown* 1 *Pick.* 197 recognizes, and is founded on this distinction. It is said that that case was submitted without argument, and that the opinion of the court is briefly given. Still the facts of that case are similar to those of the present ; and the reasons of the opinion are clearly stated. There seems to be no reason for questioning its correctness. We do not perceive how the case of *Springfield vs. Wilbraham*, cited by the defendant's counsel, can have any bearing on this cause. The point there decided was that, upon a father's gaining a new settlement, a child of full age, voluntarily living with him, does not gain a new settlement within the abovementioned statute of 1793. The case at bar presents no question resembling this in any degree. We are therefore satisfied that the pauper gained a settlement in *Kennebunkport* in virtue of her mother's second marriage. The second question is whether the pauper has lost this settlement by gaining one in *Parsonsfield* or *Cornish* in virtue of the statute of 1821, *ch.* 122. She was at that time about fifteen years of age ; but in the year 1816, she left *Kennebunkport* and had continued to reside in *Parsonsfield* and *Cornish*, "working out by the week. In one "of these towns she resided when the act was passed, engaged in "her usual employment, and continued so to reside until the sup- "plies were furnished." From the time of her mother's marriage she continued to live in the family of her father-in-law, and under her mother's care, till 1816 ; and the case presents no facts shewing the reasons of her leaving this family and going to *Parsonsfield* or *Cornish*, and working out, as mentioned in the statement. Such a practice is very common in all parts of the country. It is true, her father in law was not bound to maintain her ; but no facts appear shewing that his house was not a home for her, so long as she inclined to remain in his family. So that when she went into the country she seems to have had a home to which she was welcome, as well as a legal settlement, in *Kennebunkport*. The case gives us no grounds on which we are to construe her residence in *Parsonsfield* and *Cornish* as any thing more than a temporary one, for purposes of personal convenience or advant-

age ; she having the liberty to return to the family of her father in law at her pleasure. Not a fact in the case forbids this conclusion, or even renders it improbable. See *St. George v. Deer Isle* 3 *Greenl.* 390. We cannot consider the pauper as having resided, dwelt and had her home either in *Parsonsfield* or *Cornish* on the 21st of *March* 1821, according to the true intent and meaning of the statute before mentioned, passed on that day ; and on these grounds the defence fails. It is not necessary to decide whether, upon the facts before us, the pauper was emancipated by her mother's second marriage, because, if she was, it is of no importance in this case, unless she gained a settlement in *Parsonsfield* or *Cornish* under the act of 1821 ; and as she did not, her capacity to gain one, could not alter the case. According to the agreement of the parties a default must be entered.

Meserve *vs.* Dyer.

The party against whom a trespass has been committed, does not thereby become a creditor of the trespasser ; nor is he on that account entitled to impeach a conveyance on the ground of fraud, unless the conveyance is subsequent to the rendition of judgment in an action for the trespass.

In trespass *quare clausum fregit*, the defendant justified as the aid of a deputy sheriff who levied an execution upon the land as the estate of one *Jacobs* ; the defendant being the judgment creditor. The plaintiff replied that it was his own soil and freehold, traversing the title of *Jacobs* ; on which issue was joined.

The plaintiff's title was by deed from *Jacobs*, dated *June* 11, and recorded *June* 25, 1824.

The defendant's judgment against *Jacobs* was rendered *July* 17, 1824, in an action of trespass *quare clausum fregit*, alleged in the writ to have been committed in *April* preceding; and the proceedings under this judgment, in setting off the land, were in the forms prescribed by law.

At the trial, before the Chief Justice, the defendant offered further to prove that the trespass alleged in this writ against *Jacobs* was in fact committed in *April* 1824; and that the deed from *Jacobs* to the plaintiff was made without any valuable consideration paid by the plaintiff; and was fraudulent and void, against the defendant. But this evidence the Chief Justice refused to admit, on the ground that the defendant did not become a creditor of *Jacobs* till the recovery of his judgment; which being subsequent to the plaintiff's deed, he was therefore not entitled to impeach that conveyance. To which the defendant filed exceptions.

Appleton, in support of the exceptions, read an argument to this effect.—The first inquiry is whether the present defendant was a creditor of the grantor of the plaintiff at the time of the conveyance. And upon general principles it would seem that he was; because he had a demand against the grantor, which, both by law and in equity, ought to be paid. The uncertainty of its amount forms no objection; for this would apply equally to all cases of goods sold without an agreed price.

It is well settled that a debtor shall not be permitted to convey his property with the fraudulent intent to cheat his creditor. But if this rule is introduced for the protection of those whose debtor he has become by contract; why is it not applicable, and with stronger reason, to one whose property he has obtained, or destroyed, by wrong? Why not extend its benefits to the man he has injured, as well as to him he has not?

If the trespasser in this case had given his promissory note for the value of the trespass, it would have been given upon a sufficient consideration; and the conveyance would have been fraudulent as to *Dyer*. Upon what principle, then, shall he be in a worse situation, after having by process of law obtained judgment for the same amount? It is admitted that after judgment, the party prevailing is a creditor. But is he more so than before? Is the relative situation of the parties changed by the judgment? If the judgment is right, it is because it is founded in a precedent obligation of the defendant to the plaintiff, to pay money; and it is only in such an obligation that the relation of debtor and creditor is founded.

Again, in all cases of goods tortiously taken or detained, the owner may waive the tort, and proceed in assumpsit against the wrong doer, charging him on an implied promise to pay the value of the property taken. Now if a trespasser is not to be considered as a debtor, so far at least as to be restrained from conveying his estate to defraud the party injured; then it will depend upon the election of the mode of remedy whether the plaintiff shall be cheated or not. In the one case he will be regarded as a creditor from the time his goods were taken; but in the other not till judgment is obtained for the taking; and his right to impeach a fraudulent conveyance will turn wholly on the language in which he sought a remedy for the wrong he has suffered.

But the case of the defendant is within the *Stat.* 13. *Eliz. ch.* 5, which has been adopted here; giving it a liberal construction, to answer its beneficial purposes, as in *Cadogan v. Kennett Cowp.* 426. 1 *Dane* 625. By this statute all conveyances made to defraud creditors and others of their debts, damages, penalties, forfeitures, mortuaries, heriots, &c. are declared void. And like cases, "in semblable mischief," shall be taken to be within the remedy of this act. *Co. Lit.* 290 *b.* It extends not only to creditors, but to all others who have any cause of action, penalty or forfeiture. 1 *Fonbl.* 279. 3 *Co.* 82 *a. Cro. Eliz.* 233. And the judgment when recovered, has such relation back to the time when the cause of action accrued, as to avoid all conveyances fraudulently made to prevent its execution. 8 *Cranch* 416. Though in cases of forfeiture nothing vests in the government till the adoption of legal measures against the offender; yet the doctrine of relation is then carried back to the time of the commission of the offence. *United States v. Grundy* 3 *Cranch* 350. The same principle is applied to the case of an informer. *Roberts v. Witherall* 5 *Mod.* 193. 3 *Cranch* 362, 365. None but *bona fide* purchasers are protected by the common law; *Staund. P. C.* 193; nor even these, in cases of attainder, where the purchase was after the offence committed. 2 *Bac. Abr.* 582. *Hale's P. C.* 29. *Plowd.* 260. So of a sale after robbery committed, and before conviction. *Skin.* 357. So in case of heriots, the lord's title is not defeated by a sale made for that purpose by the ten-

ant, though his title does not accrue till the tenant's death. Now the analogy between these cases and judgments resulting from trespasses is strong, and the same rules of law should govern in both cases.

But admitting *Dyer* to be no creditor till he obtained judgment, yet if the conveyance to the plaintiff was made without consideration, or with intent to defraud *subsequent* creditors, it is void as against them. All conveyances without consideration, except family settlements, may be avoided by subsequent purchasers. *Roberts on Fraud. Conv.* 12, 19. 459;—and if any mark of collusion, fraud, or intent to deceive subsequent creditors appears, such conveyances are void. *Townsend v. Windham* 2 *Ves.* 10. 1 *Fonbl. Eq.* 272. *Twine's case* 3 *Co.* 80. Present indebtedness of the grantor is a badge of fraud in a voluntary conveyance; and so is a view to future indebtedness. 2 *Atk.* 481. The word "others" after "creditors," in the statute of 13 *Eliz. cap.* 5, was interpreted by *Ld. Hardwicke* to include subsequent creditors. 2 *Atk.* 600. *Stiles v. Atto. Gen.* 2 *Atk.* 152. *Partridge v. Gopp Ambl.* 596. And wherever an intent appears to make provision for other persons at the expense of creditors, the law interposes to defeat it. *Assignees of Gardiner v. Skinner* 2 *Sch. & Lefr.* 227. *Mountfort v. Ranie Keb.* 499. *Roberts Fr. Conv.* 573. 3 *Co.* 83. In *Connecticut* a case occurred in which a voluntary conveyance was made, with intent to defeat the judgment which might be recovered in an action of trespass *vi et armis*, then pending. The cause of action arose before the making of the deed; but the judgment was recovered after. Yet the conveyance was held void; because otherwise a man may do another the greatest possible mischief, and then, by a fraudulent conveyance, defeat his right to obtain satisfaction out of his estate. 1 *Con. Rep.* 195. The same principles are recognized in New-York. *Jackson v. Myers* 18 *Johns.* 425. And in Massachusetts the doctrine has been applied to a case where one, about to be prosecuted under the bastardy act, made a conveyance with intent to defraud the prosecutrix of the benefit of her judgment of filiation, should any be obtained. *Damon v. Bryant* 2 *Pick.* 414.—See also the cases of *Russell v. Hammond* 2 *Atk.* 13. *Doe v. Routledge Cowp.* 711.

Peat v. Powell Ambl. 387. *Marcy v. Clark* 17 *Mass.* 330. *Bayard v. Hoffman* 4 *Johns. Ch. R.* 450. *Goodwin v. Hubbard* 15 *Mass.* 210. 1 *Dane* 669 and cases there cited. Upon authority, therefore, as well as upon principle, *Dyer* was entitled to impeach the conveyance for fraud ; and, as against him, it is void.

D. Goodenow, for the plaintiff, relied on the position that the party impeaching a conveyance on the ground of fraud, must have been a creditor at the time it was made. To this point he cited *Parker v. Porter & al.* 9 *Mass.* 390. *Riggs v. Thatcher* 1 *Greenl.* 68. 1 *Mass.* 134. 2 *Pick.* 198. The same principle governs in conveyances merely voluntary. *Bennett v. The New-Bedford Bank* 11 *Mass.* 421.

The rule is founded in this, that where one makes a contract, he by implication pledges his body and estate for its performance. But this rule, it is manifest, can never be applied to contracts not existing at the time of the conveyance; much less to cases of mere trespass, which die with the person, and in which the party denies all liability whatever. It is absurd to suppose him denying the obligation *in toto*, and at the same time admitting its force, but evading the performance.

But however this may be, the plaintiff is entitled to recover in this case for the taking away and destroying his crop. For the deed not being merely void, but voidable only, the crop on the ground at the termination of his estate belonged to the tenant in possession at the time ; and the taking it away by the defendant was a trespass.

After this argument, the cause being continued for advisement, the opinion of the court was delivered at the ensuing *September* term at *Wiscasset*, as follows, by

Mellen C. J. The counsel for the defendant, to entitle his client to contest the operation of the deed from *Jacobs* to the plaintiff, by proving it a fraudulent conveyance, or in other words, to shew that *Dyer* was a creditor of *Jacobs* at the time the deed was made, read a copy of a judgment recovered by himself against *Jacobs* some time after the date of the deed, for a trespass

committed by him on *Dyer's* land some time before the deed; and having done this, he offered to prove that the deed was given without any consideration paid by *Meserve* and was fraudulent and void against *Dyer*. This evidence the Judge rejected, on the ground that *Dyer* did not become a creditor of *Jacobs* until the recovery of the judgment. On this abstract question we think the decision of the Judge was correct. Until judgment, all was contingent and uncertain; had *Jacobs* died before judgment, the right of action would have died also; and before judgment he could not have been adjudged a trustee of *Dyer*. The same remark applies to actions of slander, assault and battery, &c. *Dyer* therefore, not having been a creditor of *Jacobs* at the time of the conveyance, he could not, according to the practice as understood to have prevailed in our courts, be received to impeach it. In this respect, the decision, against which the exceptions were alleged, was conformable to such practice. We have listened with pleasure to the able arguments of the counsel ; and have since also heard another cause argued in the county of Cumberland, involving the same general question, as well as some others, connected with it; the facts in which last mentioned case were of such a nature as to present the questions and principles which the counsel have discussed, in a more ample and interesting manner. We have accordingly preferred to deliver our opinion at large in that case rather than in this; and we refer to that for all the reasoning and authorities on which our opinion in both causes is founded. The case to which we have alluded is that of *Howe v. Ward*. As the defendant in this case offered to prove that the deed from *Jacobs* to *Meserve* was made without any consideration, and was fraudulent and void, we must understand that he offered to prove all those facts which would render the conveyance void as against him, although he was not a creditor of *Jacobs* at the time, according to the provisions of the statute of 13 *Eliz. ch.* 5.

In this view of the subject the court sustain the exceptions, and the verdict is accordingly set aside and a

New trial granted.

GOWEN, *ex parte*.

Whether the provisions of *Stat.* 1821, *ch.* 57, and of *Stat.* 1822, *ch.* 193, *sec.* 8, respecting the granting of reviews and new trials, extend to prosecutions under the statute for the maintenance of bastard children;—*Quære.*

Whether a new trial can be granted by the court of Common Pleas after a year from the rendition of judgment, though the application was made within that time;—*Quære.*

THIS was an application for a writ of *mandamus* to be issued to the court of Common Pleas, to grant the applicant a new trial of a prosecution under the statute for the maintenance of bastard children; which *Whitman C. J.* of that court had refused, on the ground that the statute authorizing new trials did not extend to cases of that description. The petition was presented to the court of Common Pleas within a year from the rendition of judgment, but that period had now expired.

After hearing the application, the Court refused to grant a rule to shew cause, expressing themselves to the following effect—

WESTON J. By chapter 57, *sec.* 1, of the revised laws, defining the powers of the judicial courts in granting reviews, it is provided, that whenever there shall have been any legal cause for any judicial court to set aside any verdict before judgment, but nevertheless judgment shall have been rendered on such verdict; the justices of the court may, at any of their terms, giving due notice to the adverse party, grant a review, if they see fit. And by the eighth section of the act, establishing the court of Common Pleas, that court is empowered, within a year after judgment has been rendered, in any action of which it has final jurisdiction, after giving due notice, to grant a new trial, whenever in their opinion the purposes of justice require it. Whether in virtue of either of these statutes, that court has jurisdiction to order a reexamination of the facts in issue, in a prosecution under the act for the maintenance of bastard children, from the view I have taken of the application before the court, I do not deem it necessary to give an opinion ; there being in my apprehension, other sufficient reasons for refusing the rule prayed for. The claims

of justice may sometimes require a review or further trial in these cases; and I am not at this time prepared to say that, when judgment shall have been once rendered, it is out of the reach of the court having final jurisdiction of the subject matter.

The application was made in the court below under the eighth section of the act before referred to, establishing the court of Common Pleas. By this act, that court has no power to grant a new trial at any time, after a year shall have elapsed from the rendition of judgment. The limitation is not, that application be made within a year, but that the court must exercise this power, if at all, within that period. If, in the opinion of this court, the appeal was properly made to the discretion of the Common Pleas by the petitioner, and that they ought to have taken such order upon it as its merits required, when it was presented, the time within which they could by law sustain it has now passed; and it does not appear to me that we have any authority to revive their power; so as to call it into exercise after the period, expressly limited by statute, has expired. This court has without doubt the power, where other adequate remedies do not exist, by writs of *mandamus* to compel other courts of subordinate jurisdiction to do their duty; but such courts ought, when required to do certain acts by this process, to have the legal right and the power to do what is enjoined upon them. It is not enough that it should appear that they have failed in their duty; but that it remains a continuing duty, of which it is the object of this writ to compel a specific performance.

In the case of *Howard v. Gage* 6 *Mass.* 462, the court refused a writ of *mandamus*, because the period for which the petitioner claimed to be elected to the office to which he sought to be admitted, might expire, before there could be a final decision. The reasoning there, would justify the court in withholding the process; even if the application had been made in this case within the year; but after that has elapsed, and the power of the Common Pleas to do what the petitioner prays to have enjoined upon them by this court, has ceased by limitation of law, a case does not appear to me to be presented, in which this court ought to interfere; I am therefore opposed to granting the rule.

PREBLE J. expressed some doubt whether the statutes authorizing reviews and new trials in certain cases, could be construed to extend to prosecutions under the statute for the maintenance of bastard children. But without giving any opinion on this point he was in favour of granting a rule to shew cause, that the question might be properly discussed and determined.

MELLEN C. J. By the application before us, and the admission of the counsel presenting it, we are informed that the court of Common Pleas declined to hear or proceed on the motion or petition for a new trial, on the ground that they had no authority by law to grant one. This court is now called on to grant a rule on the court of Common Pleas, to shew cause why a *mandamus* should not issue to compel that court to hear and proceed upon such motion or petition. To my mind nothing can be more clear than that this court should deny the rule, unless they are satisfied they have authority to issue the writ prayed for; that is, unless they are satisfied the court of Common Pleas has power to grant a new trial in the case in question. In ordinary cases a rule to shew cause is granted, because facts may exist, with which this court is wholly unacquainted, but which, upon the return of the rule, may be disclosed, and furnish sufficient reasons for denying the writ. But the case before us is different. A want of jurisdiction is the reason assigned by the court of Common Pleas, for not hearing and proceeding on the motion for a new trial. This is not a matter of fact to be shewn on the return of a rule; but a matter of law, of which, in my apprehension, this court is bound officially to take notice. I do not perceive the use or even the propriety of calling on the court of Common Pleas, (in the form of a rule to shew cause) to inform us what the law is upon the question presented in and by the application before us. To my mind such a proceeding would be intrinsically improper. This court is, or ought to be, already in possession of that knowledge of the law, by means of which it must be ascertained and decided whether the court of Common Pleas had, in the case in question, any legal power to grant a new trial as prayed for. If this court is of opinion that the court of Common Pleas had that

power, a rule ought to be granted ; otherwise, I should be against granting it. On this point, being already in possession of reasons and principles sufficient to convince me that a writ of *mandamus* ought not to issue, I do not wish the court of Common Pleas to furnish me with any more. My reasons, in a few words are these. By law no appeal has ever been allowed, I believe, in Massachusetts, or this State, to the Supreme Judicial Court, from a judgment in a prosecution upon the statute for the maintenance of bastard children. The judgment of the court below always has been final. The statute of Massachusetts and that of this State, giving power to the Supreme Judicial Court to grant reviews in civil actions,never embraced prosecutions for the maintenance of bastard children ; and constant usage and construction confirm this. The 8th section of the act establishing the court of Common Pleas, does not in its terms embrace such a case ; and I consider that section as only giving to that court, in certain cases, a concurrent power with this court, to grant a new trial after judgment; a power which, prior to that time, was vested exclusively in this court; but I consider that no greater or broader power is given to that court than this possesess ; and that of course, it does not extend to the case of a prosecution of this kind, which is not a proceeding according to the course of the common law. Had the legislature intended to give to the court of Common Pleas a power to grant a new trial in such a case, they would have so expressed it; and probably made some provision as to the effect which such new trial, and the acquittal of the party accused, should have upon the bond given for a compliance with the order of court, and the indemnification of the town which would be otherwise chargeable with the maintenance of the child.

For these reasons I am opposed to granting a rule to shew cause.

Rule refused.

N. Emery and *E. Shepley* for the applicant.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

CUMBERLAND.

MAY TERM,

1826.

VALLANCE *vs.* SAWYER.

A writ of *scire facias* on a recognizance to prosecute an appeal, should be issued originally from the court appealed to.

It is not necessary that the party appealing should personally enter into recognizance for the prosecution of the appeal. If it be done *by* sureties, it is as if done "with sureties," within the meaning of *Stat.* 1822, *ch.* 193, *sec.* 4.

THE plaintiff in this case having obtained judgment in the court below against one *Manchester*, who was absent, the attorney of the latter entered an appeal to this court, and became bound by recognizance himself as principal, with the present defendant *Sawyer* as surety, for the prosecution of the appeal; which not being done, the plaintiff entered the recognizance of record in this court at the term appealed to, and now brought in this court the present *scire facias* thereon. Upon oyer of the recognizance and demurrer thereupon, the defendant made two objections;—1st that the recognizance was void, because the party defendant did not himself stipulate as principal;—2d. that this court had not original jurisdiction of the matter, it belonging to the court where the recognizance was taken.

Daveis, in support of the demurrer, argued to the first point, that a recognizance was founded on a pre-existing fact, imposing a duty on the party bound. It is a recognition of an obligation already existing ; and therefore where the principal owes no duty, he cannot be bound by recognizance, though he might by bond. The rule yields only to those cases where the party is legally incapable of being bound. And he likened this to the case of bail, who are not liable unless the principal has executed the bond *Bean v. Parker* 17 *Mass.* 591. So of an administration bond, not executed by the administrator ; *Wood v. Washburn* 2 *Pick.* 26. The language also of the *Stat.* 1822, *ch.* 193, *sec.* 4, is express that the party appealing shall recognize ; though this he may do by attorney. *Adams v. Robinson* 1 *Pick.* 461.

To the second point, he said that the *scire facias* should have issued from the court of Common Pleas, because the recognizance is in the possession, and among the *apud acta*, of that court. It is only a copy that comes up to this court. The settled principle is, that the *scire facias* shall issue from the court having possession of the record on which it is founded. *Bridge v. Ford* 4 *Mass.* 461. *Johnson v. Randall* 7 *Mass.* 209. *State v. Richardson* 2 *Greenl.* 115.

Longfellow, *Fessenden* and *Deblois*, *e contra*. The defendant having entered voluntarily into the recognizance, the objection that the principal is not bound, is not open to him. It was not permitted to an executor, who gave bail when not obliged by law so to do. 2 *Stra.* 245. 3 *Burr.* 330. *Crosset v. Hunter* 1 *Johns.* 495. Bail are estopped to gainsay their recognizance. 1 *Pick.* 461. One may bind himself that another shall perform an award; *a fortiori* that he shall prosecute an appeal. *Cutter v. Whitmore* 10 *Mass.* 445. And the requisition of the statute that he shall be bound *with* sureties, may mean *by* sureties. *Dixon v. Dixon* 2 *Bos. & Pul.* 444.

To shew that the *scire facias* ought to issue out of the court to which the cause was removed by appeal, they cited *Bridge v. Ford* 7 *Mass.* 209. *Johnson v. Randall* 7 *Mass.* 304. *Commonwealth v. Downing* 9 *Mass.* 520. *Co. Lit.* 290. *King v. Butler* 3 *Lev.* 223. *F. N. B.* 265. *Shuttle v. Wood* 2 *Salk.* 600. *Wright v. Treweeke* 2 *Barnes* 347. 2 *D. & E.* 365.

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

Two objections are made to the declaration. The first is, that the *scire facias* should not have issued from this court, but from the court of Common Pleas, where the recognizance was taken. The usage has invariably been to issue it from that court to which the appeal is made, for the prosecution of which the recognizance is taken, and to which the same is properly returned; and where the final judgment is rendered, for the total or partial satisfaction of which, recourse is had to the sureties in the recognizance, there is the record of such judgment. The very language of the writ, "as to us appears of record," shews this. In addition to the reason of the thing, the authorities cited by the plaintiff's counsel are decisive of the question.

In the second place it is contended that the recognizance in the present case is void, inasmuch as *Manchester*, the defendant in the original action, did not join in it as one of the recognizors and as principal; the language of the statute, in virtue of which the appeal was claimed, requiring that the party appealing shall first recognize, with sufficient sureties to prosecute his appeal with effect. And some cases have been cited, and others put by way of illustration to shew the necessity of a recognizance of the party appealing. They are, however, different from this. The case of *Bean v. Parker & al.* 17 *Mass.* 591, was that of a bail bond, which contained the name of the principal in the body of it; and a seal, opposite to which it was intended to be subscribed; but he never signed it; but only the persons becoming bail. The court considered the bail as not bound. Among other reasons they say, "the remedy of the sureties against the bail would "wholly fail, or be much impeded, if such an instrument as this "should be held binding. Suppose they wish to arrest the princi- "pal in some distant place, or in some other State, what evidence "would they carry with them that they were his bail. There is "nothing to estop him from denying the fact; nor any proof that "it was true. By our statute the bail are all along considered "as sureties; and a principal is recognized in every section." In another part of the case the Chief Justice observes, by way of

distinction, that "most of the cases cited to shew that the debtor "himself need not be bound, are cases of bail above, by recogni- "zance." The present is also a case of recognizance; and the distinction is as observable in this case as it was in that. But authorities are not wanting, which appear to have settled the question under consideration. The language of our statute certainly is not more explicit than that of the statute of 3 *Jac.* 1 *cap.* 8, which provides that no execution shall be stayed by any writ of error or *supersedeas* thereon, "unless such person or persons, "in whose name or names such writ shall be brought, with two "sufficient sureties—shall first, before such stay made or *super-* "*sedeas* awarded, be bound unto the party for whom any such "judgment is or shall be given, by recognizance to be acknowl- "edged in the same court," &c. But the construction has been that the plaintiff in error need not himself enter into the recognizance, but may find sureties who will enter into it. *Goodtitle v. Bennington Barnes* 75. *Lushington v. Doe ib.* 78. *Barnes v. Bulwar Carth.* 121. *Keene v. Deardon* 8 *East* 298. So the court in *Dixon v. Dixon* 2 *Bos. & Pul.* 443, decided that the words "with sureties" made use of in that statute might be construed "by sureties." This construction is in perfect compatibility with the design of the law. The object in that case, and in the provision in our statute on the subject, is to furnish security for the benefit of the other party. The plaintiff in error in one case, and the appellant in the other, is himself liable without a recognizance. The object was to furnish additional security by the liability of the sureties; if sureties recognize, that object is attained. The reasoning of the court in *Bean v. Parker* does not apply here. In *Wood v. Washburne* 1 *Pick.* 24, there were several pleas;—one was that the administratrix herself did not sign the bond; this was admitted by the demurrer; the fourth plea was that the bond was not a probate bond, and that the cause of action if any accrued within the jurisdiction of the court of Common Pleas; on these two pleas the judgment was for the defendant. The defendant's counsel admits that if an appellant is a *feme covert* or an infant, the recognizance cannot be entered into by the appellant; sureties only can in such case become responsible.

A friend may, as principal, enter into the recognizance with sureties, or the recognizance may be entered into by sureties only; in either case the design of the law is answered. The statute, however, makes no exception of the cases of *femes covert* and infants, nor specially provides for them. Construction may as well extend to other cases as to those two. We must look to the substance and not to the mere form, when examining a contract to ascertain the meaning of the parties. In the case before us the intention is clear, beyond the posibility of doubt; no law forbids our giving to the contract its intended effect; but on the contrary, the authorities are clearly in favor of it. We therefore are all of opinion that the declaration is good and sufficient in law, and there must be judgment for the plaintiff.

Baker *vs.* Appleton.

Where the verdict, on a trial in this court, is for a greater sum than was given in the court below, the court, on a hearing as to costs, will not go out of the record to ascertain whether the damages, though apparently increased, are in truth diminished as to the principal sum in dispute, and the apparent increase occasioned only by the accumulation of interest.

In this action, which was for a partial breach of the covenant of good right to sell, &c. in a deed of conveyance, the plaintiff had judgment in the court below, at *March* term 1823, for two hundred dollars; from which the defendant appealed; and at the last *November* term the plaintiff had a verdict and judgment in this court for two hundred and twelve dollars and eighty-five cents;—and the question was, whether the damages were reduced in this court, within the meaning of the *Stat.* 1822, *ch.* 193, so as to confine the plaintiff to the taxation of single costs only.

Longfellow, for the defendant, contended that they were. He said that it must be presumed that the jury in the court below were properly instructed; and that as the rule of damages in this

case was the amount of so much of the purchase money and interest, as was paid for that part of the land which the plaintiff could not hold; it would be found, by deducting the interest from each verdict, that the jury in that court had computed the principal sum much higher than in this; and that as the proportional value of the land lost was in reality the subject of dispute, the defendant had in effect succeeded in reducing the damages, within the true intent of the statute. *Kavanagh & al. v. Askins* 2 *Greenl.* 397.

But THE COURT decided otherwise. They said that in the case of *Kavanagh & al. v. Askins*, all the facts appeared on the record, of which they were bound to take notice; and moreover were strictly subjects of arithmetical calculation. But it was not so here, where the methods by which the different juries proceeded in making up their verdicts could not be known. In cases like the present, the only safe rule is a comparison of the two sums found, and by this rule the plaintiff is entitled to double costs.

Fessenden and *Eveleth* for the plaintiff.

BAKER *vs.* BAKER.

Dower may be demanded and assigned by parol. And authority to demand dower for another may be given in like manner. It is not necessary that it should be demanded on the land.

An authority to demand dower, implies also the power to assent to, or receive, the assignment of it.

THIS action, which was a writ of dower, came before the court upon a case stated by the parties, in which the principal question was upon the sufficiency of the demand of dower.

It appeared that the plaintiff having verbally requested a counsellor of this court to demand her dower in the premises, and to

take all due measures to obtain it, he addressed to the defendant a letter, in the following terms;—"*Lydia Baker*, widow of *Jo-* "*siah Baker*, late of *Westbrook*, deceased, demands of you her "dower in the land you purchased of said *Josiah*, and you are "hereby required to set off her just third part of said land." This letter was delivered by him to a deputy sheriff with a request that he would demand the dower, and leave a copy of the letter with the tenant; which he did, with the previous concurrence of the widow; making the demand at the dwelling house of the tenant, which stood near, but not upon, the premises. The tenant made no objection to the authority by which the demand was made, but denied her right to dower in the premises, alleging that he bought the land before her marriage.

Hopkins, for the demandant. In all the books no other points are laid down in the action of dower, than the marriage, seisin, and death of the husband. These points are admitted in the statement of facts in the case at bar, the only question being upon the notice. This, at common law, was not necessary; and the action of dower still lies at common law, notwithstanding the statute. It was the duty of the heir to assign the dower; but if the dowress permitted him to use it, inasmuch as he was in by right, as his inheritance, she had no remedy for the issues and profits and she could not recover them by writ of dower, unless she made a demand; prior to which no damages were estimated. An opinion has indeed prevailed, though without authority to support it, that a demand is necessary, one month prior to the commencement of the suit; but wherever it has prevailed, it appears very clearly to be founded only on the supposition that damages for the detention of dower are taken into consideration; and upon any other ground it cannot be supported, either by the common law, or by statute. *Co. Lit. 32 b.*

It is said in *Stearns on Real Actions, app. No. 75 note*, that a demand need not be averred in the count, though it must be proved. But this can be necessary only to obtain damages. For if it were essential to the action, it would be as necessary to aver the demand, as to set forth the marriage, seisin and death of the husband.

The object of *Stat.* 1783, *ch.* 40 was evidently to provide a remedy in damages for the detention of dower, beyond one month after demand made. It does not take away the common law remedy. At common law dower might be recovered without demand; and also damages, if the dower had been demanded. To save damages, the tenant should assign dower in a reasonable time, according to circumstances. The statute fixes this time to one month; which is the only change it has made in the common law.

The demand in this case was sufficient, both as to the agent by whom, and the place where it was made. Even a stranger, by order of the disseisee, may make an effectual entry to revest a possession;—*Stearns on Real Actions, p.* 19, 25, 43, 45, 46;—And if so, *a fortiori* to make demand of dower. And the demand being made at the house of the tenant, and within view of the land, is as good as if made on the land itself.

But if the manner or circumstances of the demand were originally open to exception, this has been waived by the tenant himself; whose objection went solely to the right of the demandant to any dower in the premises, in whatever form she might demand it. The ground of his refusal to assign dower, as it went to the substance of her title, rendered any regard to form wholly superfluous. This position, though without any case directly in point to support it, falls clearly within the principle adopted in other cases. *Paris v. Hiram* 12 *Mass.* 262. *Ayer v. Spring* 10 *Mass.* 83. *Embden v. Augusta* 10 *Mass.* 308. *York v. Penobscot* 2 *Greenl.* 1. 1 *Esp. Dig.* 300. *Mead v. Small* 2 *Greenl.* 207. The law seems to dispense with ceremonies in all cases where, from the condition of the parties concerned, they become wholly futile and unavailing.

Frost, for the tenant.

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

The demand, which the statute prescribed prior to the institution of an action for dower, is intended to give notice of the claim; and that the party is desirous of enjoying it, as soon as it can be conveniently assigned. It is an act *in pais*, not required to be in writing, or to be done with any special formality or solemnity. It may be made either by the party in person;

or by some one deputed to act in her behalf. The assignment of dower itself need not be by deed or other instrument in writing; the widow holding not of the heir or other tenant of whom she may demand it, but of her deceased husband, or by appointment of law. *Conant v. Little* 1 *Pick.* 189. The demand only ascertains the period from thirty days after which her right to damages accrues, if her dower is withheld. There seems to be no good reason therefore why the agency of the person deputed to make the demand may not be created by parol; as in a great variety of other cases, where the agent is thus sufficiently empowered to enter into contract, and to do many other acts, which bind his principal. This parol authority may be given directly by the principal to the agent, or communicated through the instrumentality of others. In the present case the plaintiff employed an attorney to take the proper steps to assert her right to dower. As a measure preliminary to the commencement of an action, the attorney by letter demanded her dower, in behalf of his principal. This letter he forwarded by the hands of another who, before he delivered it, had the express authority of the principal, recognizing and sanctioning the course pursued.

But it is contended that the demand is insufficient, because the person sent to make it by delivering the letter, was not authorized to receive the assignment. After demand made, if the party whose duty it is to assign dower, proceed to do it and assign it fairly, to the extent of the dowager's right, he will have a good and legal defence against any further claim. If the demand is made by the widow in person, and the party in possession is disposed then to make the assignment, he can proceed to do so as soon as it can conveniently be done. If made through the intervention of another, and he is thus disposed, authority to demand may imply an authority to assent to, or receive that which is demanded; or notice to the agent that he will then proceed may be deemed notice to the principal; and if she desire to be present she may receive notice in fact from her agent. If the party prefer to make the assignment at some other time, within the thirty days allowed, he should give reasonable notice to her of the time when he proposes to make it.

It is agreed in the present case, that the tenant made no objection to the authority of the agent, and that he refused to set off the demandant's dower ; denying altogether her right to be endowed of the land in question. The point therefore now made by the tenant, that the agent or messenger employed was not authorized to receive dower, does not seem to be entitled to much favor.

As to the demand being made upon the land, the statute does not require it; nor has any authority been adduced, in which it has been deemed necessary. It has been supposed to be analogous to those cases where, in order to be entitled to enter for condition broken for nonpayment of rent, it must on the day be demanded on the land. Great strictness was there required, because the estate was thereby defeated. In such cases, the rent was to be paid on the day when demanded. If in the assignment of dower, the law required that it should be done when demanded, or on the day of demand, there might be a propriety in holding that the demand should be made upon the land ; otherwise, if demanded at a distance from the land, the party might not be able to assign dower, on the day of demand, although, he might be desirous of doing it. But the law allowing thirty days, within which to perform the duty, after notice and demand of the claim, ample time is afforded to make the assignment, without the necessity of a demand upon the land.

It appears to us that the land, in which dower was demanded, was, at the time of the demand, described with sufficient certainty. The tenant readily understood what was intended to be communicated.

The demandant having, in the opinion of the court, a right by law to maintain this action, according to the agreement of the parties, the tenant is to be defaulted.

FOXCROFT, *treasurer, &c. vs.* NEVENS & ALS.

If, in an action on a bond given for the faithful performance of the duties of an office, the principal is defaulted, the declaration is to be taken as true against him alone; and the sureties are not thereby precluded from any matter proper for their defence.

Under *Stat.* 1821, *ch.* 116, *sec.* 1, the lists of assessment of taxes must be *signed* by the assessors. The signing of the warrant, usually inserted at the end of the tax-bill, is not a sufficient compliance with the statute in this particular.

A collector of taxes, having given bond conditioned that he should "well and "truly collect all such rates for which he should have *sufficient warrant*, "under the hands of the assessors, according to law, and pay the same into the "treasury," &c. received of the assessors a tax-bill *not signed*, together with a warrant in legal form for the collection of the taxes; after which he received, by voluntary payments, the amount of a large part of the taxes, which he neglected to account for.—In an action on the bond it was held to extend only to such taxes as he might collect after receiving a full legal authority to enforce the collection;—and that the tax-bill not being *signed*, the warrant annexed to it was insufficient, and the condition was therefore saved.

THIS was an action of debt on a bond given by the defendant *Nevens* on being chosen collector of taxes for the town of *New-Gloucester*, and conditioned that he should "well and truly col-"lect all such rates for which he should have *sufficient warrant*, "under the hands of the assessors, according to law, and pay the "same into the treasury," &c. *Nevens*, the principal defendant, never appeared in the suit, and his default was entered of record in the court below, at the first term.

The pleadings of the sureties presented two questions of fact. 1st. whether the taxes committed to the defendant *Nevens* to collect were duly and legally assessed; and 2d.—whether the warrant delivered to him by the assessors was a sufficient warrant.

To prove the first issue, the plaintiff shewed that the assessors and collector were duly chosen and sworn, and that the monies assessed were legally raised by votes of the town, and authorized by the State and county warrants. He then offered a book purporting to be a tax-book or list, but wanting the signature of the assessors; and which for that reason, the Chief Justice, before whom the cause was tried, rejected.

He also offered a warrant in legal form, under the hands and seals of the assessors, and annexed to the tax-book or list above mentioned, directing the collector to collect the taxes mentioned in that list; but this also the Chief Justice rejected, on the ground that it was not a sufficient warrant for the collection of *those sums.*

It however appeared that *Nevens* had collected and received monies of many persons named in the list, by the supposed virtue of the warrant.

It was contended by the counsel for the plaintiff that the default of the principal defendant in the action was conclusive against his sureties; and if not, yet that the plaintiff was entitled to judgment and execution for such monies as the collector had actually received *virtute officii.* But both these points were overruled, and a verdict taken for the defendants, subject to the opinion of the court.

Longfellow and *Greenleaf*, for the plaintiff.

The defendants are concluded by the default of *Nevens*, the principal in the bond; for the liabilities of sureties are in all things coextensive with those of the principal. *Bigelow v. Bridge* 8 *Mass.* 276. By the *Stat.* 1821, *ch.* 59, *sec.* 15, the default of the defendant being recorded, "the charge in the declaration "shall be taken and deemed to be true." And the evidence of the breach of the bond being thus become matter of record, it cannot now be contradicted by the other defendants. They may perhaps be received to plead *non est factum*, or any other plea tending to their own personal discharge; but not a plea which goes to the whole merits of the action. 1 *Chitty's Pl.* 546. 7 *Vin. Abr.* 458 *pl.* 6, 7, 8, 9, 10. 1 *Phil. Evid.* 141. 5 *Dane's Abr.* 678.

But upon the merits, the plaintiff is entitled to recover. By the terms "sufficient warrant" the parties evidently intended no more than that *Nevens* should not be liable for not compelling payments, unless he had the means of compulsion. A warrant was necessary only to compel the unwilling. It conferred no authority to receive the money from those who were willing to pay; for

that he already had by virtue of his office, as soon as each person's proportion was fixed by the assessors. And whatever monies he thus received, it was his official duty to pay over.

None but the persons taxed can take advantage of the defects in the list of assessments. And these have waived the objection, by making voluntary payments, which they cannot now recover back. It was no more than each man's just proportion of the tax, which, in equity and conscience, he ought to pay. *Bize v. Dickason* 1 *D. & E.* 286. *Price v. Neal* 3 *Burr.* 1357. *Moses v. McFerlan* 2 *Burr.* 1012, which, as to this point, is not overruled. *Cartwright v. Rowley* 2 *Esp.* 723. 2 *Comyn on Contr.* 37. In this view of the case it is as if an administrator should receive the voluntary payment of a debt not recoverable at law, as of a note usurious, or given for a gaming debt, &c.—or if a sheriff should in like manner receive the amount of an execution having no seal, &c. —in either of which cases the *bondsmen* could not be admitted to say the money was not received *virtute officii.*

Orr and *Fessenden* for the defendants.

The condition of the bond has reference to two things, the first of which, viz. the delivery of a "sufficient warrant," was to be performed by the obligee; and he having failed to do this, the condition is saved. Where the condition does not specify by whom an act is to be done, it shall be done by him who is skilled in performing it. 5 *Dane's Abr.* 176. And here the first act belonged to the assessors, as officers of the town, whom the plaintiff represents. Its omission may be a serious injury to the sureties; for in case of the absconding of the collector, they ought to have the benefit of the bills to finish the collection; but if these are illegal, they would be of no avail. The warrant is not sufficient, because it does not authorize the collection of a legal tax; for the assessment not being signed by the assessors, it is incomplete and void. *Colby v. Russell* 3 *Greenl.* 227.

Nor does the voluntary payment of any sums assessed, impart vitality to the tax list, or strengthen the plaintiff's right of action. To say that though the party has not done what he stipulated to do, yet he has performed another thing as good, is no answer to

an action for covenant broken. 5 *Dane's Abr.* 181. *Buckland v. Bartow* 2 *H. Bl.* 136. Such payments therefore do not save the condition on the part of the obligee to deliver a warrant sufficient to enforce the collection of the taxes; and the bond is for that cause of no validity against the defendants. If the defendant *Nevens* has received money belonging to the town, he may be liable in *assumpsit*; but not on the bond, which is wholly a distinct contract, deriving all its force from an act to be done by the obligee, prior to which the liability of the obligors did not commence.

They were about to reply to the arguments on the effect of the default of the principal; but were stopped by the court; whose opinion was afterwards delivered by

WESTON J. With regard to the first point taken by the counsel for the plaintiffs, we are very clear that the default of the principal can have no effect to charge the sureties. The declaration is to be taken as true only against the party defaulted. The provision of the statute relied upon, cannot fairly be considered as extending further. The case of *Dawes v. Shed*, 15 *Mass.* 6, and of *Baylies v. Davis*, 1 *Pick.* 206, are authorities to this point.

The liability of the sureties depends upon the legal construction of the condition of the bond. By this condition, *Nevens*, the principal, was well and truly to collect all such rates as should be committed to him, for which he should have a sufficient warrant, under the hands of the assessors according to law; render a due account thereof, and pay over the same. The first act was to be done by the assessors of the town in whose behalf this action is prosecuted. They were to commit rates or assessments to the collector; with a sufficient warrant for their collection. How this is to be done the statute prescribes. The assessments thus to be committed, are to be under the hands of the assessors, or the major part of them. It appears in the case before us, that no assessments, under the hands of the assessors, were committed to the collector. That this is an essential requisite, which cannot be dispensed with, we have decided in the case of *Colby v. Russell & al.* 3 *Greenl.* 227, in which similar language was used in

a private statute. The collector therefore was clothed with no sufficient warrant or authority to collect, by any compulsory method, any of the sums borne on the list, which was put into his hands. It would seem, from the express language of the condition, that the sureties undertook for the fidelity of their principal, when he should be furnished with the legal and proper authority, necessary to the effectual discharge of his duty. This not having been done, we cannot extend their liability by construction, beyond the bounds by which it is expressly qualified and limited in plain and explicit terms.

It is contended however that, although the collector had no means of compelling payment, yet if persons borne on the list, waiving all exceptions to the regularity of the proceedings, had voluntarily paid the sums set against their names, the collector might well receive them, and that it became his official duty to account for, and pay over monies which might thus come to his hands, more especially as it is insisted that persons paying, under these circumstances, could not legally reclaim or recover back the same. All this may be true ; yet the language of the condition does not appear to be broad enough to embrace this part of his official duty ; if such it is to be considered. Had the bond been conditioned for the faithful discharge of his duty as collector which the statute requires, the liability of the sureties would doubtless have been commensurate with his duties ; and we are not prepared to decide that the facts in this case would not have constituted a breach of the condition of such a bond. But the limitation here extends as well to the sums, which were to be accounted for and paid over, as to those which were to be collected ; namely to the sums which should be contained in the rates or assessments committed to him, and for the collection of which he should have a sufficient warrant.

Upon the whole, considering the special terms of the condition of the bond before us, and that the insufficiency of the authority of the collector, arises from the negligence of the officers of the town, in whose behalf the plaintiff prosecutes this action, we are satisfied that the jury were rightly directed by the judge, who presided at the trial ; and that there must be

Judgment on the verdict.

HALE *vs.* THE INHABITANTS OF PORTLAND.

Where a widow had held a parcel of her husband's estate for nearly 30 years, under a deed in fee from one of the heirs ; it was held that in an action by another of the heirs for an undivided portion of the same land, it could not be presumed, against the deed under which she had entered and claimed, that she held as tenant in dower.

THIS was a writ of right on the seisin of *John C. Stickney*, to recover two undivided ninth parts of a lot of land in *Portland*.

In 1796, *Feb.* 19, *Joseph Hooper*, and *Mary* his wife, who was supposed to be the sole heiress of the ancestor, conveyed to *Lucy Stickney*, his widow, the whole of the demanded premises in fee, with general warranty ; in consideration of ten dollars, and of her release to them of her right of dower in his estate. From Mrs. *Stickney* the same lot was conveyed, by several mesne conveyances in fee simple, to the present tenants ; she and her grantees having continued to occupy and claim it under their respective deeds, ever since the conveyance by *Hooper* and his wife to the widow. And their title to the whole lot was supposed to be good, till it was recently discovered that *Hooper* and wife were lawfully seised of only five ninth parts.

The tenants hereupon contended that the widow being entitled to dower in her husband's estate, the conveyance to her ought to be treated as an assignment of dower ; and that after this lapse of time, the jury ought to presume that she entered into the lot as tenant in dower, under a sufficient assignment; and that, as she was still living, and the tenants held all her right, this action could not be maintained. But the Chief Justice, before whom the cause was tried, was of opinion that no such presumption was admissible, against her entry under the deed from *Hooper*, claiming the fee, and her subsequent deed conveying the whole lot in fee simple. And a verdict was returned for the demandant, subject to the opinion of the court.

Longfellow, for the tenant, now urged the point taken at the trial, contending that as dower needs not to be assigned by deed, but may be set out *in pais*, by metes and bounds, her separate

occupancy of the lot for so many years undisturbed, ought to be taken as evidence of such an assignment, *ut res magis valeat*. 1 *Phil. Ev.* 129. 5 *Cranch* 262. 14 *Mass.* 88. *Conant v. Little* 1 *Pick.* 189. *Jones v. Brewer ib.* 317.

Fessenden and *Deblois*, on the other side, were stopped by the court, whose opinion was afterwards delivered by

MELLEN C. J. We are all satisfied that the instructions given to the jury were correct. As to that proportion of the estate which was legally conveyed by the deed of *Hooper* and wife to *Lucy Stickney*, she claimed to hold it and did hold it as tenant in fee simple ; so says the deed, and that is not to be contradicted by her. Not only so, but she afterwards conveyed legally this same proportion in fee with warranty. As to the proportion not rightfully conveyed to her by the deed of *Hooper* and wife, she claimed and possessed it, under the mistaken idea that she had derived a title to it by that deed. She never pretended to claim or hold it adversely to the rights of *Hooper* and wife. But as it has recently been discovered that the whole of the estate, described in the deed of *Hooper* and wife, did not pass, though *Lucy Stickney* and all concerned supposed it did, this explains the reasons and the nature of her possession of the whole ; and at once shews her motives ; and the deed in connection with these circumstances, excludes all presumption that she entered into and claimed the estate as, and in lieu of her dower. Whether there was a conveyance of her dower to *Hooper*, does not appear, though it is mentioned as part of the consideration of the deed from *Hooper* and wife; but this single circumstance goes far to shew that the deed itself could not have been intended as an assignment to her, of the lands therein described, as and in lieu of her dower, even if no other explanatory facts appeared in the case. We perceive no defence to the action and accordingly there must be *Judgment on the verdict.*

How *vs.* Codman.

The proper remedy against the indorser of a writ is by *scire facias.*

The "*prison charges*" mentioned in *Stat.* 1821, *ch.* 59, *sec.* 8, do not include the sheriff's fees on execution.

In *scire facias* against the indorser of a writ, no interest is allowed on the judgment recovered in the original suit.

The common law that an agent, acting in the name of his principal, does not bind himself, is altered by *Stat.* 1821, *ch.* 59, *sec.* 8, so far as it regards indorsers of writs.

This was a *scire facias* against the defendant as indorser of an original writ in favor of one *Cram* against *How*, in a suit wherein *How* prevailed, and had execution for his costs. *Cram*, having been committed to prison on the execution, had been discharged by taking the poor debtor's oath.

The plaintiff now claimed the amount of his judgment for costs, together with the price of the writ of execution, and the sheriff's fees, paid for committing *Cram* to prison; with interest.

The defendant offered to prove that when he indorsed the writ, which was done thus—"*Green Cram*, by his attorney *R. A. L. Codman*," the plaintiff *Cram* was present, and authorized him so to indorse it. This evidence was excluded by the Chief Justice, before whom the cause was tried, he deeming it immaterial; and a verdict was returned by his direction for the plaintiff, for the amount of all his demand, except the interest; there being no proof that *Cram* had sufficient property to satisfy the execution.

The verdict was taken subject to the opinion of the court on the following questions:

1. Whether the writ of *scire facias* was the proper remedy.
2. Whether the evidence offered by the defendant was properly rejected.
3. Whether the defendant was answerable for the costs of commitment.
4. Whether the plaintiff was entitled to interest on the judgment.

And the verdict was to be amended or set aside accordingly.

Longfellow, for the defendant, observed that different forms of action had been resorted to in cases like the present, but no express decision having been had upon the propriety of any of them, the question still remained open. And he contended that *scire facias* was not the proper remedy. There is nothing by which the court can make up the judgment, the cause of action being partly matter of record, and partly matter *en pais*. The amount, so far as the expenses of commitment are concerned, can only be ascertained by parol testimony, and the intervention of a jury.

This mode of remedy could not be resorted to against bail, till the statute gave it; because their liability here is not of record, as in England; but it is by bond to the sheriff. And the reason for denying it against the indorser of a writ is the same.

He was proceeding, under the second question, to argue that by the form of the indorsement the defendant bound his principal, and not himself;—but was stopped by the Chief Justice, who observed that the same question having been recently settled in the case of *Davis v. M'Arthur* 3 *Greenl.* 27, there was no propriety in again permitting it to be discussed.

Upon the third question he said that the costs of commitment in execution, were not the "prison charges" mentioned in the statute. If the plaintiff commits the defendant on *mesne* process, and fails to support his action, then the indorser is liable for his expenses in prison;—but it is not so where the defendant prevails in the suit, and commits the original plaintiff to prison under the execution.

Adams, for the plaintiff, contended that the proper remedy was by *scire facias*, because the object of the suit was simply to obtain execution of a judgment. 2 *Salk.* 598. 14 *Mass.* 386. 6 *Mass.* 494. 10 *Mass.* 359. 11 *Mass.* 411. 8 *Mass.* 266. *Reid v. Blaney* 2 *Greenl.* 128.

The evidence of *Cram* was properly rejected.—When a writ is indorsed, a contract is expressly made, in the language of the statute, between the indorser and the defendant, to secure the latter his costs. The terms of this contract being plain and unambiguous, they cannot be altered, explained or impugned by

parol testimony. If the evidence of *Cram* was offered for this purpose, it was inadmissible. If not, it was irrelevant and useless. 5 *Mass.* 97. 13 *Mass.* 422. 7 *Mass.* 25. *Stackpole v. Arnold* 11 *Mass.* 27.

As to the third question, he argued that the term "prison charges" in the statute included not only the expenses of supporting the original defendant in prison when committed on *mesne process*, but also all monies necessarily expended in placing the plaintiff there, on the execution recovered against him. The intent of the law was to give the original defendant a complete indemnity, against the indorser of the writ; which, upon any other construction, cannot be had.

And upon the same principle he is liable for interest; because his liability is intended to be commensurate with that of his principal; against whom, in debt on the judgment, interest would of course be allowed. *Weeks v. Hasty* 13 *Mass.* 218.

The opinion of the court was delivered by

MELLEN C. J. As to the first question reserved, we are of the opinion that *scire facias* is proper process in the present case. It has always been used in Massachusetts; and its correctness seems never to have been even questioned in a single instance; though several cases of the kind are reported which were sharply contested on various grounds. In *Reid v. Blaney* 2 *Greenl.* 128, we at least indirectly intimated the same opinion which we now expressly give. We do not say that an action on the case would not be as convenient and correct as the remedy by writ of *scire facias*; but there can be no advantage in changing a long established course of proceeding, which relates merely to a remedy, and has no connection with a right. We therefore cannot sustain the objection, which has been urged against this process.

The second question has become unimportant, in consequence of our decision in the case of *Davis v. McArthur* 3 *Greenl.* 27.

The third depends on the meaning of a very loose expression made use of in the statute of 1821, *ch.* 59, *sec.* 8. The sentence is this: "And the plaintiff's agent or attorney who shall so indorse

"his name on the original writ, shall be liable, in case of the "avoidance or inability of the plaintiff, to pay the defendant all "such costs as he shall recover; and to pay all prison charges that "may happen where the plaintiff shall not support his action." What are prison charges? If the plaintiff does not support his action, the defendant can never suffer any imprisonment on execution; if he suffers any, it must be on *mesne process*. He may be compelled to suffer this, being unable to procure bail; and in his imprisonment, he must necessarily incur expense; and we do not perceive any expense or charges more properly termed prison charges than these. There certainly seems to be justice in subjecting the indorser to the payment of these, where the suit proves to be groundless. We say, this seems to be the most correct construction to be given to the foregoing expressions; but without deciding this point definitively, we are all clear in the opinion that the charges of committing the original plaintiff to prison on the original defendant's execution, cannot in any legal or proper sense be denominated prison charges within the meaning of the above provision. Such an expense is not incurred in prison; and what connection have an officer's fees for travel, or for what is called dollarage, on an execution for a bill of cost of hundreds of dollars, with a prison, or how can they be deemed prison charges? We are well satisfied, that an officer's fees on execution, were never intended to be embraced in the above terms; and accordingly the amount of those fees, now included in the verdict, must be deducted; and it is then to stand, so amended, for the balance and no more; as we cannot, on this *scire facias*, allow any interest.

Let the verdict be amended accordingly and judgment be entered for that amount.

NOTE.—After the foregoing opinion was delivered, the Chief Justice observed that as the court had been pressed to revise their decision in the case of *Davis v. McArthur*, which they had not thought it expedient to do, being satisfied with the principles on which it rested, he would, for the satisfaction of counsel, state these principles more at large. This he did to the following effect.

By the principles of the common law, an attorney or agent who, being duly authorized, makes a contract in the name of his principal, as he ought to do, thereby

binds his principal, and not himself. In the case at bar the defendant, as attorney, indorsed the writ in question in the name of the plaintiff suing in that writ ; and if duly authorized so to indorse it, at *common law*, this would have bound the principal, and not the attorney. The question then is whether the *Stat.* 1821, *ch.* 59, which so far as it respects original writs issuing from the court of Common Pleas and from this court, is an exact copy of the law now in force in *Massachusetts* which was passed in 1784, has altered the common law in relation to that particular contract which is created by the indorsement of a writ. The section contains four provisions. 1. If the plaintiff lives in this State, his writ must be indorsed by himself, or his agent or attorney living within the State. 2. If the plaintiff lives out of the State, his writ must be indorsed by some responsible person who is an inhabitant of the State. 3. If the person, agent, or attorney, who indorsed the writ is not of sufficient ability, the court may order the procurement of a new indorser, who is to be holden in the same manner as the original indorser. 4. The plaintiff's agent or attorney who so indorses a writ shall be holden to pay the defendant all such costs as he shall recover in case of the plaintiff's avoidance or inability.

It is admitted that where an attorney or agent indorses a writ thus—"*A. B. attorney to C. D.*" the attorney is liable But where he indorses the writ thus—"*C. D. by his attorney A. B.*", it is contended that the attorney is not liable. It is true that, at common law, according to decided cases, such a distinction exists. But the statute has abolished this distinction in cases of indorsements of writs; and has made the attorney liable, though professing to act in that capacity and in no other. It binds him who actually indorses the writ. If the plaintiff indorses it himself, then he is bound ;—and so in truth he is, without his indorsement. If the plaintiff's agent or attorney indorses it then he is liable, though acting in that capacity. The statute makes it his own contract. This construction is supported by the provision for the procurement of a new indorser in certain cases ; and for the indorsement of the writ by some responsible agent or attorney, where the plaintiff is an inhabitant of another State. For, upon the defendant's construction of the statute, of what use is either of these provisions, or why were they enacted? It is of no importance whether the indorser be a responsible person or not, if he is not bound by the indorsement ; and a new indorser is no better than the original one, unless liable personally. If the mode of indorsing which the defendant has adopted will protect him from liability, every other attorney may adopt the same mode ; and the provision which was intended to give rights and furnish an additional security to the defendant will be rendered wholly nugatory. Such a construction must not be admitted as would completely destroy the effect of a law, and amount to an evasion of it. In a word, whether a writ is indorsed "*A. B.* attorney to *C. D.*" or, "*C D.* by his attorney *A B.*", is immaterial. In both cases A. B. professes to act and does act as attorney, and in no other capacity ; and yet the statute expressly renders the agent or attorney liable. It has in this instance changed the common law. But we are not without authority on this subject. The case of the *Middlesex Turnpike Corporation v. Tufts* 8 *Mass.* 266, seems directly in point. The writ was indorsed thus ; "*The Middlesex*

Turnpike Corporation, by Royal Makepeace." It was admitted that *Makepeace* was the agent of the Corporation ; but it was contended that by this indorsement he had not made himself personally liable to the defendant But the court said that the addition was nothing more than the law would imply: viz. that *Makepeace* was the agent for the Corporation ; and that the defendant would be entitled to the same remedy against him as if he had written his name only. Here the indorsement was in the same form as in the case at bar, except that he did not describe himself as agent or attorney. The argument of the defendant proceeded on the admission that he would have been bound, had he so described himself ; and yet in the case before us, this very circumstance is urged as a reason why the defendant should not be held liable. The court there said, the law implied the agency; here it is expressed.

Some have said that as the statute requires the plaintiff's writ to be indorsed by his, or his attorney's " christian and surname," it cannot be applicable to corporations aggregate, because they have no such name. This is too refined. A plaintiff's christian and surname constitute his name; and the corporate name of a corporation is its only name—the statute requires in both cases the plaintiff's whole name. This nice distinction did not present itself to the mind of Chief Justice *Parsons* in the case before cited ; because he said expressly that the indorsement in that case was binding on *Makepeace* ; but if such a case or such a plaintiff was not within the meaning of the statute, his indorsement would have had no operation whatever; nor have bound him any more than if he had written his name on any loose piece of paper.

Stearns *vs.* Burnham.

Where one of two copartners, after the dissolution of the partnership, gave a note in the name of the firm, for his own private debt, the creditor knowing that the partnership was dissolved ; and this note being afterwards sued, and the party who made it having become bankrupt, the other partner compromised the suit by giving his own note for half the debt and all the cost; part of which note he afterwards voluntarily paid ;—it was held that the making and acceptance of the first note was a fraud upon the absent partner, and that the second note was therefore void.

Assumpsit on a promissory note, made by the defendant *Nov.* 6, 1802, payable on demand, to *William Stearns*, since deceased, and indorsed by his executrix to the plaintiff. The pleas were the general issue, and the statute of limitations.

To prove a new promise, the plaintiff offered the depositions of two persons, to whom legacies, of one dollar each, still unpaid, were given by the will of the testator; and the depositions on that account were objected to; but it being proved that the assets amounted to more than eighty thousand dollars, and no doubt suggested of the solvency of the estate, the Chief Justice, before whom the cause was tried, admitted the depositions.

It appeared that the defendant and one *Fairfield* were partners in trade from *Nov.* 1797 to *Aug.* 5 1799, at which time the dissolution of their partnership was regularly published. At this time they owed the testator $311,11 which *Fairfield* soon afterwards paid, informing him that the partnership was dissolved. In *November* following, *Fairfield* gave the testator another note, for a private debt of his own, but signed it with the name of the former firm of *Fairfield* and *Burnham*. This note being put in suit, the action was contested by the defendant, but before trial, it was compromised, so far as he was concerned, by his giving the note which is now in controversy, for one half the sum claimed in that suit, and all the costs. At that time *Fairfield* was a bankrupt. In 1806, *Burnham* complained to *Fairfield* of the impropriety of his conduct in giving a partnership note for his private debt, three months after their connection had ceased. But it also appeared that in 1811, *Burnham* voluntarily paid part of the sum due on the note now in suit.

The counsel for the defendant hereupon contended that the note was given without consideration. On this point the jury were instructed that if the defendant believed that the note of *Nov.* 12, 1799, was given for a debt due from the company, and under that impression gave the note in question for one half of it, then this last note was destitute of consideration and therefore void, no such debt being due the testator;—but that if the note in question was given by the defendant with the knowledge that *Fairfield* had unlawfully used his name, and to avoid the risk of a trial, in which he might not be able to prove that the testator knew that the partnership was dissolved, and as a prudent compromise of a doubtful claim, these circumstances formed a sufficient consideration for the note.

The jury returned a verdict for the plaintiff, which was taken subject to the opinion of the court.

Emery, for the defendant, argued that the first note being wholly void as against *Burnham*, it could form no valid consideration for the second. The essential ingredient of legal obligation was wanting equally in both instances. Nor is it fortified by the partial payment ; for this, at most, is nothing more than a part performance of a contract not legally binding; which, it is settled, does not preclude the party from his defence against any future claim grounded on the same contract.

Its very foundation, moreover, was in fraud; and it ought not to stand on better ground than transactions clearly usurious. *Pierce v. Jackson* 6 *Mass.* 242.

He also objected that this action could not be maintained, under the statute, in the name of the indorsee, without evidence of a special promise to him ; which did not appear in the case.

Willis, for the plaintiff. As the jury have found that there was no want of knowledge of the facts on the part of the defendant, and no bad faith in the plaintiff, the case stands simply upon the point of consideration. And the evidence shews both a loss to the plaintiff, in the expenses of his suit, and a gain to the defendant, in terminating a contest the issue of which at best was doubtful, and the continuance of which would certainly have been expensive. The *quantum* of consideration the law does not descend to weigh. It is enough if there be any loss, trouble, or prejudice to the promissee; or any the least gain or actual benefit to the promissor. 1 *Dane's Abr.* 89, 108, 109, 116, 125. 2 *Com. Dig.* 334. *Pillans v. Van Mierop* 3 *Burr* 1671. *Eaton v. Taylor* 10 *Mass.* 54. 2 *Bl. Com.* 445.

And, for aught appearing in the case, *Fairfield* was authorized to make use of the partnership name. There may have been a subsisting privity between the late partners; and from the subsequent adjustment of part by *Burnham*, such a relation between them was fairly to be inferred. But if he knew that there was fraud in his former partner, but that he could not prove it, the case was sufficiently fair for a new contract.

The question respecting the admissibility of the depositions not being decided by the court, the arguments to that point are omitted.

MELLEN C. J. delivered the opinion of the court, as follows:

As the note declared on was payable on demand, and was not indorsed to the plaintiff until several years had elapsed after it was given, it is perfectly clear, that it is liable to the same objections and equities in a suit by the indorsee as it would be if the executrix of the promissee were the plaintiff. We pass over the objection made as to the admissibility of the witnesses named in the report, and proceed immediately to consider that which is predicated on the want of consideration. And, here, it is proper to observe that the ground on which the objection is now placed, was not taken by the defendant's counsel at the trial; and, amidst a mass of evidence and some confusion in the manner in which it was introduced, the point on which we now decide the cause, seems to have escaped all serious attention.

The original note, for half of which the note in question was given, was made and signed after *Fairfield* and *Burnham* had dissolved partnership ; and when it was given, *Fairfield* informed *Stearns*, the promissee, of that fact; *Stearns*, therefore, knew as well as *Fairfield*, that the latter had no legal authority to bind *Burnham*, by signing the note in the name of the firm ; it was given for a debt due from *Fairfield* only ; it seems from these circumstances to have been a fraud in *Fairfield* to give the note and a fraud in *Stearns* to receive it ; the object must have been to cheat *Burnham*, and to a certain extent, it has had that effect, because he has paid a portion of it. But it has been contended that though the original note was given under these circumstances, still that as they were known to *Burnham* when he settled the action against him and *Fairfield*, by giving the note now in suit ; being for half the amount of the first note, and for the costs of the suit, he must be bound by it ; as it was a compromise of a doubtful action and demand, made voluntarily and with a perfect knowledge of facts; and this, it is said, is a good and legal consideration. This argument would be sound and satisfactory, in a

case not poisoned by fraud on the part of the person asserting the doubtful claim. It is not denied that a compromise of such a suit, where both parties are lawfully pursuing what they consider honestly to be their rights, constitutes a good and legal consideration ; but such a compromise has no resemblance to the one relied on as proof of the consideration of the note in question. In the case before us nothing was due to *Stearns* when this note was given, and *Stearns* knew it ; that is, that no claim existed against *Burnham*, except what was founded in fraud and collusion between him and *Fairfield*. The note was given at a time when a suit was pressing him, and *Fairfield* was a bankrupt : an undue advantage was taken of *Burnham's* situation, although he was conusant of all the facts ; but without pursuing this idea, the fatal objection to the action is, that the plaintiff's claim is founded on a fraudulent transaction ; and if we should sustain and sanction it, it would render the fraud successful ; whereas it is the duty of courts of justice in every instance in their power to protect the innocent by defeating the stratagems of iniquity. Under these circumstances, we are all of opinion that the verdict must be set aside and a new trial granted.

Goodwin *vs.* Mussey.

The want of notice is no valid objection to a deposition taken *in perpetuam*, under the provincial statute 7, *W.* 3, *c.* 35, *sec.* 3.

And such deposition may be used whenever the deponent is so sick as to be unable to attend court.

In a writ of entry, which was tried before the Chief Justice, the demandant, to prove the loss of a title-deed, offered the deposition of *Nathan Winslow*, taken in *perpetuam rei memoriam*, *Aug.* 13, 1784, and recorded on the same day; and proved that the deponent, who had attended court several days during the term, as a witness in this cause, was, at the time of trial, confined to his house, by sickness. The deposition was objected to, because it

did not appear from the caption that any person had been notified to attend when it was taken; but the Chief Justice overruled the objection, and the tenant filed exceptions to his opinion.

Longfellow, for the tenant, said that as the common law did not authorize the use of depositions, under any circumstances, the question whether the deposition offered was admissible, depended wholly upon statute provisions. These are found only in the statute of 1695, *Ancient Charters*, *p.* 288, which is to receive a liberal exposition. The preamble states the cases in which depositions may be taken; the first section directs that notice shall be given to the adverse party in all cases; and this provision ought to be considered as reasonably applying to the other sections of the statute, especially to the third, which authorizes the perpetuating of testimony in this manner, and only designates the persons before whom it is to be done.

If, however, the want of notice formed in general no valid objection; yet the deposition ought not to have been received, unless the witness was either dead, or so ill as to be unable to depose anew, under a commission issuing from this court, in this cause; because the adverse party ought to have the benefit of a cross examination.

But the statute of 1695, he contended, was repealed, partially by *Stat.* 1797, *ch.* 35, and totally by *Stat.* 1821, *ch.* 180, and therefore no depositions taken prior to 1797, can now be used.

Willis, for the demandant, insisted that no notice was required by the third section of the statute of 1695; which is all that relates to depositions of this kind. The other sections apply wholly to evidence taken in causes pending between party and party.

Nor is that statute so repealed as to abrogate all the rights acquired under its provisions; for this no legislature has power to do. 10 *Mass.* 437. 4 *Burr.* 246. 12 *Mass.* 383. 7 *Johns.* 500. The deposition, as it was the only existing evidence of a title deed, was of the nature of a conveyance of real estate, standing in the place of the deed itself. To reject this evidence, which was regularly taken under a law then in force, the witness being sick

and unable to attend, would in effect be annulling the conveyance it was taken to prove. Such a power cannot be constitutionally exercised, even by the legislature. 6 *Dane's Abr.* 618. 6 *Cranch* 87, 148.

WESTON J. delivered the opinion of the Court.

The deposition of *Nathan Winslow*, taken in perpetuam in 1784, being offered in evidence, by the demandant, was objected to by the counsel for the tenant, upon the ground that it did not appear by the caption that any person had been notified. This objection was overruled by the judge, who presided at the trial; and the case comes before us upon an exception to the opinion of the judge in this particular. In the argument, the admission of this deposition has been objected to upon other grounds, in addition to that made at the trial. The exception then taken to the opinion of the judge, upon the point raised before him, is alone properly before us; but as they are questions of practice, which may arise upon other depositions, taken under similar circumstances, the provincial statute having been in force until 1798, we have considered all the objections urged against the admission of this deposition.

It has been very properly contended, that this is a kind of testimony not admissible at common law, and that it derives its validity, if it has any, from statute provision. And it is insisted that the statute, under which this deposition was taken, has not authorized its use in a court of justice. The deposition was made by virtue of the third section of the provincial statute of the seventh of *William* the third, *ch.* 35. *Colony and Province laws*, 288. The act is entitled "an act for taking of affidavits "out of court." The preamble is in these words. "Forasmuch as it is often necessary that witnesses in civil causes be "sworn out of court, when by reason of their going to sea, living "more than thirty miles distant from the place, where the cause "is to be tried, age, sickness, or other bodily infirmity, they are "rendered uncapable of travel and appearing in person at the "court, to the intent therefore that all witnesses may indifferently

"testify their certain knowledge, and the whole truth in the "cause they are to speak unto," the first section provides for the taking of affidavits, under a commission from two or more justices of the superior or inferior court, to be returned to the court where it is to be used, reasonable notice being "first made out "and delivered to the adverse party, if within twenty miles of "the place, or left at the place of his dwelling or usual abode." The second section authorizes every justice of the peace "to "grant summons for the appearance of any witness before him, "in any civil or criminal cause, where such witness is bound to "sea, before the time of trial, and to take his deposition in such "cause, the adverse party being present, or notification sent "him as aforesaid." By the third section it is enacted, that depositions *in perpetuam rei memoriam* shall be taken before some court of record, or two or more justices of the peace, quorum unus. This section contains no clause requiring notice. It has not in itself any provision, authorizing the use of depositions taken under it in courts of justice; but the design and object of this section, as well as the others, is sufficiently indicated by the preamble which must be considered as extending to the whole act, the object of which plainly is to provide, for certain reasons, for the taking of testimony out of court, frequently essential to the due administration of justice; to be taken in some cases, where suits were then actually pending; and in others to be prescribed as evidence, which might become necessary for the elucidation of facts which might afterwards be drawn into controversy, before judicial tribunals. It is difficult to conceive any other adequate reason, which could induce the provincial government to provide for, or individuals to take, affidavits or depositions of this description. In point of fact, they have uniformly been received; and no case, it is believed, can be adduced by those who have been conversant with our courts for the longest period, in which this objection has either been made or sustained; and they are essentially necessary, in many instances to verify facts, upon which important interests depend.

With regard to the objection arising from the want of notice, we are very clear, that the provision requiring it in the first sec-

tion cannot, upon any sound construction, be held to apply to the third. It is omitted there, although repeated in the second.

The notice required was to be given to the adverse party. This supposes an existing suit, in which there are parties and adversary proceedings. The taking of the affidavits, authorized by the third section, was a precautionary measure, predicated upon the possibility of future controversies in relation to facts, the evidence of which was thus intended to be preserved. The provincial government did not at that time think proper to prescribe notice to other persons, interested in these facts ; although at a subsequent period the general court of *Massachusetts*, and more recently the legislature of our own State, have required such notice.

It is further objected, that depositions taken under the third section of the provincial statute, if admissible at all, can only be used where the deponent is dead. There is no such limitation to be found in the statute. The circumstances, under which affidavits or depositions may be necessary, are enumerated and set forth in the preamble ; and they are such as have been generally provided for in subsequent statutes upon the subject of depositions. By the statute however of our own State, revised laws, *ch.* 85, section eighth, a deposition *in perpetuam* is to be used as evidence in case of the death of the deponent, absence out of the State, or inability to attend court. But under the provincial statute, we apprehend such deposition might be used, for any of the causes stated in the preamble. At any rate we can discover no sufficient reason why the inability of the deponent to attend court, does not authorize the use of his deposition in evidence, as well as his death.

It is finally urged that the provincial statute being repealed, the deposition in question is no longer admissible. Without conceding that this consequence would flow from an unqualified repeal of the statute, we do not find that the statute is repealed, as it respects depositions taken prior to the revised statute of the commonwealth of *Massachusetts*, by which it was repealed with regard to such as might be taken, after a certain day limited. It is however contended that, this latter statute having been repealed by an act of the legislature of *Maine*, by which it was provided

that such repeal should not be construed to revive any act, or parts of acts, repealed by the statute of the commonwealth of *Massachusetts*, and the saving in the latter statute being in the repealing clause, the provincial statute must be deemed to be entirely repealed. But this cannot be considered as the effect of the clause relied upon. So far as the provincial statute was repealed by that of the commonwealth, it is not revived ; but so far as that repeal was qualified by the saving in the repealing clause, it remains unaffected by the repealing act of *Maine*.

The exception is overruled, and there must be

Judgment on the verdict.

Rogers *vs.* Joyce.

Where one, having intruded on the public highway, leased a part of the land for a term of years, on which the tenant erected a building, but afterwards, by order of the selectmen, removed it from the highway, part of which he again incumbered, within the term, as before ;—it was held that the removal of the building restored the land to the public, for their use, and terminated the privity between the lessor and lessee; and that the replacing of a building on part of the same land, and continuing it after the end of the term, did not restore any privity between them, nor give the lessor any right of action, his possession being already gone.

Whether the owner of land, over which a public highway passes, can be disseised of it, except at his election, *quære*.

This was a writ of entry in which the demandant counted on his own seisin within twenty years, and a disseisin by the tenant; and it was tried before *Preble J.* upon the general issue.

The demandant proved that in the year 1810, he took possession of a parcel of land adjoining the demanded premises, which are in a gully or ravine near the termination of the twelve-rod-road in *Brunswick*, by erecting a wharf and other improvements thereon ; professing also to claim the demanded premises ; and continued so to occupy and improve, until the year 1815 ; when one *Millea* placed a building upon the demanded premises, under

a lease from the demandant for five years, which he continued to occupy, paying rent to the demandant, till his death, which happened *Sept.* 15, 1818. Soon after his decease *Joyce*, the tenant, entered into possession of the building, under the administratrix of the estate of *Millea*, who continued to pay rent to the demandant till the five years were expired. About three months after the decease of *Millea*, his administratrix sold the building to the tenant.

In 1819, the tenant, by order of the selectmen of *Brunswick*, moved the building from the ground on which it was originally placed by *Millea*, to another part of the demanded premises; but erected a porch and platform on that part of the premises on which the building of *Millea* originally stood, and where they still continue.

The tenant proved that the whole of the demanded premises was situated in what is called the twelve-rod-road, and which was used as such by the public; though there was no proof of its original location or acceptance.

Upon this evidence the Judge instructed the jury that the title set up by both parties was merely possessory ;—that the possession of the demandant of a part of the premises being of an earlier date than that of the tenant, this gave the demandant a better right to that part, as against the tenant, than the tenant had; and as the tenant had not disclaimed any part of the premises, but had defended the whole, and did not show so good a title as the demandant to that part which was originally covered by the building of *Millea* ; they ought to find, as to this part, for the demandant. But they found for the tenant, for the whole land demanded, on the ground that it was all within the public highway. And for this cause the demandant moved that the verdict might be set aside.

Fessenden and *Deblois*, for the demandant.

The question between the parties, at the trial, was whether the claim of the demandant, or the tenant, to the possession of the whole premises, was the better founded. This question the

jury were bound to try, and thus they were charged by the Judge. But by determining that part of the demanded premises was a public highway, they have neglected to determine the issue joined, as they were bound by law to do.

The title of the demandant, though proved by possession only, was a perfect title against all wrong doers and trespassers ; and an elder possession is to be preferred to one more recent. This point also was substantially in issue between the parties ; but the jury avoided it, and proceeded to settle the claim of the demandant, as between him and others not parties to the suit.

When a way is located over the land of a private person, the public acquire nothing but an easement. The fee remains in the owner, as before ; and he may still exercise all the rights of ownership consistent with the right of passage which is assumed by the public, and may claim every other use and profit which can be derived from the land. *Perley v. Chandler* 6 *Mass.* 454. *Commonwealth v. Peters* 2 *Mass.* 127. *Fairfield v. Williams & al.* 4 *Mass.* 427. *Tibbets v. Walker* 4 *Mass.* 595. *Stackpole v. Healey* 16 *Mass.* 33. *Robbins v. Boardman* 1 *Pick.* 122. *Cortelyou v. VanBrundt* 2 *Johns* 357. He may maintain an action to recover possession of land covered by a highway, if he be disseised of it. *Alden v. Murdock* 13 *Mass.* 256. And upon a discontinuance of the highway, the right to the exclusive occupancy of the soil reverts to the original owner.

As to that portion of the premises which was covered by the porch, the jury ought to have found for the demandant ; and the reason alleged why they did not, is unfounded in law, and is against the direction of the judge. The case finds no location of the road, no user for twenty years, and no other right authorizing the public to interfere. And if it did the tenant could not, in this form of action, avail himself of a title in another, under whom he did not claim.

Orr, for the tenant.

The demandant acquired no estate, by his possession of the land. The case finds that the land is part of a public highway, which he demised for the term of five years, in virtue of which

he claims a seisin as of an estate in fee simple. The general principle is not denied, as laid down by *Blackstone*, that an actual possession, adverse to the true owner, is construed to be a disseisin; but while this is admitted, it must be taken with reference to the specific subjects to which it relates, and not be extended to a state of things which might not have occurred when that author wrote. Had he stated that the posssession of a part of a public highway gave a seisin in fee, either in fact or by fiction, this would have been precisely what is contended for on the other side; but there is no such proposition to be found in any elementary treatise, nor is there any adjudicated case. The position, therefore, that a prior possession gives a better right, must be taken with the limitations by which it is restrained by other maxims of the common law.

If the demandant, as he alleges in his writ, had a seisin in fee, it must have been acquired by ousting the true owner of the land. But it is contended for him, that the tenant cannot avail himself of any defects in the demandant's seisin, as between him and the owner. This, in ordinary cases, is a valid objection; but not in the present case; unless the demandant was in truth a disseisor. Now disseisin is properly "where a man entereth into lands or "tenements where his entry is not congeable, and ousteth him who hath the freehold." *Lit. sec.* 279. *Co. Lit.* 277. 4 *Dane's Abr.* 16. None therefore are disseisors, but such as acquire a freehold estate against the owner; in which case not only is a right to the soil acquired, but a right to all the uses of it, as fully as if the disseisor were owner against all the world; the true owner only excepted. And hence, from all that can appear between him and a stranger to the title in a trial at law, he holds an estate in fee. He is said to acquire it by wrong, if he holds till he is protected by the statute of limitations; but the truth is that to a certain extent he acquired it by right, being protected in the possession and uses, against any claim but that of the owner. If a descent be cast on his heir, the owner is put to his action. If by reason of his buildings or incumbrances placed upon the land, the owner be injured in his person or property in passing them, no action of the case lies against him for the damage. These are rights and

exemptions appertaining to such a disseisin as is known to the law.

The case of a mere intruder into a public highway is widely different. Where the disseisor, in the legal sense of that character, acquires rights, the intruder incurs liabilities. Where the one gains the quiet use of the land, free from all molestation, the other is exposed to an indictment for a nuisance, or action of the case, and his buildings are liable to be removed from their place by the hand of a stranger, without even the forms of law. *Rex v. Wilcox* 1 *Salk.* 458. *Arundel v. McCulloch* 10 *Mass.* 70. 3 *Bac. Abr.* 687. At common law he cannot even gain a right from length of time, by prescription ; for his possession can have no legal commencement. The original intruder, and his heirs, are equally liable. No right can be gained by disseisin, for the uses can never be lawfully enjoyed. *Fowler v. Sanders Cro. Jac.* 446. The argument drawn from priority of possession can avail nothing, for the title itself of the demandant is a mere fiction. And when the common law employs fiction it is always in support of an acknowledged principle of justice, and not in support of that which is totally unlawful.

It is undoubtedly true that ejectment lies for the owner of land over which a road is laid, against any one who takes possession of it. And if the present demandant owned the land, there could be no doubt of his right to recover. But there is no adjudged case which supports him in this action. A leading case on this subject is that of *Chester v. Alker & al.* 1 *Burr.* 133, which was ejectment against the occupant of part of a highway. The defence rested on the position that the action did not lie, because seisin of the premises could not be delivered upon a writ of possession; but the plaintiff prevailed because he was the undisputed owner, and held by an ancient title, and because he had a right to the seisin, subject to the public easement. The whole argument of the court goes on the ground that nothing short of an undoubted right would authorize a recovery in such a case. The case of *Alden v. Murdock* 13 *Mass.* 256, goes on the same ground ; the demandant having a fee simple estate in the land. Such also was the case of *Jackson ex. dem. Yates v. Hathaway* 15 *Johns* 447.

But if it were otherwise ; and if the demandant, by a fiction of law, acquired a seisin in fee by a disseisin of the true owner, or if it is not competent for the tenant to aver the contrary ; yet the possession of the demandant, and with it his constructive seisin, has been broken up and extinguished.

He had leased the ground for five years, but before the end of this term the shop erected by his tenant, being a nuisance, was abated, and the highway disencumbered. What then became of the seisin of the demandant ? His foothold was broken up by lawful means ; and it was not afterward in the power of any one to commit, against him, a trespass on the land thus vacated, because he had neither the possession nor right of possession remaining. Now every disseisin is a trespass, although every trespass is not a dissesin; *Co. Lit.* 153 ; and if this maxim of law admits of some exceptions in a comparison of titles, it admits of none in favor of a mere intruder on a public easement. It does not appear that the tenant quitted the land of his own choice. He yielded to the command of the selectmen of *Brunswick*. The command was lawful, and obedience a duty ; and had the demandant immediately again incumbered the land, again it might in like manner have been disencumbered. Hence he was defeated of all right, and color of right, as effectually as if he or his tenant had been turned out by the owner of the land. For in case of an actual disseisin, it is immaterial whether the trustee, or *cestui que trust*, principal, or agent, clear the premises; they are effectualy restored, and the owner of the land holds it, subject to the use, as before.

It is not contended that the re-entry of the tenant, after his removal, gave him any right to the land ; for both he and the demandant were equally in fault. But it is enough that by such act he did not deprive the demandant of any legal right whatever.

Besides, if the principles contended for in support of the action were sustained, the consequence would be that *Rogers* might maintain an action for mesne profits, as well as the present action; and yet these recoveries would be no bar to an action of trespass against *Joyce*, by the true owner, who is neither party nor privy to the present controversy.

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

By the report of the Judge who presided in the trial of this cause it appears that the demanded premises are a part of a public highway in the town of *Brunswick*; and that the legal title to the same is not in either of the parties. The demandant rests his right to recover, upon his possessory title merely. The jury returned their verdict in favor of the tenant; and the question is whether it ought to be set aside for any of the reasons stated in the motion filed by the demandant. The authorities cited by the counsel for the tenant seem to establish a distinction between an exclusive possession of a piece of land, belonging to an individual who has a right to the absolute controul of it; and one which though belonging to an individual, is subject to a public easement, as in the case before us. But we do not mean to decide the cause upon the ground, that the possession of the demandant, while it continued, was not a seisin, of the kind alleged in the writ; because the facts do not require us to decide this point. The only possession of the piece of land demanded which *Rogers* ever had, was by means of the building which *Millea* placed on it under his permission and lease in 1825. *Millea*, the lessee for five years, died in *September* 1818, having paid rent in the mean time to *Rogers*. In *October* following, the tenant entered into the building under *Millea's* administratrix, who accounted for the rent to *Rogers*. About two months after this *Joyce* purchased the building; and in 1819 the selectmen of the town ordered the removal of the building from off the highway; and *Joyce* accordingly submitted to their order and removed it; and the highway which had for some years been thus incumbered with a public nuisance, was again opened and became, in this place, unobstructed. This act of removal, in which every citizen had an interest, and to effect which, had a legal right, dissolved the connection and privity betwen *Rogers* and *Millea*, and *Joyce* claiming under him, and the administratrix on his estate, and completely terminated the possession of *Rogers* as to the demanded premises on which the building stood. The land was thus restored again, to the public, for their use. It is true that soon after, *Joyce* erected a porch

and laid a platform on the ground, which had before been covered by *Millea's* building; but this act was no injury to *Rogers* or his rights; for he had lost all the possessory right he ever had; the act was an encroachment on the public highway, and a violation of the rights of the public; in other words the building of the porch and laying down of the platform, instead of being a continuance of a legal possession on the part of *Rogers*, was an illegal intrusion on the part of *Joyce*, not into private property, but public; it was no more nor less than a common nuisance; and from such a wrongful act, we are all satisfied, that there cannot result any proof of the alleged seisin on the part of the demandant. The opinion of the whole court, therefore, is that notwithstanding the instructions which were given to the jury by the presiding judge, there is no ground for granting a new trial.

ANDERSON *vs.* ANDERSON.

In a libel for divorce for the cause of adultery, the record of the conviction of the respondent, upon an indictment for that crime, is sufficient evidence, both of the marriage, and of the offence.

A libel for divorce *a vinculo*, for adultery, may be amended by adding a charge of extreme cruelty, and praying for a divorce from bed and board.

IN a libel by the wife, for divorce *a vinculo*, for the adultery of the husband, *Alden*, for the libellant, to prove the fact of adultery, offered a copy of the record of the conviction of the husband on an indictment for that offence.

Daveis, for the respondent, required proof of the marriage, independent of the recital in the indictment and the finding of the jury upon that trial.

But THE COURT overruled this objection, deeming the record of the conviction as sufficient proof of that fact.

The respondent then proved that the libellant had forgiven his offence, by subsequent cohabitation, with knowledge of the crime.

Whereupon *Alden* moved for leave to amend the libel, by adding a charge of extreme cruelty, and praying for a divorce *a mensa et thoro* for that cause.

Which THE COURT granted, ordering that the libel, as amended, be served on the adverse party three months before the next term.

JOYCE *vs.* RYAN, *Ex'x.*

If the lands of a deceased person, which have been sold under licence for the payment of his debts, are taken from the purchaser by an elder and better title; he cannot maintain against the executor an action of *assumpsit* for the consideration money; but must resort only to such covenants as are contained in his deed.

IN this action which was for money had and received the facts are stated in the opinion of the court, which was delivered as follows, by

PREBLE J. The defendant, the executrix of the will of *Charles Ryan*, being duly licensed to sell and convey the real estate of her testator for the payment of his debts, exposed for sale at public auction a certain piece of land, a deed of which had been made to her testator in his life time by *John Robertson*. The premises named in *Robertson's* deed were struck off to the plaintiff, and the defendant accordingly executed to him in due form a deed of the premises containing also certain covenants, touching the regularity of her own proceedings in the sale. The plaintiff now alleges that the testator had no title to the premises; and, as nothing passed by the deed from the defendant to himself, he seeks to recover back the consideration money in an action of *assumpsit* for money had and received. It is a sufficient answer and defence to this action that the plaintiff took his deed with the covenants agreed upon at the time by the parties; for it is not pretended there was any fraud, circumvention or purposed concealment, practiced by the defendant. And to his action on those

covenants he must look for his remedy. If those covenants are not broad enough to meet the exigencies of his case, we cannot enlarge them. Nor can we add to them, or supply their deficiencies indirectly in the form pursued in this case by the plaintiff; for to do so, would still be to make a contract for the parties, and not to enforce the one, which they at the time thought proper to make for themselves.

The exceptions taken in the court of Common Pleas are accordingly overruled, and the

Nonsuit confirmed.

WAITE *vs.* MERRILL & AL.

The covenant by which the members of the societies of shakers are bound to each other, is a valid instrument, obligatory on all who voluntarily enter into it.

In an action against the deacons of the society of shakers, touching the common property, the members of the society may be competent witnesses, being properly released.

THIS was an action of *assumpsit* against the defendants as trustees and deacons of the society of Shakers in the town of *New-Gloucester*, having the care and oversight of their temporal concerns; and was brought to recover compensation for the services of the plaintiff about twelve years in that family or society, rendered while a professed shaker and member of the same family, from the time of his attaining the age of twenty one years.

At the trial, which was before *Preble J.* it appeared that the father of the plaintiff, who was also a shaker, carried the plaintiff with him into that family and bound him to the deacons as an apprentice, where the plaintiff continued to reside, except at some few intervals, from the age of fourteen years, working and farming, and clad like the other brethren of the same family. During this period he left the family twice; and after having been absent a few months returned, asked pardon for his desertion, and was forgiven and received again into the family where he contin-

ued to reside as a professed shaker, till he was thirty two years old, when he finally left them.

It appeared, from the plaintiff's shewing that the principle of association in regard to their temporal concerns, was that of laboring for the common good of the society, each individual, whether sick or well, active or past labor, being clothed and supported out of the common stock. It also appeared that the shakers, while the plaintiff resided among them, did not encourage human learning ;—that neither the father of the plaintiff, nor the plaintiff himself thought favorably of such learning ;—but that all their young men, who wished it, were taught to read and write, and were instructed in arithmetic as far as the rule of three ;—that the Bible was furnished to all the members of the society, to be read and consulted at their pleasure ;—that the book published by the ministers of the society, called "The Testimony of Christ's second appearing," containing their covenant, and principles of faith and association, was placed within the reach of all, and all were encouraged to read it ;—that the plaintiff could read and write, and sometimes exhorted in their religious meetings ; and was a man of common talents. It was proved that the society took care to have each member well instructed in his particular department of labor ; but that the opportunities for acquiring general information among them were few ;—that while the plaintiff was with them they had no school except in winter evenings, and even this regulation was not uniform ;—and that all progress in human learning and science, beyond what has already been stated, was discountenanced by the elders and directors of the society, except in particular instances and for special purposes. And it appeared that the plaintiff, when he left the society, though well acquainted with farming, knew very little of the business transactions between man and man, and was totally ignorant of the comparative value of the common coins, not being able to distinguish one from another.

According to the rules of the society, its members were not permitted to mingle with the world ; nor to keep any memorandum or transact any business, but such as was prescribed to them by the deacons or elders ;—and if any one obtained money, he was not allowed to retain it for his own private or separate use.

It was fully proved by the concurring testimony of the witnesses on both sides,—several of those adduced by the plaintiff having formerly been shakers and members of this particular family, but afterwards having renounced that faith,—that all vice and immorality are disallowed by the society, and that integrity, uprightness, and purity of life are taught and enforced among them;—and that the precepts of the gospel, as they understand and interpret them, constitute, as they conceive, the foundations of their faith, and the rules of their practice. It was also proved that they teach and enforce the doctrine that the love of a brother or sister of the society should not exclusively centre in husband or wife, parent or child, individually; but that all the brethren and sisters, whether standing in those relations or not, should be alike the objects of their affection.

An attempt was made to prove that the shakers held that a husband or parent belonging to their society was not bound to contribute to the support of a wife or child refusing to unite with them;—but *Elisha Pote*, one of their elders, testified that they held no such principle, and that where such wife or children were unable to support themselves, the shakers always contributed to their support and relief.

It appeared that they are accustomed to receive to a noviciate or probation such persons as propose to unite with them; and that in this way they receive parents with their children; but that no person is considered bound to them till he signs the covenant;—that every person who joins them after having completed his noviciate, and every minor among them upon his arrival at full age, must, by the standing regulations and orders of the society, sign the covenant, or leave them; that neither force nor compulsion is used to induce them to subscribe; but they are obliged to sleep and eat alone; and are told that they must sign or leave them, and that if they should leave them they would be eternally miserable; but no other obstacle is interposed to prevent them from leaving the society, if such is their choice. It was testified also that the rulers and elders of the society claimed to have knowledge or discernment of all that any brother or sister, whether present or absent, had been or might be doing; of all

their secret sins and derelictions of duty; of all their impure thoughts, and sinful or carnal desires;—that they also claimed to have gifts, as from God;—that their usual language in giving their orders was,—"I have a gift that you should do" thus; and that the doctrine of implicit obedience to the rulers of the society is inculcated and enforced by discipline and ecclesiastical sanctions.

The defendants, on their part, produced their covenant or articles of association, of the following tenor:—

"Whereas, we the subscribers, of the plantation called Sabbath-day Pond, in the county of Cumberland, and State of Massachusetts, having received the grace of God in this day of Christ's second appearing, which hath separated us from the course of this world, and all natural relation, to take up our cross and follow Christ in regeneration, according to the light of God and revelation of Christ made known unto us. We feeling a desire to unite and gather ourselves together, in the order and form of a church in gospel order, agreeable to the order and covenant of the church of our communion at New Lebanon, in the State of New-York, gathered under the order and administration of Elder Joseph Meacham, whom we acknowledge to be our Elder and example in the gospel, and we were some time in the year of our Lord one thousand seven hundred and ninety four, received and gathered into relation, according to our own faith and understanding of the Church of Christ in gospel order, under the care and ministration of Elder John Barnes, whom we acknowledge to be our Elder and minister, being set apart to the work of the Ministry by the ruling Elders of the church of our communion at said New Lebanon, in which we gave ourselves and services, with all our temporal property freely, according to our own faith, to support one joint union and interest in all things, both spiritual and temporal, for the mutual good, support and comfort of each other, and for other pious and charitable uses, according to the order and covenant of the church. And whereas, Nathan Merrill and Josiah Holmes were chosen and appointed as deacons in the church, to take the care and management

of the estate or temporal interest of the church in trust; to receive and hold in their said capacity all such real and personal estate with all gifts, grants or donations that may be devoted and given to the church; the estate to be taken and holden by them, in their said capacity, in manner and form so as it may go and be holden in a line of succession, under the care and oversight of those members who may be appointed by the church, as their successors in the like office and trust; to be by them religiously improved, according to the true intent and meaning of the following covenant, which was committed to writing some time in the year of our Lord, one thousand eight hundred and one, and was signed by the members at large, and is as follows, viz:

"The Covenant of the Church of Christ at Sabbath-day Pond, so called, relating to the possession and use of a joint interest, in the year of our Lord 1794; the year in which most of the members of the church were gathered, in the following order and covenant; was then and from time to time after made known and understood, received and entered into by us as members of the church, agreeable to our understanding of the order and covenant of a church in gospel order, for it was and is still our faith and confirmed by our experience, that there could be no church in gospel order according to the law of Christ, without being gathered into one joint interest and union, that all the members might have an equal right and privilege according to their calling and need in things both spiritual and temporal, and in which we have a greater privilege and opportunity of doing good to each other and the rest of mankind, and receiving according to our needs jointly and equally one with another in one joint union and interest, agreeable to the following articles of covenant:

"First. The conditions on which we were received as members of the Church were in substance as follows: All or as many of us as were of age to act for ourselves, who offered ourselves as members of the Church, were to do it freely and voluntarily as a religious duty and according to our own faith and desire.

"Secondly. Youth and children, being under age, were not to be received as members, or as being under the immediate care and government of the church, but by request or free consent of

both their parents, if living, except they were left by one of their parents to the care of the other, then by the request or free consent of that parent, and if the child have no parents, then by the request or free consent of such person or persons as may have a just and lawful right in care of the child together, with the child's own desire.

"Thirdly. All that should be received as members, being of age, that had any substance or property, that were free from debt or any just demands of any that were without, either as creditors or heirs, were allowed to bring in their substance, being their natural and lawful right, and give it as a part of the joint interest of the church, agreeable to their own faith and desire, to be under the order and government of the deacons and overseers of the temporal interest of the church, for the use and support of the church, and any other use that the gospel requires, according to the understanding and direction of those members with whom it was entrusted, and that were appointed to that office in care.

"Fourthly. All the members that should be received into the Church should profess one joint interest as a religous right; that is, all were to have a just and equal right and privilege according to their needs in the use of all things in the Church, without any difference being made on account of what any of us brought in, so long as we remained in obedience to the order and government of the Church, and are holden in relation as members, are likewise equally holden according to their ability to maintain and support one joint interest in union and conformity to the order and government of the Church.

"Fifthly. As it was not the duty or purpose of the Church in uniting into Church order to gather and lay up an interest of this world's goods—but what we become possessed of by honest industry, more than for our own support, was to be devoted to charitable uses, for the relief of the poor, and such other uses as the gospel might require, therefore it was and still is our faith never to bring debt nor demand against the Church, or each other, for any interest or services which we have bestowed to the joint interest of the Church; but freely to give our time and talents, as brethren and sisters for the mutual good one of another, and other charitable uses according to the order of the Church.

"The foregoing is the true sense of the covenant of the church, in relation to the order and manner of the possession and use of a joint interest, understood and supported by us, the members, and we as fully and freely, in the most solemn manner, acknowledge and testify in presence of each other, and are free and willing to do it before all men if required, that it is that which we have kept and supported according to our understanding, from time of our first gathering, and still mean to support as that which we believe to be both our privilege and duty.

"And as we have received the grace of God in Christ by the gospel, and were called to follow him in the regeneration, we had not only a right as a religious society to gather into order according to our own faith, but also we believe it to be the duty of as many of us, that believe, as might be for the good of the whole, to gather into the order and covenant in which we now are. We believe we were debtors to God in relation to each other and all men, to improve our time and talents in this life in that manner in which we might be most useful. We have had the experience of twenty years' travel and labor, and received a greater confirmation and establishment in our faith, and that the order and covenant in which we have gathered and solemnly entered into, is a greater privilege, and enables us to be more useful to ourselves and others than any other state in our knowledge, and is that which is required and is accepted of God, and is that which we feel in duty bound according to our faith and understanding in the most conscientious manner to support and keep. And whereas we find by experience and travel for twenty years past that further provisions ought to be made for the better supporting and maintaining the joint union and interest of the church, and that each member may receive a full information and understanding of the order and covenant which we have solemnly entered with each other.

"We do therefore renew and confirm our said covenant with our aforesaid elder and minister John Barnes, and with each other. We have also chosen and reappointed Samuel Pote, together with Joshua Merrill, as deacons in the church, and do hereby intrust them with all the care and oversight of all the temporal

interest of the church, with full power to make all just and lawful defences in all cases in behalf of the church, for the protection and security of the joint interest and privilege of the church, as the gospel may permit, while acting in union according to the covenant and no longer; and when by death or other means, one or both of the aforenamed deacons shall cease to act in said office, the power invested them shall be given to those members who may be chosen and appointed by the church as their successors in the like office and trust, while acting in union according to the foregoing covenant, and no longer. We do all appoint and request the aforesaid Samuel Pote, that he keep a copy, to be kept in a book provided for that purpose, a true and proper record of this covenant, together with all other acts, covenants, records, or matters, that may be necessary for the understanding and safety of the joint union and interest of the church, and we do by these presents solemnly covenant with each other for ourselves, our heirs and assigns, never hereafter to bring debt or demand against the said deacons nor their successors, nor against any member of the church or community, jointly or severally, on account of any of our services or property thus devoted and consecrated to the aforesaid sacred and charitable use. And we also covenant with each other to subject ourselves in union as brethren and sisters, who are called to follow Christ in regeneration, in obedience to the order, rules and government of the church. And this covenant shall be a sufficient witness for us before all men, and in all cases relating to the possession, order and use of the joint interest of the church.

"In testimony whereof, we have, both brethren and sisters, set our hands and seals this thirty first day of January, in the year of our Lord one thousand eight hundred and fourteen."

To prove that the plaintiff signed this covenant the defendants called *Elisha Pote*, one of the elders of the community of shakers, and several others who were members of their family; to whose admission the plaintiff objected on the ground of interest, arising from their being covenant members of the same family. Whereupon mutual releases were produced, by which the defendants

released the witnesses from all claims and demands to contribute, aid, or assist them in defending this suit, and from all other demands by reason of the same ;—and the witnesses released to the defendants all their interest in the common property in their hands by virtue of their office of deacons of the society, and in all other property which may appertain to the community of shakers, or to them as members of that society. The plaintiff still insisting on his objection, the Judge admitted the witnesses to testify, leaving their credibillity to the jury. These witnesses testified the fact they were called to prove ; and they were also permitted to speak of the faith and practice of the society with the same latitude which had been allowed to the plaintiff in the examination of his own witnesses.

Upon this evidence the Judge instructed the jury that the witnesses on the part of the defendants were competent ; but that they must judge what degree of credit was to be attached to their evidence ; for though mutual releases had been given, the witnesses still regarded themselves, and were still considered by the society, as shakers; but that independent of this circumstance, these witnesses stood unimpeached before them, and with these allowances they were, like other witnesses, entitled to be believed. He also told the jury that by the plaintiff's own shewing it appeared that he was a man of common abilities, and of competent understanding to bind himself at the time he signed the covenant, and that he must be presumed to have understood it ;—that from the evidence before them there was nothing which the law recognized as compulsion or undue influence, so as to avoid the act, if the signature were really the plaintiff's ;—that there was nothing in the covenant itself inconsistent with law, or morally wrong, which could render it void ;—and that therefore, however inconsistent with their own particular views of christianity or religion the faith of the shakers as developed in this cause might be, yet if they were satisfied that the plaintiff knowingly signed the covenant, their verdict ought to be for the defendants. And the jury found for the defendants. To these opinions and directions of the Judge the plaintiff excepted.

Fessenden and *Deblois* argued in support of the exceptions.

1. The contract itself is unconstitutional and illegal, and therefore void. If illegal in part only, it cannot be sustained. 1 *Dane's Abr. ch.* 1, *art.* 25, *sec.* 1 and 3. *Stackpole v. Earl* 2 *Wils.* 133. *Featherston v. Hutchinson Cro. El.* 199. 1 *Comyn on Contr.* 30. 8 *Mass.* 46. But it is contrary to the Constitution of Massachusetts, *Art.* 1, as it is in derogation of the right to acquire and possess property. It infringes the duties of children and parents reciprocally to support each other; and destroys the natural relation subsisting between them. All the property and services of the contracting parties are pledged to the association for their own support alone, no provision being made for the discharge of other obligations.

2. The contract is also void as being against good morals. The parties to this covenant bind themselves to observe the order and rules, and submit to the discipline of the Church. To ascertain these rules, orders and customs, by which the shakers are governed, not only is recourse to be had to their own printed manuals of faith and practice, and to such expositions as they may deem it for their own interest to give; but we are at liberty to advert to the practical application and effect of them among themselves. Otherwise any combination of men, however nefarious their real object may be, might by the public avowal of principles not contrary to law and good morals, escape merited punishment, and even under the protection of law, subvert the very foundations of society. Thus if such a combination should exist, having for its real object the propagation of atheism, or the practice of lewdness, or the destruction of the domestic relations; any individual, unwarily drawn into the confederacy, by publications and professions of a different character, ought to be admitted, by shewing its true tendency, to separate his property from that of the society, and be absolved from his engagements. Here the counsel cited many passages from the book called the Testimony of Christ's second appearing, to shew that marriage was not admitted among the Shakers.

Now the contract in this case, taken with its practical exposition by the Shakers themselves, goes to the destruction of

marriage, which is a moral as well as political institution. It is true that the chiefs of this association insidiously admit the lawfulness of marriage, provided it is undertaken from motives purely etherial, unmingled with any earthly ingredient whatever; but the known impossibillity of the condition renders the rule absolute and the prohibition universal. And so is it well understood. The very names of husband and wife are not known among them ; and even those already united in that relation, however advanced in life, as soon as they enter the pale of this self styled Church are separated forever by an unrelenting despotism. The authority of a husband to control, and even the right to counsel and advise his wife, or to afford her his sympathy and protection, are no longer his own ; but become vested in the elders of the family, to whose gifts every member is bound to yield implicit homage. The love they have hitherto had for each other they are now enjoined to extinguish forever ; and to regard their children as no longer their own. The husband and father surrenders his authority, the wife her deference, the children their obligation to obey, and all surrender their affections into the common stock, where they are lost as so many drops in the ocean. In their daily intercourse the endearing appellatives of parent and child are studiously rejected, as words without meaning. They have no ritual for the celebration of the ordinance of matrimony ; and should any among them enter into that relation, they are immediately expelled from the society, with the anathema of interminable perdition, for disobedience to the gifts of the elders.

Thus the Shaker's covenant is in substance and effect a contract that the husband will separate himself from his wife ;—that he will no longer love, cherish, or cleave to her alone ;—that if she cannot profess his faith, he will not support or protect her;—that she shall no longer receive his particular sympathy or regard ;—that he will renounce all parental authority over his children, and withhold from them his instruction, advice, and support;—that the wife and children shall in like manner renounce their reciprocal duties, and that those whom God has joined shall no longer be one. Can such a contract receive the sanction of

law? *Worcester v. Eaton* 11 *Mass.* 368. *Smith & al. v. Poor & al. ib.* 549. *Coolidge v. Blake* 15 *Mass.* 429. *Jones v. Randall Cowp.* 39. *Page v. Trufant & al.* 2 *Mass.* 159. *Brown v. Getchell* 11 *Mass.* 11.

3. Its tendency to fetter and enslave the mind and person, is contrary to the genius and principles of a free government. In effect it is a contract that the party will always remain in the profession of his present faith; under the penalty of forfeiting all his estate should he become wiser and change his religious opinions. Thus, through the medium of interest, all freedom of thought, inquiry, and action, in a subject of all others the most important, are perpetually restrained. It is also a contract for unlimited servitude, without any other compensation than bare support; and is therefore unconscionable, and void, being in derogation of the right of personal liberty.

Respecting the admissibility of the witnesses objected to, it was contended that the releases did not discharge their interest in the event of this suit. If the contract be valid, the property holden is the joint property of them all. The right to the personal services of each individual, is a right pertaining to every other party to the contract; and which no member could discharge or release, except only so far as he was personally concerned. To be a good release from the whole contract, it should have been signed by all the parties to that contract, except those who were released. But the witnesses and their property are not affected by the releases produced. They are still bound to continue with the society, and labor for the common benefit, as before; and are still entitled to support from the common fund, for this fund is alleged to be religiously consecrated to that, among other uses. Their case is like that of a partner not named in a suit brought against others of the firm. No releases between him and his copartners could make him a competent witness for them, if his interest still remained in the joint property. *Peake's Evid.* 147, *note a.* 2 *Root* 498.

The defendants have no power to release the fund from its liability to meet the plaintiff's demand. For by the terms of the covenant they have no separate property, nor can they have any.

They have a joint interest in the common fund, but it is not assignable. It is merely a right to personal sustenance, when unable to support themselves; and this is all which the defendants or the witnesses can claim. Now the right to support being personal, cannot be claimed by substitute; and therefore nothing passed by the release made by the witnesses to the defendants; nor could the defendants, by their release to the witnesses, exonerate the common fund from the claim of the plaintiff. If he prevails, his judgment will and ought to be satisfied out of that property, in their hands. Equity would so decree it. Of course the witnesses would rely, for their support, upon a fund by so much diminished. Can any interest be more direct?

The covenant itself is an anomaly in the history of contracts; and if valid, is extensively mischievous in its tendency. By its terms the property is holden in trust, to be expended, first, for the support and maintenance of the contracting parties;—and secondly, for charitable purposes at the discretion of the trustees. The interest of each individual being merely a right to personal sustenance, is not attachable; and consequently any number of men; placing their property in this situation, the income alone being sufficient to support them in splendor, may bid defiance to all subsequent creditors.

Against such a contract the party would be relieved in Chancery, and it ought not, therefore, to be supported in a court of law. *Boynton v. Hubbard* 7 *Mass.* 112. *Greenwood v. Curtis* 4 *Mass.* 93.

Orr and *Greenleaf*, for the defendants, said that whatever might be the peculiarities of the Shakers' faith, the subject was not within the cognizance of the civil tribunals. And if it were, it would appear that they hold no tenet, affecting the outward conduct, which has not for ages been sanctioned by the common law. It does not accord with the genius and spirit of our institutions, to look for men's faith beyond the circle of their practice; and so far as this evidence is afforded, the case finds the moral conduct of the Shakers to be uniformly good.

The covenant on which the defence rests, contains in itself nothing inconsistent with law, or morally wrong. It violates no right to acquire property; and it places those who leave the society, and thus abandon their share of the common fund, upon no other footing than every inhabitant of a town or parish is placed by law in relation to the public property, upon his removal from one town or parish to another. Nor is the faith of the party any more controlled by his interest in the one case than in the other, unless by the greater value of the estate. Men sometimes convey their whole property, and bind themselves to labor for the grantor during life, for no other consideration than their own support and maintenance; and the legality of such contracts is never doubted; nor are they distinguishable in principle, from the case at bar.

Neither is this a contract in restraint of marriage. The book referred to does not contain any reprobation of marriage itself, but only of the unhallowed motives with which it is often contracted. It denounces *all* impurity, as being destructive of the life of religion in the heart of man; and insists on the sacrifice of every pleasure in its nature polluting. And however some may err in the application of these principles to real life, their errors form no objection to the principles themselves.

But if marriage were forbidden to every shaker, under any circumstances, the legality of the covenant would not be affected by the prohibition, it being only a contract at will, continuing while the party shall continue in their communion. In this respect it stands upon the same basis with the contract that an apprentice shall not marry while in his master's service; the regulation that a scholar shall not contract matrimony during his connection with his college; and with devises of estates during widowhood; all which have been recognized as good in law.

Nor is its tendency to enslave the mind any stronger in principle than every other engagement or employment affecting in any degree the religion or conscience of the party. Such, virtually, are all contracts with clergymen for their settlement and support; and the tenures of some professorships in public seminaries, &c. in each of which cases the incumbent must adhere to the distin-

guishing tenets of his sect, or renounce his living. He accepts the benefice with a full understanding of the whole import of the condition, which it is reasonable he should be holden to perform.

If any part of the covenant is void at common law, as being immoral or against public policy; it is void for that part only; there being an acknowledged difference in this respect between the common and statute law. 5 *Vin. Abr.* 98, *pl.* 7, and authorities there cited.

And if the services of the plaintiff have been rendered under a contract wholly void as against the policy of the law, he cannot recover wages, being himself a willing party in the offence. The law does not lend its sanctions to enforce either side of a contract thus tainted; but it leaves the parties as it finds them. *Bland v. Robinson Doug.* 679.

The admissibility of the witnesses they considered as settled by the case of *Anderson & al. v. Brock* 3 *Greenl.* 243.

The argument of this cause was had at the adjourned term of this court in *April* last; and the opinion of the court was now delivered as follows, by

MELLEN C. J. This case presents two questions for consideration. 1. Were certain members of the society of shakers properly admitted as witnesses? and 2. Were the instructions of the Judge to the jury correct?

1. The objection to the admission of the witnesses seems to have been effectually removed by the releases given at the trial. A question of the same nature was settled by this court in the case of *Anderson & al. v. Brock* 3 *Greenl.* 243; the only difference is, in that case the witnesses were introduced by the plaintiffs; and they and the witnesses executed mutual releases. This objection, therefore, is overruled.

2. The second deserves more consideration. Under the instructions which the jury received, they have found that the plaintiff knowingly signed the covenant; and by the report it appears that he was a man of common natural abilities and understanding; and sometimes taught and exhorted in the religious meetings of the society; and that he was more than twenty one

years of age when he signed it. By thus signing, he assented to all the terms and conditions specified in that covenant ; made its stipulations his own, and agreed to conform to the rules and regulations of the society in relation to its spiritual and temporal concerns. By the covenant, and also from the testimony of the plaintiff's own witnesses, it appears that a community of interest is an established and distinguishing principle of the association ; that the services of each are contributed for the benefit of all, and all are bound to maintain each, in health, sickness and old age, from the common or joint fund, created and preserved by joint industry and exertion. And each one by the express terms of the covenant engages "never to bring debt or demand against "the said deacons nor their successors, nor against any members "of the church or community, jointly or severally, on account of "any service or property thus devoted and consecrated to the "aforesaid sacred and charitable use." Such are the facts as to the contract into which the plaintiff entered when he subscribed the covenant. It is an express contract. The plaintiff, in the present action, however, does not profess to found his claim on an express promise ; but he contends, that upon the facts proved and disclosed in the report before us, the law implies a promise on the part of the defendants to pay him for his services, although they were performed for the society, of which the defendants are officers, and not for them in their private capacity ; and although such an implied promise is directly repugnant to the covenant, or written contract. Besides, it is clear from all the evidence in the cause, that whatever services the plaintiff performed while he was a member of the society, and remained and labored with them, he performed in consequence of his membership, and in pursuance of the covenant, in virtue of which he became a member. Now it is a principle perfectly well settled that where there is an express contract in force, the law does not recognize an implied one ; and where services have been performed under an express contract, the action to recover compensation for such services must be founded on that contract and on that only, unless in consequence of the fault or consent of the defendant. In the present case there is no proof that the covenant has been violated

on the part of the society, or that the plaintiff had any right to waive that covenant and its special provisions, and resort to a supposed implied promise on which to maintain his action. But as the covenant refers to the order of the church and their peculiarities of faith; and as at the trial both parties, without objection, went into an examination of witnesses, and thus obtained all those facts in relation to the society which are detailed in the Judge's report; the argument of the counsel has been founded on all the evidence in the cause viewed in a body; and, of course, in forming our opinion, we shall place it on the same broad foundation, without reference to technical objections, if any should present themselves. We are perfectly satisfied that the covenant was properly admitted as proof to the jury, to shew on what terms and considerations the services were performed by the plaintiff, for which he is now seeking compensation. We are also of opinion that the instructions of the Judge to the jury were correct, if the covenant signed by the plaintiff, taken in connection with those facts in the cause which are considered on this occasion, as a part of it, is a lawful covenant,—one which the law will sanction, as not being inconsistent with constitutional rights, moral precepts, or public policy. This leads us to the examination of the covenant, the principles it contains and enforces, and the duties it requires of the members of the society. The counsel for the plaintiff contends that the covenant is, for several reasons, void, and ought to be pronounced by this court to be a nullity.

It is said that it is void, because it deprived the plaintiff of the constitutional power of acquiring, possessing and protecting property. The answer to this objection is, that the covenant only changed the mode in which he chose to exercise and enjoy this right or power; he preferred that the avails of his industry should be placed in the common fund or bank of the society, and to derive his maintenance from the daily dividends which he was sure to receive. If this is a valid objection, it certainly furnishes a new argument against banks, and is applicable also to partnerships of one description as well as another.

It is said that the covenant or contract is contrary to the genius and principles of a free government, and therefore void. To this it may be replied that one of the blessings of a free government is, that under its mild influences, the citizens are at liberty to pursue that mode of life and species of employment best suited to their inclination and habits, "unembarasssed by too much "regulation"; and while thus peaceably occupied, and without interfering with the rights and enjoyments of others, they freely are entitled to the protection of so good a government as ours; though perhaps all these privileges and enjoyments might be contrary to the genius and principles of an arbitrary government. But, in support of this objection, it is contended that the covenant is a contract for perpetual service and surrender of liberty. Without pausing to enquire whether a man may not legally contract with another to serve him for ten years as well as one, receiving an acceptable compensation for his services, we would observe that by the very terms of the fourth and fifth articles, a secession of members from the society is contemplated and its consequences guarded against in the fifth by covenants never to make any claim for their services, against the society; and the fourth article speaks of a compliance with certain rules so long as they "remained in obedience to the order and government of the "church and holden in relation as members." Besides the general understanding and usage for persons to leave the society whenever they are inclined so to do, the plaintiff himself has in this case given us proof of this right, by withdrawing from their fellowship, and, now, in the character of a stranger to their rules and regulations, demanding damages in consequence of the dissolution of his contract. We, therefore, cannot consider the contract of a subscribing member as perpetual; he may dissolve his connection when he pleases, though perhaps he may thereby surrender some of his property, as the consideration of his dissolution of the contract. In all this we see nothing like servitude and the sacrifice of liberty at the shrine of superstition or monastic despotism.

It is said the covenant is void because it is in derogation of the inalienable right of liberty of conscience. To this objection

the reply is obvious ; the very formation and subscription of this covenant is an exercise of the inalienable right of liberty of conscience. And it is not easy to discern why the society in question may not frame their creed and covenant as well as other societies of Christians ; and worship God according to the dictates of their consciences. We must remember that in this land of liberty, civil and religious, conscience is subject to no human law ; its rights are not to be invaded or even questioned, so long as its dictates are obeyed, consistently with the harmony, good order and peace of the community. With us modes of faith and worship must always be numerous and variant ; and it is not the province of either branch of the government to controul or restrain them, when they appear sincere and harmless.

Again it is urged that the covenant is void, because its consideration is illegal, that it is against good morals and the policy of the law. We apprehend that these objections cannot have any foundation in the covenant itself; for that is silent as to many particulars and peculiarities which the counsel for the plaintiff deems objectionable. The covenant only settles certain principles as to the admission of members ; community of interest ; mode of management and support ; acquisition and use of the property ; stipulations in respect to services and claims ; professions of a general nature as to the faith of the society, and a solemn renewal of a former covenant and appointment of certain officers. This is the essence of the covenant signed by the plaintiff ; and on this the defendants rely ; as a written contract of the plaintiff; under his hand and seal, never to make the present claim ; and also as a complete bar to it. Now, what is there illegal in its consideration, or wherein is it against good morals or the policy of the law. It does not contain a fact or a principle which an honest man ought to condemn ; but it does contain some provisions which all men ought to approve ; it distinctly inculcates the duty of honest industry, contentment with competency, and charity to the poor and suffering. In this view of the subject, these objections vanish in a moment. But if we consider them as founded on the covenant, and all the evidence in the cause together, the result of the examination will not in a legal

point of view be essentially varied. It is certainly true that some articles of faith, peculiar to the society, appear to the rest of the world as destitute of all scriptural foundation; and several of their consequent regulations unnatural, whimsical and in their tendency, in some respects, calculated to weaken the force of what are termed imperfect obligations. Professing to exercise a perfect command over those passions, which others are disposed most cheerfully to obey, they, perhaps in so doing, may chill some of the kindest affections of the heart, gradually lessen its sensibility, and to a certain extent, endanger, if not seriously wound "the tender charities of father, son and brother." Perhaps celibacy, out of the pale of this church, has often the same tendency. It is true the mode of education and government may be too restrictive; and the means used to preserve perfect submission to authority may be deemed artful, severe, and in some particulars highly reprehensible, especially in their pretended knowledge of the secrets of the heart. On the other hand it appears, as before stated, that benevolence and charity are virtues enjoined and practised; and the pla'ntiff's witnesses, who had formerly belonged to the society for several years, testified that "all vice and immorality are disallowed in the society, and integ- "rity, uprightness and purity of life are taught and enforced "among them, and that the precepts of the gospel, as they un- "derstand and interpret them, constitute, as they conceive, the "foundations of their faith and the rules of their practice". As for their faith, it would seem from the volume which they have published, that it extends to unusual lengths; and leads to what others, at once pronounce to be absurdities; but this is not within our control: it is rightfully their own. But it is contended that according to the faith and principles and usages of the society, which are considered as referred to in the covenant as a part of it, the covenant amounts to a contract never to marry, which public policy will not sanction. We have before observed it is not a perpetual one; of course, at most, it is a contract not to marry while they continue members of the society; but their faith does not require so much as this; their principles condemn marriage in certain cases only; that is, where it is contracted with

carnal motives; and not purely with a view of complying with the original command "increase and multiply." It is true they do not believe that marriages are contracted (except in some solitary instances) without motives far less worthy and disinterested. As it regards those members of the society who are married; though they may live separate, without cherishing the gentle affections, still such conduct violates no human law; and however lightly they may esteem the blessings of matrimony, their opinions do not lessen the legal obligations created by marriage. Surely they may agree to live in different houses and without any communication with each other. Contracts of separation between husband and wife are not unfrequent; neither are they illegal when made with third persons. This objection cannot avail, nor that which refers to the relation between father and son. Their principles require the circle of benevolence and affection to be enlarged; but not that parental or filial tenderness should be destroyed or lessened. We must not overlook the distinction between duties of perfect and imperfect obligation; the neglect of the former is a violation of law, which will render the delinquent liable in a court of justice to damages, penalties or punishment; but the performance of the latter is never the subject of legal coercion. A man may be punished for defrauding his neighbour; but not for indulging feelings of unkindness towards him; or, in the hour of sorrow, withholding from him the balm of sympathy, consolation and relief. Though we may disapprove of many of the sentiments of this society in respect to the subject of education and discipline, yet as they steadily inculcate purity of morals, such a society has a perfect right to claim, receive and enjoy the full blessings of legal protection.

But, for the sake of the argument, let us suppose that the covenant or contract is illegal and void for the reasons which have been urged by the plaintiff's counsel; what then will be the legal consequence? will the action then stand on any firmer ground? Though in the present case, the plaintiff does not demand of the defendants the repayment of a sum of money paid to them, on the ground that they have no legal right to retain it yet his demand is in principle, the same thing; it is a demand of

compensation for services rendered, on the ground that, as the contract was unlawful and void, the value of those services may be recovered; that is, if he had increased the funds of the society by a sum of money, instead of his personal labors and services, the right to recover back the money, or recover the value of those services in money must be settled by the same principles of law in both cases. Now, what are those principles? Before stating them, let it be again observed that the jury have found that the plaintiff knowingly signed this covenant which we are now considering in the light of an illegal and void contract; and voluntarily joined this society and remained for several years a member, engaged with all the other members in all the transactions of it, and all of them *in pari delicto*; for if the covenant is illegal and void, it is because the society who formed and signed it, is an unlawful society, and united for purposes which the law condemns. "If a wager be made on a boxing match, and on the "event happening the winner receives the money, it cannot be "recovered back by the loser; for where one knowingly pays "money upon a contract executed, which is in itself immoral and "illegal, and where the parties are equally criminal, the rule "is *in pari delicto potior est conditio defendentis.*" 2 *Comyn on Contr.* 120. *Bull. N. P.* 132. *Cowp.* 792. To same point also is the case of *Howson v. Hancock* 8 *D. & E.* 575. Lord *Kenyon* there says, "there is no case to be found, where, when money "has been actually paid by one of two parties to the other on an "illegal contract, both being *participes criminis*, an action can be "maintained to recover it back again; here the money was not "paid on an immoral, though on an illegal consideration, and "though the law would not have enforced the payment of it, yet, "having paid, it is not against conscience for the defendant to "retain it." *Lawrence J.* adds "In *Smith v. Bromly* Lord *Mans-*"*field* said that where both parties are equally criminal against "the general laws of public policy, the rule is, *potior est conditio* "*defendentis.*" See *Smith v. Bromly Doug.* 696. So also in *Engar & al. v. Fowler* 3 *East.* 222, it was determined that an underwriter could not maintain an action against brokers to recover premiums of reassurances declared illegal by statute

Lord *Ellenborough C. J.* says, "We will not assist an illegal "transaction in any respect; we leave the matter as we find it."

So, an action will not lie to recover back money deposited for the purpose of being paid to one for his interest in soliciting a pardon for a person under sentence of death. *3 Esp.* 253. No implied promise arises out of an illegal transaction. *Robertson v. Tyler* 2 *H. Bl.* 379. See also *Aubert v. Moor* 2 *Bos. & Pull.* 371; and *Mr. Dane*, in his *Abr.* 1 *Vol.* 194, says,—"And on the "whole, the sound principle is, the law will not raise or imply "any promise in aid of a transaction forbidden by the law of the "land." With these authorities before us, it would seem impossible to sustain the present action, even allowing the covenant and the society, by whom and for whose use it was formed, to be of the reprehensible and illegal character which has been given them. On the whole, we are all of opinion that there is a total failure on the part of the plaintiff, and there must be

Judgment on the verdict.

MITCHELL, *treasurer*, &c. *vs.* OSGOOD & ALS.

An action of debt on a foreign judgment, where the plaintiff is not a citizen of this State, may be brought in any county in the State.

A judgment rendered in Massachusetts against a citizen of Maine, before the separation, may be revived in the same court by *sci. fa.* though the defendant is not resident in that Commonwealth; the jurisdiction of both courts as to processes brought to execute such judgments, remaining unaffected by the separation, by *Stat.* 1819, *ch.* 161, *sec.* 1, *art.* 8, adopted into the constitution of Maine, *art.* 10, *sec.* 5.

And such judgment will be received by the Courts in this State as conclusive evidence of debt.

THIS was an action of debt on a judgment rendered by the Supreme Judicial Court of Massachusetts, in the county of *Middlesex*, at *March* term 1824, upon a *scire facias* brought by the Treasurer of State, to have execution for the benefit of one *Palmer*, of a judgment rendered prior to the separation of *Maine*, for the penalty of the bond of office given by the late sheriff *M'Millan*,

of the county of *Oxford*. The defendants, with one *James Osgood*, deceased, were the sureties of the sheriff, and inhabitants of the county of *Oxford*.

In a case stated for the judgment of the court, the principal facts were these. The bond was given *Feb.* 17, 1812, to the then treasurer of Massachusetts, in the penalty of thirty thousand dollars, with the usual condition for a faithful discharge of the office of sheriff. In *October* 1816, one *Shobal C. Allen* recovered a judgment against the sheriff for nonfeasance in his office. In *February* 1817, the sheriff died, insolvent; a commission of insolvency was duly issued in *April* following, the proceedings under which were regular; and a dividend of his estate was finally decreed in *March* 1823, after a settlement of the fifth and last administration account. *Allen's* judgment not being satisfied, an action of debt upon the sheriff's bond was duly brought in *Sept.* 1817, against the defendants, by the then Treasurer of State, and judgment rendered in his favor for the penalty, at *October* term 1817, of the Supreme Judicial Court, and execution awarded for the use of *Allen*, for the amount of his debt and costs, being $633,85.

Another suit was commenced in *June* 1816, against the sheriff for his official nonfeasance, by one *David Palmer*, in which judgment was recovered at the Court of Common Pleas in *Middlesex*, at *December* term 1818, against the executors of the sheriff, who had died pending the action. This judgment not being paid, a writ of *scire facias* for the benefit of *Palmer*, was sued out in *May* 1822, by Mr. *Sargent*, then treasurer of State, upon the judgment previously rendered for the penalty of the bond. This writ was returnable to the Supreme Judicial Court in the county of *Middlesex*; and after several continuances judgment was rendered at *March* term 1824, for the present plaintiff, as successor in office to Mr. *Sargent*, that he have execution for the use of *Palmer*, for the amount of his debt and costs, being $205,90. The execution upon this last judgment being but partially satisfied by one of the bondsmen, the present action was brought upon the same judgment to recover the residue.

In all these suits the defendants appeared and answered. The claim of *Palmer* was never laid before the commissoners on the sheriff's estate, nor reported by them to the Judge of Probate ; nor did it appear that the insolvency was ever suggested by the defendants.

Deblois, for the defendants, objected, *first*, that this court, sitting in this county, had no jurisdiction of the cause. The defendants resided in *Oxford*, and the plaintiff in *Massachusetts* ; and the *Stat.* 1821, *ch.* 59, *sec.* 35, which authorizes the bringing of an action of debt on a foreign judgment, speaks only of the county in which the defendants reside, or have attachable estate ; which is not the case here.

2. The claim which this action is brought to enforce, should have been laid before the commissioners on the estate of the late sheriff; and the creditor having failed to do this, the bondsmen are discharged. *Todd v. Bradford* 17 *Mass.* 569.

3. The recovery of judgment in Massachusetts makes no difference in the case, because, being a foreign judgment as to these defendants, its merits are still open to examination. *Bartlett v. Knight* 1 *Mass.* 401. 1 *Caines* 460. *Buttrick & al. v. Allen* 8 *Mass.* 273. *Stevens v. Gaylord* 11 *Mass.* 266.

Adams, for the plaintiff. The objection that the action is brought in the wrong county, if well founded, should have been taken in abatement. *Jewett v. Jewett adm'r.* 5 *Mass.* 275. *Tidd's Pr.* 590. It stands upon the same principle with the objection of misnomer, want of indorser, omission of parties in tort, &c. *Hart v. Fitzgerald* 2 *Mass.* 50. *Thompson v. Hoskins* 11 *Mass.* 419. *Haines v. Corliss* 4 *Mass.* 659. *Coffin v. Coffin* cited in *Story's Pl.* 353, *note*. *Cleaveland v. Welch* 4 *Mass.* 591. *Briggs v. Nantucket Bank* 5 *Mass.* 94. *Lawrence v. Smith* 5 *Mass.* 362.

But whatever may be the merit of the objection if taken by plea, it is not open to the party in a case stated for the opinion of the court ; for such statement is taken as a waiver of all objections not going to the gist of the action. *Portland Bank v. Stubbs* 6 *Mass* 425. Nor is this objection supported by the facts con-

tained in the statement; for it does not appear that the defendants had not any attachable estate in this county. See also *Ruggles v. Patten* 8 *Mass.* 480. *Converse v. Symmes* 10 *Mass.* 377. *Barstow & al. v. Fossett* 11 *Mass.* 250.

But the action is not brought in the wrong county. The plaintiff being a citizen of another State, might elect his county; and such was manifestly the intent of the legislature. The ninth section of the statute cited, which makes provision for the bringing of all transitory actions in the county where one of the parties live, applies only to cases where both parties reside within the State. Plaintiffs who are citizens of another State have always been considered as not within its provisions. And the language of the thirty fifth section, which permits actions on foreign judgments to be brought in the county, where *either* of the parties live, as it evidently regards citizens of this State alone, ought to receive a similar interpretation. Such has been the construction given by the courts in Massachusetts to the statutes of that Commonwealth, from which our statute is copied. *Day & al. v. Jackson & al.* 9 *Mass.* 237.

As to the defendants' second objection; the original suit by *Palmer* being pending at the time of the sheriff's decease, the proper course was to have liquidated the demand by proceeding to judgment, before laying it before the commissioners. And if the defendants would avail themselves of the insolvency it was their duty to have suggested it in the former suit. Besides, this objection, if valid, should have been taken in abatement in that suit, admitting the justice of the demand. It comes now too late. *Hunt v. Whitney* 4 *Mass.* 624. *Moore v. Eames* 15 *Mass.* 312. *Thatcher v. Gammon* 12 *Mass* 268.

Nor is this a foreign judgment. This point is considered as settled by the cases *Bissell v. Briggs* 9 *Mass.* 462. *Jacobs v. Hull* 12 *Mass.* 25. *Commonwealth v. Green* 17 *Mass.* 545. And if the judgments of other States in the Union were generally to be treated as foreign judgments, yet the relation of Maine to Massachusetts at the time when the original judgment in this case was rendered, constitutes an exception to such rule. The records of the courts of the parent state prior to the separation, ought to

be treated as domestic proceedings, within the meaning of the eighth article of the terms and conditions in the act of separation.

Fessenden, in reply, said that if the language of the ninth section of the statute was broad enough to include the case at bar, it was qualified by the thirty fifth, which is in the nature of a proviso; and both taken together amount to this, that in debt on a foreign judgment, the defendant shall be sued in his own county unless the plaintiff is an inhabitant of this State, in which case the suit may be brought in the county of the plaintiff.

The benefit of the objection is not waived by the statement. The rule adverted to in the case of the *Portland Bank vs. Stubbs* applies to matters of form only, not appearing in the statement itself. But here the very object of presenting the facts in the statement is, that this objection should be considered and decided by the court. It was not necessary to plead it in abatement; for being apparent on the record, it may be pointed out and relied on in any stage of the cause. *Jacobs v. Mellen* 14 *Mass.* 134. It cannot be waived even by consent of parties, so as to confer a jurisdiction not otherwise existing. *Coffin v. Tracy* 3 *Caines* 129. The cases cited on the other side have no application here, because in them the want of jurisdiction was not apparent on the record; except in the case of *Lawrence v. Smith*, which proceeds wholly on the ground that in cases like the present a plea in abatement is unnecessary.

This argument having been heard in *April* last at the adjourned term of this Court, the opinion of the Court was now delivered by

Mellen C. J. In *October* 1817, judgment was recovered against the defendants for the whole penalty of the bond, which they and *Osgood* had signed as the sureties of *McMillan*. *Allen*, a creditor of *McMillan*, had execution for a part of said penalty. Afterwards *Palmer*, having obtained a judgment against *McMillan's* executors, sued a *scire facias* against the defendants to obtain satisfaction of his judgment also out of said penalty; and in *March*

1824 obtained judgment and had execution in the name of *Sargent*, treasurer; a part of this sum was paid on the execution, and the present action of debt is brought in the name of the present treasurer to obtain payment of the residue. In all the actions before named the defendants appeared and defended; the last *scire facias* was served on the defendants in Oxford county in this State. First it is said this action should have been commenced in the county of Oxford, where the defendants reside; and that as this irregularity appears on the record, the court must take notice of it without a plea in abatement. The validity of the objection depends on the construction to be given to the 9th and 35th sections of the statute of 1821 ch. 59. By the 9th sect. when the plaintiff and defendant both live within this state, all personal or transitory actions shall be brought in the county where one of the parties lives; otherwise, the writ shall abate. The 35th sect. provides that an action of debt may be brought on a judgment rendered by a court of record in any other of the United States, in any court of record of this state, holden for the county in which either of the parties to such judgment shall dwell or reside. So also the 34th section provides that an action of debt may be brought on a judgment of a court of record of this state in the county where either of the parties to such judgment shall dwell and reside at the time of bringing the action, or in the same court where it was rendered; the language is the same in both sections as to the locality of the action in respect to the parties. We do not perceive any direct repugnance of either of these sections to the 9th section, which should require of us to give them a different construction upon the point in question, where no perceptible reason can be assigned for the distinction. To make such a distinction between transitory actions only serves to impair the symmetry of our system of law on the subject; and in a case, too, where the Legislature may fairly be considered not to have intended any such distinction. It seems more to comport with their design to construe the several provisions before mentioned as affecting the character of all transitory actions in the same manner and to the same extent as to the particular under consideration. This construction renders it unnecessary for us to

decide whether a plea of abatement was necessary; or, if so, whether the advantages of such a plea are waived by such a statement of facts as that before us.

The second objection is that the judgment on the last *scire facias*, recovered in 1824 against the defendants, is not binding here, inasmuch as the court in Massachusetts had no jurisdiction over the defendants, living at the time in this state; that though process was served on them in the county of Oxford, and they in person or by attorney attended the court in Massachusetts, still that such attendance gave the court no jurisdiction, as they had none at the time the suit was commenced; and the case of *Bissell v. Briggs* 9 *Mass.* 462, is cited as establishing these principles. Waiving for the present, all further inquiry as to the correctness of this argument, it may be of importance to examine the subject in another point of view. By the 6th section of the act of Massachusetts of *March* 1, 1799, in an action on a bond with penalty, judgment, when rendered for the plaintiff is to be rendered for the whole penalty; and such judgment is to stand as a security for further damages to which the plaintiff may be entitled; which further damages are to be ascertained on a writ of *scire facias* on said judgment, from the court where the same was obtained; such is the law applicable to all bonds. The act of Massachusetts of *March* 13, 1806, regulates the proceedings to be had upon sheriff's bonds for the use of any person or persons who are or may be entitled to the benefit of the same; but it does not alter the nature of the judgment to be entered in a suit on such bond; but prescribes the sum for which a creditor shall have execution, after the amount of his claim against a sheriff, his executors or administrators, has been legally ascertained. Thus the law stood at the time "an act relating to the separation of the District "of Maine from Massachusetts Proper and forming the same "into a separate and independent State" was passed, on the 19th of *June* 1819. Several of the provisions of this act are incorporated as a part of our constitution; among which is the following. "And the rights and liabilities of all persons shall "after the said separation, continue the same, as if the said Dis- "trict was still a part of this Commonwealth, in all suits pending,

"or judgments remaining unsatisfied on the fifteenth day of March "next, where the suits have been commenced in Massachusetts "Proper and process has been served within the District of "Maine; or commenced in the district of Maine and process has "been served in Massachusetts Proper, either by taking bail, "making attachments, arresting and detaining persons, or other- "wise, where execution remains to be done; and in such suits, "the courts within Massachusetts Proper, and within the pro- "posed state, shall continue to have the same jurisdiction, as if "the said district still remained a part of the Commonwealth." We are bound to presume that those who drew and arranged the provisions of this interesting act, and the Legislature that enacted it, well knew and duly considered the provisions and principles of the acts of 1799 and 1806 above mentioned; that they well knew and duly considered the manner in which any creditor who had suffered by the misdoings of a sheriff or his deputies, could legally avail himself of the benefit and security of the official bond of such sheriff; and that they did not intend to render those provisions less effectual and certain, contained in those two acts. Indeed, the division of a state is of such rare occurrence; and the partition of a general jurisdiction of so much importance to those whose interests are involved in such partition, we apprehend that a liberal construction ought to be given to those provisions, professedly introduced for their protection. The judgment for the penalty of the bond in question was rendered in 1816, years before the act of separation was passed;—a portion of that penalty had on *scire facias* been appropriated to the use of *Allen*; the residue remained liable to satisfy the legally ascertained claims of other suffering creditors to be appropriated to their use upon *scire facias*, as provided by the act of 1799. At the time Maine was separated from Massachusetts, the judgment for the penalty of the bond, rendered in 1816, remained unsatisfied for five sixths of its amount, and the only mode of satisfaction pointed out by the act of 1799 was by the process of *scire facias*, which in such a case as this must be brought in the name of the State Treasurer, though for the use of a creditor. Now it is well settled that a *scire facias* can issue only from the court having cus-

tody of the record; under the supposed authority of the above quoted provision in the act of separation, the *scire facias*, on which the judgment declared on was rendered, was served on the defendants in this state, by leaving a copy with them; they understood the law in the same manner as the plaintiff's counsel then did, and, without any coercive process, attended at the court in Massachusetts and defended the action. On this ground, without touching the question as to the validity and effect of judgments rendered in other states, in ordinary circumstances, our opinion is that the judgment rendered on the *scire facias* in *Middlesex*, *October* term, 1824, is to be considered by us as conclusive as it would have been, if Maine had still continued a part of Massachusetts. In support of this construction it may be observed, that the mode by which a creditor is to avail himself of the security of a sheriff's bond is peculiar, depending wholly on the statutory provisions above recited—that manifest inconveniencies would attend any other construction. The judgment for the penalty of the sheriff's bond having been rendered in the Supreme Judicial Court of Massachusetts, that court only, before which the record remains, can know when the amount of that judgment shall have been exhausted by successive appropriations on *scire facias* at the instance and for the benefit of suffering creditors who had substantiated their claims against the sheriff. In addition to all this, we would observe that these successive writs of *scire facias* in case of sheriff's official bonds are not original writs; but processes employed to obtain satisfaction of the judgment for the penalty; they are, to all pecuniary purposes, to be considered as a continuation of the original action, necessary to enable all concerned for obtaining the fruits and benefits of that judgment which was rendered before, and was remaining unsatisfied, at the time the act of separation was enacted. In support of this principle may be cited the case of *Dearborn v. Dearborn* 15 *Mass.* 316, in which the court decided that a writ of *scire facias* against bail, was not to be considered as a new action; but a regular step in the collection of the original demand. In fact, unless the plaintiff can avail himself of this mode of proceeding, he is utterly without remedy. This objection, therefore, must not be permitted to prevail.

The remaining objection is that this action cannot be maintained, because the claim of *Palmer* was never laid before the commissioners on the estate of *McMillan* the late sheriff; and in support of the objection the defendants rely on the proviso in the first section of the before mentioned statute of 1806, which is in these words: "Provided however, that no such suit shall be "instituted by any person for his own use, until such person shall "have recovered judgment against the sheriff, his executors or "administrators, in an action brought for the malfeasance or "misfeasance of the sheriff or his deputy, or for nonpayment of "any monies collected by the sheriff or his deputy, in that ca-"pacity; or a decree of a judge of probate allowing a claim for "any of the causes aforesaid."—The defendants also rely on the case of *Todd v. Bradford*, Adm'x. 17 *Mass.* 567. Upon examination of that case it is found to differ essentially from this.—There the estate of the intestate was insolvent when the action was commenced; and that fact was pleaded in bar, and admitted by the demurrer. The court thereupon decided that the plaintiff had not maintained his suit, as he had not filed his claim before the commissioners, and therefore could proceed no further, though his object was merely to obtain a judgment as the basis of a claim against the sureties of the intestate. The facts in the case before us are far different from these. At *December* term 1818, at the C. C. Court of Common Pleas in *Middlesex*, *Palmer* recovered judgment against the estate of *McMillan* in the hands of the executors of his will, for $156,58, damages and costs; the executors not pleading the insolvency of the estate, or disclosing any fact on the record, intimating that such insolvency existed; and it further appears that in the action of *scire facias*, instituted in *January* 1822, and on which judgment was rendered in *March* 1824, no defence grounded on the insolvency of *McMillan's* estate, was then made; nor any intimation to the court that such a fact existed or had been represented to the Judge of Probate; but the defendants suffered judgment to be rendered in common form against them, and execution to issue for the sum of $236,24. Now, it is a general rule and well settled principle, that upon a *scire facias*, or in an action of debt upon

judgment, no defence can be admitted which existed prior to the judgment; as was decided in *Thacher & al. v. Gammon* 12 *Mass.* 268. The case of *Sturgis v. Reed ad'r* 2 *Greenl.* 109, seems directly in point; and the judgment, therefore, of *Palmer*, against the representatives of *McMillan*, is not affected by the insolvency of his estate. The claim has been ascertained by judgment of law; and that is sufficient, according to the terms of the proviso in the act of 1806; no other ascertainment is necessary. The present action is therefore sustainable, by means of which to recover of the defendants a portion of the penalty for which judgment has been rendered, equal to the amount of the balance now due, of the sum for which execution was ordered in *March* 1824, for the use of *Palmer*. The result of this investigation is that the action is maintainable, and the defendants, according to the agreement of the parties, must be defaulted.

CROFTON, *Ex'r appellant from a decree of the Judge of Probate, vs.* ILSLEY, *adm'r de bonis non.*

A will made and proved in a foreign country prior to *March* 20, 1821, may be filed in the Probate office here, though it be attested by only two witnesses; notwithstanding the proviso in *Stat.* 1821, *ch.* 51, *sec,* 14, which, in this respect, is to be taken prospectively.

THIS was an appeal from a decree of the Judge of Probate against receiving and filing a certified copy of the last will and testament of *James Dunn*, late of the city of *Dublin*, in *Ireland*.

Mr. *Dunn*, many years since, resided in this county, where he left personal estate, on which administration had been granted to another person, and afterwards to the appellee. Whereupon *Crofton*, the executor of his will in *Ireland*, presented at the Probate office a copy of the will, duly proved and authenticated there, and prayed that the same might be filed here, pursuant to the law of this State, and that a letter testamentary might be granted to him. This was refused by the Judge, on the ground that the will being attested by only two witnesses, it was not within

the terms of *Stat.* 1821, *ch.* 51, *sec.* 14, which admits the filing of such foreign wills only as are attested by three witnesses, like those made by virtue of the law of this State. It was contended by the petitioner that his right to file the will accrued under the statute of Massachusetts of 1785, *ch.* 12, which authorized the filing of *any* foreign will which had been duly proved in a foreign country, Mr. *Dunn* having died before the separation of Maine from Massachusetts ; and that the right, being thus vested, could not be taken away ; but the Judge was of opinion that the statutes on this subject were to be expounded as all other statutes conferring jurisdiction, which it was always in the power of the legislature to modify or take away at pleasure ; and that the right to call on the Probate Court to take cognizance of a will not executed as the act requires, stood on no better foundation than the right to require another Court to sustain an action, after its jurisdiction of such causes had been taken away.

Various reasons of appeal were filed, all tending to the point taken at the Probate Court, and stated above.

Fessenden, *Daveis* and *Deblois* argued for the appellant,—1. that the disposition and succession of personal property are regulated, not by the law of the country in which it is locally situated, but by that of the testator's country or domicil. To this point they cited *Vattel b.* 2, *c.* 7, *sec.* 85, *cap.* 8, *sec.* 109, 110, 111. *Voet. Comm. lib.* 38, *tit.* 17, *sec.* 34. *Vinnius Select. quæst. lib.* 2, *cap.* 19. *Denisart. Collect. de juris domicilii sec.* 3. 4. *Bynkershoek. quæst. priv. juris lib.* 1, *cap.* 16, *p.* 334, 335. *Erskine's Inst. b.* 3. *tit.* 9, *ch.* 4. 1 *Wooddes. lect.* 385. *Huber*, *cap. de conflictu legum tom.* 2 *lib.* 1 *tit.* 3, *sec.* 15, *ib. lib.* 2, *tit.* 4, *sec.* 1, 5. *ib. tom.* 3, *lib.* 20, *tit.* 4, *and lib.* 42. *tit.* 3, 4, 5, 7. *Coppen v. Coppen* 2 *P. Wms.* 293. *Fonbl.* 441. *Bovey v. Smith* 1 *Vern.* 85. *Sill v. Worswick* 1 *H. Bl.* 690. *Hunter v. Potts* 4 *D. & E.* 192. *Smith v. Buchanan* 1 *East* 11. *Porter v. Brown* 5 *East.* 131. *Bempde v. Johnstone* 3 *Ves. jr.* 198. *Phillips v. Hunter* 2 *H. Bl.* 405. *Bruce v. Bruce* 2 *B. & P.* 229. *Thorne v. Watkins* 2 *Ves.* 35. *Piper v. Piper Ambl.* 25. *Burn v. Cole* 6 *Bro. Parl. Ca.* 584, 601. *ib.* 550, 577. *Prec. Chan.* 207. *Somerville v. Somerville* 5 *Ves.*

786. And this position has been fully recognized and adopted by the courts in this country in the following cases. *Goodwin v. Jones* 3 *Mass.* 517. *Dawes v. Boylston* 9 *Mass.* 337. *Richards v. Dutch* 8 *Mass.* 506. *Stevens v. Gaylord* 11 *Mass.* 256. *Dublin v. Chadbourne* 16 *Mass.* 441. 9 *Cranch* 191. *Harvey v. Richards* 1 *Mass.* 408. *Desebats v. Berquier* 1 *Bin.* 345. *United States v. Crosby* 7 *Cranch* 115. *Robinson v. Campbell* 3 *Wheat.* 212. *Dixon v. Ramsay* 3 *Cranch* 319.

2. They contended that the rights of the parties under this will were vested by the death of *Dunn* many years ago, while the statute of Massachusetts authorizing the filing of every foreign will was in force; and this right the legislature could not take away. All wills made and consummated by the death of the testator prior to the passing of the *Stat.* 1821, *ch.* 51, may be proved under the former law, under which the right to file this will became vested. The statute of Maine must therefore receive a construction wholly prospective. Prior to its enactment, a will of personal property was good, though attested by two witnesses only; and if such a will, legally made at the time, were now offered for probate, the Judge would be bound to receive it. If this be true as to domestic wills, it is equally so as to those made abroad; for both are placed, by our statute, on the same footing. *Pro. Ken. Pur. v. Laboree* 2 *Greenl.* 275. *Dash v. Van Kleick* 9 *Johns.* 477. *Puffend. Droit Nat. lib.* 1 *cap.* 6, *sec.* 6.

Greenleaf, for the appellee, did not controvert the position that personal property was to be distributed by the law of the testator's domicil; but denied its application to the case at bar; which he said was a question of remedy, merely, and did not touch vested rights. The permission to file any foreign will was but an indulgence, in the nature of an *exequatur*; which the legislature might at any time withdraw, modify, or repeal. By the statute of Massachusetts every will, originally proved in a foreign country, might be filed here, and the executor be recognized in that character in suits in our courts. The legislature of Maine, at the revision of the statutes might lawfully have omitted this provision; giving the Judges of Probate no power to receive

probate of foreign wills ; nor to grant letters testamentary but to our own citizens. Had this jurisdiction been thus wholly abolished, where would have been the right to file any foreign will ? But instead of abolishing the jurisdiction, they have limited it to wills attested, like those of our citizens, by three witnesses, excluding all other testamentary papers. This regulation does not abrogate any foreign wills ; nor impair any rights vested under them. It merely changes the mode by which the executor is to obtain the property, to distribute in his own country. The bond given to the Judge of Probate by the administrator *de bonis non*, is a sufficient protection to the interest of all persons concerned. Though the want of a letter testamentary may prevent the executor from suing in our courts in that character ; yet the certified copy of the will is plenary evidence of his right to receive the balance of the effects under a decree of distribution, for the benefit of the legatees ; or of their right to a decree directing it to be paid to themselves. The rights of the legatees, in the one mode or the other, would always be safe, under the power of the Judge of Probate, and of this court. And if a suit were necessary on the administration bond, it would of course be brought in the name of the Judge, for the benefit of the party entitled to the money. Indeed the executor himself would always be enabled, under such circumstances, to obtain a letter of administration, ancillary to that granted abroad, and thus retain the effects in his own hands.

The rights of legatees being thus secured, the question is reduced to a matter of form ;—whether they shall receive their money by a decree of the Judge of Probate ordering the administrator to pay it to them,—or to the executor as their agent or representative, for their use ;—or whether he shall first be clothed with the powers of an executor to sue in our courts. And this subject the legislature had the same right to regulate, that they have to change the mode of remedy in any other case ; concerning which no doubt has been suggested.

After the argument, which was in *April* last, the cause being continued for advisement, the opinion of the court was now delivered by

WESTON J. By the laws of most civilized countries, to which possibly no exception now exists, the disposition of the personal estate of any one deceased, is determined by the law of his domicil. With regard to real estate ; the tenure by which it may be holden, the mode of enjoyment, the instruments and solemnities, by which it may be transferred, and the right of succession thereto, upon the decease of the owner are uniformly regulated by all nations, possessing regular governments, so far as we know, by the *lex rei sitæ*.

In relation to personal property owned by persons resident abroad, who had deceased, after making a testamentary disposition thereof, according to the law of their domicil, proved and allowed by the regular foreign jurisdiction, the laws of Massachusetts, prior to the separation, had prescribed a mode of giving effect to such dispositions, without reuqiring any particular mode of execution or authentication abroad. The statute contained a clause, providing that nothing therein "shall be "construed to make valid any will or codicil, that is not attested "and subscribed in the manner the laws of this commonwealth "direct, nor to give operation and effect to the will of an alien "different from that which such will would have had, before the "passing of this act." A prior statute of Massachusetts had prescribed, that wills devising lands, tenements, and hereditaments, should be attested by three witnesses ; but contained no provision as to the attestation of wills of personal estate only.

In the revision of the general statute laws, which was made in this state in 1821, it was deemed a convenient mode to digest and arrange into one act, statutes relating to the same subject matter which had passed at successive periods. In regard to wills, the Legislature thought proper to abolish the distinction, which had previously existed, between wills of real and of personal estate ; and to require the same attestation in the latter as in the former. The proviso, before referred to, in the act of Massachusetts was continued, probably without con-

sidering that, in the connexion in which it now stands, in the statute of Maine, its most obvious construction would seem to require, that the attestation of three witnesses was deemed necessary in a foreign will of personal estate; although without such attestation, it might be valid by the law of the testator's domicil, of which the probate by the foreign jurisdiction, is the conclusive and only evidence. As our laws in this particular, may generally be unknown to the testator abroad, and as it is not easy to conceive that our legislature were unwilling to give full effect to the right, now so universally recognized, of disposing of personal property, in conformity with the laws of the country, where the deceased had his domicil, we are not inclined to believe that they intended to introduce a provision, inconsistent with this principle. Whether the words of the proviso warrant a construction giving effect to such wills, not attested as our laws require, or whether further legislation upon the subject may not be found expedient, we give no opinion; as in the view we have taken of the case before us, the determination of this point is not necessary to its decision.

In the revised statute of 1821, the legislature, so far as alterations were made in the prior law, intended to prescribe new rules for the future, not for the past. Upon every sound principle of construction, laws should be prospective in their operation. The past, when private rights are concerned, is not within the legitimate scope of legislation; and although the tense used, according to the strict rules of grammatical construction, may seem to regard the past, yet this often arises from considering events, then future, as past in reference to proceedings provided for and regulated, which must necessarily succeed these events in the order of time. This results as well from the imperfection of language, as from a want of attention and accuracy in the use of it.

With regard to wills made prior to the enactment of the statute of Maine, which had become consummate by the death of the testator, and which had been made according to existing laws, continuing in force to the period of his decease, it never could have been the design of the Legislature to vacate and annul them

and to leave the estate bequeathed to pass in different channels; thus defeating the lawful intentions of the testator. If they had power to do this, nothing short of the most express and unequivocal language could justify such a construction We are satisfied that the provision requiring the attestation of wills of personal property by three witnesses, must be deemed prospective in its operation; and that it does not affect such as had become consummate prior to the passage of the law. If the will in question had been a domestic will, it was entitled to probate; and there is therefore nothing in the proviso to prevent its being filed and recorded as a foreign will, in the probate office in this county.

In conformity with this opinion, the decree of the Judge, in the court below, is reversed; and the case remitted to him, with a direction that he permit a copy of the will and codicil of the said *James Dunn*, with the probate thereof, to be filed and recorded in the probate office for the county of Cumberland; and that he cause such further proceedings to be had in the premises, as to law may appertain.

THE INHABITANTS OF DURHAM, *plfs. in review*, *vs.* THE INHABITANTS OF LEWISTON.

The legislature of this State has no authority, by the constitution, to grant a review of a suit between private citizens.

UPON the record in this case it appeared that the original judgment was rendered at *November* term 1822;—that at *May* term 1824, on the petition of *Durham* a review was granted;—and that no writ of review having been sued out returnable at the next term in *November* 1824, the legislature, on the petition of the plaintiffs in review, authorized them, by a resolve passed *Feb.* 23, 1825, to sue out and prosecute the present writ of review, at the then next term of this court, which was done accordingly. The defendants pleaded in abatement that the writ of review

was not sued out and returnable to the next term following that at which it was granted;—to which plea there was a general demurrer.

The principal question arose upon the right of the legislature to authorize the suing out of this writ of review.

Fessenden and *Daveis* argued in support of the demurrer.

There are no limits to the power of the State legislature, except what are imposed by the constitution of the State, and of the United States.—Whatever authority it possesses, is transcendent. Notwithstanding the theoretic division of powers, a practical line of demarcation is still to be settled; and perhaps this very uncertainty is one of the excellencies of a mixed constitution, the scheme of which is to prevent any one of its principles from being carried so far as, taken singly and theoretically, it might go. Thus, among their undisputed powers, the judiciary possesses a power of interpreting statutes, almost equivalent to simple legislation; and the legislature possesses that by which they are enabled to remedy the apparent defects of existing provisions, and to declare their sense of the existing laws. Thus also it changes relative rights at pleasure, by setting off a citizen from one town to that adjoining him; it remedies the defects of ministerial acts, and confirms irregular, and completes imperfect judicial proceedings.

The constitution does not attempt to define the judicial authority; but leaves it to be ordained and distributed by the legislature, and parcelled out in such portions as it may see fit, in its general discretionary superintendence over the municipal concerns of the community. The *residuum* of such power remains, therefore, by the necessary constitution of the State, in the legislature. Having no court of chancery jurisdiction, the legislature does necessarily possess some chancery powers. The authority of its acts of this class is familiar in cases affecting the estates and rights of minors, and other persons incapacitated by law; in respect to which the State legislature may be said to contain the elements of chancery jurisdiction. And these powers extend to granting relief in all cases of accident, mistake, and hardship.

This case is clearly distinguishable from that of *Lewis v. Webb* 3 *Greenl.* 326, which was a case of appeal. Almost the whole jurisdiction of this court is appellate; and the statutes regulating appeals require them to be pursued within limited periods; after which the rights inevitably lapse, and cannot be revived consistent with the rights of the adverse party, which have become vested by the omission. Hence an act of the legislature to grant an appeal from a final legal judgment, may amount to an act to vacate such judgment. Reviews, however, stand on a different footing. Besides the inherent power of this court to grant new trials at common law, it has a general power to sustain applications for reviews, if presented within three years from the rendition of judgment. During this period the case is so within the power of the court to grant a review, and so under the control of the party who may apply for it, that the party obtaining the judgment can, in no sense, be considered to have acquired a vested right under it, which it would be illegal and unauthorized to disturb.

The statute does not require that the review should be prosecuted at the term next after it is granted. This restriction is only imposed by a construction, in the case of *Hobart v. Tilton* 1 *Greenl.* 399, of a statute of Massachusetts, different, in its provisions, from ours, which imposes no positive limitation in point of time. And our statute, having been enacted since that decision, may be considered as taking away the effect of the voluntary limitation thereby constructively imposed upon the power of the judiciary.

But the case is, at least, within the discretionary power of the court. It is a judicial writ, upon which the court may impose the condition that it shall be entered at the next term ; and may relieve against its own restriction. The legislature, in the general law, and in the resolve passed touching this case, has industriously expressed its opinion of the merit of such applications ; and has, by implication, removed the barrier imposed in *Hobart v. Tilton*, and the court, in the case of *Clap v. Joslyn* 1 *Mass.* 129, has indicated the course to be pursued in similar cases, to administer substantial justice, and relieve parties from the effects of extraordinary accident or mistake.

Adams, for the defendants, relied upon the objection that the resolve authorizing the prosecution of this suit was unconstitutional, and void ; it being an exercise of judicial power, and therefore against *Art.* 3, *sec.* 2, of the constitution ; and it being also a violation of rights already vested, as it went to suspend the operation of a general law, in favor of a particular case. To this point he cited *Const. Maine*, *art.* 1, *sec.* 11, 13. *Holden v. James* 11 *Mass.* 396. *Merrill v. Sherburne* 1 *N. Hamp. Rep.* 199. *Lewis v. Webb* 3 *Greenl.* 326. And he contended that the case of *Hobart v. Tilton* 1 *Greenl.* 399, was not affected by any subsequent legislation ; and that at the time of passing the resolve, the law requiring every writ of review to be entered at the next term after it was granted, was in full force, and obligatory on these parties as well as all other citizens.

This cause having been argued at the adjourned session in *April* last, the opinion of the court was now delivered by

MELLEN C. J. On the facts appearing on the record in this cause, the question is whether the writ shall be sustained, or the plea adjudged good. The cause has been ably argued on both sides. One object of the plaintiff's counsel has been to distinguish this case from that of *Lewis & al. v. Webb* 3 *Greenl.* 326, in respect to the constitutional authority of the legislature to pass the resolve in question and give it its intended operation. The soundness of that decision is not questioned ; but as the two cases in some respects were different, we have attentively listened to the arguments, that we might become satisfied whether there is any difference of such a character as to leave the present case unaffected by that decision ; and after mature consideration, we are all satisfied there is no such distinction. We therefore lay the resolve out of the case, and proceed to examine the other grounds on which it is contended that the writ may be maintained. And here, in the first place, it is contended, that upon a fair view of the decision of this court in *Hobart v. Tilton* 1 *Greenl.* 399, the writ in this case was entered in season, it being at the second term after the review was granted. That case presents two principles. There the writ was entered at the second term

after the review was granted, and a plea in abatement was filed; the court decided that the plea was good and abated the writ. Thus far that case is directly in point, and we are by no means disposed to disturb it. But as the court had then been recently organized, they considered it proper, after having decided that the plea was good, to lay down the principle of the decision, with one limitation, in respect to future cases ; which was that in certain cases the court might, by a special order, passed at the time of granting the review, authorize the prosecution of the writ of review at the second term, when reasons existed, rendering such order necessary or proper. In the case before us no such order was passed or requested. After this decision, the law upon the subject was considered as settled, and the practice was conformed to it. The legislature has so considered it ; and by the act of 1826, *ch.* 347 has enlarged the principle, and declared that a writ of review, in certain cases may be entered and prosecuted at the second term. We feel bound by our decision and this legislative recognition of its force and effect. In the case of *Hobart v. Tilton*, after abating the writ for its irregularity, we received a new petition and granted a review, in the same manner as the Supreme Judicial Court of Massachusetts had done before ; so in this case, after the failure to enter and prosecute the writ of review at the first term, another application might have been made for a review ; as at that time the three years allowed by law for granting a review had not elapsed ; but no such application was made, and the reasons which have in argument been assigned in excuse for not suing out the writ of review and causing it to be served and entered in season, do not apply to the omission to renew the petition for review within the legal term. It is said that a doubt existed in the minds of counsel as to the power of the court to grant a review a second time, when a failure to sue out the writ had occurred ; but we did grant a second review in *Hobart v. Tilton*, under our statute. We cannot on this account bend a principle of law ; nor can it be justice to the town of *Lewiston* for us so to do, even if it could be done consistently with settled principles. But it is in the last place contended that the writ may be sustained upon the principles adopted by the court, in the

case of *Clap v. Joslyn* 1 *Mass.* 129. We cannot consider that case as an authority or entitled to very great consideration. *Clap* applied for a review; and it seems the court granted it without notice to *Joslyn*; and when a writ of review was sued out and served, the defendant appeared and obtained a rule on the plaintiff to shew cause why it should not be quashed for want of notice; the court, perceiving the dilemma in which the parties were placed by their premature decision, quashed the writ of review, though they protested that they were not obliged to quash it; they even said that the writ of review might be considered as an order of notice; and yet they did not so consider it. It is difficult to see how such a principle could be sustained, as the statute of reviews requires a petition, hearing upon it, and a judgment of court granting a review; and then provides that after all this the petitioner shall sue out a writ of review in common form, to be served on the opposite party. We cannot adopt a course of proceeding so evidently opposed to the language and spirit of the law. Besides, experience has proved how important it is that courts of justice should observe regularity and consistency in those rules which are established for the government of matters of practice; matters of frequent occurrence, and extensive operation in their effects. Rules are easily understood, though principles are often doubtful in their application.

Upon a view of all the facts in this case and of the principles of law applicable to them, we feel ourselves bound by our former decisions; and we are unanimously of the opinion that the plea in abatement is good and sufficient in law, and that the defendants must have judgment for their costs.

Bartels *vs.* Harris.

Where a creditor, who was also the surety of a debtor on the eve of stopping payment, received from him his whole stock in trade, accompanied by a bill of parcels, at the foot of which payment was receipted in the usual form ; and at the same time the parties executed an indenture of two parts, declaring the conveyance to be intended as security for the debt due to the grantee and certain others, for which he stood liable as surety or indorser, with power to sell for payment of these debts, and a covenant to pay over the surplus to the debtor or his order on demand ;—it was held that both the instruments taken together amounted to a mortgage ; and that it was a valid transaction against other creditors for whose debts no provision had been made ; the jury having found that no fraud was actually intended.

This was an action of replevin, against a deputy sheriff, for divers goods, the property of which the defendant alleged to be in one *John B. Cross*, against whom he had several precepts, by virtue of which the goods were attached, *July* 15, 1825.

At the trial, which was before the Chief Justice, the plaintiff produced a bill of parcels of the goods, made by *Cross* to him, comprising his whole stock in trade, and receipted in full in common form, bearing date *July* 8, 1825. He also exhibited one part of an indenture of two parts, made on the same day, between him and *Cross*, reciting the transfer of the goods by the bill of parcels, to the amount of $4466,02, and that this transfer was made "to secure in part the said *Bartels* for sundry liabilities he "is under for said *Cross* by reason of his having indorsed several "notes of hand made and signed by said *Cross*, and also to secure "said *Bartels* and his partner for a certain sum due them on book "account, and for a note indorsed by them,"—which liabilities are enumerated, amounting to something over 8000 dollars ;—and by which it was agreed between the parties that *Bartels* should make sale of the goods to the best advantage, and apply the proceeds to the payment of the enumerated debts, and afterwards account with *Cross* for the balance, should any remain in his hands.

One of the subscribing witnesses testified that on the day the writings were signed, he was asked by the plaintiff if he would

attend his store; saying he expected to purchase *Cross's* goods ;—that he was sent for on Saturday night, *July* 9, about sunset, to witness the signature of the papers at *Cross's* store, where a formal delivery was made of the goods. At this time *Bartels* said to the witness that it might be as well not to mention the transaction, till he and *Cross* should return from *Calais*, to which place they were immediately going, and did set out on the following day, for the purpose, as *Bartels* said, "to secure the property which *Cross* had there"—he having at that place another store of goods, and a large quantity of lumber. *Bartels* left the witness in possession of the store, engaging to see him paid for his services, but without stipulating for any certain sum ; and instructed him not to mention the conveyance, but to keep up the name of *Cross* over the door, unless the creditors of *Cross* should "make a stir;" in which case he advised him to put up the witness's own name in its stead, especially if *Seaver*, (who afterwards was the principal attaching creditor,) should make a stir ; but he left it to the judgment of the witness. The store was accordingly kept open, under the name of *Cross* ; but on Wednesday or Thursday the witness deemed it prudent to take down that name and put up his own ; and on Friday *Seaver* caused the goods to be attached.

The writings were prepared by *Cross*, and conveyed all his visible attachable property, except his household furniture, and his goods at *Calais*. He was the brother in law of the plaintiff, and was at this time reputed to be insolvent. No persons were present at the transaction except the witness before mentioned, and the two clerks of the parties.

It was proved by the defendant that *Bartels*, after his return from *Calais*, told *Seaver* that the object of the conveyance was to prevent attachments, and to prevent *Cross* from being broken up ; observing at the same time that he had not been aware of the extent of *Cross's* debts,—that he was liable to a large amount as his indorser,—and that he was apprehensive the property would not be sufficient to secure himself. *Seaver* complained that *Bartels* had taken a conveyance of all the visible property, leaving nothing for other creditors to attach ; and asked him why he had not taken an assignment of his notes and accounts ; to which he

replied in substance as before, that the object was to prevent attachments. It was also proved by the defendant, that on the Monday or Tuesday after they started for *Calais*, the witness whom *Bartels* had left in charge of the store, being asked where Mr. *Cross* was, replied that he had "gone out;" leaving it to be inferred that he was in town about his ordinary business.

Upon this evidence, the Chief Justice instructed the jury that as the deed of conveyance from *Cross* to the plaintiff referred to the schedule or bill of parcels as containing an enumeration and description of the goods conveyed, they might both be taken as parts of the same conveyance; and as the deed contained a statement of the grounds and reasons for making it, and on the face of it appeared to be, and was intended to be, a conditional conveyance, the mere addition of the words "received payment," which preceded the name of *Cross* at the bottom of the bill of parcels, and the form of the bill itself, would not alter the case; and that therefore it might and ought to be considered as a mortgage of the property, and not an absolute sale. He also instructed them that if they should be satisfied from all the evidence that the conveyance or mortgage was given to and received by the plaintiff, not for the purpose therein specified, of securing him against his liabilities on *Cross's* account, but for the purpose of defeating the rights of other creditors, and in this manner obtaining the property and appropriating it to the use and benefit of *Cross*, then they ought to set aside the conveyance as fraudulent, and find for the defendant. But if, from a view of all the evidence, they should be of opinion that the conveyance was made by *Cross*, and received by the plaintiff, with an honest intention to protect himself, as far as he could by its means, from loss on account of his liabilities as surety for *Cross* and his demands against him; then the mortgage was valid in law, although by receiving it, and obtaining the goods conveyed by it, he also intended to prevent or defeat the attachments of other creditors; because such a defeat of attachments would be the necessary consequence of a fair, honest, and legal conveyance of the goods to the plaintiff; and of course they ought to find for the plaintiff; which they accordingly did. And the question whether these instructions were

correct; and whether the verdict was against law, or the weight of evidence, was on motion of the defendant referred to the court.

Orr and *Greenleaf*, for the defendant, argued that the transaction, was a legal fraud upon creditors. The bill of parcels was in the usual form, and was receipted; to enable *Bartels* to shew to the world an absolute title to the goods. Yet no consideration was paid, not even by cancelling his own debt. Being intended only as a protection against liabilities, it should have been in terms a mortgage; otherwise, it is void. *Gorham v. Herrick* 2 *Greenl.* 87. If both of the instruments are to be taken together, they amount to a receipt and release under seal, which *Cross* would be estopped to deny, should he attempt to set up the delivery of the goods in bar of an action by *Bartels* for the debt due to himself.

If it was not an absolute conveyance to *Bartels*, then it created a tenancy in common between *Cross* and his creditors, who might lawfully attach his interest in the goods; *Bartels* being placed in the situation of a trustee, acting in their behalf. *Estwick v. Caillaud* 5 *D. & E.* 420, 423.

But the case shews conclusive evidence of fraud; of which the court are the proper judges. The conveyance was made by an insolvent debtor, to his brother in law, secretly, of all his tangible property, for the avowed purpose of preventing attachments, and without the payment of any consideration. Its object and effect were to delay creditors, and turn them round to another remedy, and this too against a trustee of the debtor's own appointment. The law entrusts to a debtor no such power. 4 *Dal.* 88. 4 *Day* 150, 151, 156. In its best form it appears to have been a contrivance between the debtor and one creditor, to delay the others; and therefore is void. 5 *D. & E.* 421. The subsequent payments of the plaintiff do not affect the case; for if the conveyance was void for fraud in the concoction, it cannot stand as a security for subsequent advances. *Sands v. Codwise* 4 *Johns.* 536. *Merrill v. Meacham* 5 *Day* 341. On these grounds they insisted that the verdict was manifestly against the evidence in the cause, and ought therefore to be set aside.

Longfellow, for the plaintiff, contended that the bill of parcels and the indenture, being taken together, amounted to nothing more than a conditional conveyance, or mortgage, to secure the plaintiff against his liabilities as the surety of *Cross*, with power to sell for that purpose. His liabilities formed a sufficient consideration for this sort of conveyance; and all intention of fraud on the part of the plaintiff is negatived by the finding of the jury. No tenancy in common can exist in these cases unless the conveyance is absolute; nor unless the property conveyed is more than sufficient to pay the debts of the grantee; but here the case finds a great deficiency.

As to the motion to set aside the verdict, it is never done unless the Judge certifies that he is dissatisfied with it; nor even then, if there was evidence submitted on both sides. 6 *Dane's Abr.* 245, 253. 7 *Mass.* 205. *Ward v. Center* 3 *Johns.* 271. *De Fonclear v. Shottenkirk* 3 *Johns.* 170.

Weston J. at the ensuing *June* term in *Kennebec*, delivered the opinion of the Court as follows.

The plaintiff in this action having a book account against *John B. Cross* for seven hundred and fifty dollars, and having also made himself liable as indorser and surety for said *Cross* for upwards of seven thousand dollars, took a transfer of his stock in trade, amounting to four thousand, four hundred and sixty six dollars. There was executed at the time of the transfer a certain indenture, by which the plaintiff covenanted to sell the goods transferred to him upon the best terms in his power, and, after deducting the necessary expenses, to apply the proceeds to the payment of his own demand, and of such sums as he had become liable for and to pay over the surplus, if any should remain, to the said *Cross*. Another instrument executed at the same time, was a particular schedule of the said goods, which was referred to in the indenture. Both papers were attested by the same witnesses. The schedule was in the form of a common bill of parcels; closing with the words "received payment," and signed by *Cross*. There was no reference in the schedule to the indenture. The judge, who

presided at the trial, instructed the jury that the indenture and the schedule referred to therein, constituted but one instrument, and that, notwithstanding the form of the schedule, and the words "received payment," which were explained in the indenture, the consideration for the transfer being there fully set forth, it was to be deemed in the nature of a mortgage of the property, and not an absolute sale of it.

This construction is resisted upon the ground that as the schedule, or bill of parcels, is itself evidence of an absolute sale or transfer, and has no reference to the indenture, the sale must be regarded as absolute and therefore within the principle of the case of *Gorham v. Herrick*, cited in the argument, liable to be defeated by subsequently attaching creditors. The form of the schedule, connected with other facts of a suspicious aspect, unexplained, might be a circumstance indicative of fraud; but being expressly referred to in the indenture, and its extent and meaning there specially stated and limited, we must consider the schedule as qualified by the indenture, and gather the intention of the parties from both these papers; and viewing them together the meaning is too plain to be misunderstood. The evidence of fraud, so far as it may arise from the form of the papers, is in a great measure repelled by the fact that they were both attested by the same witnesses, three in number, by a resort to either of whom, the existence of the indenture could have been ascertained; although it is not noticed in the schedule.

The plaintiff, being the creditor and surety of *Cross* to a large amount, had a right to take measures for his security. For his own debt he was at liberty to have taken an absolute transfer, or a qualified one. The consideration of his liabilities, he having then made no actual payments on that account, was sufficient to justify a qualified transfer of the goods, for the purposes of indemnity, which is the ground distinctly stated in the indenture; unless the object of it was to defeat or to delay other creditors. The evidence, tending to shew this, was submitted to the jury, and they were instructed to consider the transfer as invalid against the creditors of *Cross*, if they were satisfied, it was made, not to secure the plaintiff, but to defeat or delay them. But that if the

plaintiff's object was to defeat other creditors, in order to secure himself, he might lawfully do this, having a just right to prefer himself to others, and if they were defeated or delayed, this consequence could have no tendency to vitiate the transaction. The jury found for the plaintiff; and we do not perceive any ground upon which the verdict can be disturbed. The amount of the goods was insufficient for the plaintiff's indemnity. The plaintiff, being deeply involved as the surety of *Cross*, and believing him to be insolvent, was well justified in resorting to all lawful means for his indemnity. Under these circumstances, his own security must necessarily have been the motive, which quickened his diligence, and viewing the nature of the transaction, as detailed in both the papers, we cannot regard the conclusion, to which the jury have arrived, as unsupported by the evidence.

It has been urged that, upon the facts proved, the judge should have distinctly instructed the jury, that this was a clear case of legal fraud. In the case of *Estwick v. Caillaud*, 5 *D. & E.* 420, cited in the argument, the court say that fraud is sometimes a question of law, sometimes a question of fact, and sometimes a mixed question of law and of fact; and that if a decision is to be had on the face of the deed, that is a question of fraud in point of law. The law will be the same in regard to any other instrument in writing, not under seal, where the evidence of fraud appears in the instrument itself. There were strong circumstances in the case cited, from which to infer legal fraud; which was however repelled by explanatory evidence. As the deed itself furnished no proof of fraud, the question was left at large to the jury, whether it was a fair transaction between the parties without meaning to defraud other creditors; and a verdict being returned for the plaintiff the court refused to set it aside.

In the case before us, no evidence of fraud arises in our opinion, from the papers taken together. The course pursued by the plaintiff appears to have been somewhat indiscreet; and in some parts of it, he manifests a disposition to conceal his operations from the observation of *Cross's* other creditors; but this seems to have been done rather with a view to secure himself from loss, than to favor *Cross* at their expense; his claims are as meritorious,

and entitled to as much favor, when limited to the payment of his own debt, and to indemnity for the sums for which he stood responsible, as those of other creditors. The declarations made, and circumstances relied upon, as evidence of fraud, being susceptible of explanation, and capable of being understood in a sense which would leave the plaintiff free from the imputation of being influenced by any intention to defeat other creditors, except what must necessarily arise from the measures he had a right to pursue to secure himself, it presented a case falling within the province of the jury; and was in our opinion submitted to them with proper instructions from the presiding judge.

The case finds that there was no surplus; but if there had been, it was accessible to creditors, through the medium of the trustee process. There is no foundation for the position, that by reason of this possible surplus, *Cross* was tenant in common with the plaintiff; and that the latter could not therefore be entitled to maintain replevin. The interest of the mortgagee, either of real or personal property, is distinct, several, and paramount, and entitles him to possession in all cases, where the thing pledged is a personal chattel; and also, where it consists of real estate; unless it is otherwise expressly agreed in the deed.

The motion to grant a new trial is overruled and there must be

Judgment on the verdict.

POTTER, *Judge, &c. vs.* STURDIVANT, *adm'r.*

A statute granting chancery powers to relieve against all penalties and forfeitures, in actions at common law, *it seems* may be allowed, if such is its general language, to operate upon penalties and forfeitures already incurred at the time of its enactment; without violating the principle that vested rights are not to be disturbed; the party injured having still the right to recover all which, in equity and good conscience, is due to him.

THIS was an action of debt on the bond given by *Sylvanus Drinkwater*, as administrator on the estate of *Pyam Prince*, for the benefit of whose children this suit was commenced against *Drinkwater's* administrator.

The ground of the plaintiff's claim, as indorsed on the writ, was for mismanaging and squandering the estate of *Prince*.

In a case stated for the opinion of the court, the point originally presented was, whether the administrator was justifiable in defending, at the expense of the estate, the action of *Daniel Drinkwater* against him in that capacity. That action was a writ of entry on a mortgage made by *Prince* to the demandant, and it was resisted by the administrator, representing creditors as well as heirs, on the ground that nothing was due to the mortgagee, and that the transaction was fraudulent and void. It is reported in 4 *Mass.* 354, where it appears that the defence was not admitted as legal, and it was said by *Parsons C. J.* that the administrator ought in equity to pay the costs of the defence out of his own pocket.

It was agreed in the present case that the defence of that action was advised by eminent counsel, and undertaken with the concurrence of all the guardians of *Prince's* children, they then being minors; and that the expenses were charged and settled in the administration accounts, the first of which was settled in 1805, and the last in *October* 1808, on all which accounts notice was duly issued, and at the settlement of the last of which one of the guardians was present. The estate was represented insolvent.

The proceedings in the Probate office were referred to as parts of the case, and copies of them annexed; and it was agreed that if the opinion of the court should be in favor of the plaintiff, the defendant should be defaulted and heard in chancery.

Todd, for the plaintiff, argued that the conduct of *Drinkwater*, in charging the expenses of defending the former suit to the estate of his intestate, and procuring the allowance of them by a decree of the Judge of Probate, after they had been declared chargeable in equity to himself alone, by the highest tribunal, was fraudulent; and that a decree thus obtained, could not protect him. *Walker v. Witter Doug.* 5. On any principle the decree is no bar, its merits being examinable by this court whenever the record is before them, whether by appeal, or by suit on the bond. *Dean v. Dean* 3 *Mass.* 258. And he relied on the opinion of the court in *Drinkwater v. Drinkwater, admr.* 4 *Mass.* 354, as the ground of charging the administrator in this action.

On examination of the papers annexed to the statement of facts, it appeared that *Drinkwater* had never in fact returned any inventory of *Prince's* estate, according to the condition of his bond; but that the paper filed and recorded in the Probate office as an inventory, and made the basis of all the subsequent proceedings, was made out by three appraisers appointed and sworn by a Justice of the peace, before the grant of any administration, according to an irregular practice sometimes allowed at that day. This paper, however, contained a true list of all the estate which came to the hands of the administrator.

Todd hereupon contended that he ought not to be admitted to a hearing in chancery, the neglect to return an inventory being a forfeiture of the whole penalty of the bond, by *Stat.* 1786, *ch.* 55, *sec.* 2, which was in force when this bond was given. The right to this penalty was fixed at the time of the breach; and it was not in the power of the legislature to take away or impair it by any subsequent statute. *Wales v. Stetson* 2 *Mass.* 146. 6 *Bac. Abr. Statute C. Calder & ux. v. Bull* 3 *Dal.* 397. *Vanhorne v. Dorrance* 2 *Dal.* 304. *Society &c. v. Wheeler* 2 *Gal.* 134. *Dash v.*

Van Kleeck 7. *Johns.* 477. *Call v. Hagger & al.* 8 *Mass.* 423. *Foster & al. Exr's v. The Essex Bank* 16 *Mass.* 271.

Greenleaf, for the defendant, contended that it was the duty of the administrator to defend the suit brought upon the mortgage, he being sued in that capacity, and representing creditors as well as heirs; because, by proving that nothing was due, he would have prevented the mortgagee from obtaining judgment. *Vose v. Handy* 2 *Greenl.* 322. Even the costs of suits commenced by executors may be charged upon the assets in their hands, if prudently commenced; *Hardy v. Call* 16 *Mass.* 532. *Brooks v. Stevens* 2 *Pick.* 68; much more the costs of suits against them.

If the paper returned as an inventory is not a performance of the letter of the condition of his bond, yet the defendant ought to be admitted to a hearing in chancery; this being a case to which the *Stat.* 1786, *ch.* 55, *sec.* 2, was not intended to apply. The severe exaction of the whole penalty of the bond, authorized by that statute, was enacted against the contemptuous refusal, or grossly culpable neglect of an administrator to exhibit any account whatever of his doings. In such cases, if he had returned an inventory, he was chargeable with its whole amount; if not, he was rendered liable to pay the whole penalty of his bond. It could never have been the intent of the legislature to inflict such vengeance on an administrator who honestly endeavored to comply with the law, and actually accounted for all the estate which came to his hands.

But if such had originally been the intention of the legislature, yet that statute is no longer in force. The *Stat.* 1785, *ch* 22, provided for a hearing in chancery after forfeiture found or confessed, in every action on penal bonds. By the *Stat.* 1786, *ch.* 55, an exception was introduced in certain cases of administration bonds; and this exception was repealed by *Stat.* 1816, *ch.* 94, which was re-enacted in our *Stat.* 1821, *ch.* 50. The forfeiture now claimed is in the nature of a fine or penalty for not returning an inventory; and is like the treble damages sometimes given in certain cases of trespass, the right to which does not be-

come vested till action brought. No man's vested rights can be considered as disturbed so long as the tribunals are open for him to recover all which is due to him in equity and good conscience.

MELLEN C. J. in delivering the opinion of the court, observed that the statutes of 1786, *ch.* 55, and of 1816 *ch.* 94, were both expressly repealed by our statute of 1821, *ch.* 50; and the provision of the latter statute, directing the award of execution for such sum only as should be deemed reasonable, was wholly prospective. The question therefore is, whether the award of execution in this case depended on the general statute regulating judgments on penal bonds;—or whether the right of the plaintiff to the whole penalty was secured by the saving clause in our general repealing act, passed in 1821, in these words,—"saving also to all persons all rights of action, in virtue "of any of the acts hereby repealed; and all actions and causes "of action commenced in virtue of or founded on said acts, or "any of them, in the same manner as though this act or any acts "revising and virtually repealing said former acts had never "been passed." As the present action had not been commenced when that act was passed, it does not seem to fall under the last member of the sentence. Is the plaintiff's claim to the whole penalty secured under the words "saving also to all persons all "rights of action in virtue of any of the acts hereby repealed"? The construction contended for by the defendant does not take away or impair the plaintiff's right of action. He is still in this action, entitled to the full benefit of all that reason and justice can require. Besides, on looking into the statute of 1786, *ch.* 55, we perceive that his right of action does not depend on that statute, but existed independent of its provisions, as they manifestly shew. The act is entitled "an act for regulating the proceedings on "probate bonds in the courts of common law, and directing their "form in the Supreme Court of Probate." The first section prescribes the form of judgment; and then, "as a directory for "what sum execution ought to be awarded upon an administration "bond, when it shall appear upon confession, verdict, demurrer, "or otherwise, that the penalty is forfeited," the second section

contains a variety of specific provisions as to the mode of ascertaining the amount for which execution shall issue in the cases mentioned. The preamble speaks of the manner in which judgments had been given before the law was passed; and introduces some new modes of proceeding; but it professes nothing more. Whether the plaintiff's right of action is founded on any other statute, or on the principles of the common law, is immaterial; in either case the right of action is saved; but it is modified, both in the course of proceeding, and in the amount for which execution is to be issued. It can be no interference with the right of action, to reduce the costs of suit below their legal amount by the law in force when the right of action accrued; nor is it a violation of any sound principle to mitigate the severity of a penalty, and award to the party injured as much as he deserves in equity and good conscience to receive. The grant of this chancery power as to penalties and forfeitures, and its operation upon those contracts where such penalties and forfeitures had been incurred before the power was given, seems to form an exception to the principle contended for by the plaintiff's counsel; such a law does not appear to be retrospective and void; nor to disturb any of those vested rights which are to be protected.

But it is not necessary to place the decision of this cause upon these principles, and this reasoning; because the parties in this case have agreed, as we find in the statement of facts submitted to us, that if the court should be of opinion that the action is maintainable, the defendant should be defaulted and heard in chancery. If, therefore, the plaintiff had a right to the whole penalty, it is waived by this agreement.

On examination of the documents before us, it appears that a paper supposed to be an inventory, and treated as such, though not legal in its character and form, was regularly filed in the Probate office; that it contained a true list of all the estate of the deceased; and that the administrator had fully accounted for all the property which came to his hands. And the decrees of the Judge of Probate, upon the accounts presented to him, having never been appealed from, are yet in full force, and not open to exami-

nation, even if improper credits had been allowed by the Judge. Such being the case, we think execution ought to be awarded for only one dollar, and the costs of this suit.

MILLER *vs.* LANCASTER.

Where the indorser of a note of more than six years standing, on a demand being made of payment, said he had not been duly notified, and was clear by law; this was holden to be no acknowledgment of the debt, to take it out of the statute of limitations.

It is not within the province of the jury to determine what acts or declarations amount to a new promise.

Assumpsit by *Nathaniel J. Miller* as indorsee of a promissory note given in 1807 by *Sewall Lancaster*, to the defendent *Thomas Lancaster* his father, and by him indorsed to *Rebecca Miller*, and by her indorsed to her son, the plaintiff, without recourse to the indorser.

At the trial before *Whitman C. J.* in the court below, upon the general issue, and a plea of the statute of limitations, the plaintiff proved that when the writ was served on the defendant, he at first remarked to the officer that he knew nothing about a note like the one declared on; but afterwards observed that he did indorse such a note, and supposed it was paid; and that as he had never been seasonably notified as indorser, he was not bound by law to pay the note, and should not pay it.

The plaintiff also called *Mrs. Miller*, the first indorsee, who testified that some time previous to the date of the note the defendant, who was her uncle, advised her not to loan any more money to his son *Sewall* without security; that afterwards *Sewall* produced to her the note declared on, with the defendant's name indorsed in blank, on which she advanced the money; that several years afterwards the defendant told her to get all the money she could from *Sewall*, and at any rate to obtain the interest; but did not then intimate to her that he was not holden to pay the note. After this, in 1814 or 1815, and not long before the de-

cease of the promissor, she called on the defendant for payment; but he said he was not properly notified, and considered himself clear, and should pay nothing. These facts were known to the plaintiff, at the time he received the note, which was not long before the commencement of the action.

This evidence the counsel for the plaintiff insisted was proper for the consideration of the jury, as proof both of the defendant's liability to pay the debt, and of a waiver of notice, as well as of a design to defraud. But the Judge rejected it as improper to be submitted to the jury, and ordered a nonsuit; to which the counsel for the plaintiff filed exceptions.

Fessenden and *Deblois* for the plaintiff, and *Adams* for the defendant, having submitted the cause without argument; the opinion of the court was delivered as follows, by

Mellen C. J. There having been no proof offered at the trial except that which was introduced by the plaintiff, the court had an unquestionable right to order a nonsuit, if on such evidence the action was not by law maintainable; as the court decided in *Perley v. Little* 3 *Greenl.* 97.

Upon the general issue, there seems to be no proof on which the defendant can be charged. *Mrs. Miller*, the promissee and witness, does not pretend that she ever demanded payment of the promissor, or gave notice to the defendant as indorser. She must have known those facts, if they existed. Seven or eight years after the date of the note, she called on the defendant for payment; and his reply to her was the same as was afterwards given to the officer who served the writ, viz: that he had never been duly notified as indorser, and was by law exonerated. Neither is there any proof of a waiver of notice.

But if he had been seasonably notified, after demand made on the maker, still the defence is perfect on the statute of limitations. There is not an expression proved on the part of the defendant which can be construed into an acknowledgment of an existing demand against him; nor any thing resembling an acknowledgment; both witnesses swear the contrary; they prove that

he denied all liability. In the above mentioned case of *Perley v. Little* we took a general view of the cases on the subject, and stated the principles by which the evidence adduced to prove a new promise must be tested; and to that case we refer for authorities and the reasons of our opinion. In that case there was an ambiguous answer given by *Little* which was relied on as an acknowledgment of the debt; but the court decided otherwise. The present case is a stronger one for the defendant than that was.

The counsel for the plaintiff contend that the evidence which was introduced should have been submitted to the jury for their consideration. There is no ground for this objection. No facts were in dispute; the defendant did not deny the statements made by the witnesses; but only their legal effect; and surely the jury were not authorized to decide that question. In *Lloyd v. Maund* 2 *D. & E.* 760, it was decided to be the province of the jury to determine what acts or declarations constitute a new promise, or an acknowledgment; but that decision was overruled in *Bicknell v. Keppel* 1 *New Rep.* 20, and *Mr. Day*, in his notes to the action *Baillie v. Inchiquin* 1 *Esp. Rep.* 435, says "that in "every other reported case except that of *Lloyd v. Maund*, the "question has been determined by the court." Such has been the principle and the practice in Massachusetts and in this State. On every ground we are very clear that the nonsuit was correctly ordered. Consequently the exception is overruled, and there must be

Judgment for the defendant.

LEAVITT *vs.* LEAVITT.

A promissory note, liable to be stamped by the act of Congress of *July* 6, 1797, cannot be read in evidence, unless it has been stamped, or the holder has complied with the requisitions of the act of *April* 6, 1802.

IN an action of *assumpsit* upon a promissory note for more than twenty dollars, given in the year 1799, the defendant objected to

the competency of the note as evidence to the jury, because it was not stamped according to the act of Congress of *July* 6, 1797, nor had the plaintiff paid the duty of ten dollars and obtained the certificate of the collector, under the act of *April* 6, 1802. But the Chief Justice, before whom the cause was tried, admitted the note in evidence, and a verdict was returned for the plaintiffs subject to the opinion of the court.

Longfellow, for the defendant, cited *Edeck v. Ranuer* 2 *Johns.* 423.

Orr and *Fessenden* for the plaintiff, contended that whatever may be the law upon the question raised at the trial, the verdict ought not now to be disturbed, the note having been stamped since that time, and the extra duty paid.

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

The act of Congress of *July* 6, 1797, laying duties on stamped vellum, parchment and paper, provides, in the 13th section, that "no such deed, instrument or writing shall be pleaded or given "in evidence in any court, or admitted in any court to be availa- "ble in law or equity, until it shall be stamped as aforesaid." That act remained in force until *April* 6, 1802, on which day it was repealed by the act entitled "an act to repeal the internal taxes;" in the first section of which there is the following proviso, viz. "Provided, that for the recovery and receipt of such "duties as shall have accrued, and on the day aforesaid remain "outstanding; and for the payment of drawbacks or allowances "on the exportation of any of the said spirits or sugars, legally "entitled thereto; and for the recovery and distribution of fines, "penalties and forfeitures, and the remission thereof, which shall "have been incurred before and on the said day, (i. e. the 30th "of *June*, 1802) the provisions of the aforesaid acts shall remain "in full force and virtue." The note declared on, when offered in evidence at the trial of the cause, had never been stamped; and its admission was objected to on that account by the defendant's

counsel. I, however, overruled the objection, on the ground that the above quoted proviso had not continued any part of the act of 1797 in force, except for the special purposes and to the limited extent of the proviso, and that as to every thing else the act was a dead letter, in consequence of the repealing act of 1802 ; not then particularly attending to the second proviso in the second section of the act. But on examining that provision, it is evident my opinion at the trial was incorrect ; and that the note should not have been admitted :—for according to the second proviso abovementioned, any collector in the state is required on payment of the proper stamp duty and additional ten dollars, to indorse the same on the instrument ; and, thereupon, though the same is not stamped, it shall be " to all intents and purposes, as valid and " available to the person holding the same, as if it had been or " were stamped, counterstamped or marked as by law required ; " any thing, in any act, to the contrary notwithstanding." This provision clearly shews that Congress never intended by repealing the act of 1797, to render deeds, instruments and writings which ought by that law to have been stamped, admissible in evidence, unless, after they were written, they had been stamped by the supervisor according to said act ; or should be rendered admissible by payment to the collector, and indorsement by him on the instrument of the stamp duty, and additional ten dollars, according to the second proviso in the second section of the repealing act of 1802.

On this view of the several provisions of the acts before mentioned, the court are of opinion that the note in question was improperly admitted in evidence ; it not having been stamped, nor the additional duty having been paid to the collector. The case cited from *Johnson's Reports* by the defendant's counsel is in unison with this opinion. But it is contended that, as the extra duty and the proper stamp duty have both been paid to the collector in *Portland*, and by him indorsed on said note since the trial, the verdict ought not to be disturbed, because the merits of the cause have once been tried, when the jury had the note before them ; and because the same is now legal evidence. But by the report in this case, it is stated that if the court should be of opinion that

the decision of the Judge at the trial was incorrect, the verdict is to be set aside and a new trial granted. This is the invariable practice, unless the contrary is agreed by the parties. Every citizen has a right to have his cause tried and decided on legal principles ; and where it has been decided on those which the court afterwards pronounce not to be legal, he has a fair right to claim another trial ; and it cannot be proper for the court to refuse it. It may be probable that another jury will decide the cause in the same way as it has already been decided ; and it may be that the defendant will be able to furnish new proof that may give a very different complexion to the defence. On the whole, the verdict must be set aside and a new trial granted.

Boody *vs.* Keating.

The owner of goods stolen cannot maintain a civil action for the injury, till after the conviction or acquittal of the party charged with the taking.

This was an action of trover for a bag of money, stolen in *July*, 1824, by the defendant, who has since been convicted of the larceny and sentenced. This action was commenced before the conviction. And at the trial, which was before the Chief Justice, a default was entered *pro forma*, subject to the opinion of the court whether the action was maintainable.

Longfellow, for the defendant, argued that the action was not maintainable, it being against public policy to permit the party injured to pursue his private remedy, until after conviction. *Yelv.* 90, *a. note* 2. 5 *Bac. Abr.* 265. *Tatlock v. Harris* 3 *D. & E.* 178. *Mead v. Young* 4 *D. & E.* 30. *Masters v. Miller* 4 *D. & E.* 332. *Gibson v. Minet* 1 *H. Bl.* 569. *Sty.* 346.

Fessenden and *Deblois*, for the plaintiff, said that the principles of the common law of England did not apply to the course of practice here. There the goods of the felon were vested in the king from the time of the felony done ; and hence the remedy by

action was fruitless, and the private wrong merged in the public injury. Afterwards, to incite the party injured to greater vigilance in detecting the offender, he was allowed a writ of restitution for his goods, by *Stat.* 21. *Hen.* 8, *cap.* 11. 5 *D. & E.* 175. 6 *Bac. Abr.* 689. 2 *Rol. Abr.* 557. 15 *Mass.* 78. But in this country these reasons have no applicatiou. *Boardman v. Gore & al.* 15 *Mass.* 336. Our laws are sufficient to bring offenders to justice, without coercing the party injured by any denial or suspension of his civil remedy.

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

It appears that in *July* 1824, the defendant stole a bag of money of the plaintiff, for which this action of trover was brought in the same month of *July*; and that the defendant was convicted of the larceny, at the following *October* term of the Common Pleas for this county. From an inspection of the English authorities cited in the argument, it is manifest that this action cannot be sustained until after the conviction of the party charged, or until after his acquittal; and from a note in *Metcalf's* edition of *Yelverton*, it appears, that the late Chief Justice *Sewall*, in a case before him in *October* term, 1813, in the county of *Norfolk*, recognized this to be the law in Massachusetts. It is contended however, that the reason upon which this law is founded, not existing here or being applicable to us, the law ought not to be considered as in force in this country. In support of this position, it is urged that the principal reason why the action has not been sustained in England is, that a better remedy is afforded by the statute of *Henry* the eighth, namely, by writ of restitution. Prior to that statute however, it was the ancient doctrine of the common law, that the civil injury was merged in the felony; so that the remedy therein provided cannot be considered as substituted for that by action, but as affording a remedy to the party injured, where none existed before.

The ancient doctrine of merger, being founded upon the feudal principle of forfeiture, and upon the paramount claims of the king; as well as from the nature of the punishment, which went

to the life of the guilty party; may be considered as inapplicable here. But it is by no means so manifest that the principles of public policy, which have been the basis of the later English decisions, ought not in this country to produce the same result. With respect to the argument arising from the writ of restitution, provided by the statute of *Henry* the eighth, in addition to what has been before remarked upon that subject, it may be observed, that our statute provides a remedy somewhat analogous, directing the sheriff or other officer, upon the warrant or other process issued for the arrest of the party accused, to seize and secure the money, goods, or other articles alleged to have been stolen, to make an inventory of the same, for the safe keeping of which he is made accountable; and providing further that, whenever the conviction of the party accused shall be had upon the prosecution, and by the care and diligence, of the owner of any money, goods, or articles thus seized, such owner shall and may have restitution thereof immediately after such conviction, by an order in open court, or by a writ of restitution, as the case may require. And further provision is made by statute in his behalf, by an appropriation to his use of the net earnings of the convict, or by his services directly to the party injured, or by disposing of his person for a limited period.

In support of the argument, on the part of the counsel for the plaintiff, the opinion of chief justice *Parker* in the case of *Boardman v. Gore & al.* 15 *Mass.* 336, has been adduced. If the English doctrine, as there stated by him, as we believe for sound reasons, is limited to larcenies and robberies, it was inapplicable to the case then under consideration. The opinion therefore intimated by him, was not essential to the decision of that cause; and upon consideration, we feel ourselves constrained to regard as the better opinion, that which was given by his predecessor, chief justice *Sewall*. The public good requires that in this country, as well as in England, offenders should be brought to justice; and if the civil remedy in favor of the party injured, is postponed until a public prosecution has terminated, he will be stimulated to effect this as speedily as possible. And he will be further induced to procure criminal process, to search for and secure the

goods stolen, which, if he continues faithful to the public interest, will be ultimately restored to him. But if he is permitted to pursue his civil remedy before conviction, there may be reason to apprehend that the claims of public justice may be disregarded, which must be considered as paramount to individual interests. Besides, until after the termination of the criminal prosecution, the law requiring that the goods should be seized and retained by the officer, it cannot be known what portion of these goods may be restored to the owner, which must necessarily affect the measure of damages in the civil action.

It has been urged, that the conviction having taken place prior to the trial, the objection now made ought not to prevail; but the authorities to this point, adduced by the counsel for the defendant, clearly prove that the action cannot be maintained, unless there was a right to prosecute it, at the time of its commencement.

According to the agreement of the parties, the default is to be taken off, and a nonsuit entered.

Law *vs.* Law.

A deposition, opened by *mistake* out of Court, may be received and filed, on affidavit of the fact.

In this case a deposition having been transmitted by mail to the plaintiff's attorney, he broke the seal, supposing it to be a letter addressed to himself;—and on motion at the last *November* term, the Court, (*absente Weston J.*) permitted the deposition to be filed in the cause, the attorney making affidavit of that fact, and that it had not undergone any alteration, nor been out of his possession.

VARRELL *vs.* HOLMES.

If one purchase land of which his grantor is disseised, and this is known to the purchaser; this is probable cause for prosecuting him *criminaliter* for buying a disputed title; though other lands, which the grantor might lawfully convey, are described in the same deed.

THIS was an action on the case for maliciously and without probable cause procuring the plaintiff to be indicted for the crime of maintenance, and for buying a disputed title to land.

At the trial, before the Chief Justice, it appeared from the plaintiff's shewing, that *Richard Varrell*, the plaintiff's grandfather, was once owner of a farm of which the land in question was a part, lying on both sides of the county road;—that he conveyed to *Nathan Merrill* all the land *on the eastern side of the county road*; which land in 1801 *Merrill* conveyed to *James Merrill and Barnabas Briggs* for the use of the shakers' society in *New Gloucester*. At the time of *Merrill's* purchase the county road as actually surveyed and entered of record, ran through the grass-field several rods east of the road actually travelled; and it never was travelled according to its original location, but was soon afterwards located anew, and farther west, to conform to the road *de facto*. The grantees of *Varrell* entered into possession of the land up to the visible travelled road, including about two acres afterwards decided to be not actually covered by his deed; all which the shakers constantly held in open, peaceable and exclusive possession, claiming it as their own adversely to all others; which was well known to the plaintiff. It further appeared that the plaintiff, in 1823, purchased of his father and others, heirs at law of *Richard Varrell*, all their right and title to the land lying east of the county road as *then* travelled, except what had been conveyed by deed to the shakers; and thereupon commenced an action in the name of his grantors, against the present defendant and *William Merrill*, deacons of the society of shakers, and managers of their property, to recover seisin and possession of the land alleged to be by them so wrongfully withholden. In that suit a verdict was returned for the demandants

in this court at the same term in which the present action was tried, for that parcel of land lying between the county road as originally located, and the road actually travelled. After receiving his deed, the plaintiff called on the defendant to surrender to him the land described in his deed; shewing him the minutes of the original laying out of the road; to which the defendant replied that he knew there was a piece of land there which belonged to *Varrell*, and which the shakers would give up or settle for; but that there was not so much as the plaintiff claimed. This piece, to which he said the shakers made no claim, was only a part of the parcel described in the plaintiff's deed. The defendant also denied that the plaintiff's ancestor had any deed of the land, and promised to give it up if a deed could be produced; and afterwards said it would cost the plaintiff more to get the land than it was worth.

While the real action was pending, the plaintiff was indicted for unlawfully maintaining that suit on the part of the demandants; and for having purchased the land knowing the title to be doubtful and disputed, and the shakers to be in possession claiming title adversely to his grantors, who were not seised, in law or fact, of the land. Of this indictment, on trial in the court below, he was acquitted.

Upon this evidence, the Chief Justice being of opinion that instead of proving the want of probable cause for the criminal prosecution, it proved that probable cause for it did exist, notwithstanding the acquittal, he directed a nonsuit; with leave for the plaintiff to move to set it aside.

Emery and *Fessenden*, in support of the motion, now argued that there was no probable cause for the prosecution; because it appeared that the plaintiff did not purchase any land, except what his ancestor had not before conveyed; and that the parcel which was not already conveyed, the shakers did not pretend to claim. It was merely a question of boundaries between them. The shakers having renounced all title to any land not included in their deed, were mere tenants at will of such land, holding in submission to *Varrell's* title; and therefore, as to this land, *Varrell* was

never disseised, and his heirs had good right to convey. If, as the shakers in fact conceded, there was any land on which the deed to the plaintiff might operate, the offence was not committed.

Whether the shakers held the land in question adversely, or not, was a question of fact, which ought to have been submitted to the jury; but the Judge seems to have assumed the affirmative of the question as an undisputed fact; and for this cause the nonsuit ought to be set aside, that this point may be determined by the proper tribunal.

Longfellow and *Greenleaf*, for the defendant, contended that it was not material whether or not there was land described in the deed upon which it could operate;—if it did purport to convey any land of which the shakers were in possession, claiming title, and of which the plaintiff was well knowing, this justified the prosecution. And that such were the facts, the plaintiff himself proved, by testimony which the defendant did not controvert, nor offer to explain.

At the ensuing term in *Lincoln*, the opinion of the court was delivered by

Mellen C. J. The facts in this case, appearing on the report, are very simple; and the law is as plain as the facts. On the 29th of *December* 1823 the plaintiff purchased of *Varrell*, his father, and of others, a piece of land, and received a deed of it under which he claimed to hold it. Soon after, the defendant caused the plaintiff to be indicted for purchasing a disputed title of the grantors, on the ground that at the time of the purchase they were disseised of the lands so purchased, and that the plaintiff knew they were so disseised. On the trial of the indictment the plaintiff was acquitted; and this action is brought to recover damages for a malicious prosecution of the plaintiff in that case; and the nonsuit was ordered by the Judge who tried the cause, because, in his opinion, the proof adduced by the plaintiff disclosed that there was probable cause for the prosecution. On the facts reported, we are now to decide whether such probable cause

existed. It appears that in the year 1801 the shaker society, by their proper officers, purchased a piece of land adjoining that which was purchased by the plaintiff of his father and others; but it further appears that they, for twenty years or more before the plaintiff's purchase, had constantly held, in open, peaceable and exclusive possession, not only the land actually conveyed to them by the deed from *Merrill*, but also the adjoining piece described in the deed to the plaintiff; and during all the time, claimed it as their own, and adversely to all others, till after the plaintiff's purchase according to the testimony of some of the plaintiff's witnesses; though according to the testimony of others, the society did not assert a title to all the land described in the deed to the plaintiff; but were willing to give up a part. Now here is no difference in the testimony of the plaintiff's witnesses, which can change the character of this cause, and of the defence growing out of this testimony. It amounts only to this, that to a part of the land conveyed to the plaintiff by his grantors, the shakers had never asserted any claim or had any adverse possession; but that as to all the residue, they had possessed and claimed and held it, in such a manner as completely disseised the true owner; and to have continued such disseisin until after the plaintiff made his purchase and received his deed. It is very clear that if the grantors were disseised of any part of the tract they undertook to convey to the plaintiff, especially as that fact was known to him at the time, it was proof of probable cause for the prosecution though there was an acquittal. This view of the subject shews most plainly that there can be no legal ground for the objection which has been urged by the plaintiff's counsel; viz. that the question should have been submitted to the jury, whether the claim and long continued possession by the shakers were adverse to the right and title of the true owner. There was nothing for the jury to decide. The defendant did not deny any of the facts sworn to by the witnesses for the plaintiff. He said, "on your own testimony, there is proof of probable cause." It is wholly immaterial, as has before been observed, whether the plaintiff's grantors were, at the time of the conveyance, disseised of all the land they undertook to convey; or of only a part of it; the con-

sequence as to the question of probable cause, is the same in both cases. The plaintiff could not impeach his own witnesses; and their testimony cannot by any possible construction prove any thing more or less than this,—that at the time the plaintiff purchased and took his deed, his grantors were disseised of all or a part of the land in that deed described. The report states this fact in the most unequivocal language ; and the legal result is perfectly plain. The court are of opinion that the nonsuit was properly ordered. As the facts were all disclosed by the plaintiff's own witnesses, and those facts were not contested, the question whether they presented proof of the want of probable cause, or proof of probable cause, was a question of law, which it was the duty of the Judge to decide ; and he decided it correctly.

Accordingly the nonsuit is confirmed.

McKenney *vs.* Dingley.

In order to avoid a sale of goods on the ground of false and fraudulent conduct in the vendee, in representing himself to be a man of good property and credit when he was not so ; it is competent for the vendor, in addition to the direct proof of the case, to give evidence of similar false pretences successfully used to other persons, in the same town, about the same time, to shew a general plan to amass property by fraud.

This was an action of replevin for a horse, which one *Reed* purchased of the plaintiff on credit, *July* 12, 1824, and which the defendant claimed to have bought fairly of *Reed*. The plaintiff sought to avoid the sale and reclaim the horse, on the ground that it was obtained from him by means of false and fraudulent representations made by *Reed* respecting his own property, credit, and responsibility, and that the defendant was party to the fraud. At the trial, before the Chief Justice, the plaintiff, having proved the false representations made personally by *Reed* to himself, proposed, with a view to connect him with *Dingley*, to prove that *Reed*, on the 9th and 10th, and on one or two other days in *July*, and also on the 19th day of *August*, had made similar false repre-

sentations to other persons, from whom he had succeeded in obtaining goods to the amount of between four and five thousand dollars. This evidence was objected to, but the Chief Justice admitted it, as tending to shew a fraudulent intention to obtain the possession of a great quantity of goods without payment; instructing the jury, first to consider and decide whether the representations made to the plaintiff were false and fraudulent, with intent to gain possession of his horse and not to pay for him; and then to ascertain whether the false representations made to the others were made for similar purposes; and whether they all were parts of a plan formed by *Reed*, to defraud the parties of their property. If they should be satisfied of the existence of such fraudulent design and of its execution on the part of *Reed*, then he instructed them to inquire and decide whether *Dingley* was acquainted and connected with it; and whether the transfer of the horse from *Reed* to him by exchange was made to render the original fraud effectual, under the appearance of a fair purchase. If so, then this action was maintainable against *Dingley*; but if he was innocent of the fraud, and purchased the horse for a valuable consideration, without notice, they ought to find for the defendant.

The jury found for the plaintiff; and informed the court that independently of the false representations made to others, those made to the plaintiff by *Reed* were false and fraudulent, and made with the design to cheat him out of his property; and that *Dingley* was assenting to and connected with the fraud. The verdict was taken subject to the opinion of the court upon the question whether the evidence was properly admitted, and the jury correctly instructed.

The cause having been submitted without argument, by *Fessenden* and *Deblois* for the plaintiff, and *Longfellow* and *Adams* for the defendant, the opinion of the court was delivered at the following *September* term in *Lincoln*, by

MELLEN C. J. In the case of *Seaver v. Dingley* lately decided in the county of *Kennebec*, we have had occasion to examine the

principal facts disclosed in the report before us; and have pronounced our opinion upon the objections made to the decisions and instructions of the Judge in that cause, which are nearly the same as those reserved as the basis of the motion for a new trial of this. Upon the general questions, therefore, which have been argued, as to the admissibility of evidence, we refer to our opinion in *Seaver v. Dingley*, and the grounds on which we have placed it. In that case we overruled all objections and entered judgment on the verdict in favor of the plaintiff. In the case before us, the facts, in some respects, are much stronger for the plaintiff than they were in that. For in addition to the fact found by the jury, that *Reed* had formed a plan fraudulently to obtain as many goods as he could in *Portland*, by purchases of a number of persons; and that the several purchases which he made, including that of the horse, were parts of such plan; it appears by the special information to the court, given by the foreman of the jury, that independently of the false representations made to others, they found that the representations made by *Reed* to the plaintiff, at the time of purchasing the horse in question, were false and fraudulent, and made with the view of obtaining credit, and getting possession of the horse, and never paying for him. This evidence alone is enough to maintain the action, without proof of the false and fraudulent representations made to others; and therefore, even if the proof which was admitted as to them had been improperly admitted, it is very questionable whether the verdict ought to be disturbed; but we all think it was properly admitted, and that the instructions of the judge were correct, both as to the alleged plan to defraud, and the alleged knowledge of it on the part of *Dingley*, and his connection with it. There must be

Judgment on the verdict.

JORDAN *vs.* JORDAN *ad'x.*

Where the children of one deceased entered into an agreement, under seal, for a division of the estate, designating, in general terms, in what part of the land each one's portion was to be assigned, but referring to a future survey, plan, and division-deed for the completion of the partition ; and thereupon the parties entered each into his several portion thus designated, and continued in the quiet and exclusive possession more than thirty years, but no such survey, plan, or deed was ever made ; and afterwards a will was discovered and duly proved, by which their father had devised all the land to one of them in fee ; it was holden that, this possession by the others being founded in mistake, the law raised an implied promise in each of them to pay to the devisee a reasonable rent for the portion of land so occupied.

THIS was an action of *assumpsit* by *Thomas Jordan*, against the administratrix of the estate of his brother *Timothy Jordan*, for the use and occupation of a farm, from the year 1783 to *August* 1821 ; and was tried before the Chief Justice upon the pleas of *non assumpsit*, and the statute of limitations.

It appeared that the father of the plaintiff, being owner of the farm, made his will in 1761, and died seised in 1783, having devised the farm to the plaintiff in fee. The will was not discovered, nor was there any proof that its existence was known to any of the testators' children, until a short time before it was proved in the probate court, which was in *January* 1822. The defendant's intestate had occupied the farm as stated in the writ.

It was proved by the defendant that the plaintiff, with his brothers and sisters, in 1784 entered into an agreement under their hands and seals, reciting that their father had lately died intestate, and that they were desirous to have his estate divided among them without any formal administration ; and thereupon agreeing that the estate should be divided "as near as may be "according to the following plan." The part to be assigned to *Timothy* is then described, he paying to each of his sisters a certain sum of money ;—*Thomas*, the plaintiff, was to have a certain ten-acre field, to be afterwards surveyed ; and a portion of a swamp, "to be appraised by indifferent men according to the "goodness of it". Certain other tracts, distinctly described, were

assigned to the five daughters, "to be equally divided between "them according to quantity and quality with their brother *Thom-* "*as*' lot";—the portion of *John* was to be laid off, adjoining his other land, "as shall hereafter appear on the plan";—and to the same plan reference is made for the parts specifically assigned to the others; and the residue of the real estate was to be equally divided among the other children. It was then agreed that the personal estate should be equally divided; that any dispute which might arise should be determined by arbitrators mutually chosen; and that after the division should be completed, a sufficient deed of partition should be mutually executed by all the parties. This deed of partition, however, was never executed; but it appeared that each of the parties to the agreement, soon after it was made, entered into possession of that part of the estate therein assigned to him or her; and had ever since continued to hold it in severalty, without interruption from any of the others.

The Chief Justice hereupon instructed the jury that this agreement amounted at least to a lease at will to each of the parties, from all the others, of the part specially assigned to each; which, as there was no proof of its express determination, must be considered as continuing during the life of *Timothy*, the defendant's intestate;—that as the agreement was under the hands and seals of the parties, it imported in itself a legal consideration; and was not void in consequence of the ignorance of all concerned as to the existence of the will, nor on that ground, impeachable in this action; and that as, by the agreement, no rent was to be paid for any of the lands occupied by the parties, it was not competent for the plaintiff to control or explain the agreement by parol evidence. He further instructed them that the law implied no promise, where the parties had entered into an express agreement; and that even if parol evidence were admissible, they would judge whether there were any facts in the case from which a promise could be implied, no express engagement being pretended to have been made. A verdict was returned for the defendant; subject to the opinion of the court upon the correctness of these instructions.

The cause was argued at an adjourned session of this court in *April* last, by *Daveis* for the plaintiff, and *N. Emery* for the defendant; and being continued for advisement, the opinion of the court was delivered at the ensuing *November* term by

MELLEN C. J. This case is a peculiar one, and not similar to any of those which have been cited in the argument, various and multiplied as they are. The plaintiff and the deceased, and all their brothers and sisters, in every thing relating to this cause, and the agreement signed and sealed by them, and in all the facts to which it relates, and from which it originated, appear to have acted under a mistake as to their rights, but with perfect fairness and good faith. Under the circumstances which this cause presents, what are the legal principles to be applied in its decision? Nothing appears to prevent the operation of the statute of limitations, as to all that part of the account which was of more than six years standing at the time of the commencement of the suit; for whatever right of action the plaintiff had as to such part, it accrued more than six years before this action was commenced; although the plaintiff did not know it; and this ignorance on his part cannot prevent the effect of the statute, unless in those cases where such ignorance is owing to the fraud or default of the debtor. *Bree v. Holbech Dougl.* 655. *Bishop v. Little* 3 *Greenl.* 405. As to the residue of the account, other grounds must be examined. Numerous cases shew that on a failure of consideration, the law implies a promise of payment or repayment of a sum of money, as the case may be; and the question in the present case is, whether the law raised a promise, on the part of the intestate, to pay for the use and occupation of the plaintiff's land. If so, this action is maintainable, on the same principle that a promise is implied by law to pay a sum of money, which by mistake was omitted on a settlement of accounts, although a receipt in full was given at the time of settlement. A variety of cases, similar in principle, might be cited, if necessary. The Judge instructed the jury that the agreement under the hands and seals of all the children of *Thomas Jordan*, the father, on which the defendant grounds his defence, amounted to a lease at will, at least to each of the chil-

dren, from all the other children, of the part of the estate which each was to have and hold; and being an agreement under seal, and no rent being reserved, this express agreement excluded all implication. We have carefully examined the agreement, and the instructions of the Judge to the jury, and have felt no little embarrassment in arriving at a conclusion satisfactory to our own minds. The result however of our examination is, that the legal principles which govern our decision, are in unison with the evident equity and justice of the plaintiff's claim. If we considered the agreement as a lease at will, and that each of the children entered under it, we should not be disposed to question the correctness of the Judge's conclusions, as to the effect thereby produced in relation to this action. A careful examination of that instrument has satisfied us all, that it was only an incipient measure, adopted by the children as to the division of their father's estate. Several other measures were contemplated; divisional lines were to be established; proportions to be adjusted by appraisement of indifferent men; disputes, if any, to be settled by referees, and finally partition deeds to be made. In fact, the agreement is no more nor less than a bond in the penal sum of one hundred pounds, to make and execute among themselves deeds of partition, according to the general grounds agreed upon, after all preliminary and incidental questions should have been settled, and the division completed. There is no proof that such deeds have ever been executed, and this agreement or bond is now in as full force and virtue as it ever was. In the preamble of the agreement, the parties say the estate shall be divided, as "near as may be, according to the following plan." The contract with *Timothy* was on condition of his paying a certain sum to each of his sisters; there is no proof it was ever paid. The contract with *Thomas*, speaks of the appraisement of his part of the swamp "by indifferent men according to the goodness of it." The contract with *Mary*, *Elizabeth*, *Sarah*, *Abigail* and *Ann*, provides that the part they were to have, was "to be equally divided between "them, according to quantity and quality, with their brother "*Thomas Jordan's* lot." The contract with *John Jordan* and *Elizabeth* his wife, is that they shall have their part of said estate,

adjoining his land to the northward of the marsh, "as shall appear hereafter on the plan." We have no proof of any such plan. *John* and *Sarah Marr's* part was to be designated "as shall here- "after appear on the plan."—*Mary*, *Abigail* and *Ann's* parts were to be designated on the plan, "according to the goodness "and quantity of the land with their brother *Thomas*, and their two "other sisters." It is agreed that the residue of the estate "shall be equally divided between the other children." The closing provision relates to the future disposition of the personal estate. It is true that it appears by the report that each of the children, soon after the execution of the agreement, entered into possession of that part of the estate which, by said agreement, he or she was to have and hold in fee. But by the agreement itself it does not appear that any particular part was to be holden in severalty and in fee, until the contemplated deeds of division should have been made. Neither is there any provision, in the agreement, that either of the sons or daughters should enter into their respective parts, as therein described, before such partition deeds should have been executed. Their entry and possession, therefore, for aught appearing to the contrary, might have been, and undoubtedly was, by a mutual understanding and parol consent. But as all this was founded on mistake, the law raises a promise, on the part of the intestate, to pay the plaintiff for the use and occupation of that land, which, by the will, is now found to have been, at the time of the occupation, his property, though the intestate, and all concerned, supposed otherwise. This view of the cause avoids all technical objections and difficulties, removes out of the way what has been incorrectly supposed an express contract under seal, in virtue of which the land was occupied; and thus opens the door of inquiry, and leaves room for the law to do perfect justice, by raising an implied promise in favor of the plaintiff, on the part of the intestate. We are, accordingly, all of opinion that the verdict must be set aside and a

New trial granted.

LEVY & ALS. *vs.* MERRILL & AL.

Where the underwriter, in a policy of insurance, professes to take "the risks contained in all regular policies," a loss by capture is within the policy. And parol evidence is not admissible to prove that the parties understood it as covering sea risks only.

If the goods of a Spaniard, insured by an American, are shipped in the name of the insurer, by agreement of the parties, to protect them against the enemies of Spain, the policy is not therefore void; nor does the transaction contravene any provision of the treaty of 1795, between the United States and Spain.

Where goods insured are shipped on board a vessel of the underwriter, on freight, a loss happening by the want of proper documents, or by the carrying of contraband articles, is chargeable upon the underwriter alone, and does not affect the right of the assured to recover upon the policy.

It is not necessary, by the statute of frauds, that the consideration for a collateral undertaking should be recited in the note or memorandum signed by the party to be charged.

THIS was an action of *assumpsit* on a collateral undertaking of the defendants to guaranty the performance of a contract entered into by *Joshua Gordon*, relative to the insurance of a quantity of mahogany on board the brig *Sam*, on a voyage from *St. Domingo* to the island of *St. Thomas*. It was tried before the Chief Justice, upon the general issue. The original undertaking was as follows.—

"I the undersigned do hereby insure to Messrs. *Levy fils aine* "& *Co.* to the amount of two thousand dollars, on mahogany now "on board the American brig *Sam*, Capt. *Prentiss Crowell*, at "present at anchor in the port of *St. Domingo*, from whence she "will proceed, as soon as circumstances will admit, to the port of "*St. Thomas*, where the risk will end twenty-four hours after "the vessel is safely moored, and acknowledge to have receiv-"ed in hand the premium on said insurance, at and after the "rate of one per cent.—Touching the risks I am willing to bear, "they are the same as contained in all regular policies of insur-"ance; and should there any difficulty arise in the adjusting this "policy, I am willing the same shall be decided according to the "rules established at *Lloyd's* in *London*, or at the regular insur-

" ance offices in the United States. I further declare that al-
" though the bills of lading and invoice are made out in my name,
" it is merely to secure the property, which in reality belongs to
" Messrs. *Levy fils aine & Co. St. Domingo, March* 15, 1822."
Signed, " *Joshua Gordon.*"

By the bill of lading, and invoice, produced by the plaintiffs, the property appeared to belong to *Joshua Gordon.* On the 17th of *April*, soon after the brig sailed, she was captured by a Spanish privateer, and carried into *Porto Rico* for adjudication, where the vessel was decreed to be given up, but the cargo condemned. In the report of the capture, by the captain of the port, and in the libel of the captors, it was alleged that the clearance and manifest were irregular,—that the captain had admitted that he had previously navigated the same vessel under the patriot-flag,—that various munitions of war were found on board, together with sundry articles not mentioned in the manifest,—and that the vessel had contravened the fourteenth and seventeenth articles of the treaty of *Oct.* 27, 1796, between the United States and Spain. In the decree of condemnation, the judge declared the proof of property of the cargo to be insufficient, and " having before him
" the thirty-second article of the last ordinance for cruising, and
" the seventeenth article of the treaty of amity, limits and navi-
" gation between Spain and the United States of America," he confirmed his first sentence of the eighth of *May* preceding, and condemned the cargo to the captors. This final condemnation was on the eighteenth of *July* 1822.

It was proved by the plaintiffs, that in fifteen days after the vessel sailed, a rumor prevailed in *St. Domingo* that she was captured and carried into *Porto Rico*, which is about ten or twelve days sail from the former place;—that sometime in *July* or about the first of *August*, the defendant *Merrill*, being at *St. Domingo*, informed the plaintiffs that the cargo was condemned and the vessel liberated, and that he had supplied the captain, at *Porto Rico*, with funds to get his vessel away. In about three or four weeks after this, the plaintiffs abandoned the cargo to *Gordon*, who had remained at *St. Domingo*; but neither the protest nor any other document relating to the capture and condemnation had then been received.

After this, *Gordon* being about to leave the island, the plaintiffs directed their agent to take measures to arrest him; to prevent which the defendants, after several days deliberation, entered into the stipulation on which this action was founded; and which was of the following tenor.—

"We the undersigned *Paul E. Merrill* and *Nathaniel Gordon*, both of the city of *Portland* shipmasters, do hereby declare that we jointly and each of us separately constitute ourselves security towards Messrs. *Levy, Son & Co.* of this city merchants, for Capt. *Joshua Gordon* of the above cited city of *Portland*, in the manner following, to say—said *Joshua Gordon* having insured the said sum of two thousand dollars on part of the cargo shipped in *March* last on board the American brig *Sam*, bound for *St. Thomas*, as appears by the policy signed on the fifteenth day of *March* 1822; and said brig *Sam* having been detained in *Porto Rico*, and her cargo taken out; the above named *Paul E Merrill* and *Nathaniel Gordon* hold themselves responsible for the amount of the above insurance, according as expressed in the policy, should the said *Joshua Gordon* not pay it on the presentation of regular documents proving the condemnation or loss. And for the security thereof we do hereby engage ourselves personally, and whatever property we may at present be possessed of, or which we shall hereafter possess." This was signed by the defendants, and bore date *Sept.* 22, 1822; and upon its execution, the principal, *Joshua Gordon*, was suffered to depart from the island.

A few days before the commencement of this action, which was in *October* 1823, copies of the protest, and of a translation of the decree of condemnation, were left in *Portland* at the house of *Joshua Gordon*, who was absent at sea; and were also exhibited to the defendant *Merrill*, who was requested to pay the amount, which he declined.

The defendants produced in evidence a letter from the plaintiffs to the president of one of the insurance offices in *Boston*, in which they claimed the amount of certain insurance effected there, declaring that the policy signed by *Gordon* covered only the risks of the sea, and that therefore under it they could not claim the amount of their loss by capture. Hereupon the defen-

dants contended; 1st, that the risk undertaken by the insurer was only a sea-risk ; and that the loss by capture was not within the policy;—2d, that the policy was void, because the goods were not shipped in the names of the true owners ;—3d, that the policy was void, because the brig was sent to sea having on board articles contraband of war, and other goods not mentioned in the manifest or other documents on board ; and was not furnished with the documents required by the treaty with Spain ; and because the vessel had violated the provisions of that treaty;—4th, that the stipulation of the defendants was void, because it was without consideration; and because no consideration was expressed in the agreement itself ;—5th that they were not liable, because no documents or proof of loss had ever been presented to *Joshua Gordon* ;—and 6th, because the abandonment was not made in season.

These points of defence the Chief Justice overruled, for the purpose of ascertaining the amount of the plaintiff's claim; directing the jury to find for the plaintiffs to the value of the mahogany insured, and interest after sixty days from the abandonment ; which they did accordingly. Upon these points, as well as the amount of damages, the case was reserved for the consideration of the court.

Longfellow and *Greenleaf* argued for the defendants—1st, that the risk taken was only sea risk, as was evident from the low premium paid, and from the plaintiffs' letter to the underwriters in *Boston*, expressly declaring it to be such. And this evidence *ab extra* is admissible, the reference to "all regular policies" creating a latent ambiguity, which may always be thus explained. To the 2d and 3d points they argued that the sentence of condemnation was conclusive as to the facts upon which it was founded ;—*Croudson v. Leonard* 4 *Cranch.* 434 ; and from this it appeared that the brig was sent to sea without the documents required by *Art.* 17, of the treaty of 1795 with Spain ; that she had violated the sixteenth article by carrying goods contraband of war ; and that by the plaintiffs' own shewing, the evidence of ownership of the cargo was false, in stating that it

belonged to *Gordon*. Hence the condemnation was lawful, through the fault of the plaintiffs. *Stocker v. The Merrimack Ins. Co.* 6 *Mass.* 220. *Cleveland v. the Union Ins. Co.* 8 *Mass.* 308. *Garrels v. Kensington* 8 *D. & E.* 230.—4th. The objection that the consideration was not expressed in the agreement itself, they submitted to the court upon the authority of *Saunders v. Wakefield* 4. *Barnw. & Ald.* 595; observing that, though it had been held otherwise in *Packard v. Richardson* 17 *Mass.* 122, yet in this State the construction of this part of the statute of frauds was still unsettled. But they insisted that the agreement itself was wholly without consideration, and so void. It was made while the vessel was under detention only, but not condemned. The plaintiffs had no right of action at the time; and of course could give no indulgence or delay to Capt. *Gordon*; for he was not liable to be arrested by any principles of general law, and the case shews no law of the place authorizing any precautionary detention. 5th. They further contended that by a fair construction of the contract, it was the duty of the plaintiffs first to make demand of payment on Capt. *Gordon*; and that their liability attached only in the event of his refusing to pay in a reasonable time after demand, and upon presentation to him of proper documents proving the loss. But the papers left at his house were only uncertified copies of garbled extracts from the record, shewing little else than the fact of condemnation. To the point that the abandonment was made out of season, it not having been made until three or four weeks after the arrival of certain intelligence of the loss, they cited *Marshall on Ins.* 508. *Livermore v. The Newburyport Ins. Co.* 1 *Mass.* 264. *Smith v. The Newburyport Ins. Co.* 4 *Mass.* 668. *Abel v. Potts* 3 *Esp.* 243. *Aldridge v. Bell* 1 *Stark.* 498.

N. Emery, for the plaintiffs, replied to the first point, that the "regular policies" referred to, do usually contain sea risks; and this policy contains no exception of such perils. If therefore there is in the contract enough to shew that the parties intended to insure, and at an agreed price, it is sufficient. *McCulloch v. The Eagle Ins. Co.* 1 *Pick.* 278. The policy alone is conclusive evidence of the agreement, not to be controled or varied by parol

testimony. *Caines v. Knightly Skin.* 454. *Cheriot v. Barker* 2 *Johns.* 346. *Mumford v. Hallet* 1 *Johns.* 433. *Graves & al. v. The Boston Marine Ins. Co.* 2 *Cranch* 419. *Merry v. Prince* 2 *Mass.* 176. To the 2d and 3d objections he answered that as between these parties, goods contraband of war might lawfully be carried, and insured. *Seton & al. v. Low* 1 *Johns. Ca.* 1. *Skidmore v. Desdoity* 2 *Johns. Ca.* 77. *Juhel v. Rhinelander ib.* 120. *Pond v. Smith & al.* 4 *Con. Rep.* 297. The whole loss was occasioned by the mismanagement and omission of the assurer, who being owner of the vessel and appointing his own master, it was his duty to see that all the documents were furnished which the safety of the voyage might require. *Richardson v. The Maine Fire and Marine Ins. Co.* 6 *Mass.* 102. 7 *Cranch* 536, 234. 12 *Mass.* 291. As to the sentence of condemnation; where various causes are recited as the foundation of the decree, it is to be referred only to those which are good, rejecting all others. *Christie v. Secretan* 8 *D. & E.* 192. To the fourth point he said that after capture it was not necessary for the plaintiffs to litigate with the captors by way of appeal, nor even to contend at all. It was enough that the property was seized and detained, and the voyage broken up. By this event the rights and obligations of the parties were fixed, and the plaintiffs might forthwith proceed at law upon their policy. 2 *Marshall on Ins.* 564, *Condy's ed.* 8 *Johns.* 245. 1 *Caines* 284, 444. And the right to arrest the original debtor being thus perfected, the waiver of it was sufficient consideration for the guaranty in the present case ; and it needs not to be expressed in the agreement, as it is not a contract standing upon the statute of frauds, but upon general principles of national law. 14 *Ves.* 189. *Fell on Guarantees app.* 337. *Packard v. Richardson* 17 *Mass* 122. *Weightman v. Caldwell* 4 *Wheat.* 85. To the objection of the want of a demand on Capt. *Gordon*, he replied that it was not necessary, this being a case of guaranty ; 2 *Johns* 365 ; and if it were generally required, the absence of the party in this case would excuse the omission of all which was not done. *Warrington v. Furber* 8 *East* 245. 1 *Vin. Abr. suppt.* 299.

The opinion of the court was read by the Chief Justice at the following *November* term, as drawn up by

WESTON J. The policy executed by *Gordon* is very brief in its terms ; but with regard to risks, it expressly assumes such as are contained in all regular policies of insurance, to be adjusted according to the rules established at *Lloyd's* in *London*, or at the regular insurance offices in the United States. It was a policy therefore against what are called the usual risks. The form of of the policy now used in *London*, and which it seems has varied very little for two hundred years, [*Park* 14] embraces losses arising from "men of war, enemies, pirates, rovers, takings at "sea, arrests, restraints, and detainments of all kings, princes and "people of what nation, condition, or quality soever." These risks among others are to be found also in the common printed forms in use in this country. Loss by capture then, being one of the usual risks contained in regular policies, is clearly included in the one in question. And we are not at liberty to vary a contract, the terms of which are thus explicit, from any considerations drawn from the amount of the premium, or from the letter of the assured to their correspondent, adduced to shew their sense of the contract, written with a view to obtain indemnity from another quarter, in which they were however unsuccessful. In this letter, they speak of the policy of *Gordon* as protecting them against sea risks only ; but in the instrument executed by the defendants, upon which this action is brought, loss by capture is contemplated as being within this policy; and they engaged to hold themselves responsible for the amount, if *Gordon* does not pay on presentation of regular documents, proving the condemnation or loss. But what risks were in fact assumed must be determined from the policy itself, which we are satisfied includes, among others, the risk of loss by capture.

The property captured was proved at the trial to have belonged to the plaintiffs ; and that it exceeded in value the amount insured by this policy. But it is contended that the contract cannot be enforced against *Gordon* or against the defendants, who have assumed his responsibility, because the goods on board were not shipped in the name of the true owners. This fact is distinctly

noticed in the policy and the property thus covered is expressly insured. No law of the United States is violated by a measure of this sort, which was manifestly adopted to protect the property from capture by the enemies of Spain. Nor was it an infringement of the treaty with Spain, adverted to in the decree of condemnation, which requires only certificates of the several particulars of the cargo, and the place whence the ship sailed. As to the owners of the cargo, the language of the treaty is, that "if any one shall "think it fit or advisable to express in the said certificates the "person to whom the goods on board belong, he may freely do "so;" thus leaving to the individuals concerned the full exercise of their discretion upon this point.

It is objected that the brig, in which the goods insured were transported, had on board goods contraband of war. That fact is affirmed in an official representation made to the judge, by *Don Jose Mendose*, captain of the port of *Caboroxo*, into which the prize was carried; and also in the libel or petition of the captor, praying for condemnation; but it is not made the basis of the decree of condemnation, nor does the decree take any notice of the charge, other than by an enumeration of a few articles, having this character, among those which are condemned. The seventeenth article of the treaty between the United States and Spain, which is the only article alluded to in the decree, has no reference whatever to the case of contraband goods, which is made the subject of specific stipulations in the sixteenth article. If there is however competent proof that the vessel had goods contraband by the law of nations, or by the treaty with Spain, if she had been bound to an enemy's port; yet in this case she sailed from a Spanish port, not to a port of the enemy of Spain, but to that of a neutral, to which munitions of war may be innocently carried. It is not pretended that the contraband goods on board, if there were any, were the property of the plaintiffs. The vessel belonged to *Gordon* the insurer, and they must have been received by his privity or that of the master appointed by him, and in his employment. Besides, contraband articles found on board a ship are alone liable to confiscation; innocent goods are not affected, unless they belong to the same owner. *The Staadt Embden*, 1 *Rob. Adm. Rep.* 26.

Another ground taken in defence is, that the property was condemned for a violation of the treaty with Spain, and that upon this point the decree of condemnation is conclusive.

That the sentence of a foreign court of admiralty, in a case within its jurisdiction, is conclusive evidence not only of the right which it establishes, but of the fact which it directly decides, is a position which has been so uniformly sanctioned by the highest and most respectable tribunals, that it cannot now be controverted. But the sentence adduced does not decide that there had been any violation of the treaty. The Judge states that, having before him the seventeenth article of the treaty of friendship, limits, and navigation between Spain and the United States of 1795, confirmed also by the new treaty of February 1819, and having present the thirty second article of the last ordinance about privateers, and finding the proof of property in the cargo insufficient, he condemned it. That article of the treaty is found, upon examination, to require no proof of property except of the vessel, which, without such proof, is made liable to condemnation. But the vessel was in this case acquitted. By the treaty, free ships made free goods, with the exception only of goods contraband of war; and no document is therefore required proving property in the cargo, unless as is provided by the seventeenth article, as before stated, any one shall think it fit or advisable to state to whom the goods on board belong, in the certificates containing the several particulars of the cargo, and the place whence the ship sailed. The sentence does not in terms profess to condemn the cargo for a violation of the treaty; nor does it decide any fact, which amounts to such violation. What may be the nature of the thirty-second article of their ordinance about privateers, adverted in the sentence, does not appear; and if it did, it could have no influence upon the decision of this cause. The port captain it is true, in his official communication, informs the Judge, and the captain of the privateer in his libel or petition avers, that certain portions of the cargo were not set forth or specified, as required by the before mentioned seventeenth article; but these allegations not being directly supported by the sentence, or even deducible from it upon any fair construction, cannot be considered as verified by competent proof.

But admitting that the cargo was condemned, because certain parts of it, other than that belonging to the plaintiffs, had not the certificates required by the treaty ; this fault or deficiency does not appear in any degree imputable to the plaintiffs; or that they had any interest in, or any connexion with, the merchandize stated to have been omitted in the manifest. The vessel belonged to *Gordon*, the insurer. The master was appointed by him, and under his control. If he received goods, without the proper certificates required by treaty, and thus occasioned the loss which accrued, it could have no tendency to exonerate *Gordon* from his liability to the plaintiffs, who had done nothing subjecting their merchandize to forfeiture.

It is urged that, if the defendants are liable, this action was prematurely brought ; inasmuch as regular documents, proving the condemnation, had not been presented to *Gordon*. It appears that the sentence of condemnation was finally confirmed on the eighteenth of July, 1822 ; and that an abandonment was offered to *Gordon* in the succeeding month of *August*, which was seasonably made ; as the loss then remained total, and has ever since so continued. *Dorr v. New Eng. Ins. Co.* 11 *Mass.* 1. *Marshall*, 489. *Gordon*, the owner of the brig, must have been apprized by the master appointed by him of what had happened ; and may well be presumed to have been in possession of documents, proving the condemnation, long prior to the action, which was not instituted until more than a year subsequent to the abandonment. It appears further that, before the action was commenced, copies of the protest and of the translation of the sentence of condemnation were left at *Gordon's* house, he being then at sea. Upon these facts, we are of opinion that this objection to the verdict cannot be sustained.

With regard to the consideration for the guaranty entered into by the defendants, the statute of frauds, according to the construction which it has received in Massachusetts and in this State, does not require that the consideration for the collateral undertaking should appear in the note or memorandum, signed by the party to be charged. Upon this point, we are fully satisfied with the reasoning and authority of the case of *Packard v. Richardson*

17 *Mass.* 122. The consideration therefore may be proved by parol. *Keating*, the agent of the plaintiffs, testifies, that it was forbearance on the part of the plaintiffs. This, though a good consideration, as it is conceded, where the party had a right of action, was, it is urged, insufficient in this case; because the plaintiffs had then no right to require or to enforce payment.

We have no process in this State, by which a party can legally arrest his debtor, for the purpose of security, before his demand has arrived at maturity; but such process may exist in other countries; and in regard to strangers and transient persons, may be found essential in the administration of justice. The forbearance of a right to prosecute or arrest for further security would unquestionably form a sufficient consideration for the undertaking of the defendants; but it must appear that such right existed. This would depend upon the laws of the Spanish colony of *St. Domingo*; and foreign laws are to be proved as facts. *Mostyn v. Fabrigas*, *Cowper*, 174. *Talbot v. Seaman*, 1 *Cranch*, 38. *Church v. Hubbart*, 2 *Cranch*, 237. *Keating* further testifies that he was directed to arrest *Gordon*; that he should have done so, but for the interposition of the defendants, who, to induce the forbearance of any prosecution against *Gordon*, after several days deliberation, entered into the guaranty; whereupon he desisted from taking any measures to arrest him. By the terms prosecution and arrest, we must understand measures authorized by law. The defendants were upon the spot; they took time to deliberate; and they had it in their power to acquaint themselves with the course of legal proceedings in that jurisdiction. We do not at this time decide that, upon this evidence, the jury might not have been warranted, under the direction of the court, in inferring that the plaintiffs had a right thus to proceed, by the laws of the then Spanish colony of St. Domingo. But this fact has not been established by their verdict; nor has it been directly proved; we are therefore of opinion that the verdict, returned for the plaintiffs, must be set aside. By the case reserved, it is agreed that if upon either of the points taken, the law is with the defendants, the verdict is to be set aside, and the plaintiffs to become nonsuit. The point raised by the defendants, to which we have last advert-

ed, is, that their engagement was without consideration. It appears to us that the facts, necessary to constitute such consideration, have not been sufficiently established; but as we think it highly probable, from the evidence in the case, that such facts existed, we do not feel warranted in deciding that this engagement was without consideration, without affording an opportunity for a further and more distinct examination of this question. We do not therefore order the plaintiffs to be called; but the verdict is set aside, and *A new trial granted.*

DEERING *vs.* SAWTEL.

The rule that a party to a negotiable promissory note is not admissible as a witness to impeach it, applies not only to actions directly upon the note, but to all others where its validity comes collaterally in question.

IN this case, which was a writ of entry, brought upon a mortgage deed by the assignee of the mortgagee, against the grantee the mortgagor; the tenant pleaded that the note, to secure which the mortgage was given, was usurious; and this being traversed, issue was joined thereon. At the trial, before *Preble J.* the tenant, having executed a release to the mortgagor, who was the maker of the note, offered him as a witness to prove the usury. He was objected to by the plaintiff's counsel, on the ground that this being a negotiable note, no party to it could be admitted a witness to impeach its original validity. But the Judge overruled the objection; and the witness fully proving the usury, the tenant had a verdict, which was taken subject to the opinion of the court.

Fessenden and *Deblois* for the demandant, cited the following authorities in support of the general objection made at the trial. *Walton v. Shelly* 1 *D. & E.* 296. *Adams v. Lingard Peake's Ca.* 117. *Hart v. McIntosh* 1 *Esp.* 298. *Bent v. Baker* 3 *D. & E.* 34. *Buckland v. Tankard* 5 *D. & E.* 578. *Carrington v. Mil-*

ner Peake's Ca. 6. *Humphrey v. Moxon ib.* 52. *Phetheon v. Whitmore ib.* 40. 1 *Phil. Ev.* 49, 50. *Warren v. Merry* 3 *Mass.* 27. *Parker v. Lovejoy ib.* 565. *Churchill v. Suter* 4 *Mass.* 156. *Widgery v. Munroe* 6 *Mass.* 449. *Jones v. Coolidge* 7 *Mass.* 199. *Manning v. Wheatland* 10 *Mass.* 502. *Worcester v. Eaton* 11 *Mass.* 368. *Clarke v. Waite ib.* 439. *Butler v. Damon* 15 *Mass.* 223. *Hartford Bank v. Barry* 17 *Mass.* 96. *Packard v. Richardson ib.* 126. *Winton v. Saidler* 3 *Johns. Ca.* 185. *Mann v. Swan* 14 *Johns.* 270. *Coleman v. Wise* 2 *Johns.* 165.

2. They contended that the rule was applicable to the case at bar; because the note and mortgage formed but one contract, the debt being the principal subject, and the security only an incident, and partaking of the character of the principal, which was a negotiable paper. *Green v. Hart* 1 *Johns.* 580. *Runyan v. Mersereau* 11 *Johns.* 534.

3. The tenant's purchase, though in terms a bargain and sale of the whole estate, amounted to nothing more than an equity of redemption; and the holder of such an estate is not permitted to avoid the mortgage on the ground of usury. *Green v. Kemp* 13 *Mass.* 515. *Bearce v Barstow* 9 *Mass.* 48. *Bull. N. P.* 224.

Greenleaf and *Hill* for the tenant, contended for the admissibility of the mortgagor to prove the usury, under the general rule that all persons, not affected by interest or crime, are competent witnesses. The only exception to this rule was established to exclude the party to a negotiable security from testifying that it was originally void; and this on the ground of public policy; as in *Churchill v. Suter.* Its application to the case of the grantor, in a real action in which the validity of a pretended title under him was the only point to be tried, was expressly rejected in *Loker v. Haynes* 11 *Mass.* 498; and such is the case at bar. If the grantor was admissible in that case, in order to defeat an absolute conveyance made by himself, *a fortiori* in this, to shew usury in a conveyance upon condition. Nor does the present case fall within the principle of *Churchill v. Suter*, because the mortgage does not belong to the class of negotiable securities. It is a distinct and independent transaction, the fate of which does

in no wise affect the note; and it is governed by the same general principles which apply to the pledge of goods. It is the note alone which is known among merchants, and the preservation of mercantile confidence in this instrument, and not in any other, is the sole ground of the exception.

To shew that this defence was open to the tenant, he having purchased the whole estate, they cited *Green v. Kemp* 13 *Mass.* 515. *Hills v. Elliot* 12 *Mass.* 26.

The opinion of the court was read by the Chief Justice at the following *November* term, as drawn up by

WESTON J. That a party to a negotiable instrument shall not be received as a witness to prove the same to have been originally usurious and void, in an action brought upon such instrument, is a rule which has for a long time been so uniformly adhered to and practised upon, in this State and in Massachusetts, that we cannot suppose it to have been the intention of the counsel for the defendant to call it in question, in the case before us. The point now raised is founded on the assumption, that the rule is applicable only where the action is brought upon the negotiable instrument itself. But we do not find upon examination, that the rule can be considered as thus qualified. In all the cases cited to this point, from the Massachusetts reports, the proposition appears to be laid down in general and unqualified terms, that the party to a negotiable instrument, is not a competent witness to prove it to have been originally void. These were, it is true, actions brought upon the instruments themselves; and the rule will generally be applied in practice to cases of this class. The decisions in Massachusetts are deduced from the case of *Walton & al.* assignees of *Sutton v. Shelley*, 1 *D.* & *E.* 296, which is not distinguishable in principle from the one under consideration.

It was an action upon a bond, given by the defendant to *Sutton*; to which there was a plea of usury. It was proved that the bond was given in consideration of delivering up two promissory notes, made by Mrs. *Perry* to *Birch* or order, the one indorsed by *Birch* and *Sedley*, the other by *Birch Corbin* and *Sedley* to *Sutton*. *Sed-*

ley was called to prove the consideration of the notes usurious, and rejected. The action was not on the notes, but it was the notes which the defendant attempted to prove usurious. Here the maker of the note, collaterally secured by the mortgage now in suit, was offered to prove that it was given on an usurious consideration. In both cases, the question whether the deeds were or were not tainted with usury, depended upon the consideration of the notes. From the cases cited from the Massachusetts reports, it appears that the case of *Walton v. Shelley* was adopted with approbation here; and, notwithstanding the vacillation of the English courts, in regard to the rule, it has been adhered to in Massachusetts and in this State, with this qualification, that it is negotiable instruments only, which a party to them shall not be permitted to prove originally void. But if the rule had been thus limited in *Walton v. Shelley*, the result would have been the same. *Sedley*, the witness rejected, was no party to the deed in suit, but to the negotiable notes, the giving up of which was the consideration of the deed. This question was examined and illustrated by the late C. J. *Parsons*, in delivering the opinion of the court in *Churchill v. Suter*, cited in the argument; and the subsequent cases refer to this, as settling the law upon the subject. All the reasons of public policy, which are there so lucidly exhibited as the foundation of the rule, apply with equal force to the case before us.

The mortgage deed is incident and collateral to the note, which, as the principal, is chiefly to be regarded. When that is paid, the incident has no longer any binding efficacy. It is for the purpose of enforcing payment of the note, or of holding the land as a substitute, which will be payment, if of sufficient value, that the present action is brought.

It was urged that the direct object of the defendant, in calling the witness, was, not to prove the note void, but the deed void and usurious, to which the rule does not apply. This distinction seems too refined for practical application, if we regard the spirit of the rule; and was not even suggested in the case of *Walton v. Shelley*. Besides, in the case before us, the plea alleges the note to have been usurious and void, to secure which the mort-

gage deed was given; and it was upon a traverse of this averment, that issue was joined. Whether the note was or was not infected with usury, was therefore the question directly before the jury.

In the case of *Loker v. Haynes*, cited and relied upon by the counsel for the defendant, the grantors in certain deeds of conveyance were held to be admissible witnesses to prove the same to have been fraudulent and void. But it does not appear that they had any connexion whatever with any negotiable instruments; and it is only where questions arise in relation to these, that the rule is here understood to apply.

The opinion of a majority of the court is, that the witness ought not to have been admitted to prove the facts, for which he was called. The verdict is therefore set aside, and a

New trial granted.

Howe *vs.* Ward.

If a conveyance is made by one who is insolvent, even upon a good and sufficient consideration advanced to him, but not *bona fide*, and the purchaser is conusant of and assenting to the fraudulent intent, it is void against creditors.

A voluntary conveyance, without consideration, is good against subsequent creditors, if made by one who is solvent, and without any fraudulent intent; but is void against creditors existing at the time of the conveyance, if the grantor be insolvent at the time.

And the want of consideration, and the insolvency of the grantor, are badges or *indicia* of fraud or trust between the parties, which, under some circumstances may render the conveyance void against even subsequent creditors.

A voluntary conveyance, without consideration, whether the grantor be insolvent or not, is void against subsequent creditors, if such conveyance was made for the purpose of defrauding them "of their just and lawful actions," &c.

The relation of debtor and creditor among the sureties in a bond, so as to entitle one of them to impeach a voluntary conveyance made by another, commences at the time of executing the bond; and not at the time when one actually pays more than his proportion of the debt.

In this case, which was an action of trespass *quare clausum fregit*, the defendant justified under an extent made upon the *locus in quo July* 16, 1824, as the property of one *Waterhouse*; and the plain-

tiff claimed the land by virtue of a deed from *Waterhouse* to him, dated *April* 5, 1823, subsequent to which time *Waterhouse* had continued to occupy the land as his tenant. This conveyance the defendant sought to impeach, on the ground of fraud.

At the trial, before *Preble J.* at the last *November* term, it appeared on the part of the defendant, that on the 13th day of *September* 1821 one *James March*, being appointed a deputy sheriff, gave bond to the sheriff, in which *Ward* and *Waterhouse*, with two others, were sureties;—that *March* died insolvent about the first of *April* 1823;—that the sheriff sued this bond against the sureties, and recovered judgment at *March* term 1824, by default, for the penalty, with an award of execution for $377,06. This execution was fully paid by *Ward*, *May* 14, 1824. The sum for which it was awarded was composed of the sheriff's proportion of fees, accrued from the date of the bond to the time of *March's* death; together with the amount of a judgment which one *Washburn* recovered at the same term, against the sheriff, for *March's* neglect in not paying over moneys he had collected on an execution in favor of *Washburn*, which was issued after *October* term 1821, and was returnable in *January* 1822; prior to which time *March* had received the money.

Ward sued *Waterhouse May* 18, 1824, for his proportion of the money thus paid to the sheriff; and having recovered judgment by default, extended his execution on the *locus in quo*, and proceeded soon after to cut the hay. The officer's return described the appraisers as "three disinterested men, freeholders of said "county"; without certifying that they were "disinterested "*and discreet* men, being freeholders" &c. in the words of the statute.

The bond given by *March* to the sheriff, upon his appointment to the office of deputy sheriff, was conditioned, among other things, that he should "refuse to accept or hold the office of constable "of any town within said county of Cumberland."

Upon this evidence the plaintiff's counsel, at the proper stages of the cause, objected; 1st—That *Ward* had no right to impeach the conveyance from *Waterhouse* to the plaintiff, because, at that time, he was not a creditor; 2d—That the bond to the sheriff

was an illegal bond, and could not be enforced at law, as it restrained the deputy from serving in the office of constable, which the statute made it his duty to do, if elected; 3d—That the levy of *Ward's* execution against *Waterhouse* was void, because it did not appear that the appraisers were "*discreet*" men, as well as disinterested, and freeholders.

These objections the Judge overruled, in order to try the principal questions of fact; and permitted the defendant to offer evidence to prove that the conveyance by *Waterhouse* to the plaintiff, was made for the purpose of putting the property out of the reach of the sheriff, in any suit upon the bond; of which the plaintiff was conusant; and that it therefore was in law fraudulent and void. And upon this point, after hearing evidence on both sides, the jury returned a [illegible] the defendant; which was taken subject to the opinion of the court upon the points made by the plaintiff at the trial.

Greenleaf and *Frost* argued for the plaintiff; 1st—That to entitle the defendant to impeach the conveyance for legal fraud, it must appear that he was a creditor at the time it was made; and a surety has not the character of a creditor till the rendition of judgment against him. *Fales v. Thompson* 1 *Mass.* 134. 1 *Dane's Abr.* 628, *sec.* 20.

2. The bond from *March* to the sheriff was illegal, because it was conditioned to refuse an office which the statute of 1821 *ch.* 116, made it the duty of every citizen to accept, under a penalty enacted against his refusal to take the oath of office. For where a duty is prescribed by statute, a bond conditioned to omit it is wholly void, even though it contain other conditions which, if standing alone, would be good. 5 *Vin. Abr.* 98, *Condition Y. pl.* 7, 8. *Guppy v. Jennings* 1 *Anstr.* 256. *Wheeler v. Russell* 17 *Mass.* 258. *Layng v. Paine Willes* 571. 3 *Bac. Abr.* 703—705. *tit. Obligation.*

3. The extent was void, because it does not appear that the appraisers were "discreet" men. The statute requires that they should be not only "disinterested," or free from bias, and "freeholders," practically acquainted with real estate; but "discreet" men; that is, men capable of discerning its true value; and not imbecile of judgment. Each of these qualifications is

made indispensably necessary in an appraiser ; and every thing made necessary by statute, must appear in the officer's return. *Williams v. Amory* 14 *Mass.* 20, 29. *Eddy v. Knapp* 2 *Mass.* 154. *Ladd v. Blunt* 4 *Mass.* 402. A creditor claiming under this sort of involuntary conveyance, must shew a strict compliance with every statutory provision. *Waterhouse v. Waite* 11 *Mass.* 207. *Bott v. Burrell* 11 *Mass.* 163. *Tate v. Anderson* 9 *Mass.* 92. *Allen v. Thayer* 17 *Mass.* 299. And of this defect even a stranger may take advantage, the extent being merely void. 7 *Bac. Abr.* 68, *tit. Void & Voidable F.*

Longfellow and *Adams*, for the defendant, replied to the first point, that the plaintiff's deed, being found to be fraudulent, was void as well against subsequent as prior creditors. The principle contended for by the [illegible] applies only to voluntary conveyances, and not to those which are fraudulent. *Damon v. Bryant* 2 *Pick.* 411. *Roberts Fraud. Conv.* 17, 27, 521, 522. And if it were not so, yet the defendant was a creditor at the time of the conveyance, the condition of the bond being then broken, and the rights of all parties fixed.

To the second point they said, that the statute of this State could not be construed imperatively to require the acceptance of any town office; but was rather to be understood as conferring the privilege to accept or to waive it ; and that this objection was not open to the plaintiff, he being a stranger to the contract, and his title illegal.

The third objection, they also insisted, the plaintiff was not entitled to take, for the same reasons. *Dagget v. Adams* 1 *Greenl.* 198. *Lawrence v. Pond* 17 *Mass.* 433. *Williams v. Amory* 14 *Mass.* 20. *Barret v. Porter ib.* 143. *Atkins v. Bean & al. ib.* 408. Nor can the objection be sustained ; for the law presumes every man discreet, till the contrary appears.

Mellen C. J. delivered the opinion of the court, at the ensuing *November* term, as follows.

In this case the plaintiff claims title to the *locus in quo* under a deed from *Waterhouse* to him, bearing date *April* 5, 1823 ; and the defendant claims title to it in virtue of the levy of his execu-

tion thereon, as the property of said *Waterhouse* on the 16th of *July* 1824. If, as against *Ward*, the close passed by the deed to the plaintiff, then the objections to the bond and the levy are of no importance, as the conveyance was prior to the levy. If, as against *Ward*, the deed was fraudulent and void, then the plaintiff has no title to maintain the present action for merely taking hay from the premises in question, although, at the time of the levy, *Waterhouse* occupied the same as tenant of the plaintiff; such an act of trespass being an injury to the tenant, and not to the landlord, as was decided by this court in the case of *Little v. Palister* 3 *Greenl.* 6. These objections may therefore be laid out of the case ; and the only question for consideration is, whether *Ward*, at the time the deed was given, was such a creditor of *Waterhouse*, or was so situated in relation to that conveyance or is so affected by it, as that he is thereby entitled to contest its operation, by shewing that it was in its origin fraudulent, and made with intent to defeat the rights of creditors. Upon the evidence which was admitted to the jury, for the purpose of shewing that such was the character and design of the deed, they returned their verdict in favor of the defendant. Was the proof properly admitted? The main question presented in this cause is worthy of consideration, in two points of view. The first inquiry is whether *Ward* may be considered as having been a creditor of *Waterhouse*, at the time the deed was executed ; and the second is, whether the deed was made under such circumstances, and with such fraudulent intentions, as to be void with respect to *Ward*, if not then a creditor by virtue of the statute of 13 *Eliz. ch.* 5, which has been adopted here as common law.

The consideration of the first point leads us to the examination of some of the peculiar rights and liabilities of sureties. So far as the obligee of a bond, or promisee of a note, is concerned, the principal and sureties are each and all equally liable ; but as between or among themselves, each surety is liable only for his proportion ; and such proportion will depend on the number of sureties, in case none of them prove to be insolvent or negligent. What then is the legal relation in which one of the sureties stands to each of the others? The answer is, at the time of

executing an instrument by several persons as sureties, each one impliedly promises all the others, that he will faithfully perform his part of the contract, and pay his proportion of loss arising from the total or partial insolvency of the principal, and to indemnify them against any damages by reason of his neglecting so to do. A similar promise is implied on the part of the principal, to indemnify and save harmless each of the sureties. This promise, in both cases, is conditional in its nature. The principal may remain solvent, and punctually pay the debt; and, again, in case of the failure on the part of the principal to pay, each surety may honestly pay his due proportion. It is a promise which may never be broken; but it is binding until broken or performed. In this respect, such a promise resembles that by which a man binds himself to pay a certain sum of money at a future day; here a debt exists *in presenti* though payable *in futuro*. The debt exists long before a right of action accrues for its recovery. There is no question as to the right of a creditor, whose debt is payable at a future day, by the express terms of the contract, lawfully to impeach a conveyance as fraudulent, made by his debtor after contracting the debt; because though he cannot maintain an action on the contract, until it shall have been violated by nonpayment at the day; still he has an interest in the property conveyed, as a fund out of which the debt ought to be paid; and may therefore shew, if he can, that the debtor has conveyed it away fraudulently to defeat his rights. Now can there be any sound distinction between such a contract, and the implied contract, which in case of suretyship exists between the principal and the sureties, and between each surety and all the others? The case of *Mountford v. Ranie Keb.* 499, is not inapplicable to the case before us. One *G.* had given a bond to Sir *John Lenthall*, who was sheriff and lessor of the plaintiff; he obtained a judgment on *scire facias* against the heir and tertenants, claiming under the ancestor and obligor. The defendant set up a settlement by recovery to the use of trustees for sixty years, subject to the disposition of the grantor, which conveyance was made fourteen years before the ancestor became bound as security for the prisoner who had escaped; *Kelyng C. J.* and *Rainsford J.* firmly

agreed, as the reporter says, in pronouncing the conveyance fraudulent, although the plaintiff had only become a creditor by the escape of the prisoner; and so instructed the jury. *Twydsen J. contra.* *Roberts*, in his treatise on the construction of the 13th & 27th of *Elizabeth*, says, in page 549, that there is a distinction between demands fundamentally originating after a conveyance by way of family settlement, or provision, or advancement, and such as arise upon an obligation prior in date to the conveyance, with a condition to perform some collateral act; for it cannot be said that an obligor in a bond, before the pecuniary demand arises by its forfeiture, can be ignorant of his liability or danger, so as to exempt him from the imputation of fraudulent intent upon the statute; and that whether the person making such voluntary settlement be principal, or only a surety in the bond, can make no difference in such view. In the case before us, it appears that the bond in question was signed *Sept.* 13, 1821, *Ward* and *Waterhouse* being two of the sureties; and that *March*, the principal, died insolvent about the first of *April* 1823. Of course he was insolvent before the deed was given; and the sureties were then placed in a situation in which they were absolutely liable to pay all eventual losses occasioned by the conduct and insolvency of *March*. At that moment each surety was absolutely bound to bear and pay his share of such losses; and yet in these circumstances, *Waterhouse* conveyed to the plaintiff the land in question. The circumstances in which sureties stand in relation to the principal, and to each other, seem to distinguish their claims from ordinary demands. There is a perfect understanding among them that they are all embarked in a common cause by common consent; and this understanding amounts in law to an implied promise of indemnity by each to all; and, for the purpose of the present argument, such implied promise is equal to a bond given by each surety to all the others, and by the principal to all; conditioned that the obligor will faithfully pay his proportion of any eventual loss, and effectually protect them from all damage on account of his negligence or failure. Such a bond would surely constitute the obligees creditors of the obligor, so far as to entitle them to impeach any of his subsequent conveyances on the ground of fraud.

The present question seems different from that which has often been made and decided, as to the time when a surety can prove his demand on the principal before the commissioners, in case of the bankruptcy of such principal. It is settled that in such a case, the surety has no right of action on an implied promise against the principal, until he himself has paid or absolutely assumed the debt as his own. 1 *Dane's Abr.* 195, 196. 3 *Wils.* 13. *Chilton v. Whiffin. Coup.* 525. *Taylor v. Mills & al. Dougl.* 160. *Alsop & al. v. Price.* Though if the debt be absolutely due, and payable *in futuro*, it may be proved under the commission before the day of payment. The question now before us is, whether the defendant, at the time the deed was given to the plaintiff, was a creditor of such description, and so situated, as to be entitled to contest the deed, and shew it to have been made for the fraudulent purposes before named. It may be further suggested as an argument in favor of the view which we have taken, that if a co-surety or co-obligor cannot be legally considered as a creditor, so far as to impeach a fraudulent conveyance made by another co-surety or co-obligor, for the purpose of securing his property from all liability to contribution, the consequence will be that any such co-surety or co-obligor may completely shelter his property, and place it beyond the reach of process, and thus leave such as shall have paid the whole debt, or more than their just proportion, destitute of all remedy against him as to his estate thus fraudulently conveyed. Such a consequence is not to be disregarded, nor a principle leading to such a consequence to be respected in a court of justice. It would defeat the very design of suretyship, by rendering it, to a certain extent, useless or dangerous.

The consideration of the second point renders it necessary to examine the before mentioned chapter of the 13th of *Elizabeth*, and ascertain the extent of its provisions, and the construction which it ought to receive. It is believed that the language of the section is broader and more comprehensive than the construction which the courts of Massachusetts have generally given to it, or than has been usually, in practice, considered as the true one, in the trial of causes in this State. This idea seems to have been

entertained and often expressed by the court, sometimes directly and sometimes incidentally, as may be seen in the case of *Northampton Bank v. Whiting* 12 *Mass.* 110. *Brooks v. Powers* 15 *Mass.* 247. *Quincy v. Hall* 1 *Pick.* 357, and *Badlam v. Tucker & al. ib.* 389. It has long been a received opinion that no man could legally be permitted to impeach a conveyance as voluntary or fraudulent, unless he was a creditor of the person who made the conveyance at the time it was made. Voluntary and fraudulent conveyances have not been sufficiently distinguished.

In our common actions of replevin, where questions as to the validity of the sale of chattels are daily tried; and in real actions between creditors claiming under executions levied on debtors' lands, and persons claiming the same lands under the debtors' deeds made prior to such levies, it has been the common practice to call on the person who contests the fairness and validity of the sale, to prove, in the first place, that he was a creditor of the alleged fraudulent vendor, or grantor, at the time of sale; and this principle and practice seem to have been founded on the idea that unless this fact appeared, he could have no interest in the inquiry; that as against him the sale was good at the time it was made; and that he could not afterwards acquire the right to impeach such a conveyance.

The correctness of the above principle has been often doubted in some of our courts of law; and this court is called upon, in the cause before us, to examine this question, and pronounce an opinion, whether the principle and practice above mentioned are in conformity to the language and true intent and meaning of the 5th *ch.* of the 13th of *Elizabeth*. By this statute, "every feoff-"ment, gift, grant, alienation, bargain, and conveyance of lands, "tenements and hereditaments, goods and chattels or any of them" by writing or otherwise, "that had been or afterwards should be" had or made to or for any intent or purpose—"to delay, hinder "or defraud creditors or others of their just and lawful actions, "suits, debts, accounts, damages, penalties, forfeitures" &c. is declared to be "clearly and utterly void, frustrate and of "no effect; any pretence, colour, feigned consideration, ex-"pressing of use, or any other matter or thing to the contrary

"notwithstanding." A proviso follows, which need not now be noticed. In *Cadogan v. Kennet Cowp.* 432, Lord *Mansfield* says, "The rules and principles of the common law, as now univer-"sally known and understood, are so strong against fraud in every "shape, that the common law would have attained every end "proposed by the statutes of the 13th and 27th of *Elizabeth*; "these statutes cannot receive too liberal a construction, or be "too much extended in suppression of fraud." Still, at common law, a fraudulent conveyance could be avoided only by him who had a "former right, title, interest, debt on demand." *Twyne's case* 3 *Co.* 80. *Roberts on Fraud. Conv.* 13 says that "the first expounders of the statutes of *Elizabeth* against fraud-"ulent conveyances have given them a very strong construction "against voluntary dispositions; and particularly the statute "made for the protection of creditors, they have understood in "a sense correspondent to the probable intention of the makers, "to supply the defect of the common law and of former statutes, "where they fell short of relieving those whose debts had arisen "subsequently to the fraudulent alienation." In *Taylor v. Jones* 2 *Atk.* 601, Lord *Hardwicke* observed upon the words in the 13 *Eliz.* "to defraud creditors and others," that the word "others" seemed to have been inserted to take in all manner of persons; as well creditors after, as before, the conveyance, whose debts should be defrauded. Even voluntary family settlements, which the law appears to favour more than any other species of conveyance, though made by one not indebted, are not always safe against subsequent creditors. In *Walker v. Burrows* 1 *Atk.* 94, Lord *Hardwicke* said that to impeach such a conveyance, it was necessary to prove that the person conveying was indebted at the time of making the settlement, or immediately after the execution of the deed. In *Stileman v. Ashdown* 2 *Atk.* 481, it was decided that a settlement upon children, even though made by a person not indebted at the time, might be void as against subsequent creditors, if any thing in the transaction afforded ground for an inference that the provisions were made with a view to becoming indebted. In the case of Lord *Townsend v. Wyndham* 2 *Ves.* 10, Lord *Hardwicke* says, "if there is a voluntary conveyance of

real estate, or chattel interest, by one not indebted at the time, though he afterwards becomes indebted, and that voluntary conveyance is for a child, and without any particular badge or evidence of fraud to defraud subsequent creditors, that will be good; but if any mark of collusion, or fraud, or intent to deceive, or defraud subsequent creditors appears, that will make it void, though he afterwards becomes indebted." In the case of *Fitzer v. Fitzer* 2 *Atk.* 511, the debt of the creditor arose subsequent to the voluntary settlement. The cases of *Fin v. Hills* 1 *Con. Rep.* 295, and *Jackson v. Myers* 18 *Johns* 425, and *Jackson v. Swann ib.* in note, are founded on the principles above stated. See also *Hinde's lessee v. Longworth* 11 *Wheat.* 199, and *Sexton v. Wheaton* 8 *Wheat.* 229. In each of the two former cases, property had been conveyed by a person against whom judgment was recovered in an action for a tort; in both cases the property was conveyed after the cause of action, and before judgment was recovered; but the court set aside the conveyances as fraudulent, and against the provisions of the acts in the respective States, similar to the above mentioned statute of *Elizabeth.* The same principle is recognized by the court in *Jackson v. Ham* 15 *Johns.* 261. *Newland*, in his treatise on contracts, page 389, says that the deeds which are avoided by the statute of the 13th *Eliz.* are void as well against those creditors whose debts were contracted subsequently to such deeds, as against those creditors whose debts were in existence at the execution of the deeds. In *Lush v. Wilkinson* 5 *Ves.* 384, Lord *Alvanly* says, that to impeach a voluntary settlement, made on a meritorious consideration, it seems necessary that the person making it should be insolvent at the time; a single debt would not do; it must depend on this, whether he was in insolvent circumstances at the time. "The opinion of courts of equity appears to be that the conside-"ration of natural love and affection is a good consideration, "within the proviso of the statute, and sufficient to support a "deed against creditors, unless from other circumstances it can "be shewn to be *mala fide.* *Newland* 386. This is agreeable to the opinion of Lord *Hardwicke* before mentioned, in the case of *Townsend v. Wyndham.*

Mr. *Dane*, in his learned Abridgment, *Vol.* 1, page 668, lays down the position that one insolvent cannot make voluntary conveyances or settlements; that is, for love and affection; and in support of the position cites a long catalogue of decisions; several of which have been mentioned in the course of this opinion; among others he states the above case of *Lush v. Wilkinson* 5 *Ves.* 384, *Ambler* 121. 1 *Ves.* 27. 2 *Ves.* 11. 1 *Atk.* 93. 2 *Bro. C. C.* 90. 1 *Dane* 669. He also lays down the other principle, that deeds avoided by the 13 *Elizabeth* are also void against subsequent creditors, in those cases where the debtor or person making the deed is insolvent. Then he says, perhaps a voluntary conveyance may be deemed to have respect to them, and made with intent to defraud them. On this head he observes that according to our decisions, one becoming a creditor after a voluntary conveyance is made and known, has no right to complain of it. He refers to *Adams v. Adams*, *Essex Nov. Term* 1796, and *Parker v. Procter* 9 *Mass.* 390, and considers them the best decisions; and then adds "there may however "be an exception, as where the deed is unrecorded and unknown "to him, or actually made with a design to affect after credi- "tors." In such a case the principle of the English decisions is the one applicable here. This seems to be the true and solid ground. Unless the principle is extended thus far, cases of the most gross fraud may exist and yet not be within the statute. For instance, suppose *D.* a man possessed of property real or personal, of the value of a thousand dollars, and of which he is the undisputed owner, to day makes a voluntary conveyance of the same to *A.* with the express intent to purchase goods or real property of *B.* and defraud him of the value, by means of this artifice; and tomorrow makes the contemplated purchase; all of which arrangement is known to *A*; surely, in such a case, *B* may be permitted to contest, and by proof defeat this sale to *A*, although, at the time of the conveyance to *A*, *B* was not a creditor of *D.* He may do this, because the very purpose of the plan was to cheat *B*, a subsequent creditor. The supposed case is clearly within the reason and scope of the statute; and not against any of its language. It is in harmony with the numerous decisions

in the English courts upon the point; and although the doctrine seems not to have been so clearly defined and so liberally applied in practice in the courts of Massachusetts, and of this State, hitherto, (as has been before intimated,) yet there is no case, in the reports of either State, by which this extended application of the salutary provisions of the statute is forbidden; on the contrary the Supreme court of Massachusetts have given a clear intimation of an opinion entertained on the subject, as we perceive in the case of *Damon v. Bryant* 2 *Pick.* 411. This court cannot doubt that the cause of truth and justice would be aided by extending the construction, defining the principles, and at the same time giving the intended effect to the statute in question, in the manner before mentioned. Thus frauds would be more easily detected, and guarded against more effectually, than under the limited construction which has so long governed our courts in practice. No possible danger can result from the extension of the principle as proposed; as it goes no further than to permit the introduction of proof to the jury, for the purpose of impeaching a conveyance on the ground of fraud; and if the party for whose benefit the proof is introduced, was not a creditor at the time the alleged fraudulent conveyance was made, such proof cannot avail him, unless found sufficient to convince the jury that the conveyance was made for the purpose of defrauding him in particular, or subsequent creditors generally, as well as those who were creditors at the time, if there were any such. From the foregoing principles, established or recognized in the cases we have stated, as well as from numerous others relating to the same subject, the following propositions may be deduced; and it may not be useless or unacceptable to present them all in one view.

1.—If a conveyance is made by a man who is insolvent, upon a good and sufficient consideration advanced to him, but not *bona fide*; and the purchaser is conusant of and assenting to the fraudulent intent; it is void against creditors.

2.—A voluntary conveyance, made without consideration, by a man who is solvent, and without any fraudulent intent, is good against subsequent creditors.

3.—A voluntary conveyance, made without any consideration, by a man who is insolvent, is void against creditors existing at the time of the conveyance.

4.—A voluntary conveyance made without consideration by a man insolvent, may, on that very account, be deemed fraudulent, even as against subsequent creditors; at least that circumstance is a badge or *indicium* of fraud or trust between the parties, which may lead to that conclusion.

5.—A voluntary conveyance, made without consideration by a man, whether insolvent or not, is void against subsequent creditors, if such conveyance was made for the purpose of defrauding them "of their just and lawful actions, suits, debts, accounts, "damages, penalties, forfeitures, &c."

In all the foregoing cases, the questions of insolvency and intention are before the jury. And now having taken this review of those principles of law which relate to fraudulent conveyances, we recur to an important fact in the report of the Judge, viz. that he "permitted the defendant to offer evidence that the "conveyance by *Waterhouse* to the plaintiff, was made with the "knowledge of the plaintiff, for the purpose of putting said prop- "erty out of the reach of the sheriff in any suit upon the bond "aforesaid." And upon the evidence thus introduced, which we must presume was applicable to the several facts necessary to bring the case within the 13th of *Elizabeth*, the jury decided that the deed was fraudulent and void, on the grounds upon which the cause was submitted to them. The fraudulent intention of putting the property out of the reach of the sheriff in any suit upon the bond, included the intention of defrauding the defendant, by preventing him from obtaining any indemnity from *Waterhouse*, for any loss he might sustain by being compelled to pay more than his, the defendant's, share in consequence of his suretyship.

We conclude this opinion, which is the result of laborious investigation, by saying that we all agree that the evidence objected to was properly admitted to the jury; and that accordingly there must be *Judgment on the verdict.*

LITTLE *vs.* PALISTER.

If a tenant at will makes a mortgage to a stranger in fee, the lessor may have trespass forthwith against the mortgagee. And it is no bar to such action, that the mortgagee has had judgment against the mortgagor, in a writ of entry upon his mortgage, and has been put into possession by the sheriff, under a writ of *habere facias*.

Recitals in ancient deeds are good presumptive evidence of pedigree, where no adverse title by inheritance has been set up under the same ancestor; even though the land conveyed by the deeds is itself the subject of controversy.

IN this case, which was trespass *quare clausum fregit*, and was tried before the Chief Justice, upon the general issue; the plaintiff derived his title from the heirs of *Hannah Fairweather*; and for proof of their pedigree he relied on the recitals in certain deeds, made in the years 1779 and 1780, in which *Hannah Winthrop* and *Anne Mason* styled themselves her daughters, and conveyed their shares, being one third each; and in which *Samuel Fairweather* conveyed one third "derived to him by right of inher-"itance," but not saying from whom. This proof was objected to by the counsel for the defendant, but the Chief Justice admitted it as sufficient evidence for the jury to presume the relationship expressed in the deeds.

The defendant relied upon his possession of the lot, of which the *locus in quo* was a part, under a mortgage made to him by one *McKenney Feb.* 11, 1817, which had been sued and prosecuted to final judgment, and the writ of *habere facias* regularly served on the 28*th* day of *March* 1820; of which judgment the agent of the present plaintiff had notice. The defendant had continued in possession ever since the service of the *habere facias*; and a part of the same lot was also possessed by a grantee of the plaintiff, to whom he had sold that part about eight years since. It appeared that *McKenney*, who mortgaged the lot to the present defendant, had originally entered on the land as tenant to the plaintiff, before the mortgage; and had paid rent for it to the plaintiff; by whom he was furnished with part of the materials to build the house, which the defendant had torn down and carried

away. This defence the Chief Justice overruled ; instructing the jury that the plaintiff might maintain this action against the defendant, notwithstanding this possession of the land under the judgment against *McKenney* upon the mortgage. And a verdict was thereupon taken for the plaintiff, subject to the opinion of the court.

N. Emery, for the defendant, denied that the deeds were admissible as evidence in the cause, under the circumstances in which they were offered. The plaintiff should at least have shewn a previous search in town records, and diligent inquiry after better testimony. As the cause stood, he insisted that the evidence amounted to no more than the declarations of a party interested to prove his own title; and the rule is that such declarations cannot be received. The exceptions to the rule are in favor of recitals in deeds not relating to the property in dispute, family settlements, and family records, monumental and other inscriptions, where the parties could have no interest in their falsehood, and would not suffer them to exist, if not known to be true. But the present case not being within either of the exceptions, the evidence should have been excluded. *Jackson v. Cooley* 8 *Johns.* 128. *Clark v. Wait* 12 *Mass.* 439.

Little, for the plaintiff, said that the defendant, being a stranger, ought not to be admitted to impeach the evidence of pedigree on grounds merely formal, it appearing by the deeds that the plaintiff had title. And to shew that the evidence was properly admitted he cited *Peake's Evid. ch.* 1 *sec.* 12. *Jackson v. Cooley* 8 *Johns* 128. 1 *Phil. Evid.* 175. 2 *Str.* 1151. *Bull. N. P.* 233. 1 *Ves. Jr.* 143. *Higham v. Ridgway* 10 *East* 120. 11 *East* 505. *Cowp.* 594. *Douglass v. Sanderson* 2 *Dal.* 116. *Paxton v. Price* 1 *Yeates* 300.

To the other point, that the landlord may maintain trespass against the grantee of his tenant at will, he cited *Co. Lit.* 57 *b.* 62 *b.* 1 *Cruise's Dig.* 280. *Starr v. Jackson* 11 *Mass.* 519.

MELLEN C. J. at the ensuing *November* term, delivered the opinion of the court, as follows.

By the report of the judge, several objections, it appears, were made to his decisions and instructions; some of which have since been abandoned; and two only have been relied upon in the argument. One is that *Palister* recovered a judgment against one *McKenney* in *May* 1818 on a mortgage of the *locus in quo* made by him on the 11th of *February* 1817, that execution was duly issued on that judgment, and that in *March* 1820 he was, in virtue of that execution, regularly put into possession of the same. It further appeared that prior to the mortgage, *McKenney* entered upon the *locus in quo* as a tenant at will under the plaintiff; and the defendant's counsel has contended that on these facts the action is not maintainable. The answer to this objection we consider to be very plain. The plaintiff was no party to the judgment under which the defendant entered and took possession; it was *res inter alios acta*. *McKenney*, being a mere tenant at will under the plaintiff, his conveyance to the defendant was an act inconsistent with his tenure, and which determined his estate. The authorities cited by the plaintiff's counsel establish this principle. The defendant's entry, then, was *tortious*, and a trespass, for which the present action well lies.

The other objection is that the judge was incorrect, in his instructions to the jury, as to the evidence of pedigree. Those instructions were that "the recital in the deeds was suffi-"cient evidence for the jury to presume the relationship "as therein stated." The deeds referred to were executed more than forty five years ago. *H. Fairweather* was the proprietor of the lot in question. From the recitals in two of the deeds, it appears that *Hannah Winthrop* and *Anne Mason* were the daughters of *Hannah Fairweather*, named in the deeds; and though no such recital appears in the deed of *Samuel Fairweather*; yet it purports to convey the same proposition as the two other deeds, viz. one third of one eighth part; and he states his right to have been derived to him by inheritance. All these circumstances seem to have been proper for the consideration of the jury, as legitimate grounds on which they might presume that *Hannah*

Fairweather, mentioned in the deeds of *Hannah Winthrop* and *Anne Mason*, was the same person described on the proprietors' records under the name of *H. Fairweather*; and that the persons describing themselves as her children, were so in fact, and that all the grantors belonged to the same family. It must be remembered that the evidence before mentioned was not delivered to the jury as positive proof of the pedigree, but only as evidence from which they might presume the relationship as stated. Facts proveable by existing records are not generally to be considered as subjects of presumption; there is no need of presumption; the record or a copy should be produced. The facts in the present case are not of that description, nor does the evidence resulting from the recitals necessarily suppose better proof in reserve. It is not liable to objection on that ground. It is a familiar principle that after the lapse of thirty years, the execution of a deed is presumed, and, so, need not be proved. The case of *Gray v. Gardner* 3 *Mass.* 399, and *Colman v. Anderson* 10 *Mass.* 105, shew that in ancient transactions numerous facts, important, and absolutely essential, may and ought to be presumed; and when such facts are recited in a deed as having taken place, the ground of presumption is strengthed; because the probability of their truth is thereby increased. It must be admitted by all, that in modern deeds, recitals by the grantor as to his own pedigree, or the derivation of his title, or the existence of it, cannot of themselves be considered, in a court of law, as proof of the facts recited, or a ground of presumption for a jury. A man must not be permitted in this manner to make evidence for himself. But after a long series of years, as in the present case, where no other persons appear ever to have claimed the land in question, as heirs of the original proprietor, and thus denied or rendered improbable the truth of the recital, and where the defendant has offered no proof tending to destroy or weaken the presumption; in such cases a jury may be permitted to presume the pedigree, as stated in deeds of conveyance, unless facts control the presumption. See 1 *Phil. Ev.* 137, 138. A will by an ancestor is proof on an question of pedigree. *Doe v. Ld. Pembroke* 11 *East* 505. So recitals in family deeds, monu-

ments, inscriptions, engravings on rings, &c. 13 *Ves.* 144. *Cowp* 594. 10 *East.* 120. In the case of *Jackson v. Cooley* 8 *Johns.* 128, *Thompson J.* says, in delivering the opinion of the court —"the books furnish us with no definite or precise rule on the "subject; almost any circumstances which are calculated to show "a general reputation, and afford reasonable ground of belief, "are received as evidence of pedigree." See 1 *Phil. Ev.* 188 to 194; and the distinction between those cases where recitals and declarations were written or made after the commencement of a dispute in the family, respecting the fact to which such recitals or declarations refer; and those cases where no circumstances existed, to influence the mind, at the time of such recitals or declarations. It is true that in most, if not all the cases before mentioned, the recitals or declarations were written or made by persons other than those under whom the party claimed, who introduced the proof; that is, by persons standing indifferent as to the title. In *Jackson v. Cooley* the power of attorney of the plaintiff's lessor, in which he appointed the witness to act for him as heir and devisee of the ancestor, who formerly owned the estate in question, was admitted as evidence of pedigree, to go to the jury with other evidence; and this was a transaction of recent date. This last case nearly resembles the case at bar. In that the pedigree was stated in a power of attorney signed by the plaintiff's lessor; in this it is stated in the deeds from the plaintiff's grantor; why was the power better proof of pedigree, for the consideration of the jury, in a recent transaction, than the deeds in the present case, of a very ancient transaction? On the whole we think the instructions of the judge were correct, and there must be *Judgment on the verdict.*

FOX & ALS. *petitioners*, *vs.* WIDGERY.

If a disseisor takes from the disseisee a naked release of all his interest in the land, no relations arise between them, by which one is placed in subordination to the other; and the disseisin is not thereby purged; nor is the disseisor estopped from denying that the disseisee had any title to the land.

THE petitioners in this case prayed for partition of a small parcel of land which they held in common with the respondent; who resisted their petition, under the plea of sole seisin.

To support this plea, the respondent proved that in 1808 his grandfather and devisor, *William Widgery*, extended three writs of execution upon the whole parcel, of which partition was prayed, as the property of *Woodbury Storer*; that the return was duly registered; and that the creditor immediately entered into possession of the whole, claiming it as his own, and so continued till his death; when the respondent succeeded him in the possession, as his devisee.

At the time of the extent, Mr. *Storer* was supposed to be the owner of the whole tract, he being in possession and claiming the whole. But in truth the title to a part of it remained in the heirs of *Benjamin Titcomb*; six of whom executed to Mr. *Widgery*, the devisor, a deed of release of all their interest in the premises, *July* 22, 1815, which was immediately registered, and for which he paid no consideration. The other heir of Mr. *Titcomb*, was Mrs. *Eunice Storer*, deceased; whose surviving husband, *Ebenezer Storer*, with their children, executed to the petitioners, on the 10th of *August*, 1821, a similar release of their interest in the same parcel of land, "which was not devised by the last will and testament of the said *Benjamin*, but descended to us and others his heirs; hereby meaning and intending to quitclaim and release all our right and interest in and to the premises," &c. After the execution of this deed, Mr. *Widgery* applied to one of the same heirs, to purchase his interest in the land.

Upon this evidence, the counsel for the respondent contended that the possession of the whole parcel by the devisor, under the extent, was exclusive and adverse to the right of all others; and

was a disseisin of the ancestor of the grantors of the petitioners, continuing till after the execution of their deed; by which, therefore, nothing passed to the petitioners. They also contended that if the deed did operate to pass the estate of the children, yet it did not pass the right of Mr. *Storer*, as tenant by the curtesy. But the Chief Justice, before whom the cause was tried, ruled that even if the possession of the devisor was exclusive and adverse, up to the time when he took a deed of release from the heirs of *Benjamin Titcomb* in 1815; yet the acceptance of that deed, and his subsequent application to purchase the share of the heirs of Mrs. *Storer*, amounted to a waiver of all possessory claims to that part, and put an end to any supposed prior disseisin of the true owners;—that after he had purchased of six of the heirs of Mr. *Titcomb*, he must be considered as holding in common with the seventh, and that therefore the deed of Mrs. *Storer's* heirs was operative and effectual to convey to the petitioners their title, including that of Mr. *Storer* as tenant by the curtesy. And the jury, being thus instructed, returned a verdict for the petitioners, which was taken subject to the opinion of the court upon the points raised at the trial.

Hopkins and *Emery*, for the respondents, contended that the petitioners were not seised in fact, and therefore were not entitled to the remedy by petition for partition. *Bonner & als. v. Proprs. of the Kennebec purchase* 7 *Mass.* 475. *Barnard v. Pope* 14 *Mass.* 434. Mr. *Woodbury Storer* had the land in his own exclusive and adverse possession; his creditor Mr. *Widgery* took it by extent, and devised it; and his devisee entered, claiming title to the whole. After fourteen years' exclusive possession, and a descent cast, the right of entry was gone, and this remedy with it. The extent of the execution gave to the creditor actual seisin of all the land described in the return; and operated a disseisin of all other persons. Nothing therefore passed to the petitioners by their deed. *Langdon v. Potter* 3 *Mass.* 215. *Gore v. Brazier ib.* 523. *Wyman v. Brigden* 4 *Mass.* 150. *Bigelow v. Jones ib.* 512. *Chapman v. Gray* 15 *Mass.* 439. *Hathorne v. Haines* 1 *Greenl.* 238. *Ken. proprs. v.*

Laboree 2 *Greenl.* 275. 6 *Dane's Abr. ch.* 191. *art.* 6. 3 *Dane's Abr. ch.* 92 *art.* 1, *sec.* 5, 8. 4 *Dane's Abr. ch.* 104 *art.* 3 *sec.* 1, 2, 3, 5, 9. *Stearns on Real actions, p.* 41.

Nor was the disseisin thus made by *Widgery* ever purged by any subsequent consent to hold under the disseisee. He paid nothing for the deed; it contained no covenants; he merely bought his peace, by extinguishing what he regarded as a pretended and groundless claim to his land. *Small v. Procter* 15 *Mass.* 495. *Somes v. Skinner* 16 *Mass.* 348. *Blight's lessee v. Rochester* 7 *Wheat.* 535, 547.

And the deed to the petitioners, as it was obtained with a full knowledge of all the facts, was void in law; being the purchase of a disputed title. 5 *Com. Dig.* 16. *Maintenance A. Everenden v. Beaumont* 7 *Mass.* 76. 6 *Dane's Abr. ch.* 196 *art.* 7. *Swett v. Poor* 11 *Mass.* 549. *Wolcot v. Knight* 6 *Mass.* 418. *Phelps v. Decker* 10 *Mass.* 267. *Co. Lit.* 369. 6 *Dane's Abr. ch.* 202, *art.* 9.

They further insisted that in the deed to the petitioners, the general description of all the interest of the grantors in the premises, was restrained by the particular description of such estate as they had by descent from their ancestor; and that therefore the estate of Mr. *Storer*, as tenant by the curtesy, did not pass, his title not being by descent, but by marriage; *Browning v. Wright* 2 *B. & P.* 14; and thus the deed could not take effect, nor the grantees have this remedy, till after his decease.

Longfellow and *Greenleaf*, for the petitioners, denied that the possession of Mr. *Widgery*, the elder, was adverse or hostile in its character; and contended that, in the absence of any proof to the contrary, the legal presumption was that he held in submission to the rights of his cotenants. If he did not know that there was an outstanding title, then his occupancy of the whole parcel was at most but a possession by mistake, and therefore no disseisin. *Brown v. Gay* 3 *Greenl.* 126. *Little v. Libby* 2 *Greenl.* 242. As soon as he discovered the existence of the title of the heirs of Mr. *Titcomb* to a portion of the land, he admitted its validity by purchasing under it, thus recognizing the right of the other heirs, who afterwards sold to the petitioners. Having

placed on record a deed from *Titcomb's* heirs as his grantors, this was notice to the public that those heirs had a right to convey. It was therefore no offence in the petitioners, to purchase their title.

The language of the deed, they insisted, was such as shewed an intent in the grantors to divest themselves of all title to the land. If this was not the meaning of Mr. *Storer's* deed, it can have no operation whatever as to him, because he had no pretence of title, other than his tenancy by the curtesy. *Bott v. Burnell* 11 *Mass.* 163.

To shew that here was no descent cast, because there was no actual disseisin, they cited 4 *Dane's Abr. ch.* 132, *art.* 3. And they contended that the remedy by petition for partition existed wherever there was a right of entry into the lands. *Wells v. Prince* 9 *Mass.* 508. 4 *Dane's Abr. ch.* 132, *art.* 8, *sec.* 12.

The opinion of the court was read at the following *November* term, as drawn up by

WESTON J. The respondent claims to be sole seised of the premises, whereof partition is prayed. It appears that in 1808, *Woodbury Storer* was in possession of the premises, claiming, and being supposed, to be the owner of the whole. In that year, *William Widgery*, having obtained judgment against the said *Storer*, duly levied an execution, which had issued thereon, upon the whole tract. He continued to hold under this levy as long as he lived; and by his last will devised it to the respondent, who, upon the decease of *Widgery* the elder, entered upon the premises, and has ever since been in possession of the same. It further appears that, during this period, and before, the right to the proportion claimed by the petitioners, was in the heirs of *Benjamin Titcomb*, who, in *August* 1821, conveyed the same by deed to the petitioners; if by law it was competent for them so to do.

By the levy in 1808, *Widgery*, the elder, became seised of the whole; and that, not in the character of a disseisor of a part, but by apparent right. He thereby had all the title, which *Storer* could have given him by deed. *Storer* being in actual pos-

session, and claiming the whole, and being the reputed owner thereof, although he might be a disseisor of part; yet his grantee, coming in innocently, would acquire a seisin, which, though defeasible, would be regarded as lawful. Even if he held as a disseisor, until the disseisin was purged, the party having the right could not pass his interest to a third person ; still less could he do so, while the lawful seisin was in another. Unless therefore the sole seisin, which *Widgery* acquired by the levy, had been waived and abandoned by him, nothing passed by the deed under which the petitioners claim ; the right only, not the seisin, remaining in the heirs of *Benjamin Titcomb.*

It is contended that the release, given by the heirs of *Titcomb* to *Widgery*, in 1815, purged the disseisin ; and that he thenceforward held under their title, and ought not to be permitted to deny it. A disseisin may be purged by entry, by judgment of law, by abandonment of the possession on the part of the disseisor, or by his consenting to hold under the disseisee. If it was done in this case, it must have been by the last mode. If the disseisor take a lease from the disseisee, he then holds under him ; and will not be permitted to dispute the title of his lessor. But if he take a release of all his interest, no relations arise between them by which the one is placed in subordination to the other. The releasor has no further interest in the title ; nor is the releasee under any obligation to defend it; or to abstain from any act inconsistent with it. He is not estopped by the release ; for it is not his deed. The grantee may be permitted to show that his grantor was not seised; which is uniformly done in actions brought on the covenant of seisin.

In the case of *Blight's lessee v. Rochester*, 7 *Wheat.* 547, cited in the argument, *Marshall C. J.* in delivering the opinion of the court, says that the lessee, " cannot be allowed to controvert the title of the lessor, without disparaging his own; and he cannot set up the title of another, without violating that contract, by which he obtained and holds possession, and breaking that faith which he has pledged, and the obligation of which is still continuing, and in full operation." After adverting to the policy of the times in which this doctrine originated, and tracing it back to the feudal

tenures, he adds, "The propriety of applying the doctrines between lessor and lessee to a vendor and vendee may well be doubted. The vendee acquires the property for himself, and his faith is not pledged to maintain the title of the vendor. The rights of the vendor are intended to be extinguished by the sale, and he has no continuing interest in the maintenance of his title, unless he should be called upon in consequence of some covenant or warranty in his deed. The property having become, by the sale, the property of the vendee, he has a right to fortify that title by the purchase of any other, which may protect him in the quiet enjoyment of the premises. No principle of morality restrains him from doing this; nor is the letter or spirit of the contract violated by it."

The party in possession may lawfully purchase in any title, real or pretended. It is for the public good that it should be so. The law favors all acts, which go to secure men in the quiet enjoyment of their estates and possessions. To this end also it fixes periods, beyond which the title of the possessor cannot be disputed. The purchase of an adversary claim therefore, although it may strengthen, ought never to have the effect to impair, the title of the possessor. If it were otherwise, he would often be deterred from purchasing his peace, and constrained, at perhaps greater expense and sacrifice, to defend at law, for fear of having his own title tainted and infected by the defects of that which he might, to avoid the vexation of a lawsuit, be disposed to purchase, if he could do it with safety.

In the case before us no consideration having been paid for the right passed by the release, it was treated as of little or no value. It could not have been in the contemplation of *Widgery* that, by taking it, instead of continuing to be seised of the whole of the premises, as he was before, he thereafterwards was seised only of a part in common and undivided. It was plainly a measure of precaution, from which he might hope to derive a benefit, but which could not have been intended by him as a waiver or abandonment of any of his former rights. At any rate, the question whether it was in fact, or was intended to be, a waiver or abandonment of these rights, was one proper for the consideration

of the jury, and which, as such, should have been submitted to their decision; it being a question of intention. In the numerous causes which have come before the court, where the inquiry has been whether a possession of lands was of such a character as to amount to a disseisin of the true owner; or whether an actual disseisin had been purged or waived by the subsequent conduct, or confessions, or declarations of the disseisor, the subject of inquiry has been submitted as a matter of fact to the jury, for their determination. In this respect the case at bar differs from that of *Little v. Libby*, cited in the argument, and many others which have since been tried, where no question of law has been reserved on the point. In the case before us, the judge decided the question himself, instead of leaving it to the jury. We are therefore of opinion that the verdict must be set aside and a *New trial granted.*

EMILY SMALL & *als. appts. vs.* MARY SMALL.

Of the effect of a will made *in terrorem.*

If a wife by her virtues, has gained such an ascendancy over her husband, that her pleasure is the law of his conduct; such influence is no reason for impeaching a will made in her favor, even to the exclusion of the residue of his family. Nor would it be safe to set aside a will on the ground of influence, importunity, or undue advantage taken of the testator by his wife, though it should appear that she possessed a powerful influence over his mind and conduct in the general concerns of life, unless there should be proof that such influence was specially exerted to procure a will peculiarly acceptable to her, and prejudicial to others.

The legal construction of a will is exclusively a subject of common law jurisdiction; and is not cognizable by the Supreme Judicial Court, when sitting as the Supreme Court of Probate.

IN this case, which was an appeal from the decree of the Judge of Probate refusing probate of the will of *Henry Small*, the principal question was whether, under the circumstances proved, the testator intended the instrument as his last will, or only as an expedient, to operate *in terrorem* upon a child who had incurred his displeasure.

It was argued at this term by *Emery* for the appellants, and *Longfellow* for the appellee. The facts sufficiently appear in the opinion of the court, which was delivered at the following *November* term by

MELLEN C. J. This is an appeal from a decree of the Judge of Probate in this county. A paper, purporting to be the last will and testament of *Henry Small*, was presented for probate. Upon examination of all the facts in relation to the same, the Judge was of opinion, that the testator, at the time of making the supposed will, was not of sound and disposing mind and memory ; and he thereupon decreed against the probate and allowance of the same, as the last will and testament of said *Henry Small*. In the reasons of appeal, the decree is alleged to be against law, because the testator, at the time of making the will, was more than twenty one years old ; was then of sound and disposing mind and memory ; and that the instrument was duly executed, and was his last will and testament. It has not been denied that the testator was of competent age ; and in the argument it has not been contended that he had not the possession of his reason, understanding, and memory ; but the point relied on is, that if the instrument was duly executed as to form, still that it was not intended to be, or executed as the testator's last will ; and, even if it was, that it was made under the unlawful importunity and influence of his wife, who is the principal appellant in the case, and that on that ground, it is void.

1. From the testimony of the subscribing witnesses, there does not seem to be any doubt as to the execution of the will in point of form. One of the witnesses testifies to his making the usual declaration, that the instrument was his last will and testament. The other two do not particularly recollect this ; but the circumstance is not material ; the due subscribing by the testator and witnesses being proved. See 4 *Dane's Abr.* 559, 560, 561, 568, 569, and cases there cited.

2. The next question is, whether the instrument, so executed, was intended to be, and operate, as his last will ; or was only designed as an admonition to his daughter *Mary*, the appellee ;

and an experiment, by way of corrective to her conduct, of which he was habitually complaining ; and was, in fact, a mere measure to have its effect *in terrorem* on the mind of his daughter, but none upon his own property.

On this point the proof is not clear. If such was his object, it seems no measures were taken to apprize her of what he had done ; and there is proof of *Mary's* declaration, that she did not know of the existence of a will till some time after the testator's death, and more than four years after the will was executed. One of the subscribing witnesses says that the testator stated that " if his daughter found out that he had cut her off, she would do better." Another of the witnesses says that the testator, at the time the will was written, remarked that if his daughter " reformed, he should do better by her." Both say that at that time he appeared much excited and angry. And yet, during four years, he does not appear to have changed his determination as to his daughter, and the disposition of his estate, though his excitement and passions must have subsided. It further appears, from the testimony of one of the witnesses, that the testator requested him to examine the will, and give his opinion respecting it ; and spoke of it as his settled will. Considering all these circumstances, in connection with the other important fact, that the will does not appear to have been revoked, or cancelled, or in any manner altered, we cannot perceive any legal ground for concluding that the instrument in question, when it was executed, was not intended to be his last will and testament, and as such to be considered and respected. We must presume that in his view, at least, his daughter had not " reformed," and therefore he was never disposed " do better by her."

3. The next inquiry is, whether the instrument in question is to be disallowed as the last will and testament of *Henry Small*, on account of any unlawful importunity and influence of his wife, by reason of which his mind was embarrassed, and so restrained in its operations that he was not master of his own opinions, in respect to the disposition of his estate. On this subject no precise and distinct line can be drawn ; but the influence exerted must be an unlawful influence, on account of the manner and motive of its exertion.

If the testator be compelled by violence, or urged by threatenings, to make his testament, the testament being made by just fear, is ineffectual. Likewise if he be circumvented by fraud, the testament loseth its force; for albeit honest and modest intercession or request is not prohibited, yet these fraudulent and malicious means, whereby men are secretly induced to make their testaments, are no less detestable than open force. 1 *Swinb.* 22. So if by over importunement. As if a man make his will in his sickness, by the over importuning of his wife, to the end he may be quiet; this shall be said to be a will made by constraint, and shall not be a good will. *Style* 427. If a wife, by her virtues, has gained such an ascendancy over her husband, and so rivetted his affections, that her good pleasure is a law to him, such an influence can never be a reason for impeaching a will made in her favor, even to the exclusion of the residue of his family; nor would it be safe to set aside a will on the ground of influence, importunity, or undue advantage taken of the testator by his wife, though it should be proved she possessed a powerful influence over his mind and conduct in the general concerns of life, unless there should be proof that such influence was specially exerted to procure a will of such a kind as to be peculiarly acceptable to her, and to the prejudice and disappointment of others. The evidence on this point is, that prior to the testator's marriage with the appellant, he was remarkably fond of his daughter *Mary*; but that afterwards there was not only a coolness, but a great degree of alienation; his affections were withdrawn from her, and in several instances he treated her with extreme harshness and severity. It appears also that the mother in law said she could not live with her; and that she ought not to share in the estate equally with the rest, as she had been so troublesome. It is also in proof that the husband often said his wife was the best woman in the country; and that such an angel of a woman could not do wrong; but no witness has testified as to her having exerted any influence over her husband in the disposal of his estate, though she expressed her opinion to one of the witnesses, as before stated, that *Mary* ought not to have an equal share with the rest of the family. The father also com-

plained that *Mary* had a very ugly temper. Such is the essence of the testimony, applicable to this head of the cause, and the inference is irresistible that the testator reposed the greatest confidence in his wife, and entertained the highest opinion of her virtues; and there is strong ground for believing that his opinion and treatment of *Mary*, after his marriage with the appellant, were the consequences of her prejudices against *Mary*, and complaints and accusations to him respecting her conduct. Thus far she seems to have possessed, and successfully exerted, a general influence over her husband; and there is no proof in the cause that *Mary* did not give occasion for some of the complaints made by the testator and his wife against her; or that the wife was not deserving of the affections and confidence of her husband. But a will must not be set aside in consequence of such a general influence, obtained in such a manner; for in so gaining it, she could not be liable to censure. Have we then any evidence, by which we can be justified in the conclusion that she abused the confidence of her husband, and exerted an unlawful influence over his mind and feelings and passions, upon the subject of his will, so as to induce him to give his estate to her and her children, to the almost total exclusion of his children by the former marriage from the benefits of that estate? We do not find any proof direct to this point, and we do not feel at liberty to decide this cause, or any other, on mere conjecture. The law requires proof of facts; especially when the object is to destroy and set aside an act, apparently deliberate, and executed with all usual and legal formalities. For the reasons above assigned, we cannot sustain either of the three objections which we have been considering. The remaining one is of a different character.

The fourth objection is founded on the nature of the devise to the wife, or rather of the condition on which the estate is devised to her, viz. "that she shall hold it during the time she continues "the widow of the testator, sole and unmarried." This condition or restriction it is said is void, as against the policy of the law; and in support of the objection the counsel has cited the case of *Parsons v. Winslow* 6 *Mass.* 169. Hence, it has been argued, the will ought not to be allowed. Without giving any opinion as

to the effect of the above mentioned condition or restriction, either as it may regard the estate devised to the appellant, or the subsequent devise and legacies to the several children, we would answer the argument, by merely observing, that so far as the construction of the will, or any particular clauses in it, may be a subject of judicial inquiry, it is one of purely common law jurisdiction, and not a question examinable by us, sitting as the Supreme Court of Probate. On the contrary, the question whether an instrument, purporting to be a last will and testament, ought to be approved and allowed as such, is one of purely probate jurisdiction, and so not examinable by us, in virtue of our common law jurisdiction. This distinction is well settled and established by our statute, and uniform practice, as well as by the following decisions. *Osgood v. Breed* 12 *Mass.* 525. *Dublin v. Chadbourn* 16 *Mass.* 433. *Laughton v. Atkins* 1 *Pick.* 535, and *Shumway v. Holbrook ib.*114. This objection must share the same fate, and fail as the preceding ; and the consequence is that the decree appealed from, must be reversed, and the will approved, and allowed, and an exemplification of this decree be remitted to the probate court; that such proceedings may there be had touching said will, and in conformity to said decree, as the law requires.

Decree reversed, and the will approved and allowed.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

OXFORD.

MAY TERM,

1826.

GIBSON *vs.* WATERHOUSE.

In an action for a malicious prosecution, the want of probable cause is a material allegation; the omission of which is not cured by a verdict for the plaintiff, nor supplied by an allegation that the prosecution was unjust.

IN this case the defendant was charged, in the first count in the declaration, with having maliciously, and without probable cause, prosecuted the plaintiff and caused him to be arrested and brought before a magistrate, on a false and groundless charge of common barratry, and of corruption and fraud in his office of deputy sheriff; of which he was discharged by the magistrate, on the preliminary examination.

The second count was copied, in substance, from the form *No.* 10, in *Amer. Prec. decl. p.* 208, and was in these words;—"Also for that the said defendant, at the court of Common Pleas begun and held at Paris, within and for the county of *Oxford*, on, &c.; caused a certain bill of indictment to be drawn up against the plaintiff, charging him with being a common disturber of the peace, and oppressor of his neighbors, and stirrer up of strife among them, and with being a common barrator, moving and ex-

citing suits between his neighbors; and caused the same to be laid before the grand jury for the body of said county; which, by reason of the plaintiff's innocence, the grand jury aforesaid returned 'we are ignorant;' by all which unjnst prosecution of the said defendant, the plaintiff was put to great costs"—&c.

The third count was a general charge of verbal slander, in accusing the plaintiff of barratry, extortion and oppression, and charging him with being a common exciter of suits, and strife among his neighbors. Of all these offences, the plaintiff, in the preamble to the first count, alleged himself innocent and unsuspected.

After a trial upon the general issue, before *Preble J.* at the last *August* term, upon the general issue, and a verdict for the plaintiff on each count, with a general assessment of damages; the defendant moved in arrest of judgment, assigning several causes, of which that principally relied upon was, that in the second count, it was not alleged that the indictment therein mentioned was preferred without good and probable cause therefor.

Greenleaf and *D. Goodenow*, for the plaintiff, being called upon by the court to support the verdict upon the second count, argued that this count, in essence, was not a charge of malicious prosecution, but of slander. It charged the defendant with having caused an indictment to be drawn, and laid before the grand jury; but no prosecution could be said to be commenced till the indictment was certified to be a true bill; which in this case was never done. Prior to that time, the paper, if false, was only written slander; and therefore an allegation of the want of probable cause was superfluous. Had this count not been inserted in the declaration, yet the facts set forth in it might have been given in evidence under the third count, either in direct proof, or in aggravation of damages.

No evidence, however, was offered at the trial, exclusively applicable to the second count; as that count, and the third were substantially for the same cause of action; and the ground of the motion in arrest of judgment may be removed by the judge's certificate of this fact. *Barnard v. Whiting & al.* 7 *Mass.* 358.

Patten v. Gurney 17 *Mass.* 187. If this cannot be had, yet after verdict the court will presume that all such facts were proved as are necessary to support the finding of the jury.

But admitting the count to be incurably bad; yet as there are good counts sufficient to justify the verdict, and the plaintiff has prevailed upon a trial of the merits, it will not be necessary wholly to deprive him of this remedy by arresting the judgment; as the offensive count may be removed, under leave to amend, after a *venire de novo* is awarded.

Fessenden, for the defendant, in support of the motion, replied that the want of probable cause was the ground of this kind of action; and that whatever was the gist of the action must be alleged in the writ, as well as proved at the trial. 2 *Dane's Abr.* 722. *Little v. Thompson.* 2 *Greenl.* 228. But if any judgment be rendered upon this record, it will amount to a decision that it is not necessary to allege the want of probable cause, and of course not necessary to shew it at the trial, in any action for malicious prosecution.

Neither can the facts alleged in the second count be shewn under the third; for they relate to a transaction before the grand jury, which in its nature was secret, and which took place in the due course of legal proceedings, and therefore was not slanderous.

MELLEN C. J. at the ensuing term in *Lincoln*, delivered the opinion of the court, as follows.

The writ in this action contains three counts; and the jury have found "the defendant guilty in manner and form as the plaintif has alleged in each count in his writ," and assessed entire damages. The motion in arrest of judgment, is grounded upon the idea that the second count is totally defective. If either count is bad, the judgment must be arrested, unless the alleged defect has been cured by the verdict. The authorities are clear on this point. *Trevor v. Wall* 1 *D. & E.* 151. *Hancock v. Hay-*

wood 3 *D. & E.* 435. *Holt v. Scholfield* 6 *D. & E.* 691. 2 *Chit. Plead.* 171, *b.* Indeed this point is not contested by the plaintiff's counsel. As to the second count, there can be no question that it would have been bad on demurrer. To this point may be cited, 2 *Chit. Pl.* 242, 248, 249. *Sutton v. Johnson* 1 *D. & E.* 544. *Reynolds v. Kennedy* 1 *Wils.* 232. *Farmer v. Darling* 4 *Burr.* 1974. But it has been argued that although the second count might have been bad on demurrer, it is good after verdict ; and that the court must intend that every thing was proved, essential to the maintenance of the action. This subject was, in some degree, examined by this court in the case of *Little v. Thompson* 2 *Greenl.* 228. We now observe further that in an action for a malicious prosecution, the want of probable cause is all important; is essential and indispensable; as appears by the authorities last cited ; and we are not aware that the omission of what is absolutely essential to the maintenance of an action, can ever be cured by verdict. The authorities on this head are numerous. The principle is laid down in precise language in 1 *Chitty's Pleadings* 228, *e.* in these words—" But still, " if the plaintiff either states a defective title, or totally omits " to state any title or cause of action, a verdict will not cure " such defects, either by the common law or by the statutes of " jeofails ; for the plaintiff need not prove more than what is " expressly stated." The following cases support this principle, *Rushton v. Aspinall Dougl.* 679. *Avery v. Hoole Cowp.* 825. *Buxendin v. Sharp* 2 *Salk.* 642. *Spieres v. Parker* 1 *D. & E.* 141. *Bishop v. Hayward* 4 *D. & E.* 472. In *Rushton v. Aspinall*, which was an action against an indorser of a bill of exchange, there was no averment of a demand on the acceptor, and of notice to the defendant. This was fatal after verdict. And in the above case of *Buxendin v. Sharp*, which was an action for keeping an unruly and mischievous bull, there was no averment of a *scienter* on the part of the defendant. This was not cured by the verdict. On this point, we again refer to *Little v. Thompson*, and the cases there cited. At the argument it was intimated that a certificate of Mr. Justice *Preble*, before whom the cause was tried, but who was not then present, would remove the ob-

jections made by the defendant's counsel, by shewing that no proof was offered as to the second count. On consulting him, however, no such certificate could be furnished. Indeed, the verdict, in its peculiar terms, seems to preclude every supposition of the kind suggested. Even if the evidence at the trial was not sufficient to prove the second count, as was suggested by the plaintiff's counsel in the argument, still that circumstance would not be of any importance on a motion in arrest of judgment. Though it would be proper for consideration on a motion for a new trial, on the ground that a verdict is against evidence.

We consider the motion of the defendant, as well sustained; and accordingly the judgment must be arrested.

WATERHOUSE *vs.* GIBSON & AL.

There is no difference between a conveyance by extent, and a conveyance by deed, in the rules of construction to be applied to them.

The extent of an execution on the debtor's land, conveys to the creditor all the debtor's buildings standing on the land, whether their foundations are sunk below the surface or not.

And parol evidence is not admissible to shew that certain buildings were not included in the appraisement, but were reserved by mutual consent, to be removed by the debtor, the returns of the appraisers and sheriff not stating any such exception.

THIS was an action of trespass *quare clausum fregit*, for taking a barn and blacksmith's shop from the plaintiff's land; and was tried before *Preble J.* upon the pleas of not guilty, and a license from the plaintiff.

It appeared that the *locus in quo* was set off to *Cotton B. Brooks*, *April* 11, 1821, under an execution in his favor against *James Jack*, one of the defendants; and that the plaintiff had purchased the same land of *Brooks*, by deed dated *July* 27, 1822, referring to the returns on the execution for a description of the land. These returns were in common form, describing the land by metes and bounds, and containing no exception or reservation

of the buildings. The fact of their removal by the defendants was not contested.

The defendants offered to prove that at the time of the extent, the creditor's attorney, considering the buildings as of little worth, and expensive to the creditor, directed the officer and appraisers not to set them off; but to appraise sufficient land, exclusive of the buildings, to satisfy the execution; which they did;—that at the time of receiving livery of seisin, the attorney declared that the buildings were not the creditor's, but that they belonged to *Jack*, who might take them away when he pleased;—that the attorney himself drew up the returns of the appraisers and of the officer, in doing which he intended to have inserted the exception of the buildings, but accidentally omitted it;—that the buildings stood on blocks, without any foundations sunk in the ground;—and that the present plaintiff, before he purchased the land, knew that they were not appraised, nor in fact included in the extent, but were left for the debtor.

This evidence the Judge rejected, but saved the point for the opinion of the court; a verdict being returned for the plaintiff, for the value of the buildings.

Dana and *Greenleaf*, for the defendants, insisted that as the extent created no contract between the creditor and debtor, but was only a statute license to the creditor to enter into the debtor's freehold, and appropriate to himself, at his pleasure, sufficient land to pay the debt; every act of his should receive a strict construction; and property which he expressly rejected, ought not to be forced into his hands. The evidence, therefore, should have been admitted, either as shewing the creditor's express renunciation of all title to these buildings; in which case, even if fixtures, they might be treated as personal property, on the same footing with standing trees, sold in prospect of severance from the soil; *Crosby v. Wadsworth* 6 *East* 602;—or, as going to prove a license from *Brooks* to the defendants, to enter and take away the buildings, to which the plaintiff assented.

They further contended, 1st—that these buildings were not fixtures, as they merely rested on the surface of the earth, with-

out foundation in the soil; were not appurtenant to any dwelling house, and had no higher character than the same quantity of materials deposited on the ground;—and 2dly—that if they were fixtures, they ought to be regarded as erections made for the benefit of trade, and belonging to *Jack*, who, as to them, was tenant at will of the *locus in quo* after the levy, and might lawfully remove them at his pleasure. *Dean v. Allaly* 3 *Esp.* 11. *Elwes v. Maw* 3 *East* 38.

Fessenden, for the plaintiff, denied that there was any sound distinction between a conveyance by extent, and one by deed, as to the rules of interpretation to be applied to them; and argued that whenever the owner of the soil conveys his estate, all his erections pass by the conveyance, however founded. The cases cited on the other side are exceptions to this general rule, introduced for the benefit of trade only, and in cases where the erections are made by a tenant. If then the buildings would pass by deed, and the extent is to be treated as such a conveyance, the evidence was properly rejected, as it went to contradict the highest species of written testimony.

As to a licence, the attorney had no authority to grant one; and if he had, it was revoked by the deed to the plaintiff.

WESTON J. delivered the opinion of the court.

In determining whether the barn and shop in question belonged to the plaintiff, we must regard the levy of *Brooks*, upon the land of his execution debtor *Jack*, as having the same effect, as if the latter had passed the land to the former by deed. *Jack* was the owner of the buildings, as well as of the land; and if he had conveyed the land by deed, without any exception or reservation, we entertain no doubt that the buildings thereon standing would have passed. Land, says *Coke*, includeth all castles, houses, and other buildings; so as passing the land or ground, the structure or building thereupon passeth therewith. *Coke Lit.* 4 *a.*

In certain cases, where land is leased, in favor of the lessee, for the benefit of trade, and to promote the purposes of justice, buildings erected by him are not considered as belonging to the

owner of the soil ; but as the personal property of the lessee, and as such removable by him. Erections of this sort standing on blocks, and not on permanent foundations fixed in the ground, are very generally regarded as the personal estate of the lessee. And, for the benefit of trade, his rights have been still further extended. In *Penton v. Robart* 2 *East* 88, he was held justified in removing a building of wood, erected by himself on a foundation of brick ; for the purpose of carrying on his trade. But in *Elwes v. Maw*, 3 *East* 38, cited in the argument, a tenant in agriculture, having erected, at his own expense, several buildings for the accommodation of the farm, the court held that he could not remove them ; although he left the farm as he found it. In this case a distinction was taken between erections for the benefit of trade, and for the use of a farm. But there never could have been any question whether buildings, like those described in these cases, belonging to the owner of the land, would pass to the grantee by a conveyance of the land, upon which they were erected. The cases in which buildings erected by the lessee, are held to be personal property, are exceptions to the general rule of law, by which they are regarded as real estate ; passing as such, by deed or devise of the land, and descending to the heir, as a part of the inheritance.

The levy, operating upon the buildings, as well as the land, it was not competent to show that the former was excepted, by parol testimony. This would be materially to vary and modify, by parol, the effect of written evidence, which by law is clearly inadmissible.

The opinion of the court is, that the evidence offered was properly rejected by the Judge ; and that there must therefore be *Judgment on the verdict.*

WATERHOUSE *vs.* GIBSON.

Where an officer, having a writ of attachment against a party who had removed out of his precinct, falsely returned that he had left a summons at his last and usual place of abode in *B*, being the place of his late residence ; and judgment went by default, the defendant having no notice of the suit ; and afterwards the defendant obtained a grant of the writ of review, which he never sued out, but sued the officer for a false return ;—it was holden that the officer, though liable for some damages, was not liable for the costs of the application for review, nor for the amount of the original judgment, till the latter had been proved erroneous, by a successful termination of the action of review ;—but that if the debt on trial, should prove to be due, the officer might be liable for the amount of the original costs.

THIS was an action of the case against the defendant, who was a deputy sheriff, for making a false return upon an original writ; and it came up to this court upon exceptions taken to the opinion of the court below. The material facts stated in the exceptions were these :—

Waterhouse, who had been a trader in *Brownfield*, in this county, removed from that place to *Parsonsfield*, in the county of *York*, about the first day of *August*, 1821, shutting up his store, and the house he had just left ; but was occasionally at *Brownfield*, which was only thirteen miles from his new residence, to settle his accounts and close his business, on different days, for several weeks afterwards. About four weeks after his removal, the defendant, having in his hands, for service, a Justice's writ against *Waterhouse*, put the summons into some part of the house from which he had removed, and which was then uninhabited, and made return of a nominal attachment of property, and that he had left a summons at the last and usual place of abode of *Waterhouse*, in *Brownfield*. The present suit was for the falsehood of this return, the plaintiff alleging that he had no such place of abode, of which the defendant was well knowing, and that the return was fraudulently made. It appeared further that judgment was rendered in that suit against the present plaintiff by default, for $6,05 damage, and $2,94 costs; he having no knowledge of the pendency of the action;—that he afterwards

applied to the court of Common Pleas for a review, which was granted at *October* term 1821, but the writ of review had not been sued out; and that at the trial in the court below the plaintiff offered a witness to prove the amount of the expenses he incurred in obtaining the review; to the admission of which the the defendant objected; but the testimony to that point was admitted by the court. There was some evidence offered by the defendant to shew that the plaintiff had not changed his domicil. But upon the whole evidence Chief Justice *Whitman* instructed the jury that the plaintiff, at the time of the service of the writ, had so changed his residence, that the service in that manner was illegal, and the return thereof false ; and that they ought to return a verdict for the expenses of the review, as well as for the amount of the judgment rendered against him; which they accordingly did. To this instruction, as well as to the admission of testimony shewing the amount of expenses incurred in obtaining the review, the defendant took exceptions.

Dana and *Greenleaf*, in support of the exceptions, argued that the question of domicil ought to have been submitted to the jury, instead of being decided by the court ; and that the costs of the petition for review were not a just charge to the defendant, because they were unnecessarily incurred ; no writ of review having been sued out, to falsify the original judgment.

Fessenden, for the plaintiff.

Mellen C. J. delivered the opinion of the court, at the ensuing *November* term in *Cumberland*.

It is not necessary to decide whether the testimony as to the cost of the petition for review was properly admitted ; nor whether, upon the evidence in the cause, the question of domicil should have been left to the jury ; because, on another ground, we are satisfied that the exceptions must be sustained, and a new trial had. We think the instructions of the judge to the jury on the question of damages were incorrect. Though a review has been granted, because the present plaintiff had no notice of the suit till after the judgment was rendered, yet it does not appear

that he did not justly owe the debt he was sued for. The review was granted in *October* 1821; but a writ of review has never been sued out. From these facts we have no reason to presume that any injustice has been done by the judgment in regard to the damages recovered. The conduct of the officer, however, cannot be justified; and he is liable in damages to some amount. But we can see no reason for his being liable to the costs attending the application for review. They could not be taxed against the original plaintiff, until after a successful trial on the review, and a total or partial reversal of the judgment; and there is no reason for making the officer chargeable with them, on the facts before us, because, according to these facts, the petition for review may have been prosecuted, and the costs incurred, for no good purpose, and with no good reason. Should it appear on the trial that the debt was not due, the plaintiff ought to recover of the defendant the amount of the judgment;—but if due, he may be entitled to recover the costs of suit before the justice. At any rate the exceptions are sustained, and there must be a new trial at the bar of this court.

INNMAN & ALS. *vs.* JACKSON.

A devise of lands to an executor, to be sold for the payment of debts and legacies, with power to give deeds in fee, is a conveyance of the legal estate to him in fee and in trust.

It seems unnecessary that deeds made by proprietors' committees, and persons acting *in auter droit*, other than executive officers, should contain recitals of their authority and proceedings in the sale ; as their certificates of such proceedings are not in themselves evidence of the facts they recite.

Whether the proprietors of land granted by the State, but not yet located in any particular county or place, can, prior to such location, act as a corporation under a warrant from a Justice of the peace, pursuant to *Stat.* 1783, *ch.* 39, and *Stat.* 1821, *ch.* 43;—*quære.*

The forty days' notice required by the Provincial act of 1753, *Ancient Charters, ch.* 253, and the sixty days' similar notice required by the act of 1762, *Ancient Charters, ch.* 289, to be given previous to the sale of delinquent proprietors' lands, are to be computed after the expiration of the respective periods of three, six, and twelve months, mentioned in those statutes.

THIS was a writ of entry for certain lots of land in *Paris*, in which the demandants counted on the seisin of *George Innman*, their father, within forty years. It was tried before the Chief Justice, upon the general issue, at *August* term 1824. Since the commencement of the action, but prior to the term next before the trial, *Mary Ann R. Innman*, one of the demandants, had been married ; and this fact was suggested by the tenant, and entered on the docket at the term at which the cause was tried.

The demandants, in support of their title, read to the jury a copy of a grant from Massachusetts, to *Joshua Fuller*, *William Park*, *William Dana*, and others, of a tract of land six and a quarter miles square, bearing date *June* 11, 1771 ; and a confirmation of the same grant by boundaries, including what is now the town of *Paris*, as corrected and finally established by a resolve of *Feb.* 11, 1773. It appeared that the original records of the proprietors of *Paris*, and their original plan of the township, had long been lost ; but that the lots demanded were marked on the plan with the name of "*R. Innman*;" that they were commonly called the *Innman lots* ; and that the tenant had so designated them.

The demandants also offered a copy of a deed, dated *Aug.* 5, 1773, from *Alexander Sheppard*, *Josiah Bisco*, and *Josiah Brown*, as a committee of the proprietors of *Paris*, "to make sale of, and deeds of conveyance to execute, of such of the proprietors' rights in said township as are delinquent in the payment of the taxes that have been granted by said proprietors;" in which they profess, in that capacity to sell and convey to *Ralph Innman* and his heirs, two full rights or sixty fourth parts of the township, being the rights granted to *William Park* on the right of *Richard Park*, and to *James Hay* on the right of *Richard Coolidge*; reserving the right of redemption as provided in an act of the Province; on condition that the grantee should perform the conditions mentioned in the grant of the township;—and covenanting that they were lawfully authorized to sell and convey said rights to him to hold as aforesaid.

They also offered a copy of another deed, of the same date, and in the same form, in which the same committee professed to convey to *Alexander Sheppard, jun.* the right, or sixty fourth part of the lands in said town, which was granted to *William Dana*. These two copies were objected to by the tenant, but the Judge admitted them to be read. The demandants also read a deed from *Alexander Sheppard, jun.* to *Ralph Innman*, conveying to him the right last mentioned. Proof of their pedigree being then called for, they produced the deposition of *Andrew Brimmer*, who testified that *Ralph Innman* had two children, *George* and *Susan*; that the former left this country at the commencement of the revolution, married at the south, and resided abroad till his death; after which, in the autumn of 1788, his widow and four children, who are the present demandants, returned to Massachusetts;—and that *Susan* was married abroad, and reputed to have had children. The tenant hereupon objected that the demandants, upon this evidence, were not entitled to demand the whole estate, but only a moiety in common with the heirs of their father's sister;—to remove which objection the demandants were permitted to read a copy of the last will of *Ralph Innman*, their grandfather, containing several pecuniary legacies, and the following items:—

" I give and devise to my executor all my real estate in *Cambridge* or elsewhere, to be sold as soon as is convenient after my decease; and I hereby give him full power and authority to make sufficient deeds of sale in fee simple of my said estates.—I further will, order, give, and devise so much of the money as my said estates shall sell for, after payment of my debts and legacies, to my son *George Innman*, and in case of his death, to the person or persons who shall, by the laws of England, legally represent him.—I give and devise all the residue of my estate, of every kind, to my said son *George*, and his heirs, and in case of his death, to the person or persons who shall legally represent him, by the laws of England." Of this will, which was executed *May* 5, and proved *July* 18, 1788, he appointed *Herman Brimmer* the executor.

The effect of this evidence, as establishing the title of the demandants, the Chief Justice reserved for the consideration of the court; and a verdict was returned for the demandants, subject to the decision of the court upon the points reserved.

N. Emery and *Greenleaf*, for the tenant, at the argument, which was in *August* term 1825, maintained the following positions.

1. The intermarriage of one of the demandants is a fact which, being suggested on the record, abates the writ as to her. This suggestion, like that of the death of a party, may be made whenever the fact is known, at any time before verdict. And being seasonably made, the verdict ought now to be set aside, that the writ may be amended, and a new trial had for the residue of the land, pursuant to *Stat.* 1822, *ch.* 186.

2. The deeds of *Aug.* 5, 1773, by *Sheppard* and others, are of no validity. 1st—Because they do not purport to be the deeds of the proprietors, but of their committee, who were not public officers, but private agents, and therefore should have acted in the name of their principals, and not in their own names. *Fowler v. Shearer* 7 *Mass.* 14. *Stenchfield v. Little* 1 *Greenl.* 231. 2d—Because they do not set forth or affirm the performance of any act made necessary by the statute, in order to effect a good sale. Every deed, return, or other charter of title by involun-

tary conveyance, ought to contain in itself a recital of every thing which is made essential in the title by the statute under which the sale is made. But these deeds mention no advertisement of the tax, nor notice of the sale, nor actual sale by auction, nor that a sale of so much was necessary, to defray the taxes and charges. *Davis v. Maynard* 9 *Mass.* 242. *Wellington v. Gale* 13 *Mass.* 488. *Howe v. Starkweather* 17 *Mass.* 243. *Stead's Ex'rs. v. Course* 4 *Cranch* 414. 3d—Because they were made without any authority. The sales were bad, if made under the statute of 1753, *sec.* 2, *Ancient Char. p.* 599, being made within six months after the confirmation of the grant, *Feb.* 11, 1773, and consequently within six months after the assessment of the tax. But this section of that statute is virtually repealed by that of 1762, *Ancient Char. p.* 645, which is a deliberate expression of the will of the legislature upon the whole subject matter of the former act; and requires all future sales to be made by the assessors, who are sworn officers, instead of being made by committees, who are not under oath. *Bartlett v. King* 12 *Mass.* 545. *Towle v. Marrett* 3 *Greenl.* 22. *Ellis v. Paige & al.* 1 *Pick.* 45. *Slade v. Drake Hob.* 298.

3. But if the deeds were good, the copies were improperly admitted, the action being by heirs at law, claiming under deeds made to their ancestor. In such cases copies cannot be used, until a foundation is laid for the introduction of secondary evidence, by first accounting for the non-production of the original. *Cunningham v. Tracy* 1 *Connecticut Rep.* 252. 2 *Day* 227. 3 *Day* 264. *Swift's Ev.* 4.

4. By the demandants' own shewing, in the will and deposition, they can have no title to the land. It was devised to *Herman Brimmer*, the executor, in trust, and has descended to his heirs. *George Innman* was entitled to receive only the money to be raised by sales of the land, after payment of the debts and legacies. He was a refugee; and it was doubtful, when the will was made, whether persons in his situation would be permitted to hold lands here. His father therefore evidently intended to devise them legally to *Brimmer*; changing the benefit intended for his son, into a legacy strictly pecuniary. It was not a

precautionary devise, to sell for the payment of debts, or to meet contingencies ; but was an absolute disposition of the whole estate. And this legal estate in the executor, even a stranger may set up, in defence of his own possession. *Craig v. Leslie* 3 *Wheat.* 563. *Doe v. Richards* 3 *D. & E.* 356. *Co. Lit.* 112, 113, 236. *Doe v. Staples* 2 *D. & E.* 684. *Shep. Touchst.* 448—450.

Longfellow and *Fessenden*, for the demandants, replied to the first objection, that no advantage of the intermarriage of one of them pending the suit, could be taken in any method but by plea in abatement ; and that this must be pleaded at the term next succeeding the event. 1 *Bac. Abr. tit. Abatement* G.

2. The deeds were well executed in the names of the committee, since the statute expressly authorizes *them* to give deeds. The cases relating to agent and principal do not apply to this. Neither was it necessary to recite the authority, nor the proceedings of the committee in making the sale. Such recitals are deemed necessary only in sales by sheriffs, whose returns are under oath, and are conclusive evidence of the facts therein stated. And the sale was rightly made by the committee, instead of the assessors, the statute of 1753 being in force, till revised by *Stat.* 1783, *ch.* 39. *Bott v. Perley* 11 *Mass.* 175. The former act authorized the levying of taxes on each proprietor's several right. The statute of 1762 did not repeal this, but conferred the additional power to assess any common and undivided lands of the proprietors, *in solido* ; taxing them as a corporation, and not as owning individual shares ; as in *Pejepscot Proprietors v. Ransom* 14 *Mass.* 145, where a tract of 1700 acres was taxed as proprietors' land. The latter statute contains no repealing clause; it is not enacted *in pari materia* ; and by contemporaneous exposition, both statutes have been taken as equally in force, until the former was revised in 1783. It was the act of 1753, and not that of 1762, which the legislature ordered to be printed in the appendix to the revised edition of the laws of Massachusetts. Nor can the objection arising from the lapse of six months after the confirmation avail the tenant, since the grant takes effect

from its date, and not from the time when it was confirmed. It is as if one should grant to another twenty acres of land, to be taken wherever the grantee may choose to locate it. Here no new deed is necessary ; but whatever parcel the grantee may designate by metes and bounds, is his own, by force of the deed.

3. The copies of the deeds were properly admitted. Had the originals been produced, being more than thirty years old, they would have been read of course, without proof of their execution. By the common law of England, title deeds descend, as heir looms, with the inheritance ; 4 *Cruise's Dig.* 59 ; and hence the propriety of requiring the heir to produce them in proof of his title. But the reason ceases here, where the lands descend to all, in equal portions ; and no one having an exclusive right to the soil, no one can claim possession of the deeds. They go, with all other papers, to the executor, who may sell the lands for payment of the debts ; and may have trover for title deeds, even against the heir. *Towle v. Lovitt* 6 *Mass.* 394.

4. To the objection that no estate passed to *George Innman* by the will ; they replied that by the language of the devise, the executor took only an authority, coupled with an interest ; and not a fee descendible to his heirs. *Powell on Devises.* 198. *Co. Lit.* 113, *a. note* [2.] *ib.* 181 *b.* 236 *b. Shep. Touchst.* 448, 449. He must sell in convenient time, or the heir may enter, and put him out. *Lit. sec.* 383, *note* [146.] 2 *Roberts on Wills, app.* 5 *note* 4. *Swan v. Lewis* 14 *Mass.* 83. After the purpose of the devise to him is satisfied, the lands go to the heir, as a resulting trust, or to the residuary devisee. 9 *Mod.* 122. 4 *Dane's Abr. ch.* 114, *art.* 8. The fact that the real estate was not sold by the executors, shews that the personal estate was sufficient of itself to pay the debts and legacies. *Jackson ex dem. Ellsworth v. Jansen* 6 *Johns.* 72. After this lapse of time, an entry on the executor may be presumed ; *Smith v. Stewart* 6 *Johns* 34. 2 *Caines* 382. 17 *Mass.* 74. 8 *Cranch* 249 ;—or even a conveyance from him to the *cestui que trust.* 1 *Cruise's Dig.* 492. 3 *Burr.* 1901. *Doug.* 721. 2 *Johns* 226. 13 *Johns* 516. 12 *Ves.* 239.

But this objection is not open to the tenant, because he does not claim under the legal estate, thus attempted to be set up against

the equitable title of the demandants. *Newhall v. Wheeler* 7 *Mass.* 189.

After this argument, the cause having been continued for advisement, the opinion of the court was delivered at the *September* term in this year, at *Wiscasset*, by

MELLEN C. J. In the argument of this cause several objections have been made and urged against the title of the demandants, as disclosed by the report of the judge who presided at the trial. On all these, on both sides, the arguments have been able, and we have listened to them with attention and examined them with care. Passing over some of the points, as not of sufficient importance to require particular notice, we have placed our decision on a number of distinct grounds, which seemed to demand our consideration ; and we now proceed to a statement of those facts and principles of law which have conducted us to that conclusion and judgment which must settle the rights of the parties in this suit.

The demandants have counted on the seisin of *George Innman*, their father ; and they demand the whole of the premises described. But as it appeared by the deposition of *Andrew Brimmer*, which was introduced by the demandants to prove their pedigree, that they were not entitled to the whole, but only to an undivided proportion of the demanded premises ; inasmuch as their father *George Innman* was not the only child and heir of *Ralph Innman* ; they then introduced the will of *Ralph Innman*, to prove that all his real estate was devised to *George Innman*, his son ; and this will, thus introduced, must be considered by us as forming a part of the case, and have its legal operation accordingly.

It is essential to the maintenance of this action, at least, in its present form, that the seisin of *George Innman* should be proved, as alleged in the writ ; or a seisin of an undivided proportion of the premises demanded. If we lay the will, as to the effects of the devise therein contained, out of the case, and inquire whether *George Innman* was seised of a proportion of the estate as heir

of his father *Ralph Innman*, the report shews us no satisfactory proof of such seisin. The will bears date *May* 5, 1788 ; and the probate of it bears date *July* 18, 1788 ; of course the testator must have died sometime between those two days or dates ; and *Brimmer* in his deposition swears that the widow of *George Innman*, with her children, arrived in this country from England, in the autumn of 1788. From these facts it does not by any means appear that *George Innman* was living at the time of his father's decease ; on the contrary the presumption is that he was not; as we find his widow was in this country in the autumn. If *George* was dead at the time of his father's death, then no seisin whatever on his part is proved ; but as the fact is not reduced to a certainty, we are not at liberty to consider the presumption as a proper ground of decision upon this point ; and we therefore proceed to examine the demandant's title in another point of view.

As we have before observed, the will of *Ralph Innman* has been offered in evidence by the demandants, as a part of the case ; and its operation and effect are therefore to be considered, in connection with other facts, in forming our opinion ; and if they have, by their own evidence, shewn that the legal estate in the lands demanded was never vested in *George Innman*, it follows that no legal right has descended to the demandants, to entitle them to maintain this action. The inquiry then is, what is the true construction of *Ralph Innman's* will, in respect to the devise of his real estate. The words are—"I give and devise to my "executor, all my real estate in *Cambridge* and elsewhere, to "be sold as soon as is convenient after my decease ; and I here- "by give him full power and authority to make sufficient deeds "of sale in fee simple of said estates." The testator then directs his debts to be paid out of the proceeds of the sale ; and in express words devises, not the land, but the money his estate should sell for, to *George*, and, in case of his death, to the person or persons who should, by the laws of England, legally represent them ; and appointed *Herman Brimmer* his sole executor.

A devise to trustees for payment of debts or for other purposes, passes the legal estate to the trustees. So a devise to executors to sell and pay debts, passes the legal estate to them in trust.

This is the general principle. It is a power coupled with an interest. A conveyance or devise in trust cannot be construed as a conveyance or devise to use, where it is repugnant to the manifest intention of the person conveying or devising. These principles are established or recognized by the following cases and authorities, as well as many others. 1 *Dane's Abr.* 244, 246, 247. Judge *Trowbridge's Reading* 3 *Mass.* 673. *Newhall v. Wheeler* 7 *Mass.* 189. *Goodwin v. Hubbard* 15 *Mass.* 219. *Somes v. Skinner* 16 *Mass.* 356. *Craig v. Leslie* 3 *Wheat.* 563.

In the case at bar, the intent of the devisor, and the language of the will, cannot be satisfied, according to decided cases, but by construing the devise to the executor as conveying the legal estate in fee to him in trust. He was to sell the estate and give deeds in fee simple; and convert the real estate into personal. Thus by the devise the legal estate was vested in *Herman Brimmer*, as trustee for the creditors of the testator, and for *George Innman*, or his children; and nothing more ever vested in them than the equitable estate. If no sale of the estate was ever made by the executor, then the legal estate has descended to his heirs; being governed by the same rules as other legal estates. 1 *P. Wms.* 108. 1 *Ves.* 357. 1 *Cruise* 492, 493. If a sale has been made, then the fee or legal estate was passed to the purchaser, and never vested in *George Innman*; and if out of the proceeds of such sale the debts have been paid, and the *residuum* has never been paid over to *George* or the demandants, still such *residuum* cannot be recovered in a real action.

Can we, from lapse of time, presume a conveyance of the legal estate from *Brimmer*, the executor and trustee, to *George Innman*; and thus find proof of his seisin? The report furnishes no facts whatever as to the proceedings of the executor under the will. We know nothing of the testator's debts, or whether he owed any; or whether the executor ever sold any part of the estate. If we indulge in presumption, it would be rational to presume that the executor did his duty, by complying with the directions of the will; and this surely would furnish no proof of any seisin of *George Innman*. We ought not to presume that the executor violated his duty, and without making any sale, convey-

ed to *George Innman*, the *cestui que trust*, the whole of the estate; and, besides, when could this conveyance have been made? *George* died in England, and probably before the will was proved, or even executed. All ground of presumption, therefore, fails, which could be favorable to the demandants. One general answer has been, by their counsel, given to the objection of the tenant, founded on the devise to *Brimmer*, of the legal fee simple estate, claimed in this action by the demandants, as children and heirs of *George Innman* and grandchildren of *Ralph Innman*; which is, that as the tenants are strangers to the title, it is not competent for them to make this objection. And among other cases the counsel has, to this point, cited and relied upon the case of *Newhall v. Wheeler* 7 *Mass.* 189; in which *Parsons* C. J. in delivering the opinion of the court, says, "No person "can set up the legal estate against the equitable estate, but "the trustees, or some person claiming under them;" and then, after having stated the seisin and possession which the demandant had proved, under the *cestui que trust*, he proceeds and says, —"for the actual possession is *prima facie* evidence of a legal "seisin; and a stranger to the trust shall not be permitted to "control this evidence, by proving the existence of the trust "estate." The first reply to this argument, and this authority, is, that the demandants in the case at bar, have never had any actual possession. But the principal and decisive answer which we have noticed before, is, that the tenant has not proved and set up the legal estate against the equitable estate. The demandants have themselves established those facts which shew that they have no title to recover. If a plaintiff, in his declaration, shews that he has no cause of action, the defendant may surely avail himself of the fact; and so he may if the plaintiff defeats his own title by his own proof. If the estate was never sold by *Brimmer* the executor, and the legal estate now remains in his heirs, the demandants may commence an action in the name of those heirs, by their consent; or may by proper process seek a remedy against them, should they refuse to convey the legal estate, and thus unite it with the equitable.

Perhaps, however, independent of the reasons hereafter assigned, our statute of limitations, might be considered as furnishing serious objections to the suggested course of proceeding by a new action. But, waiving all ideas on that point, at present, the demandants, on the facts before us, appear not to have the legal estate; and it also appears, by their own shewing, that their father never had it; and therefore it is clear that the verdict is wrong and must be set aside.

Here we might close, and leave the parties to the expensive consequences of a new trial, without any intimation of our opinion on some other points of the cause. But as several questions would again arise and be presented for decision, which have already been reserved and argued, and are now before us, on the report of the judge, we have concluded to decide them at this time. We may thus prevent any further delay, and shew the parties that a new trial would be unavailing to the demandants, even if they should distinctly prove that *George Innman* was alive when his father died; or should have permission to amend by counting on the seisin of *Ralph Innman*, instead of *George Innman*, and shaping their demand accordingly; and having done either of these, should on another trial, withdraw, or rather, not offer in evidence the will, and should thus be able to obviate all objections arising from the devise of the premises demanded, in trust, which we have been considering. We accordingly proceed to the investigation of some other parts of the demandants' title, and examine some other objections on which the counsel for the tenant has placed reliance. We pass over that which relates to the proof of pedigree; and also that which regards the manner in which the deeds from the committee were signed and executed; as well as some others; because their determination is not necessary; and because we think most, if not all of them are unfounded. We are also strongly inclined to the opinion, that the want of certain recitals in the deeds, which have been mentioned in the argument, furnishes no objection to their correctness and validity, or to the propriety of presuming certain facts, though not recited. We do not think that the cases cited as to officer's returns are applicable. Officers are

under oath, and their returns are legal proof of the facts they certify, and if they are defective, parol proof cannot be admitted to supply deficiencies. But no law requires an executor, administrator, guardian or collector of taxes to set forth in their deeds all the anterior facts, as to their authority and proceedings; they need only state the capacity in which they profess to act; for if they do state all the particulars, such recitals would not be proof, as we have decided in *Harlow v. Pike* 3 *Greenl.* 438. The facts recited must all be proved on trial; unless in those cases where, from lapse of time or some peculiar circumstance or misfortune, they may be presumed. As to the supposed impropriety of presuming facts not recited, the above answer seems sufficient. But as the law has prescribed what steps were to be taken in making sales for nonpayment of taxes, the presumption, especially after the lapse of fifty years and loss of all records, is, that such proceedings were had and such steps taken by all concerned; unless, upon examination, the contrary should appear to be the case.

This leads us to the particular examination of the acts of 1753 and 1762, and the proceedings under one or the other of them in relation to the sales of the premises demanded; because if those sales were valid, their validity must depend on their having been pursuant to the directions and provisions of one of those statutes. According to the argument, it seemed doubtful which was the one; or whether the act of 1762 had repealed that of 1753. We will first examine the sale and test it by the act of 1753, considering it, for the present purpose, as not repealed by the act of 1762. In the second section it is provided thus—"And every such "proprietor as shall neglect to pay to the collector or treasurer "or committee of such propriety, such sum or sums of money, "as shall from time to time be duly granted and voted to be "raised and levied upon his right and share in such lands, for the "space of six months, to those who live in the province, and twelve "months to those who live out of the province, after such grant "and his proportion thereof shall be published in the several "public prints as aforesaid, then the committee of the proprie-"tors of such common lands, or the major part of such committee

"may and are hereby fully empowered from time to time, at "public vendue, to sell and convey away so much of such delin- "quent proprietors' right or share in said common lands, as will "be sufficient to pay and satisfy his tax or proportion of such "grant, and all reasonable charges attending such sale, to any "person that will give most for the same; notice of such sale "being given in the said prints, forty days at least beforehand," and may give deeds, &c. &c. The common lands referred to in the above section, it would seem, must be lands which have been actually located, and the proprietors of which have incorporated themselves according to law. This appears from other parts of the act. The first section, speaking of the mode by which an original incorporation is to be effected, and subsequent meetings called, directs that application may be made to any justice of the peace through the province, or any justice of the peace for the county wherein "such their lands as aforesaid lie." In this stage of the investigation, it may be useful to inquire into the legal character of an indefinite grant of a tract, or rather quantity of land, as for instance, a township, to be laid out by the grantees, and a plan thereof to be returned for acceptance. In what situation is the land, and what are the rights, which are vested in the grantees prior to such location, ? If a man grants twenty acres, parcel of his manor, without any other description of them; yet the grant is not void; for an acre is a thing certain, and the situation may be reduced to certainty by the election of the grantee. *Keilw.* 84. 2 *Co.* 36. So if one being seised of a great waste, grants the moiety of a yard-land lying in the waste, without ascertaining what part, or the special name of the land, or how bounded; this may be reduced to certainty by the election of the grantee. *Leon.* 30. *Noy* 29. From these cases it would seem that by the grant, a right of election was conveyed; but that the title to any particular part of the general tract described, must depend on the election afterwards made; and being reduced to certainty by such election, the title would then vest in the part elected. In the present case the resolve of *June* 11*th*, 1771, granted "a township of the contents "of six miles and one quarter square, to be laid out adjoining to

" some former grant, in the unappropriated land in this province, " to the eastward of *Saco* river ;" with the usual provision that a plan thereof should be returned to the legislature within twelve months. The design of this provision in grants made by the legislature undoubtedly was, that by a return of such location and plan, they, or the agents on the part of the province or commonwealth, might know how all grants had been located ; and in what places and positions ; so that by such documentary evidence, the future proceedings of the legislature or the public agents might be regulated ; or such locations be confirmed by a subsequent resolve. Whether, after a township has been located under an indefinite grant, a confirming resolve has been usually passed, does not appear ; but it does appear that in the case before us a plan was returned to the legislature, *April* 22, 1772, and the same was then accepted and confirmed. At what time the grantees of a township, or other tract of land, have a right to become a corporation, and act as such, may be a question of some nicety and doubt ; whether they can legally become such until after a location has been made, a plan returned, and a resolve of confirmation passed, in those cases where, by the terms of the original indefinite grant, such plan was required to be returned within a specified period; or whether it may not lawfully be done as soon as the selection and location have been made. It is said that at common law, this is such an act as reduces an uncertain and indefinite grant to perfect certainty, and that thereupon the estate is at once vested and perfect in the land thus located; and that, upon this principle, the grantees may then become incorporated in the manner the statute provides, may assess taxes, and transact all business at their meetings, as legally as they could had there been a confirming resolve prior to their incorporation. Perhaps this is the better opinion, and in unison with that which proprietors under such circumstances have entertained. But on this point it is not necessary for us to deliver or form any definite opinion ; and therefore, on this occasion, we do not mean to be understood as expressing any. The correctness of this conclusion will appear by an examination of some further facts in regard to the resolve of confirmation which was passed in 1773, the

year after the first confirming resolve. This resolve of *February* 11, 1773, presents a question totally different from either of those before mentioned, and respecting which we have suggested the foregoing queries ; and the decision of this question will shew that the argument of the demandants' counsel, founded on the idea of the retrospective operation and effect of the resolve of confirmation, so as to give a legal existence to the estate of the proprietors in the township, now composing the town of *Paris*, from the time of the first grant, cannot be sustained. We have already quoted the terms of the original grant from the resolve of *June* 11, 1771. By the before mentioned resolve of *February* 11, 1773, or confirmation, as it is called in the report, it appears, as has been before intimated, that a plan was returned to the legislature *April* 22, 1772, (taken under and pursuant to the requirement of the resolve of *June* 11, 1771,) which was then accepted and confirmed. But it further appears that the grantees were afterwards dissatisfied with the location which had been made and confirmed, as above stated, on account of some important mistakes which had been committed ; and for some other reasons ; and that they accordingly applied to the legislature at their session in 1773 ; and for the reasons above mentioned, which they set forth in their application, prayed that the legislature would disannul the former plan, and confirm and establish said township agreeably to a plan annexed to their petition ; whereby the location, form, and position of the tract or township were essentially changed. And the legislature, thereupon, on the same 11th of *February*, 1773, by the resolve of the date beforenamed, did declare the said former plan to be null and void; and by the same resolve, accepted and confirmed the latter plan, and the lands thereby represented, to the said grantees, in lieu of the land contained in the plan disannulled. This brief history of the proceedings of the grantees and of the legislature, shews most clearly that until the last resolve was passed, the grantees never had any legal title to the tract of land then confirmed to them ; which tract, the report states, includes within its boundaries what is now the town of *Paris*. Until this last resolve was passed, the former location and plan were the

basis and evidence of the grantees' title to a particular tract of land, which, however, was a different tract from the one to which they now have title. This resolve, predicated on the consent of the grantees, and passed on their express application, operated as an exchange of one tract of land for another, more acceptable to them, and more convenient to the public. This exchange operated at once as an abandonment of all proprietary proceedings under the first resolve of confirmation. The basis being removed, the superstructure of course fell. Authorities and arguments cannot be necessary to shew, for instance, that the proprietors of a tract of land adjoining the east side of *Penobscot* river, having exchanged it for a tract adjoining the west side of the same river ; cannot, after the exchange of lands, go on with their proprietary records and proceedings relative to the tract on the east side, as applicable to, and in fact, a part of the records and proceedings relating to the tract on the west side; so that the former shall be legally considered as a continuation of the latter. No principle of law would justify this.

From these facts and principles, it seems manifest that the grantees, and their heirs and assigns, could not legally become the incorporated proprietors of the tract of land, now composing the territory of the town of *Paris*, until the legal title was conveyed and confirmed to them by the resolve of *Feb.* 11th, 1773. It appears that the deeds from the committee bear date *August* 5th, 1773 ;—less than six months next after the date of the resolve of exchange and confirmation. Now, unless the assessment was made prior to the confirmation, there was not sufficient time even to advertise the amount of the delinquent's assessment for six months, which was the shortest term allowed in any case. But even forty days more ought to be allowed, on a fair construction, for publishing the notice of the intended sale. However, it is not important to inquire and decide whether the forty days are to be considered as a part of the six months, or additional to them. In either case, the sale was irregular and void. In this view of the subject, it becomes a question of no consequence in the decision of the cause, whether the act of 1753 was or was not repealed by the act of 1762.

It now remains for us to inquire whether the sale was made in pursuance of the provisions and directions of the act of 1762.

Upon looking into them it appears that there was time for the assessment to have been made and the requisite notifications to have been published, after the 11th of *February*, 1773, which is the date of the final confirmation, and before the 5th day of *August*, 1773, which is the date of the deeds from the committee. The act requires notices which would occupy only five months ; but the fatal objection to this sale, if under the act of 1762, is founded on the following provision, namely : "And if any delin- "quent proprietors do not by that time" (the end of three months' notice) "pay such rates or assessments and charges ; "then and in that case, it shall and may be lawful for the asses- "sors, at a public vendue, to sell and execute absolute deeds in "the law for the conveyance of such lands of the proprietors, to "the person or persons who shall give most for the same ; which "deeds shall be good and valid, to all intents and purposes in the "law, for conveying such estates to the grantees, their heirs and "assigns forever."

Now, the said *Sheppard*, *Brown*, and *Biscoe*, who made and executed the two deeds in question, were not assessors ; they did not pretend to be or to act as such ; in both deeds they describe themselves as a committee, appointed by the proprietors to make sale of the lands of delinquent proprietors. The statute appoints the assessors to sell and to execute deeds; of course, the proprietors could not repeal this provision, and give the power to a committee. It is a special mode of divesting a proprietor of his property ; and the power must be strictly pursued, and the proceedings be strictly construed.

In addition to the foregoing objection to the regularity of the sale, if made under the act of 1762, there is another, equally fatal. For admitting that there was time between the date of the final confirmation on the 10th day of *Feb.* 1773, and the day of sale, for publishing notice of the amount of assessments for sixty days, and afterwards advertising the intended sale three months before the sale, as the above act required ; still, within that period, there was not sufficient time for calling a proprietors'

meeting, and making the assessment subsequent to the final confirmation. For the first section of the act of 1753 required that forty days' notice should be given of a proprietors' meeting. So that more than six months would be necessarily consumed in legally calling a meeting, assessing a tax, and giving the requisite notices of amount of assessments, and the intended sale of delinquents' property. This same objection applies also with the same force, if the sale was made under the act of 1753. This consequence necessarily follows from the established fact, that until the final resolve of confirmation was passed, the proprietors had not acquired a title to the township, now *Paris* ; and from the established principle, that until such acquisition of title, they could not legally commence proceedings for the purpose of incorporating themselves, or perform any acts as a corporation.

In this view of the subject, respecting the conveyances, it becomes unnecessary to examine into the alleged distinction between the acts of 1753, and 1762, as to the objects of assessment; and whether the former related to assessments on the several rights ; and the latter to assessments on the whole property ; because we find on examination, that whether the assessments were on the one or the other, the sales were not made pursuant to either of those statutes.

Thus, it is perceived, that notwithstanding the antiquity of the transactions which we have been considering and investigating, and the greatest degree of legal indulgence to the influence and effect of presumptive evidence ; the facts which are clear and undisputed, when compared with the law of the land then in force, completely control and destroy all the anticipated benefits of the presumption. *Stabitur presumptioni, donec in contrarium probetur.*

From this investigation, it will be perceived that the further prosecution of the cause will be unavailing to the demandants ; but we can only set aside the verdict, and grant a new trial.

HOLLAND *vs.* WELD.

Where one, being liable to two or more in a joint personal action, settles the dispute with one of them so far as that one is concerned; the cause of action is thereby changed from joint to several; and the party becomes liable to each of the others for their separate damages.

THE question in this cause arose upon a case stated by the parties, to the following effect :—

Weld, the defendant, in 1820 entered into a parol contract with *Holland* and three others jointly, that if they would buy his timber lands in plantation No. 4, at a certain price, he would clear the obstructions out of *Webb's* river, so that they might float the timber to market; whereupon they bought the lands, as tenants in common. Afterwards, some dispute arising, he obtained from one *Austin*, who was one of the contracting parties, a release, under his seal, of the following tenor ;—"I the subscriber hereby discharge and release *Benjamin L. Weld* from any liability to me "for any damage sustained in consequence of the nonperformance "hitherto or hereafter of any contract to clear the rips in *Webb's* "river, by him heretofore made, or alleged to have been made. "In witness"—&c.

Holland then sued *Weld* for so much damages as he had sustained in his own separate timber, by the existence of such obstructions as the defendant had undertaken to remove ; setting forth the original contract with the four, and the release given by *Austin*, whereby a right accrued to each party to maintain an action for his separate damages. And the question was whether the release was available to the defendant, to defeat this action.

Greenleaf and *Washburn*, for the plaintiff, contended that though the defendant had originally a right to require the joinder of all the parties, in a suit against him ; yet having made a settlement with one of them for his particular damages, he had destroyed the joint character of the contract, and left each of the others at liberty to assert his own claims in a separate action. *Baker v. Jewell* 6 *Mass.* 460.

Dana, for the defendant, insisted that the effect of the release was to discharge the whole subject matter of the contract. It was not in the power of any one of the promissees to change its character from joint to several ; nothing could effect this, short of the assent of all who were originally parties to the agreement. Until they all should assent to the contrary, it would remain a joint contract, the remedy on which any one of the promissees might destroy, by his own release ; thereby rendering himself accountable to the others. And such was the case here, *Austin* having absolved the defendant from the obligation, and placed himself in his stead, in relation to the other parties. *Wilson v. Moor* 5 *Mass.* 407.

If it is not so, yet the case cited on the other side, when properly understood, will be found to go no farther than to determine that the defendant, after a settlement with one of several joint promissees, is answerable to the others jointly ; the contract still continuing joint, as far as any are concerned who were not parties to the settlement. Any other construction would tend to a multiplicity of suits, and introduce great confusion in the apportionment of damages by different juries, and upon different principles.

MELLEN C. J. delivered the opinion of the court, at the ensuing *September* term at *Wiscasset*.

The single question submitted to our consideration is, whether the release given by *Austin*, one of the four persons who jointly contracted with the defendant, is available to him against each and every of the other contracting parties. The release in its terms discharges *Weld* from his liabilities to *Austin* only, for any damages sustained by him. To give it a more broad and extensive operation would be contrary to the expressed intention of both the parties. According to *Cole v. Knight* 3 *Mod.* 277, and *Lyman v. Clark & al.* 9 *Mass.* 235, a release should be confined to the object which was in view, and on which it was plainly the intention of all concerned, that it should operate. The contract was originally joint ; and had no release been given by *Austin*, an action must necessarily have been brought in the name of all the

four, against the defendant ; but as he has accepted the release, and availed himself of it so far as he was once liable to *Austin* ; he has by this act converted the joint contract into a several one; and he must now permit the plaintiff and the other two promisees to consider the contract in that light, and assert their claims against him accordingly. This course is manifestly just ; and sanctioned by settled principles. In *Baker v. Jewell* 6 *Mass.* 460 *Parsons C. J.* says, " We consider the law to be well settled, " that if one man is legally answerable in a personal action to " two or more persons jointly, if he will settle and adjust the " controversy with either of them, so that he has no longer an " interest in the dispute, this is a severance of the cause of " action as to any or all of the parties." In this view of the subject it is clear that the release of *Austin* is available to the defendant against *Austin* only. And according to the agreement of the parties the cause is to stand for trial.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

LINCOLN.

MAY TERM,

1826.

THE INHABITANTS OF ALNA *vs.* PLUMMER.

Where a husband, well able to support his wife, who was insane, neglected to protect and provide for her; and she wandered into an adjoining town, where she received support, the expenses of which were reimbursed in the first instance by the town where she was relieved, and then repaid by the town of the husband's settlement and abode;—it was held that the latter town might recover against the husband the expenses thus incurred.

The auctioneer, in the sale of real estate, is the agent of both parties, within the statute of frauds; and it is not necessary that his authority should be in writing.

And a memorandum of the sale, entered by his clerk, is sufficient, if it be made in presence of the parties, and of the auctioneer.

Where real estate is sold by auction, and a written memorandum made of the sale by the auctioneer, and a deed tendered to the purchaser, which he refuses; the measure of damages against him is the price at which the land was struck off, with interest; although the title remains as before; the purchaser having his remedy upon the same contract, should the seller refuse to deliver the deed, upon a new demand.

THE declaration in this case, which was an action of *assumpsit*, contained one count for money paid to the town of *Dresden* for the support of the defendant's wife as a pauper, her legal settlement being in *Alna*; and another count for the price of a pew in the meeting house in *Alna*; alleged to have been sold by auction to the defendant.

At the trial, which was before *Weston J.* at *September* term 1824, it appeared that the wife of the defendant, being insane, and having wandered from her husband's house in *Alna*, and fallen into distress in *Dresden*, was relieved by the overseers of the poor of the latter town, who gave due notice to the town of *Alna* that she was boarded and relieved in *Dresden* at their expense. The defendant, who was well able to support her, and knew her situation, she being but five miles from his house, neglected to bring her home, and to provide for her support; and the town of *Alna*, being sued by *Dresden* for the supplies furnished to her, suffered judgment to go by default. The ability of the defendant to support her was well known to the overseers of both towns, and to the person at whose house she was boarded.

Upon these facts, the judge ruled against the plaintiffs' right to recover upon the first count; deeming the case not to fall within the provisions of the act for the relief of the poor, from the well known ability of the husband to provide for all the exigencies of the case, at the time it happened.

Under the second count it was proved that the land on which the meeting house stood, was conveyed more than thirty years ago to the inhabitants of *Alna*, who built and repaired the meeting house thereon, under votes passed at regular town meetings. In *September* 1821, the town voted to repair the house, and to raise three hundred dollars, by the sale of pews, for that purpose; and appointed a committee to sell the pews, and to solicit subscriptions to the funds. This committee employed a regular auctioneer to make sale of the pews by public auction, which was done. By the conditions of sale, which were reduced to writing by the auctioneer's clerk, at the time of sale, and in open meeting, the purchase money was payable, in equal moieties, at thirty and sixty days from the sale. The defendant was present at the auction, and bid upon a pew which was struck off to him; and the clerk immediately wrote down his name under the conditions of sale, with the number of the pew, and the price at which it was struck off. Each sale was publicly announced by the auctioneer; but it did not appear that the defendant requested the clerk to make any entry of his name, and the purchase, nor that he knew it was done; though he was present with the com-

pany, when the entry was made. On the same day a deed of the pew was tendered to the defendant, which he refused to accept. This deed purported to be a conveyance by the inhabitants of *Alna* ; and concluded thus ;—" In witness whereof *Jeremiah* " *Pearson*, *John McLean*, and *Charles Rundlet*, authorized by a " vote of the inhabitants of the said town, at a meeting legally " holden for that purpose *Sept.* 10, 1821, have hereunto set the " seal of said town, and hereunder written their own names, this " ninth day of *October* A. D. 1822." The names of the committee were then subscribed, and one seal affixed. Afterwards at a town meeting holden *Dec.* 16, 1822, the town voted to confirm the doings of the committee in the sale of the pews, and in the making of deeds to the purchasers.—The authority of the auctioneer, and of his clerk, did not appear to have been in writing.

Upon this evidence the judge instructed the jury that if they were satisfied that the defendant was present, and knew that his name, the number of the pew, and the price he was to give, were entered by the clerk on the memorandum of the conditions of sale, at the time of the sale, they should find for the plaintiffs; and that the measure of damages was the price of the pew, with interest from the time the payments fell due. And a verdict was returned for the plaintiffs, for the price of the pew, and interest ; which was taken subject to the opinion of the court upon the points ruled at the trial.

At the argument upon these points, which was at *May* term 1825, it was contended by *Orr* and *Child*, for the plaintiffs, that the town of *Dresden* was originally bound to administer relief to the defendant's wife, by the express requirement of the statute for relief of the poor ;—an obligation which it could not avoid. By the same statute, *Dresden* had its remedy over, against *Alna*, the town in which she was legally settled; and this town might seek its indemnity from the husband. *Stat.* 1821, *ch.* 122, *sec.* 11. *Paris v. Hiram* 12 *Mass.* 262. *Hanover v. Turner* 14 *Mass.* 227. The common law also furnishes a remedy ; for the two towns may be considered as the sureties of the defendant; one of whom advanced the money, which the other replaced, and now seeks to recover against the principal.

As to the second count; they maintained that the authority of the auctioneer or of his clerk, need not be in writing; that the signing was sufficient, being in presence of the defendant; that the auctioneer was agent for both parties; and that here the whole contract was reduced to writing. *Coles v. Trecothick* 9 *Ves.* 250. *Simon v. Motivos* 3 *Burr.* 191. 1 *Phil. Ev.* [375.] *Merrit v. Clayson* 12 *Johns.* 1. *Freeport v. Bartol* 3 *Greenl.* 340.

Stebbins, on the other side, said that the statute applied only to poor persons; not to the affluent, who might for the moment be absent from their funds, and who are to find relief upon their own credit. But he denied that the statute gave any remedy in the case. The woman was in the neighborhood of her home, where her husband and his ability were well known, and it was upon his credit that she originally was relieved and taken care of. The individual who advanced her this aid, had his remedy on the husband. It was a private debt, in which *Dresden* had no right to interfere; much less the plaintiffs. The payment was wholly officious, and created no new obligation to the party making it. To admit the principle, would lead to endless circuity of action.

Upon the sale of the pew, he cited *Long on sales p.* 41, and remarked that though the auctioneer might be deemed the agent of both parties, yet his clerk was not, unless specially authorized. As a credit of sixty days was given, the deed should have been tendered and payment demanded at the end of that period. But the paper exhibited, he said, was not the deed of the town, which had no corporate seal; nor was it the deed of the committee, having the seal of but one of them.

WESTON J. at this term delivered the opinion of the court.

With regard to that part of the plaintiff's claim, which arises from a payment made to the town of *Dresden*, to reimburse them for certain expenses, incurred in the support of the wife of the defendant, it becomes important to determine whether the plaintiffs were under any legal obligation to make this payment. It appears that the defendant's wife was found out of the town where she had her legal settlement; that she was in distress;

and stood in need of relief. It must be afforded from some quarter. No person is left by law to depend upon the precarious support of voluntary charity ; or to suffer for the want of credit, which may sometimes happen to those, especially when absent from their usual residence, who may ultimately be found of sufficient ability to refund expenses, incurred in their behalf. It is made the duty of the overseers of the town, where a person may be found in distress, to institute an inquiry, not as to any means he may possess, of which he cannot then avail himself; but whether immediate relief is necessary. Were it otherwise, the party might be left to suffer, while the overseers were deliberating as to the extent of their official duty, and the nature of their remedy. The law has not subjected the towns they represent to the necessity of first attempting to enforce their claims against the party himself, before they can call upon the town where he has his settlement ; but, to quicken their diligence, has given a certain and sufficient remedy against such town, in all cases where they are bound to furnish relief. And this obligation is imposed when distress exists, and relief is necessary, for persons found out of the place of their legal settlement. Persons thus circumstanced will generally be paupers, but the statute has not in terms made it necessary that they should be in order to entitle them to the relief prescribed.

This construction is supported by the case of *Paris v. Hiram*, cited in the argument. It is true the court there say, in reference to a party in need of relief, that, "if the distress is of his "own procuring, and may be removed by his own exertions, and "this known to the overseers of the town who provide for him, a "question may arise as to the right of recovery ;" but upon this point they forbear to give an opinion. No question of this kind however can arise in relation to the relief furnished to the defendant's wife. We are upon full consideration, of opinion that *Dresden* had a claim upon *Alna* for the expenses in question, against which no legal defence could have been made.

But it is contended that a town has no remedy against the individual relieved, except in virtue of the nineteenth section of the act for the relief of the poor, *ch.* 122, which gives an action only

for the support of a pauper; and that it lies not in this case, the party relieved not being a pauper. Had it not been for this provision of the law, it might have been questionable whether supplies furnished to a pauper were not to be deemed gratuitous, and not therefore constituting a sufficient consideration to raise an implied assumpsit on his part to pay for them. But when furnished to a person not a pauper, there can be no doubt but the common law affords a sufficient remedy, without the aid of the statute. The defendant, having neglected his wife in her deranged state of mind, was as liable for her necessary support, as if he had turned her out of doors. In refunding to *Dresden* their expenditures, the plaintiffs were paying his debt. It was not done at his request; but it was not an act of voluntary interference in his concerns; it was an obligation, from which they had no means of escape. Under these circumstances, the law implies an undertaking on his part, founded on the ties of natural justice, to repay to them what they have necessarily expended on his account.

In the case of *Hanover v. Turner* 14 *Mass.* 227, the plaintiffs having relieved the defendant's wife, she being settled in another town, brought their action directly against him. It was contended that the action should have been brought against the town where she had her settlement, and that they had their remedy over against the husband. No doubt appears to have been entertained, that this course might legally have been pursued; but to avoid circuity, the action was sustained. The liability of the defendant in the case before us, is supported by the principles of that case.

We have decided, upon a view of the authorities, in the case of *Cleaves v. Foss*, in the county of *York*, that in sales of real estate at auction, the auctioneer is the agent of both parties; and that his putting down the name of the purchaser, with the price and conditions of sale, was a sufficient signing within the statute of frauds. In the case before us, the memorandum was made by the clerk of the auction; but as this was done in the presence of the auctioneer and of the defendant, and, as the jury have found, with the full knowledge of the latter, it appears to us to fall

clearly within the principles of that case. The auctioneer virtually made the memorandum by the hand of his clerk. In the case of *Coles v. Trecothic* 9 *Ves.* 234, it was stated that although the auctioneer was authorized to sign for the principal, yet his clerk is not authorized to sell in his absence, without the assent of the principal. But in this case the clerk acted in the presence, and by the virtual direction, of both the auctioneer and the purchaser. It is not necessary that either the auctioneer or clerk should be authorized in writing. *Sugden's law of vendors*, 74, 75, and the cases there cited.

An objection has been made to the sufficiency of the deed; but we consider it substantially like that which was the subject of consideration, in the case of *Decker v. Freeman* 3 *Greenl.* 338. The authority given to the committee to sell, on the tenth of *Sept.* 1821, virtually included, as necessary to the execution of that power, an authority to convey. On the day of the sale the committee tendered the deed; and all their doings were confirmed by the town in *December* following. The measure of the damages, was, as the judge instructed the jury, the price agreed to be paid for the pew by the defendant, who will be entitled to the deed, whenever he chooses to accept it. The verdict being amended in conformity with this opinion, judgment is to be rendered thereon.

THOMPSON *vs.* SNOW & AL.

Where a vessel is let to the master on shares, he victualling and manning her, paying a portion of the port charges, employing her at his pleasure, and yielding to the owners, for her hire, a certain share of the net earnings; the liability of the general owners ceases, and the master is placed in their stead, during the time the vessel continues thus under his control.

Such transactions do not create a partnership between the owners and the master, in the business of the voyage.

THIS was an action of *assumpsit* against the defendants, who were owners of the brig *Milo*, for the price of a quantity of boards alleged to have been sold and delivered to them.

At the trial of this action, before *Smith J.* in the court below, the plaintiffs offered one *Hall*, the master of the brig, as a witness ; who testified that he took her "on shares ;" but without entering into any other contract, written or verbal, or having any conversation with either of the owners on that subject. He supposed, when he took the vessel "*on shares*," that he took her in the same manner as all other coasting vessels in that vicinity are hired, where they are taken on shares ; in which cases the master or hirer victuals and mans the vessel, pays a portion of the port charges, and yields to the owner, for her hire, a certain share of her net earnings. He said that he never knew a coasting vessel sailed in any other manner from *St. George's* river, to which this brig belonged, and in the vicinity of which all the parties resided. After he had been in the brig about two months, not being able to find freight, one of the defendants observed to him that "he must look out a cargo," or, "he had better look out for a cargo;" in consequence of which he proceeded to make purchases of lime and potatoes, and bought of the plaintiff the boards in question, for dunnage. In one instance he gave a note for some lime, but could not recollect whether in his own name, or for the owners. He told the plaintiff to charge the boards to the vessel and owners ; but did not expressly bind himself, nor consider himself liable to pay for them. After completing his cargo he proceeded to sea ; not informing either of the owners where or how he obtained the cargo, or what or how much he had on board, or whither he was bound ; nor did he receive instructions from either of the owners, respecting the vessel or cargo, except what might be inferred from his being told by *Brown*, one of the defendants, that he must do the best he could. *Snow*, at this time, was absent. *Brown* lived near the vessel, appointed *Hall* as master, acted and took the control of the vessel as owner, and was ship's husband. *Hall* hired the seamen. He proceeded to *Richmond*, in *Virginia*, where he sold his cargo, except the boards, which were lost by being swept from the quay. Thence he took freight to *New Bedford* ; thence to *North Carolina* ; thence to *Jamaica* ; and back to *North Carolina* ; where the vessel was stranded, and sold for the benefit of the owners.

During all this period he had no communication with the defendants respecting the employment of the vessel, nor any instructions from them. After selling his cargo at *Richmond*, he remitted part of the proceeds to his own correspondent at *Thomaston*, with instructions to pay over the money to several persons, of whom he had purchased lime and potatoes. Soon after his return home, *Snow* remarked to him in conversation, that *Thompson* had furnished the boards, and ought to have his pay. Before he sailed, he charged the boards, with the rest of the cargo, to the defendants; and at the settlement of the voyage they did not particularly examine the books, nor was any account presented to them; but he stated to them what was due to them for earnings on the voyages, and they divided profit and loss, and received his notes for the amount. In making up this estimate of what was due to the owners, he charged the boards, and the rest of the cargo, and one half the port charges; and credited the proceeds of sales and freights; allowing them one half the difference for their part; and giving them at the same time a receipt or certificate stating that the accounts were settled, and his notes given to *Brown*, in full for the charter of the brig *Milo* for one year. The words 'in full of charter' he said were inserted by *Brown*, and he did not intend thereby to admit that he had chartered the vessel. He also testified that the plaintiff had been in the habit of selling and shipping lumber from *St. George's* river; and he believed him to be a part owner in one or more vessels; and that if there had been any loss in the cargo he supposed the defendants were to bear it.

The defendants objected to the competency of Capt. *Hall* as a witness for the plaintiff, on the ground of his interest, but the judge overruled the objection.

Upon this testimony the defendants contended that *Hall* had no authority to bind them; he being himself the owner for the voyage, and the hiring not being such as to constitute a copartnership between them. But the judge instructed the jury that if they were satisfied that the defendants, at the time when the boards were procured, and during the voyage, continued to have the control of the vessel, and directed or assented to the purchase of

the boards, *Hall* acting merely in the capacity of master, and receiving half the net earnings for his wages, the plaintiff was entitled to recover. And if they should find that *Hall* and the defendants were jointly interested in the voyage and cargo, the boards having been procured on their joint account, and by their assent ; and that they were to share the profits and divide the loss ; this constituted them copartners in the transaction ; and the defendants were liable, though *Hall* was not joined in the suit. But if they believed, from the testimony, that the defendants chartered or hired their vessel to the master, for the voyage for which the boards were procured; that he was to pay for the charter one half the net earnings ; and to have the exclusive control and management of the vessel during the time ; this constituted the master the owner for that voyage, and he alone was liable for the cargo.

To these instructions, the verdict being for the plaintiff, the defendants filed exceptions, pursuant to the statute.

Ruggles, in support of the exceptions, contended that *Hall* was incompetent as a witness, by reason of his interest. If the plaintiff prevails, he is discharged from a direct liability to him for the amount of the boards, and the verdict will be evidence in his favor. At the same time he will not be liable to the defendants, having already accounted to them ; or if liable for any thing, it can extend only to his proportion of the debt, exclusive of costs and expenses. But if the plaintiff does not succeed, his remedy against the witness will extend not only to the value of the boards, but to all the costs and damages to which he may have exposed the plaintiff by falsely pretending to have authority to charge the defendants. He is therefore directly interested to support his agency. *Emerson v. Andrews* 4 *Mass.* 653. 1 *Phil. Ev.* 52, 55. *note*. *Peake's Ca.* 84. *Bland v. Ansley* 2 *New Rep.* 331. *Owen v. Mann* 2 *Day* 399. Wherever the verdict may be given in evidence for or against him, the witness is incompetent ; and the doctrine of the preponderancy of interest does not apply. *Peirce v. Butler* 14 *Mass.* 303, 312.

But if his testimony was admissible, it discloses such an absolute hiring of the vessel as constituted the master the owner *pro*

hac vice, and rendered him alone responsible for every thing relating to the voyage. *Reynolds v. Toppan* 15 *Mass.* 370. *Taggard v. Loring* 16 *Mass.* 336. And this testimony is corroborated by the evidence of the usage, which becomes a part of all contracts made in reference to it. *Williams & al. v. Gilman* 3 *Greenl.* 276.

Allen, for the plaintiff, insisted that the witness stood indifferent, his interest, if he had any, being equally balanced between the parties. And the evidence disclosed a case of partnership between the captain and owners, the profit and loss being equally divided, and the cargo having been purchased for their joint benefit. But if the captain was not a partner, there is evidence that he was the agent of the defendants, with authority to purchase a cargo on their account; and the goods having been put on board for their benefit, a slight recognition of his authority is sufficient to charge them. This subject was fairly submitted to the jury, within whose province it belonged to determine.

WESTON J. at the ensuing term in *Kennebec*, delivered the opinion of the court.

The defendants, if liable in this action, must be charged upon one of three grounds. As owners of the vessel; as copartners with the master, in the shipment and voyage; or, as having specially authorized the master to purchase the boards, for the value of which this action is brought, on their credit. *Hall*, the master, testifies that he took the brig on shares; that the terms were not the subject of express stipulation, either in writing or otherwise; but that he expected to have her, according to the uniform usage of letting coasting vessels in *St. George's* river, from which he sailed, and in the vicinity; by which the master is to victual and man the vessel, to pay a portion of the port charges, and to yield to the owners, for her hire, a certain share of her net earnings. The owners must have had the same understanding of the terms in this case; as *Hall* further states that they settled with him, according to his views of the contract. It appears that *Hall* thereupon employed the vessel, at his pleasure,

in several successive voyages, until she was finally stranded and sold; without communicating with the general owners upon the subject of her employment; or receiving any instructions whatever from them. According to the cases of *Reynolds v. Toppan* 15 *Mass.* 370, and of *Taggard v. Loring* 16 *Mass.* 336, especially the last, *Hall* must be regarded as the owner of the brig, *pro hac vice*, and while she thus continued under his control, the liability of the general owners ceased, and was transferred to him. We refer to these cases for the reasoning from which this deduction is drawn. The same authorities show that, in transactions of this nature, the general owners and the party, who hires and employs a vessel upon these terms, are not to be deemed copartners; for if they were, the defendants in both these cases must have been held liable, instead of being exonerated. That an agreement of this kind does not constitute a partnership, is further supported by the case of *Wilkinson v. Frasier* 4 *Esp.* 182, and of *Meyer v. Sharpe* 5 *Taunt.* 74.

There is as little reason to charge the defendants upon any special authority given to *Hall*, to purchase a cargo upon their credit. The only evidence to this point, arises from the testimony of *Hall*, who says that he not being able to find freight, *Brown*, one of the defendants, observed to him that he, *Hall*, must look out for a cargo, or had better look out for a cargo. As the compensation to the owners, for the use of their vessel, was to depend on her employment, it was for their interest that she should not be delayed; and this observation of *Brown* can be considered as nothing more than the intimation of a wish on his part that, if *Hall* could not procure a cargo on freight, he would obtain one by purchase. *Hall* further states that he proceeded to purchase a cargo; but had no conversation with the defendants as to what he should buy, of whom, or where the vessel should go; although *Brown*, one of the defendants, lived in his neighborhood. He adds, it is true, that he told the plaintiffs to charge the boards to the owners, and that he did not consider that he was liable for them himself; but his directions or opinion can have no effect in determining the extent of his legal liability or theirs.

Upon this view of the evidence, it appears to us that the judge of the Common Pleas should have instructed the jury, as request-

ed by the counsel for the defendants, that the said *Hall* had no authority to bind them; that the facts proved did not constitute a copartnership; and that the defendants were not liable in this action.

We have not deemed it necessary to consider the objection made to the competency of the witness; being satisfied that his testimony is insufficient to charge the defendants.

The jury not having been in our opinion properly directed in this case, the exceptions are sustained, the verdict set aside, and a new trial ordered at the bar of this court.

ROWELL *vs.* THE INHABITANTS OF MONTVILLE.

No adverse appropriation or use of land as a road, for a period short of twenty years, is sufficient to raise the presumption of a grant; nor to impose on a town the obligation to pay any damages occasioned by its neglect to keep the road in repair.

THIS was an action brought to recover double damages for the breaking of the plaintiff's leg, occasioned by the badness of a "usually and publicly travelled town way," within the town of *Montville*. The writ was dated *July* 12, 1823.

The plaintiff, to prove the existence of the road, read in evidence a vote of the town of *Montville* passed *May* 2, 1809, accepting a road therein described, by courses and distances, as "laid and surveyed by *Joseph Chandler*, selectman." But in the warrant for calling that meeting, there was no article respecting the acceptance of any roads. The road actually opened, which was done soon after the passing of this vote, agreed with the record, in its *termini*, but not in the courses; the place where the plantiff was hurt being seventeen rods distant, from the road laid out by the selectman, and described in the vote of the town. It was also proved that one of the surveyors of highways in *Montville* had once expended about a shilling in removing obstructions from the road;—that a guide-board was placed at one end of it, as at other junctions of roads in the town;—that it was a road

much used by the citizens of the town;—and that the owner of the land over which it passed, had always acquiesced in this appropriation of it to the public use ; and on one ocsasion had taken a bond to indemnify, not only himself, but the town, against any damages occasioned by flowing water across the road. It further appeared that at a meeting of the inhabitants, called " to see if the town will accept *Jonathan Rowell's* proposals in regard to his leg being broke, &c," it was voted to allow him eighty dollars, " for damage he sustained by breaking his leg on account of a bad place in a road in said town." At a subsequent meeting, which was called in the following year, to see what method the town would take " to settle the controversy" with the plaintiff, a similar vote was passed ; but it was afterwards reconsidered, at an adjournment of the same meeting.

It was hereupon objected, on the part of the defendants, that the evidence did not shew the existence of any public road ; the way having been laid out by only one of the selectmen, and no notice of the subject having been given to the inhabitants, by any article in the warrant previous to its acceptance ;—that if the proceedings had been legal, yet the actual location did not conform to the record, and therefore was void ;—that here was no ground for presumption that a road had once been legally laid out, the opening of it being of so recent a date ;—and that the votes of the town where not to be taken as recognitions of a legal road, but merely as offers of compromise of an existing dispute. The Chief Justice, before whom the cause was tried, overruled these objections for the purpose of ascertaining the damages ; reserving the questions of law for the consideration of the court. And a verdict was accordingly returned for the plantiff.

Allen and *Greenleaf*, for the defendants, now argued in support of the objections made at the trial ; and cited *Commonwealth v. Newbury* 2 *Pick.* 51. *Commonwealth v. Charlestown* 1 *Pick.* 188. *Commonwealth v. Merrick* 2 *Mass.* 529.

Orr and *Ruggles*, for the plaintiff, said that good faith and good policy required that public roads should not be made snares for

the unwary. The town had opened the road, repaired it, and announced it to all the citizens as a safe and convenient public way, by erecting a guide-board at the end of it; its existence had been sanctioned by a previous vote of acceptance; and again it had been subsequently recognized, in repeated votes, as a public highway; and to suffer the inhabitants now to deny the regularity and legal character of their own proceedings, and take advantage of any defects in the location of the road, would be a violation of the rule that no man shall take advantage of his own wrong. If the original location were not good, it had become valid by the transactions, *ex post facto*, on the part of the town, and by the acquiescence of the owner of the land. *Stat.* 13, *Geo.* 3, *ch.* 78. *Todd v. Rome* 2 *Greenl.* 55. 4 *Mass.* 565. 5 *Mass.* 435. 12 *Johns.* 222. 10 *East* 375, *note. Proprietors of the Canal Bridge v. Gordon* 1 *Pick.* 297. *Garland v. Salem Bank* 9 *Mass.* 410. And the time which has elapsed since the opening of the road is sufficient, under the circumstances of the case, to afford ground for legal presumption that the proceedings were regular. *Balston v. Bensted* 1 *Camp.* 463. *Berry & al. v. Carle* 3 *Greenl.* 269. Lapse of time, in any case, is necessary on no other principle than as evidence of the assent of parties whose interests are adverse to the right claimed. But the present case shews not only the intent of the town to claim the easement, but the express admission of the owner of the land that the claim was lawful. The town, thus having acquired the use of the way, was bound to keep it in repair. 2 *Doug.* 749.

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

The road in question cannot be considered as a legal town way. It was laid out by only one of the selectmen, and was never duly accepted by the town, because there was no article in the warrant for calling the meeting that could justify its acceptance. It cannot be considered as a way by prescription, for it has not yet been in existence for fourteen years; and no presumption is admissible as to its origin, because we know it originated at the time it was laid out, and in virtue of the supposed legality of the

town's proceedings respecting it. But it is contended that during the above period, it has been a road or way *de facto*; and that as the town has bestowed some repairs upon it, and placed a guide-post at one end of it, they are estopped to deny its existence and their liability to repair it. Unless they had a right to repair it, we cannot consider them bound so to do. *Todd v. Rome* 2 *Greenl.* 55. No adverse appropriation and user of the land, over which the road passes, short of twenty years, could take away the owner's right of entry and give the town a right to dig up the soil or remove it, and do those things necessary in making or repairing the road. In *Gayetty v. Bethune* 14 *Mass.* 49, the plaintiff complained of the interruption of a private way. The court say "it "is adverse possession only upon which a presumption of a grant "can arise;" and that "no period short of twenty years has been "allowed, sufficient for this purpose, in this country." And a similar principle seems to have been adopted by the court in the case of *First Parish in New Gloucester v. Beach*, of which a report appears in a note to *Commonwealth v. Newbury* 2 *Pick.* 51. The same principle was recognized in *Hill v. Crosby ib.* 466. It is true these are cases in which the right of way was claimed by an individual: but there seems to be no ground of distinction between such a claim asserted by an individual or by the public: in neither case can the right be acquired, except by a continued adverse claim and user for at least twenty years. Besides, during the whole period of the road's existence, only one shilling was ever laid out upon it, and that merely in removing some particular obstruction; and whether this was done under the town's authority is uncertain, because it does not appear that the road in question was ever assigned to any surveyor. We do not perceive any one act, performed under the legal authority of the town respecting this road, which can be considered as binding on them. The votes passed and reconsidered as to compensation, were only propositions for a compromise, but were never accepted. Our opinion is, that upon the facts before us, the action cannot be maintained. And therefore the verdict must be set aside, and a

New trial granted.

ROGERS *vs.* CROMBIE.

If the defendant, in an action of trover, would bring the property into court, in mitigation or discharge of damages, he must apply for leave by a motion to the discretion of the judge, whose decision is final.

In trover for a bond, the condition of which was, that if the plaintiff would remove to the town of *P.* and dwell there a year, he should have certain lands; and he had not removed thither; the jury were instructed to estimate the value of the lands, and to deduct therefrom what it would have cost the plaintiff to have performed his part of the condition, and award him the balance in damages;—and held good.

TROVER for a bond, given by a third person to the plaintiff; and conditioned for the conveyance of certain lands, upon the plaintiff's returning to *Phipsburg*, and residing there one year. At the trial of this cause, which was before *Preble J.* at the term in which it was first entered in this court, the defendant, in open court, tendered the bond to the plaintiff, in mitigation of damages, and contended that it ought to be received; but the plaintiff refused it, and the judge ruled that he was not bound to accept it. It did not appear that the plaintiff had ever performed the condition precedent, mentioned in the bond; and it was proved that the obligor had conveyed the lands, which are worth four hundred dollars, to another person, and had removed out of the State.

Upon this evidence the Judge instructed the jury that the plaintiff's damages ought not to be diminished by the tender of the bond; but that as he had refused to receive it, the judgment on the verdict in his favor in this case, would operate as an assignment of the bond to the defendant. In the assessment of damages he directed them to ascertain the value of the lands, and from this amount to deduct what it would have cost the plaintiff to have removed from the city of *St. John*, in New Brunswick, the place of his former residence, to *Phipsburg*, and to have complied with the previous condition on his part to be performed; returning their verdict for the plaintiff for the balance thus found; which they accordingly did. The verdict was taken subject to the opinion of the court upon the law, and the rule of damages as stated by the judge to the jury.

Ames and *Groton*, for the defendant, contended that the bond ought to have been received, even if offered in discharge of damages; much more when offered only in mitigation of them; its value not being impaired. The early decisions to the contrary were all considered by Lord *Mansfield*, and overruled, in *Fisher v. Prince* 3 *Burr.* 1362. And afterwards by Lord *Kenyon* in *Pickering v. Trustee & als.* 7 *D. & E.* 52. 2 *H. Bl.* 902. 1 *Sellon's Practice* 283. Our own decisions will at least justify a return of the property in trover, in mitigation of damages, at any time before the rendition of judgment, the property being, until that time, in the plaintiff. If it be injured, the jury will estimate its value. *Wheelock v. Wheelwright* 5 *Mass.* 104.

As to the rule of damages, they said that the detention of the bond was a subject on which the plaintiff ought not to be permitted to speculate; he could entitle himself to no greater damages than he had actually sustained. The bond was worth to him just what he could recover upon it, if the present suit was against the obligor; in which case nothing could be recovered, because the obligee has never performed the condition precedent; and of course his damages in this action can be but nominal. *Clowes v. Hawley* 12 *Johns.* 484. Nor could it be of any greater value to the defendant, if assigned to him by the judgment; since he has no means of compelling the plaintiff to do the act on which the obligation of the other party depends.

Allen for the plaintiff.

MELLEN C J. delivered the opinion of the court.

Two objections are made to the verdict.

1. It is said the opinion of the judge who presided at the trial, was incorrect, by means of which the defendant was refused the advantage of tendering the bond in question and of having the same considered by the jury in mitigation of damages. In reply to this objection, we would observe, that if such an offer and claim on the part of a defendant can be considered admissible, the motion for the purpose must certainly be considered as one addressed merely to the discretion of the judge; and, of course,

one upon which his decision is final; and no more subject to revision by the whole court than a motion for the continuance of an action, or a common amendment of the declaration, or pleadings. The cases cited by the counsel for the defendant, only shew what is the course of practice in the English courts on this subject. The very mode of proceeding by a rule to shew cause, proves that the allowance to a defendant in the cases specified to bring property into court in an action of trover, in discharge of damages, is a matter of discretion; and that it cannot be demanded as a right. At common law a tender, made after the commencement of an action is not good; and our statute of 1822, *ch.* 182, relates only to a tender of money after an action is commenced; and such a tender must be accompanied by a tender of all legal costs up to the time of making it. We therefore cannot sustain this objection.

2. In the second place it is contended that the instructions of the judge as to the rule of damages were incorrect. The bond in question was demanded of the defendant, and by him refused for reasons best known to himself; and the plaintiff has thereby been unable to avail himself of its condition and enforce its payment. It appears also that the obligor has sold and conveyed to another person the property named in the condition; and thereby disabled herself from conveying it to the plaintiff, and has also since removed out of the State. Thus the plaintiff's prospects have been destroyed and he himself injured. The damages given by the jury are not merely the value of the bond, over and above the estimated expense of the plaintiff's removal; or, in other words, the sum which the defendant may, as assignee, be able to recover of the obligor; but the damages which the plaintiff has sustained by the misconduct of the defendant in withholding the bond, and thus depriving him of all the benefits he expected, and might have received from it. The evidence in relation to all these facts, was submitted to the jury; and they have deducted more than half the value of the land, conditioned to be conveyed. Under these circumstances, we think the defendant has no reason to complain; and that no more than justice has been done to the plaintiff. We are all of opinion that there must be

Judgment on the verdict.

MOONEY & UX. *vs.* KAVANAGH & AL.

The submission of an action, and all demands existing between the parties, to the determination of referees, dissolves any attachment of property made in that action; and this, whether other demands are in fact exhibited to the referees or not.

THIS was a *scire facias* to the defendants, to shew cause why the plaintiffs should not have a *pluries* execution on a former judgment in their favor against the same defendants; the first execution having been extended on land which, it was alleged, did not belong to them.

From the pleadings, which were voluminous, it appeared that the land was originally attached by the plaintiffs, and afterwards by another creditor;—that the plaintiffs, while their suit was pending, and after the second attachment, entered into a rule of court with the defendants, by which that action, and all demands, were submitted to certain referees, who awarded a balance to the plaintiffs; on which judgment was rendered, and execution issued, and extended on the land in question. Afterwards, the other creditor recovered judgment, and extended his execution on the same lands. It was alleged in one of the defendants' pleas, and admitted by demurrers, that the plaintiffs had in fact no other demand against the defendants than was contained in the original writ, and that none other was laid before the referees, or considered by them.

Allen, for the plaintiffs, said that by the submission of all demands the attachment was dissolved, and consequently the extent was void; the land being under the lien of the second attachment, by another creditor, who had since taken it in satisfaction of his own judgment. The subsequent proceedings before the referees did not restore the attachment, nor affect the question; it being already settled by the entry of record. To suffer the rights of attaching creditors to depend upon parol testimony of the transactions before referees, would unsettle real titles, and create confusion. *Hill v. Hunnewell* 1 *Pick.* 192.

Orr, for the defendants, admitted that bail were discharged by a submission of all demands; but he denied that the same principle applied to attachments of property. The obligation of bail is founded in a special contract, that the principal shall abide the judgment in that suit. But when the character of the suit is changed, and it is made to embrace other causes of action, as well in equity as at law, it is no longer the action to which he stipulated that the party should answer; and by the plainest principles of natural justice he is discharged. But the attachment of property merely creates a lien, by positive law, to the amount of the debt demanded. No new cause of action, it is true, can be inserted in the writ, to the prejudice of other liens, created by subsequent attaching creditors, who have an interest in the surplus. But where no new demand is, or can be added to the original claim, as in the present case, no other rights are affected by the mere language of the record, and the reason of the rule in favor of bail does not apply.

MELLEN C. J. delivered the opinion of the court, at the succeeding term in *Kennebec*.

It cannot be necessary, in giving our opinion in this case, to travel through the protracted pleadings of the parties, terminating in general demurrers; it is sufficient to extract from them the simple questions presented for decision. These are, 1. Does the submission of an action and all demands subsisting between the parties, to the determination of referees, dissolve an attachment of property made in that action? 2d. Is it competent for a party, in pleading to aver "that no other, or greater, or differ-"ent demand than the demand made in the declaration, was sub-"mitted to the referees, and that said referees made their "report aforesaid on a consideration and hearing of the whole "demand, in the same declaration declared for, and upon no other, "different or greater demand;" it appearing on the record that the report of said referees was "in full for said action and all demands?"

As to the first question, we would observe that the principle has long been acknowledged and familiar in practice, that a sub-

mission of all demands dissolves an attachment ; and when the plaintiff was desirous of guarding against such a consequence, he would either submit the action only omitting the words " and all demands" ; or confining the expression to " all demands" which the defendant had against the plaintiff, as mentioned by *Jackson* J. in the case of *Hill v. Hunnewell* 1 *Pick.* 192. That case is a direct authority, in confirmation of the received opinion as to the law upon this point. The court say that " the mere act of enter- " ing into such a reference dissolves an attachment—and that it " likewise discharges bail"—that is, such a submission is *ipso facto* a voluntary release of the attachment in one case, and of the bail in the other ; a right once released, is gone, and in this case the effect of the release does not in any degree depend on subsequent facts.

As to the second question, we may observe that the principle we have just stated seems to be a sufficient answer ; for as the release of the attachment operates from the time of the submission, it is of no consequence whether additional demand on the part of the plaintiff were presented to, and allowed by the referees ; the attachment, being released, is as though it had never existed ; and therefore the averment in the pleadings above stated is of no importance, and though admitted by the demurrers to be true, it is not of any more importance on that account. In addition to the answer we have now given, it may be observed that if the question, whether an attachment is dissolved, were to depend on such facts as are averred by the defendant, the rights of parties and their titles to property would be placed in a dangerous situation, often depending on the memory of referees and the uncertain testimony of contradictory witnesses ; and often liable to total destruction and loss. A principle leading to such consequences can never be sanctioned.

The rebutter and the second rejoinder are therefore adjudged bad, and a *pluries* execution is to issue according to the prayer of the petition.

WHITE *vs.* DICKINSON & AL.

In debt on a bond, conditioned to submit to arbitration a dispute respecting a division-line between the lands of the parties; it is not a good plea in bar, that the arbitrator established the line wholly on the defendant's own land.

IN debt for the penalty annexed to an agreement to submit a controversy to arbitration, the agreement was set forth as follows;—"Whereas a dispute has arisen and exists between *Abijah* and *Joseph Dickinson* on the one part, and *Joseph G. White* on the other, in respect to the line between their lands situated in *Wiscasset*, in the county of *Lincoln*, and bounded northwesterly on *Monsweag* brook, so called; and whereas the parties aforesaid have mutually agreed to submit the determination of said dispute and controversy to *Samuel E. Smith*, Esq.—We the said parties do hereby agree and promise to abide the award of said *Samuel E. Smith*, Esq. upon the dispute aforesaid; and do agree to release to each other the land which shall lie on the opposite side of the line which said arbitrator shall decide to be the true line between us, in the manner which said arbitrator shall determine;"—and they bound themselves in a penalty, each to the other, "to abide the award and determination of the said arbi- "trator, on the subject of the dispute aforesaid."

The award was also set forth, in these words;—"I the sub- "scriber, being appointed arbitrator to decide upon the dividing "line between the lot of *Abijah* and *Joseph Dickinson*, and the "lot of *Joseph G. White*, and having met and heard the parties, "their counsel, and their evidence, am of opinion, and do award "and determine that the dividing line between said lots shall be, "and is established as follows, viz.—beginning at the dividing line "between said *Abijah* and *Joseph Dickinson's* lot, and land of *Abiel* "*Wood*, at the easterly corner of said *White's* land; from thence "running on a straight line northwesterly to *Monsweag* brook, so "called, to a point two rods and six links northeast of a certain "large rock at said brook, which rock determined the line run "between said lots last fall by *John S. Foye*; and that the par- "ties mutually release to each other the land on the opposite

"sides of the line respectively ;" &c. The plaintiff alleges a tender of a release from him to the defendants, and a demand and refusal of a release from them, according to the terms of the award.

The defendants pleaded in bar, "that the said arbitrator, in attempting to make and establish the line aforesaid, did make and run a line through and upon the land of the said defendants, remote and distant from the land of the plaintiff, and not between the land of the said plaintiff and defendants; and the line by him so run and made through and upon the land of the said defendants is the same line mentioned in the said supposed award," &c. To which the plaintiffs answered by a general demurrer.

Reed, in support of the demurrer, argued that the plea was bad, as it attempted to set up matter *dehors* the award, in order to avoid it. *Barlow v. Todd* 3 *Johns.* 363. In effect it alleges a mistake in the arbitrator, and is in the nature of an appeal to this court, at whose bar it seeks to try the whole controversy again. But the parties have constituted their own tribunal, whose decision is not examinable in a court of law, unless it was founded in gross partiality or corruption. *Stevenson v. Bleecker* 1 *Johns.* 193. *Perkins v. Wing* 10 *Johns.* 140. *Cranston & al. v. Kenney* 9 *Johns.* 212. Besides, if the plea were good, it would lead to a trial of the title to real estate, in an action of debt on bond.

The agreement was that the arbitrator should establish the line ; and the award, as it follows the terms of the submission, is good. Nor is it uncertain ; for it commences at a known monument, being the corner of the defendants' own land, and proceeds by a given course to a point equally well ascertained, at the brook. And that this line was well known to the defendants, is manifest from the language of their plea.

Orr, for the defendants, said that the plea sought nothing more than an inquiry into the jurisdiction of the arbitrator, which he had exceeded by departing from the land in dispute. And this point is always examinable in courts of law. But here the declaration itself is bad, as it contains no allegation that the line marked by the arbitrator is the true line between the parties ;

which is the only question submitted to his determination. And the award also is void, for uncertainty in the designation of the line, and of the lands to be released.

MELLEN C. J. delivered the opinion of the court at the ensuing term in *Kennebec*.

A dispute having arisen "in respect to the line between the lands" of the parties, they agreed to submit "said dispute and "controversy" to arbitration, and agreed to abide by the award of the arbitrator "upon the dispute aforesaid;" and it appears that the arbitrator did "award and determine the dividing line "between said lot," as follows, viz. "Beginning at the dividing "line between said *Abijah* and *Joseph Dickinson's* lot, and land of "*Abiel Wood*, at the easterly corner of said *White's* land, from "thence running on a straight line northwesterly to *Monsweag* "brook so called, to a point two rods and six links northeast of a "certain large rock at said brook, which rock determined the "line run between said lots last fall by *John S. Foye*; and that the "parties mutually release to each other the land on the opposite "sides of the line respectively." The plea in bar is that the arbitrator "did make and run a line through and upon the land of "said defendants, remote and distant from the land of the plain- "tiff, and not between the land of the said plaintiff and defen- "dants;"—the plea then avers the identity of the lines as run by the arbitrator, and as set out in the declaration. To this plea there is a general demurrer. Is the plea good? It denies expressly the principal fact stated in the award; viz. that the line so run by the arbitrator and by him established, was the dividing line between the lands of the parties; that is, it denies that the arbitrator has settled the dividing line correctly, and avers that the line by him established runs on to the defendants' land. The award states the line to be the dividing line; and this was the very question submitted to his final determination. The award is not attempted to be impeached on the ground of fraud, corruption, partiality, or even mistake; and surely it is no good plea to say that the arbitrator has established the divisional line in the

wrong place. The plea is clearly bad as shewn by many of the authorities cited by the plaintiff's counsel, and numerous other cases.

But it is contended that the declaration is bad, or in other words, the award set out in the declaration.

It is said that the award does not state the line established to be the true line, according to the terms of the submission. But the arbitrator has established it as such, pursuant to the authority given him, and therefore it is the true line.

It is said that there is no certainty in the line, as to its course, or the position of the rock referred to. The answer is, the rock is described to be by the brook, and to be the same by which *Foye* determined the line last fall. The position of monuments may always be rendered certain by parol proof. Besides the defendant, by his plea, has informed us that he knows where the arbitrator has established it.

Again it is urged that there is another uncertainty which renders the award void, viz. that it does not appear what each party is to release. But a mere inspection of the award shews that it cannot be misunderstood as to this particular;—the language is plain and precise. We are all of opinion that the plea in bar is bad; but as there are issues of fact to be tried, the cause must stand continued for that purpose.

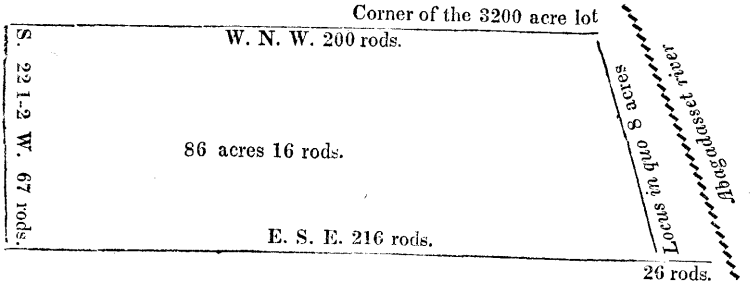
PURINTON & AL. *vs.* SEDGLEY & ALS.

A case of the construction of two deeds.

IN this case, which was trespass *quare clausum fregit*, both parties claimed title to the *locus in quo*; which was a parcel of flats, and a small border of upland, adjoining a larger parcel which formerly belonged to *Robert Sedgley*.

The plaintiffs derived their title under a deed made *Feb.* 2, 1797, by the heirs of *Robert Sedgley* to *Stephen Sedgley*, in which the land was described thus:—"beginning at the northeast corner of

a 3200 acre lot, No. 24, thence running a west-north-west course about two hundred poles, thence running southerly sixty seven poles, thence running east-south-east about two hundred and sixteen poles, thence northerly sixty seven poles to the first mentioned bounds, containing about one hundred acres, more or less." The grantee entered under this deed, claiming the land; and generally, but not every year, cutting the hay on the flats, till *Nov.* 17, 1809; after which he sold and conveyed the premises, including the whole of the upland and flats, to divers purchasers, from whom the whole estate of *Stephen Sedgley* therein came in 1824, by mesne conveyances, to the plaintiffs. The land was situated in this manner :—



The defendants, who were heirs of *Robert Sedgley*, proved that he died seised of a parcel of land which had been conveyed to him by *Nathaniel Jellison*, by deed dated *Nov.* 13, 1760, bounded thus :—" beginning on the westerly side of Abagadasset river, where the northerly line of a 3200-acre-lot No. 24 strikes said river, and running from thence a west-north-west course on said northerly line two hundred poles; then running a south-south-west course at right angles with said northerly line sixty seven poles, then running an east-south-east course, parallel with the northerly line aforesaid, about two hundred and sixteen poles, more or less, to Abagadasset river aforesaid; and from thence northerly on the water's edge to the northerly line of said tract No. 24, the first mentioned bounds; being about 100 acres more or less."

They also proved an entry into the *locus in quo*, in 1804 and again in 1807 and 1810 by *Joseph Sedgley*, one of the defendants.

cutting the grass, and claiming title as heir to *Robert Sedgley*; and that he exercised similar acts of ownership in some other subsequent years.

And they offered to prove that at the time of making the deed of *Feb.* 2,1797, the grantors expressly refused to give a deed conveying the whole lot sold by *Jellison*, which *Stephen Sedgley* was desirous to obtain; and that the words "more or less to Abagadasset river, and from thence northerly on the water's edge to the northerly line of said tract No. 24," were agreed to be omitted in the deed, for the purpose of leaving the title to the flats and a small border of upland remaining in the grantors. But this evidence was rejected by *Preble J.* before whom the cause was tried; and a verdict was returned for the plaintiffs, subject to the opinion of the court.

The question raised upon the construction of these deeds, was briefly spoken to at this term by *Allen*, for the plaintiffs, and *Orr*, for the defendants; and the opinion of a majority of the court, *Weston J.* dissenting, was delivered at the ensuing *November* term in *Cumberland*, by the Chief Justice.

Weston J. The title of the plaintiffs to the *locus in quo* cannot be sustained upon the ground of disseisin; inasmuch as their possession has not been uninterrupted; the defendant, *Joseph Sedgley*, one of the heirs of *Robert Sedgley*, while his right to enter continued, if he had not conveyed it, having entered upon the premises and exercised acts of ownership over the same, at various periods, by which his seisin was continued, if he had a right to be seised. The plaintiffs must therefore depend upon the title which passed to *Stephen Sedgley*, by the deed executed to him by the heirs of *Robert Sedgley*, dated *February* 2,1797, all the land therein described having, through certain mesne conveyances, been transferred to the plaintiffs. The place of beginning in this deed is not in controversy. The land was to run thence, upon a west-north-west course, about two hundred poles; thence southerly sixty seven poles; thence, east-south-east, about two hundred and sixteen poles; thence, northerly,

sixty seven poles, to the first mentioned bounds. It was proved that, measuring two hundred and sixteen rods from the west end of the tract conveyed to *Stephen Sedgley*, the *locus in quo* is excluded. Had there been a terminating monument referred to in the deed, the use of the term about, according to its ordinary import, would have implied, that the distance might, upon accurate admeasurement, exceed or fall short of the number of rods stated. Yet in that case, I am not aware that its use or omission would have any legal operation. If land is conveyed, running on a certain course, a certain number of rods, from one monument to another, it is a well settled principle that the land will extend to the monument described, whether it accords or not with the length of line. In stating also the number of acres conveyed, it is usual to represent it as about so many ; yet the word, about, although it negatives the conclusion that entire precision is intended, is without any legal operation whatever. In these cases, it is properly used, and carries with it a meaning readily understood ; as do many other words, which do not vary, in legal construction, the extent of the premises conveyed. If this word then, when properly used, is without legal effect, I cannot consider it as having any influence in this deed where, no fixed terminating point being stated, it appears to be used improperly, and without definite meaning. Rejecting this word as legally inoperative, there remains only the distance given ; and there is certainly nothing in the deed to lessen or extend it. It seems to me therefore to be very clear that, upon any sound construction, the *locus in quo* is not included in this deed taken by itself ; nor can I perceive that the facts present any latent ambiguity, which cannot be consistently explained without including it. The southerly line of the land conveyed to *Stephen Sedgley*, located according to the terms of the deed, does not extend to *Abagadasset* river, to which the grantors in that deed had title; but no ambiguity arises from this fact ; the grantors did not profess to convey all the land they had there ; nor have they referred to any other deed or description, than that which they have expressly given.

The deed being perfect in itself; there being no difficulty, upon legal principles, in locating the land according to the boundaries given, and no other instrument being referred to, it does not appear to me that the tract conveyed can legally be enlarged by adverting to the deed or title, under which *Robert Sedgley* held; or that it can properly be resorted to for this purpose. And if it could, I am unable to draw any deduction from it which would change the result derived from the terms of the second deed.

The deed of *November* thirteenth, 1760, from *Nathaniel Jellison* to *Robert Sedgley*, is very explicit in its terms. The southerly line extends to *Abagadasset* river, and the easterly line, by the water's edge to the point of beginning; about which there is no dispute. This important part of the description is omitted in the second deed. If the person who drew the second, had the first deed before him, I cannot account for the omission, but by supposing that it was understood that the two hundred and sixteen poles would not, or might not, extend to the river, and that it was intended that the southerly line should be restricted to the number of poles stated. It is true that, upon this hypothesis, the term, about, is not only without legal effect, but without meaning. I do not deem it necessary, in the decision of this cause to account for its insertion; but it being found in the first deed, it might have been transcribed therefrom, without adverting to the impropriety of its use; the river, the terminating boundary in the first deed, not being given in the second; being there, as I apprehend, omitted by design.

If this line, in the deed under which the plaintiffs claim, was intended to run to the river, I do not understand why the closing line should not have been described as running by the water's edge, as it is in the deed made by *Jellison*. In the second deed, it is represented as running northerly. Whether this is to be regarded as a due north course, or whether to strike the point begun at, it diverges somewhat therefrom, it carries the idea of a straight line, no intermediate points being given; whereas a river rarely runs a distance of sixty seven rods, without sinuosities or indentations in its course. In the first deed, the parallel

side lines were to be distant from each other, at right angles, sixty seven rods; but the parties seem to have been aware that if the river was not at right angles with the side lines, or if it pursued a meandering course, the distance measured by the water's edge would be greater than if measured at right angles; hence, although the other three lines are represented as running a certain number of rods, the length of the closing line, running by the water's edge, is not given. It was as easy to write "northerly, by the water's edge, to the first mentioned bounds," as to write "northerly, sixty seven poles, to the first mentioned bounds;" the change of language is not then, in this instance, to be accounted for by supposing it to have been done for the sake of abbreviation. Upon comparing the two deeds, therefore, I am so far from being satisfied that precisely the same tract of land was intended to be conveyed in both, that I am the rather led to infer, from the differences existing in the description, that it was understood that the second deed did, or might, convey less than the first. In both deeds, the quantity is stated to be about one hundred acres, more or less. There is so little precision in these terms, and they are so well understood to be uncertain and indefinite, that I cannot regard them as having any effect in the construction.

If possession had gone according to the plaintiff's claim, and the parties had uniformly acquiesced in their construction, they would have presented a case entitled to favourable consideration, had the extent of their right as deduced from the deed, under which they hold, been susceptible of doubt; but this construction has been disputed and contested, and claims and rights adverse to it, on the part of one of the defendants, asserted.

The parol testimony, as to the conversation which passed between the parties, at the time of the execution of the second deed, I have no doubt was properly rejected by the judge who presided at the triai; but upon the evidence received, I am of opinion that a verdict should have been directed for the defendant; and that, therefore, the verdict for the plaintiff ought to be set aside, and a new trial granted.

MELLEN C. J. The only serious question in this cause arises upon the construction of the deed from the heirs of *Robert Sedgley*, to *Stephen Sedgley*, bearing date *Feb.* 2, 1797; and is whether it must or ought to be so construed as to convey the same piece of land which was conveyed by *Nathaniel Jellison* to *Robert Sedgley* bearing date *November* 13, 1760. If both those deeds are in law to be considered as conveying the same piece of land, then the verdict is right, and the plaintiff is entitled to judgment; for there can be no ground for questioning the correctness of the decision, rejecting the parol evidence, by which the defendant offered to prove what the parties intended should be included in and conveyed by the deed of *Feb.* 2, 1797. There are several particulars in which there is a perfect agreement in the description of the tract conveyed; and several in which such an agreement is not expressed. The intention of the parties to the latter deed must be gathered from all the language employed in the description of the land, and its contents and boundaries. The first deed begins "on the westerly side of *Abagadasset* river, where the northerly line of a 3200 acre lot 24 strikes said river." The second deed begins "at the north-east corner of a 3200 acre lot 24," making no mention of *Abagadasset* river; but both parties admit that the place of beginning in both deeds is the same. The first course in the first deed is in these words;—"and running from thence a west-north-west course, on said northerly line, two hundred poles." The first course in the second deed is in these words;—"thence running a west-north-west course about two hundred poles"; making no mention of the northerly line of the 3200 acre lot 24. The second course in the first deed is in these words; "then running a south-south-west course, at right angles with "said northerly line, sixty seven poles." The second course in the second deed is in these words;—"thence running southerly sixty seven poles." The third course in the first deed is in these words;—"then running an east-south-east course, parallel with the northerly line aforesaid, about two hundred and sixteen poles, more or less, to *Abagadasset* river aforesaid." The third course in the second deed is in these words; thence running east-south-east about two hundred and sixteen poles;"—making no mention of

a parallel line, or of Abagadasset river. The fourth course in the first deed is in these words;—"and from thence northerly on the water's edge, to the northerly line of said tract No. 24, the first mentioned bounds." The fourth course in the second deed is in these words;—"thence northerly sixty seven poles to the first mentioned bounds;"—making no mention of the water's edge. Each deed describes the tract containing "about one hundred acres more or less, and as a matter of fact the whole tract contains only 92 1-2 acres. The question is, considering all these descriptive expressions, whether the third course or line in the second deed shall be construed to extend to *Abagadasset* river; if not, it will not include the *locus in quo*. It is certainly a general rule that when no monument is named and exists at the end of a given line or course, then the length of line must govern; and at the end of such line the measure must stop. The question is whether the facts in this case are such as to render the rule inapplicable in the present instance, by shewing that such was not the intention of the parties. By reading the second deed, and attending to courses and distances, it would seem as though the scrivener must have had reference to the courses and distances mentioned in the first deed and several of the monuments; and it seems equally clear that the person who drew the second deed, was disposed to abbreviate the description, as much as he could consistently, and without introducing what he might consider as uncertainty. It seems plain also that the second deed was not written pursuant to any actual survey or running of lines at that time; the use of the word "about" in the first and third line or course of the word "southerly," not south-south-west as in the first deed in the second course; and of the word "northerly" in the fourth line or course; and the words "about one hundred acres more or less," would all probably have been omitted, or other more definite expressions substituted, had the deed been drawn according to a surveyor's minutes, made at the time and for the purpose. Supposing the second deed, then, to have been drawn from a general regard to the boundaries, courses, distances and contents of the tract well known in the family; and noticing the many abbreviations in the description in this deed, appearing not to

have been deemed essential, we may be aided in giving the proper construction to the language employed by the grantor to convey his meaning. Now it is worthy of particular notice that in both deeds all the four courses are the same, except a slight variance as to the second; and in both deeds, the distances given are the same on the first, second and third lines or courses; and, as has been before remarked, the estimated contents of the tract are the same in both deeds. The only variance of any importance consists in the omission of some parts of the description in the second deed, which are found in the first.

The point chiefly relied on by the counsel for the defendants is that the third line is not described as running "to *Abagadasset* river aforesaid," nor the fourth as running by the "water's edge," as well as northerly to the first mentioned bounds. But we must again notice that in the beginning of the description, nothing is said about *Abagadasset* river, in the second deed, though that is a part of the description of the place of beginning in the first deed; and yet the place of beginning is agreed. Does not the omission of the river in this first instance, shew that its omission in the third line was not deemed of any more importance than the other? And it is acknowledged to be of no importance there. As, by the former deed, the third line of 216 poles was said and supposed to extend to the river, may not its omission be accounted for upon the same grounds, as that of several other descriptive particulars found in the first deed? Again, the word "about," in the third line or course, is not without its meaning. It is said that a line "about" 216 poles long, no monument being referred to, means 216 poles. Admit this, as a general proposition, to be correct; yet, in connection with the several other circumstances above mentioned, the word may have been, and probably was used, because the exact distance from or to the river was not known when either deed was written; whereas, if the intention of the grantor had been, at all events, that the third line or course should stop at the end of the 216 rods, the word "about" was not only superfluous, but improper and deceptive. The second course in the second deed is "southerly." In the first deed, as already mentioned, it is south-south-west. Yet while the lat-

ter is the true course, it is admitted that, agreeably to the intentions of the heirs, both descriptions mean the same; and that the lines coincide and are conterminous ; whereas, if the deed from the heirs is to be considered independently of the deed to their ancestor, the courses are not only different, but the second line will not reach what is admitted to be the true third line, by more than five rods, and will also, at the point of termination, fall more than twenty five rods easterly of what is admitted to be the true boundary. Beyond all this, the supposed quantity is expressed in the very same words in both deeds, and that quantity is conveyed by both. It is often to be lamented that those who are making a contract will not always give themselves the trouble to be explicit ; and thus avoid controversy and expense. One or two words, added to the deed in question, would have rendered it too clear to admit of doubt as to the intention of the grantor. But we must decide upon the language of it as we have it ; and we find, in examining the deed, more expressions, and more reasons, leading to the conclusion that both deeds were intended to convey the same tract of land, than we find for drawing the contrary conclusion. And after a very attentive consideration of the cause, and arguments of the counsel, it is the opinion of a majority of the court, that the plaintiff is entitled to judgment. Accordingly let there be *Judgment on the verdict.*

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

KENNEBEC.

MAY TERM

1826.

THE INHABITANTS OF PITTSTON *vs.* THE INHABITANTS OF WISCASSET.

Where an alien who had married a woman of this State, subsequently abandoned the country, without any intention of returning ; leaving his wife and infant son here ; but afterwards sent for them, and continued for 17 years to express affection for his son, and a strong desire to have him come and reside with him ;—it was held that the son was not emancipated by such abandonment ; and so was not capable of acquiring or receiving a settlement in his own right, while a minor.

A marriage unlawful and void, as where the first husband was still living, conveys no settlement to the wife; either by derivation from the second husband, or by dwelling and having her home in his house, at the time of passing the *Stat.* 1821, *ch.* 122.

THIS was an action of *assumpsit* for the support of one *James Shea* a pauper, of the age of 18 years. In a case stated by the parties, it was agreed that the pauper's father was an alien, resident in the British province of New Brunswick ; that in 1806 he was married to the pauper's mother, then a minor, who had a settlement in *Wiscasset*, derived from her father ;—that he lived with his wife about fourteen months, during which time the pau-

per was born ; after which he left her, and went to New Brunswick, saying he never intended to return to this country. At the time of the marriage, the pauper's mother resided with her father in the plantation of *Ballston*, which was incorporated into a town by the name *Whitefield* in 1809, she being still resident there, with her father. In 1811 the pauper's mother was again married to one *Hutchinson*, whose settlement was in *Whitefield*, and with whom she has ever since dwelt as his wife. The pauper, since the second marriage of his mother, had resided in *Whitefield* with his grandfather till 1817, and afterwards in other families, in that and the neighboring towns; *Hutchinson*, who was a poor man, being unwilling to support him ; but his mother directing the course of his life, and in one instance making the contract for his services, and receiving part of his wages.

The pauper's father left no property in this country, and contributed nothing for his support ;—but about about a year or two after he left *Whitefield* he sent for his wife, and she proposed to go to him, and went on board a vessel for that purpose, but afterwards relinquished the undertaking. He continued to make inquiries for his wife and son ; andabout seven years ago offered ten pounds to a person to bring him to New Brunswick ; and recently had written him a letter, requesting him to come to him, promising him his estate, and expressing much kindness and affection.

At the time of the passage of the statute of *March* 21, 1821, the pauper resided in *Pittston* at service, in a family in which he dwelt upwards of three years.

Sheppard, for the defendant, upon these facts,contended—1st, that the pauper was emancipated by misfortune ; his mother, by her second marriage, having deprived herself of the power of protecting him, and excluded him from a right to share her home; and his father, an alien, having abandoned the country, without any intention of returning. Being thus cast upon the world, he was capable of an involuntary settlement, at least, and acquired one in *Pittston*, by having his home in that town when the last settlement act was passed. *Freto v. Brown* 4 *Mass.* 675. *Wiscasset v. Waldoborough* 3 *Greenl.* 388. *Lubec v. Eastport* 3 *Greenl.* 280.

2. If he acquired no settlement in *Pittston* in his own right, he gained one in *Whitefield* in right of his mother, she being resident there at the time that town was incorporated, and also at the time of passing the settlement act. She was capable of acquiring a settlement for herself, being deserted by her husband, and he being an alien, and never intending to return. As far as she was concerned, he was as if dead, being in the situation of one who has abjured the realm ; in which case it is well settled that the wife may act and be treated as a feme sole. *Gregory v. Paul* 15 *Mass.* 31, and authorities there cited.

3. If the father had not abjured this country, then his domicil remained in *Whitefield*, and his settlement was fixed there by the law of 1821, which operates on aliens as well as citizens. *Knox v. Waldoborough* 3 *Greenl.* 455. In this case the pauper's settlement is in *Whitefield*, derived from his father.

Allen, for the plaintiffs.

MELLEN C. J. delivered the opinion of the court at the ensuing *June* term in *Somerset*, as follows.

James Shea, the pauper, is the son of *Joanna Shea* the wife of *John Shea*, an alien and British subject. *Joanna* was born at *Wiscasset*; and her father *John Kincade*, at the time of her birth, had his legal settlement in that town ; and though he afterwards gained another settlement in *Whitefield*, in virtue of its incorporation as a town in the year 1809, yet his daughter *Joanna* did not, though then under age, because in 1806 she was lawfully married to the said *John Shea*. The question, therefore, is whether the pauper has lost his original settlement in *Wiscasset*, and gained another, either in right of his mother, or in his own right. It is contended that in about fourteen months after their marriage, she was abandoned by her husband who then went to New Brunswick, where he has ever since resided ; but it appears he had no idea of abandoning her, because he several times inquired after her and his son, and was anxious for them to follow him to his new abode, where he preferred to reside ; and that she was once on the point of going to him, but was disappointed. Her

marriage with *Hutchinson*, when known to the husband, of course put an end to his solicitations for her removal to New Brunswick. We do not therefore perceive how the pauper's mother could gain a settlement in *Whitefield* in her own right, in virtue of its incorporation, she then being the lawful wife of *John Shea* ; and she could not gain one under her husband *Shea*, because he was not an inhabitant of that town on the 21st of *March* 1821. In this respect this differs from the case of *Knox v. Waldoborough* 3 *Greenl.* 455 ; and as the marriage with *Hutchinson* was unlawful and void, of course she gained no settlement thereby in *Whitefield*. Thus it seems the pauper never acquired a settlement in any other town than *Wiscasset*, in right of his mother or of his father. The remaining inquiry is whether he ever gained one in his own right. He is still a minor, and unless he has been emancipated, he could not gain one. Since the year 1817 he has resided in different places by permission or direction of his mother ; she has received a proportion of his wages, and in one or more instances made the contract as to his service. In addition to this it appears that his father has made several exertions to procure the removal of his son to New Brunswick, and urged his removal, assuring him of his aid and assistance, and of his regard and affection, and also informing him that the father's estate should eventually become his. All these facts shew the existence of paternal claims upon his son, and a right to enforce those claims at pleasure; at any rate, they put a negative upon the idea of emancipation. This is never to be presumed, but must always be proved. As the facts before us do not prove an emancipation, the original settlement of the pauper in *Wiscasset* remains ; and therefore a default must be entered.

WINTHROP *vs.* CURTIS.

Where, in a real action, judgment is to be entered for the demandant for the value of the land "at the price estimated by the jury," under *Stat.* 1821, *ch.* 47, *sec.* 1, if the entry of judgment on the verdict has been delayed at the request of the tenant, interest will be added to the price so estimated by the jury, from the time of finding the verdict, and judgment be rendered for the amount thus ascertained.

IN this case, which was a writ of right, the tenant prayed that the jury might estimate the value of his improvements made on the land, and the demandant requested an appraisement of the land itself, without the improvements, which was done ; and thereupon the demandant, in the same term, made his election in open court, to abandon the land to the tenant, at the price estimated by the jury, pursuant to *Stat.* 1821, *ch.* 47, *sec.* 1. After the decision of the question of law reserved in the cause, [see 3 *Greenl.* 110.] *Williams*, for the demandant, moved that interest be computed on the sum found by the jury as the value of the land, and that it be added to the verdict, and judgment rendered for the amount.

This was resisted by *Little*, for the tenant, on the ground that the language of the statute was explicit and peremptory, that judgment should be rendered "for the sum so estimated" by the jury ; and that the capital carrying interest would thereby be increased beyond the value of the land.

But the COURT at this term, granted the motion.

The Inhabitants of Windsor *vs.* The Inhabitants of China.

In the computation of time from an act done, the day on which the act is done will be excluded, wherever such exclusion will prevent an estoppel, or save a forfeiture.

Thus, in the computation of the two months, mentioned in *Stat.* 1821, *ch.* 122, *sec.* 17, the day of giving the notice is to be excluded.

Supplies furnished by order of one of a board of overseers, acting under a parol agreement with the rest of the board relative to the general manner of executing their office, are supplies furnished "by some town," within the *Stat.* 1821, *ch.* 122, *sec.* 3.

This was an action of *assumpsit* for the support of *Betsey Perkins*, a pauper, daughter of *Joseph Perkins*, with whom it appeared that she lived and had her home in *Harlem*, now *China*, on the 21st day of *March* 1821, she not being then emancipated from her parents.

At the trial before *Weston J.* in *October* term 1825, it was proved that notice was given from the overseers of *Windsor* to the overseers of *China*, on the 20th day of *October* 1823, at ten of the clock in the forenoon, and that an answer was received by the overseers of *Windsor* on the 20th day of *December* 1823, just before sunset.

Hereupon the plaintiffs contended that no answer was returned to their notice within the two months mentioned in the statute; and that the defendants were therefore estopped from contesting the settlement of the pauper; but the judge ruled that the estoppel had not attached.

The defendants then proved by *Joseph Stewart* that he had found an order in his hand writing, drawn by him while he was an overseer of the poor of *Harlem*, of the following tenor;—"*March* 27, 1820. Mr. *Jason Chadwick*, please to deliver to *Joseph Perkins* one fourth of a quintal of fish, on the town account. By order of the overseers of the poor, *Joseph Stewart.*" He further testified that he had no previous consultation with the other overseers relative to supplying the pauper, or to drawing the order; but that there was an understanding between the overseers for that year, that

either one of them might advance supplies to any person in the town, standing in need of relief, without consulting the other overseers; that the same understanding among the overseers had existed and been practised on in *Harlem* for many years before; that *Joseph Perkins* had been furnished with supplies as a pauper in 1817 and in 1821 by the town of *Harlem*;—and that while he lived in the town he was considered a very poor man. It further appeared that the order was accepted and paid on the day of its date, by *Chadwick*, who charged it to *Stewart* in his private account; and that *Stewart* charged it to *Harlem* in 1822, by which town it was duly paid. There was other testimony, on both sides, upon this part of the case, all of which was left to the jury.

The plaintiffs then contended that even if the supplies had been furnished to *Perkins* within a year next before *March* 21, 1821, yet being furnished by one only of the overseers, the case was not brought within the exception in the settlement act. But the judge ruled it sufficient, if the jury were satisfied that the overseer acted under the authority of the whole board; and they accordingly returned a verdict for the defendants; which was taken subject to the opinion of the court upon the points raised at the trial.

The arguments of counsel were delivered in writing, in vacation.

Sprague, for the plaintiffs, contended that more than two months had elapsed, between the giving of the notice and the return of the answer. If parts of a day were to be regarded, this point was clear, upon the facts of the case. And if not, yet both the days cannot be included in the computation; for that would be to comprise three 20th days, in two months. The effect of this mode of computation he illustrated, by beginning on the first day of *January*, and including the first day of *February* in the first month; in which case the second month would commence with the second day of *February*, and end with the second day of *March*, and so on; thus extending twelve months, to a year and twelve days. Rejecting fractions of a day, the defendants had notice during the whole of the 20th day of *October*, and the two months from that time expired with the 19th day of *December*.

This position is supported by authority. *Presbrey & al. v. Williams* 15 *Mass.* 193. *Doug.* 465. The rule there laid down is, that when time is to run from a certain day, the day is excluded ; but when it is from an act done, the day of the transaction is included. In the case at bar it is from an act done, viz. the delivery of notice. 1 *Dane's Abr.* 535, § 1, 2, 3. The different computation, adopted in cases of attachments of property and promissory notes, are exceptions to this general rule.

He further argued that the aid furnished to *Joseph Perkins* was not supplies "from some town," within the meaning of the statute ; because the order was drawn by one only of the overseers. The power to provide for the relief of the poor is delegated to them collectively, as a body ; and it is a personal trust in their discretion, which cannot be executed by attorney. If it could, the authority ought to be conferred expressly, and by a vote of the board of overseers; and not by a vague understanding among the individuals composing it.

Boutelle, for the defendants, insisted that to prevent the operation of the estoppel, which is not to be favored, the day of giving the notice ought to be excluded. The month, in our statutes, is always a calendar month ; *Hunt v. Holden* 2 *Mass.* 168. *Avery v. Pixley* 4 *Mass.* 460 ; and the words "within two months after the notice," are equivalent to saying "within two months after the day or time when the notice was delivered to the overseers." The law not regarding fractions of a day, except to serve the purposes of justice, the day on which the notice was delivered must be fully complete and ended, before the period of two months can commence. Such is the obvious intent of the statute in the present case. Previous to the case of *Pugh v. The Duke of Leeds*, *Cowp.* 714,which was decided in 1777, the construction of the words "from the date," and "from the day of the date," had been perpetually vibrating ; the day being sometimes included, and sometimes not ; and the decision probably influenced by the supposed merits of each particular case. But the only just and sound rule is that which excludes the day of the date. The rule laid down in *The King v. Adderley*, *Doug.* 465, opposed to

this, is founded on a distinction without a difference ; for whenever a computation is to be made from or after any given day or date, it has been uniformly held, since the case of *Pugh v. D. of Leeds*, that the day was to be excluded; yet in every case of this kind an act is done on the day ; and the difference is only in the form of expression. The rule in *The King v. Adderley* is professedly derived from the case of *Bellasis v. Hester* 1. *Ld. Raym.* 280, in which it was decided that in a note payable in ten days after sight, the day of sight is to be excluded. And *Ld. Mansfield*, in commenting on this case, expressly says that after the day, and after the sight is, in language, precisely the same. It is also worthy of notice that in *The King v. Adderley* the principal reason assigned by the court is, that it was a penal proceeding against the defendant, who was therefore entitled to a favorable construction of the statute. The authorities to this point are collected in *Bigelow v. Wilson* 1 *Pick.* 485.

As to the second objection, he contended that the authority of the board of overseers to afford relief to paupers, might be delegated to one of their number, as well as the authority to sign notices in behalf of the board; which latter act has been sanctioned by numerous decisions. And a parol delegation was sufficient. But if it was not, yet in the present case the act has been adopted and ratified by the town, by the settlement and payment of the bill for the supplies furnished in their behalf.

Allen, in reply, said that the reason why estoppels were not to be favored, was because they excluded the justice of the case. But that reason did not exist here, where the whole matter rests upon the positive enactments of a statute, devolving on corporations liabilities which have no moral foundation whatever, but rest wholly on arbitrary legislation. The principles of justice are as much affected by refusing to apply the estoppel, as by admitting it.

Upon principle, the day of sending the notice ought to be computed. If a policy of insurance of buildiugs against fire had been made on that day, and for the same term, and a loss happened on the same day, after the execution of the policy, would it be contended that the loss was not within the policy ? And is it not

equally clear, that had the loss happened after *Dec.* 20th, the underwriters would not have been holden? The objection that the defendants' computation does not leave time enough for the other five sixths of the year, is insurmountable.

To the other point, he argued that if the overseers could delegate their authority to administer relief, it could only be after they had adjudged relief to be necessary. It is only the ministerial act of advancing supplies, and signing notices, that may be done by attorney. To allow them to delegate to others their judicial or discretionary powers, would enable them, in effect, to substitute overseers whom the town never appointed. See *Powers v. Ware 2 Pick.* 485.

The opinion of the court was delivered in *Cumberland* at *November* term 1826, as follows, by

MELLEN C. J. This case presents two questions; 1st, are the defendants estopped to contest the question of the pauper's settlement? 2d. If not, is that settlement in China? As to the first point;—the words of the statute of 1821, *ch.* 122, relating to the subject are—"and if such removal is not effected nor objected "to by them, in writing, after such notice, to be delivered in writ- "ing, within two months after such notice to the overseers of "the town," &c. &c. The notice was given to *China*, *Oct.* 20, 1823; and the answer was given to *Windsor*, *Dec.* 20, 1823. If the day on which the notice was given to *China* is to be included in the computation of time, the answer was given too late; but if excluded, then it was returned in due season. The difference between the hours of the days on which the notice and answer were given, can be of no importance in the present case. By a fiction of law there are no fractions of a day, except in some particular cases, where the fiction is made to give place to the exact truth, to prevent injustice, and for the purpose of ascertaining the priority of acts done on the same day.

A distinction appears in the books to have been made between the common law and the law merchant, on this point; in the latter case, the day of the date of a bill of exchange or of an accep-

tance, and the date of a promissory note, being excluded. *Chitty on Bills* 205. 5 *Com. Dig.* 81. But in other cases it is generally included; though upon this point much uncertainty and confusion, have existed, decisions have been contradictory, and distinctions have been made without any real difference; often defeating the intention of the parties. Of late years, courts have paid more respect to the good sense of the thing, and to the object in view of all concerned, whether in the construction of a statute or of a contract. A rule perfectly uniform, would seem to have been more desirable; because more simple aud intelligible. There appears to be as much reason for excluding the day of the date of a deed, lease or other contract, as of a bill of exchange, acceptance or promissory note; and that the same rule might be applied to the date of a statute, where no day is expressly fixed from and after which it shall be in force; and also to any day or event which is named in a statute or contract as the *terminus a quo* a calculation of time is to be made. And so variant are the decisions in England and this country, and so unsettled is the question, that we are at liberty to settle it in this State upon such principles of construction as would be deemed useful and consistent. In computing a person's age, the day of his birth is always included; because, there being no fraction of a day, it must be accounted as one of the days of his life. But the day on which a writ is served is not computed as one of the fourteen, or thirty, in case of court writs, nor one of the seven, in case of justices' writs. In these instances, by excluding the day of service, the day on which the writ is returnable is computed; and there being in such cases no fraction of a day, the whole of that day is computed; and thus the term of fourteen, thirty and seven days, is complete. According to some cases, where the computation is from an act done, the day on which it is done is to be included: otherwise, when "from the day of the date." *The King v. Adderly Dougl.* 463. *Castle v. Burditt* 3 *D. & E.* 623, 624. 1 *Ld. Raym.* 650. *Clayton's case* 5 *Co.* 1. *Cro. Jac.* 135. *Salk.* 625, 658. So when goods are to be kept five days, the day of taking is to be counted as one. 1 *H. Bl.* 14. But the day of the date is excluded in writs of protection, and in

the enrolment of deeds within six months. *Norris v. Gawtry Hob.* 139. *Dyer* 218. In putting in bail, when judgment is on Monday, four days include all Friday. 4 *D. & E.* 121. But if on Monday a party has four days to plead in abatement, he must plead by Thursday night. 3 *D. & E.* 642. Again if a robbery is committed *October* 9, the year will end *October* 8, for the day of the robbery is part of the year. *Norris v. Gawtry, supra.* With us, the day on which an execution issues is excluded, in computing the three months, within which it is made returnable; thus if it is dated *January* 1, it is returnable *April* 1. And in estimating the four days, during which an officer is to keep goods seized on execution, the day of seizure is excluded. In *Brown v. Maine Bank* 11 *Mass.* 153, the day on which judgment is rendered is excluded in computing the thirty days during which an attachment of property is continued in force. But it is not necessary in the decision of this cause to cover so broad a ground, as we probably might, for the reasons we have above assigned. Estoppels are by no means the favorites of the law, as they tend to exclude the truth of the case; and we are therefore not inclined to create and give effect to one by construction. The legislature must have intended that the town notified should have two whole months in which to answer such notice; but on the plaintiffs' construction, if the notice had been given to *China* at eleven o'clock on the evening of *October* 20, the defendants would not have had two months, unless an answer on the 20th of *December*, can be considered as seasonable. If we go no further, we ought, at least, in order to avoid the effect of an estoppel, or save a forfeiture, to give a liberal construction; and such we are disposed to give in the case before us. We perceive that the Supreme Judicial Court of Massachusetts have adopted a similar principle, in *Bigelow v. Wilson* 1 *Pick.* 458, in which case the court took a view of the contradictory decisions on the subject, and decided that the day on which a deed of an equity of redemption was executed by the officer who sold it, was to be excluded, in computing the year within which it was by law redeemable. The language of the statute in that case, as to the right of redemption, is similar to that used in the statute of 1821;

in the former case it is " within one year from the time of giving such deed;" and in the latter case " within two months," &c. as before stated. This is a case directly in point ; and it seems to us to rest on a solid foundation. A similar construction was adopted by the Supreme Court in Pennsylvania in the case of *Sims v. Hampton* 1 *Serg. & Rawl.* 411. The words of the statute on which the question arose are,—" shall enter such appeal with the prothonotary of the proper county within twenty days after the entry of the award of the arbitrators on his docket." The court decided that in computing the twenty days ; the day on which such entry was made should be excluded ; observing that the party dissatisfied should be allowed the full period of twenty days. Respecting the second point, there can be no question as to the correctness of the instructions, under which the presiding judge submitted all the facts in relation to it to the determination of the jury. It was a mere matter of evidence, and exclusively within their province, whether supplies had been furnished by the town of *China* to the pauper, as such, within one year next before the 21st of *March* 1821, so as to bring the case of the pauper within the exception in the statute ; and this point the jury have settled in favor of *China*. We perceive no ground for a new trial, and there must be

Judgment on the verdict.

SEAVER *vs.* DINGLEY.

The *Stat.* 1821, *ch.* 80, has so far altered the common law, that an action of replevin may be maintained for goods unlawfully detained, though the original taking was lawful.

In replevin of goods, the original taking of which by the defendant was lawful, if he plead property in himself, it is not necessary for the plaintiff to prove a demand of the goods previous to suing out the writ of replevin.

Nor is a previous demand of the goods necessary, where the original taking was tortious.

In order to entitle the seller of goods to vacate the sale, and reclaim the goods on the ground of fraud, it is not necessary that the fraudulent representations be made at the time of sale; as in case of a warranty, which is part of the contract of sale;—but it is sufficient if the goods be obtained by the influence and means of false and fraudulent representations, though they were made on a previous occasion.

THIS was an action of replevin for goods and merchandize detained in the town of *Gardiner*; and was tried before *Weston J.* upon the issue of property in the defendant.

It was proved by the plaintiff that on the 9th day of *July* 1824, one *Reed* applied to the house of *Bartels & Baker* in *Portland*, to purchase of them a quantity of goods on credit; producing at the same time two recommendations, speaking well of him as an active and capable man, but saying nothing of his property; and that he also referred them to *Gen. McLellan* of *Bath*, then in *Portland*, who spoke of him as a smart, active man. It was also proved that *Reed* falsely stated to *Bartels & Baker* that he owned one or two farms and a clapboard machine in the town of *Clinton*, where he resided, which were free of incumbrance;—that he had a considerable quantity of lumber, and other personal property;—that he was not in debt more than one hundred dollars, and had other means of paying for the goods he wished to purchase, than the proceeds of their sale. *Bartels & Baker*, confiding in these assurances respecting his property, were thereby induced to give *Reed* credit for goods to the amount of $862, taking his promissory note for that amount, payable in six months. *Reed* then went to *Attwood, Cram & Co.* of whom he obtained goods upon the same false statements. On the same day he

went to the plantiff's store, where he stated to the chief clerk the same falsehoods, adding that he had obtained credit of *Bartels & Baker*, and of *Attwood, Cram & Co.* and wished to purchase on the same terms of the plaintiff; and upon those representations, and reference to the merchants before named, the plaintiff's clerk delivered to him goods to the value of $460 on his promissory note at six months.

The counsel for the defendant objected to this evidence, on the ground that the goods in question in this suit were no part of that purchase; but were bought of the plaintiff by *Reed* in *August* following, on a credit of six months. But the judge overruled the objection.

It was then proved that *Reed* was insolvent, at the time of the false representations before stated; that his real estate and clapboard machine were incumbered with mortgages; that a part of what he still occupied and improved had been sold by him, and that he was also much involved by other debts, which were secured by mortgage; that he had frequently been sued; and that his credit was not good.

Soon after the sale on the 9th of *July*, by the plaintiff's clerk to *Reed*, the plaintiff was made acquainted with what had been transacted by his clerk, and with the representations and facts on which he made the sale; at which he expressed no dissatisfaction. On the 4th of *August* 1824, *Reed* applied to the plaintiff personally for more goods to make up his assortment, on the same terms; and being introduced by the principal clerk as the person who had made the previous purchase, the plaintiff sold him goods to the amount of $640, taking his note, on the credit desired. On the 18th of *August*, *Reed* again applied to the same clerk in the absence of the plaintiff, for a further supply of goods on the same credit; stating that his business had been good; that he had sold his goods faster than he expected, and had been obliged to sell them on credit; that he had sold to the amount of a thousand dollars in one week; that his sales had been to very good profit; and that he intended to make a payment to the plaintiff of $400 before he left town. Upon these representations he obtained the goods which are replevied in this suit, to the

amount of $437, on a credit of six months. After these goods were selected and laid out, the chief clerk, being about to leave the store, instructed the assistant clerk not to take *Reed's* note for the goods, but to charge them in account ; but on this being afterwards suggested to *Reed*, he declined taking them in that manner; insisting that the purchase was on a credit of six months, and that if they were charged in account, the plaintiff might attach his property for the amount forthwith. Accordingly, upon the return of the chief clerk he assented to the credit proposed, and took *Reed's* note for the amount ; he paying only fifty dollars, instead of the four hundred he had promised. *Reed* received the goods, and shipped them for the *Kennebec*; and on their arrival at *Gardiner*, on the 20th of *August*, they were taken into custody by the defendant, by virtue of an order from *Reed*.

It further appeared that on the day and night of the 18th of *August*, while *Reed* was in *Portland*, his creditors entered his store at *Clinton*, and attached all the property there. While the officer was attaching the property, *Dingley* came with a writ of attachment in trover in his own name, against *Reed*, and requested the officer to make service of it ; but he attached nothing but part of a clapboard machine. It also appeared that *Dingley* arrived at *Reed's* store, which was five miles from his own residence, about sunset ; that an officer was then about the store ; in which there were goods of the estimated value of 1700 dollars ; that when *Dingley* arrived there, attachments had been made to secure debts amounting to less than three hundred dollars ; that he remained there all that night, during which the store was opened with his knowledge, and further attachments made ; that in the course of the night, and the next day, the residue of the goods were delivered by *Reed's* clerk, in payment of sundry debts; that *Dingley* declared to the officer to whom he gave his writ, that he had satisfied *Reed* and his clerk that the property might as well come into his hands, as go to other creditors; that he supposed that *Reed* had gone to *Portland* to get more goods ; and that if he was not able to get property in *Clinton*, he should take another writ and go towards *Portland*.

On the morning of *August* 19th, *Dingley* and his brother sat off for *Portland* to find *Reed* ; whom they met at *Richmond*, and re-

turned with him to *Gardiner*; where they requested him to secure the defendant in the sum which he claimed to be due, and which *Reed* declined, wishing the goods at *Portland* again, that he might return them. *Dingley* replied that if he would not secure him by the goods, he would go down to *Swan Island*, or *Bath*, or wherever they might be found, and attach them. The parties then retired into a private room, and after some conversation called a witness to their agreement, that *Reed* should sell to the defendant all his goods on board the vessel at *Gardiner*, amounting to 1500 dollars; that the defendant claimed of him 1200 dollars as a debt then due, the precise amount of which he could not then ascertain, for want of his papers; that upon a future adjustment of their dealings, the balance that might be found due to *Reed* should be paid to him by a reconveyance of real estate which he had before conveyed to *Dingley* as security for debts due to him; but no receipt, obligation, or writing had passed between them at the time of that conveyance. Hereupon *Reed* made bills of sale of the goods, and gave to *Dingley* an order on the master of the vessel, by virtue of which he received and stored them at *Gardiner*, on their arrival.

One witness testified that he had been formerly solicited by *Reed* to assume the same responsibility, as his surety, which *Dingley* afterwards assumed, and to take the same security for his indemnity; and that *Dingley*, in a conversation with the witness upon that subject, in *July* 1824, acknowledged that he was fully secured for a liability he had assumed to *Benjamin Brown*, for six hundred dollars; and that *Reed* since he commenced trading, which was but a few days before, had paid him off what he owed him on other accounts. It also appeared that *Reed* had deposited with *Dingley* about half the goods he had purchased of the plaintiff on the fourth of *August*; and that he gave him a bill of sale of those goods, bearing date *Aug.* 12, in which they were valued at $572, 35; but the defendant offered no proof of payment for them.

It further appeared that on the 25th day of *August* the plaintiff's agent, being sent to *Clinton*, stopped at the defendant's store in *Winslow*, and asked him if he had any goods of *Reed's* in his possession; to which he replied in the negative. On being further

asked whether he had in his possession any goods which *Reed* had purchased of the plaintiff, he said he had no goods of *Reed's*, nor any which ever had been his, or which he had obtained in *Portland*, except a cask or two of spirits which he pointed out, then on tap. The agent, having obtained permission to search his store, then proceeded to the chamber, where he found a large proportion of the goods which *Reed* bought of the plaintiff on the fourth of *August*, packed in the same boxes, and claimed by the defendant as his own; though he had just before assured the agent that the chamber contained nothing but empty casks and boxes. The writ in this case was issued on the 24th day of *August*; on which day the replevin bond bears date; and the plaintiff's agent was accompanied by the officer who had received the writ for service. The defendant was fully informed on the 25th of *August* that the plaintiff was in pursuit of the goods which *Reed* had obtained of him; and that his inquiries were not limited to any particular purchase. No other demand was made of the goods replevied, than appears in the foregoing transactions. The officer's return was dated *Oct.* 13; that being the day on which he served the defendant with a copy of the writ.

When *Dingley* received the goods at *Gardiner* from the master of the vessel, he desired the master to keep it secret from any one who might apply for information; and he requested the keeper of the store where they were deposited to deny that he had any goods in his store belonging either to him or to *Reed*; observing that he expected officers from *Hallowell and Augusta* in quest of the goods. He also obliterated *Reed's* name from the casks and packages, substituting his own.

It further appeared that prior to *July* 9, 1824, *Dingley* had paid or was liable to pay $600 to *Benjamin Brown* for *Reed*;—that he had received from *Reed*, as part security, a deed of some real estate, which had before been incumbered; and other property to secure the balance;—and that after the sale of the goods to him at *Gardiner* he, at *Reed's* request, transferred to *Bartels & Baker* all his right in the real estate which had been conveyed to himself.

The counsel for the defendant contended—*first*, that the false representations, made on the 9th of *July*, ought not to have been

received as evidence of fraud on the 18th of *August* following; and that the plaintiff having given credit to *Reed* on the 4th, and again on the 18th of *August*, without any repetition of the assertions made on the 9th of *July*, the jury ought to be instructed that no fraud was committed on the 18th of *August*. Upon this point the judge instructed the jury that if they were satisfied that *Reed* obtained the goods now in question, on the 18th of *August*, by reason of the false representations made by him on the 9th of *July* preceding; and that the plaintiff, or his clerk, was not then undeceived with respect to his situation; the plaintiff, as between him and *Reed*, by reason of the continued fraud practised on him, had a right to vacate the contract of sale, and reclaim the property. But that if it appeared to them that the plaintiff, or his clerk, was then undeceived, and elected, notwithstanding, to give *Reed* a credit, in the hope of getting payment, he could not prevail in this action. And the jury were further instructed, that the plaintiff had the same right, by law, to reclaim the property against *Dingley*, that he had against *Reed*; unless it appeared that the former had purchased them *bona fide*, of the latter, or had attached them for a debt or debts which had accrued subsequent to *Reed's* purchase.

Secondly. It was contended that the goods not having been replevied until the 13th of *October*, the contract was not attempted to be rescinded within a reasonable time; and that by the delay of the plaintiff, the sale was by law confirmed. But the judge instructed the jury that the plaintiff had not forfeited his rights by any delay apparent in the case.

Thirdly. It was objected that the goods were not demanded of the defendant before they were replevied; and that therefore the action could not be maintained. But this objection the judge overruled.

Fourthly. It was insisted that all the evidence relating to the sale of the goods by *Reed* to *Dingley* on the 12th of *August*, and the evidence of what was said and done at the store of the latter on the 24th of *August*, when the goods were replevied, ought not to be received by the court. But the judge admitted this evidence, as tending to shew that the connection between

Reed and *Dingley* was collusive and fraudulent against the plaintiff and others, who had been deceived by *Reed*.

Fifthly. It was contended that *Dingley* having been summoned as the trustee of *Reed*, at the suit of *Brown & Humphries*, before the goods in this case were replevied, and while they were in *Dingley's* possession, he must be adjudged trustee in that action, and therefore is entitled to retain the goods. But the judge instructed the jury otherwise ; more especially as it appeared that the debt of *Brown & Humphries*, upon which their action was instituted, accrued prior to the time when *Reed* obtained the goods in question.

A verdict was thereupon returned for the plaintiff ; which was taken subject to the opinion of the court upon the points raised at the trial.

Boutelle, for the defendant, contended that no proof of false declarations was admissible in evidence, unless they were made at the time of sale ; 2 *Com. on Contr.* 264, 5 ; which, in the present case, was not the fact. If the plaintiff was deceived on the ninth of *July*, he had opportunity to ascertain the truth, before the sale of the goods in *August*. If he neglected this, both the fault and its consequences are his own.

2. The plaintiff, if he was defrauded, has lost his lien on the goods by delay. He should have rescinded the contract, and pursued his remedy, forthwith ; but here was a lapse of fifty six days, before the replevin, which was too late. *Gloucester Bank v. Salem Bank*, 17 *Mass.* 33. *Buffinton v. Gerrish* 15 *Mass.* 156. *Marston v. Baldwin* 17 *Mass.* 606.

3. Here was no demand of the goods. Replevin lies only where trover would lie, for an unlawful detention. 5 *Mass.* 280. The original sale was not void, but voidable merely, and this only against *Reed*. But the defendant, without notice of any fraud, was the innocent bailee of the goods in pledge to secure him against his liability to *Brown*. Hence his possession was lawful, at least until the goods were formally demanded, upon notice of the fraud. 5 *D. & E.* 175. *Badger v. Phinney* 15 *Mass.* 359. *Baker v. Fales* 16 *Mass.* 147.

4. Any evidence, except as to the goods in dispute, was irrelevant and improper. All the exceptions to this rule apply to previous, and not to subsequent transactions ; and this only for the purpose of ascertaining motives. 1 *Phil. Ev.* 139. To admit evidence of other acts, is to surprise the party with testimony which he cannot be supposed to be prepared to meet.

5. He contended that the service of the trustee process operated an attachment of the goods, and fixed the rights of the parties ; entitling the defendant to hold them, until his liability was discharged. 1 *Mass.* 117. *Bissel v. Briggs* 9 *Mass.* 480. 11 *Mass.* 264. 490. *Burlinghame v. Bell* 16 *Mass.* 318.

Allen and *Sprague*, for the plaintiffs, replied to the first objection, that the evidence was admissible to shew a fraudulent purpose in *Reed*. Had the action been in *assumpsit*, against him, for false affirmation in the sale of goods, the objection would have force. But it is rather in the nature of case for deceit, in which the proof is not restricted to the time of sale. Yet if it were so, here is evidence of false representations at that time, in the statement that he had sold out his previous purchases, at a good profit, in the ordinary course of trade.

2. If there is a period when the owner of goods thus defrauded must pursue the wrong doer or lose his remedy, it cannot be said to commence before he has knowledge of the fraud. But in the present case the defendant himself was confederate with the cheat, in concealing the goods, obliterating the marks, falsely declaring that he had none of them ; and endeavoring to persuade the store keeper at *Gardiner* to become a party to the same iniquity. The plaintiff replevied the goods as soon as the place of their concealment was discovered.

3. No demand was necessary to be proved, the issue being the naked question of property. If it were otherwise, the case shews a sufficient demand, in the plaintiff's inquiry after the goods, and the defendant's denial that he had any which ever belonged to *Reed*. *Baker v. Fales* 16 *Mass.* 151. The question of a lien in favor of the defendant was not raised at the trial ; nor is it open upon the pleadings ; in which the defendant claims the

absolute property in the goods, and not merely a right, *sub modo*, to retain them. But it is manifest that here was no lien, it having been discharged by the previous delivery of other goods at *Winslow*.

4. As to the trustee process, the defendant cannot be adjudged the trustee of *Reed*, if the finding of the jury in the present case is true ; for it shews that the goods in question were never the property, either of *Reed*, or of the defendant.

Orr, in reply, argued that fraud, to vitiate a contract, must be such as was indictable, involving the intent to cheat the party out of his property, by false tokens and representations, out of the reach of detection by the party injured. A naked falsehood is not sufficient ; much less a merely colored statement of the buyer's circumstances, which he has made himself believe to be true.

There being no evidence of indictable fraud, the case stands upon the ground of false affirmation made at the time of sale. But where one is thus defrauded, it is well settled that before he can rescind the contract and reclaim the goods, he should restore all which he has received, and demand his property. But here he has done neither. In felony it is otherwise ; for there the property is not changed. In fraud, the contract is only voidable ; and if the party would avoid it, he must make his election in reasonable time. Here he was alarmed on the 18th of *August*, and put upon his guard ; yet he afterwards ratified the contract, taking a note at six months for the price.

MELLEN C. J. delivered the opinion of the court, at the ensuing term in *Somerset*.

By the report of the judge, the following facts appear. 1. The jury, under his instructions, have decided that the goods replevied, were purchased by *Reed*, of the plaintiff, on the 18th day of *August* 1824, upon a credit of six months ; and that they were so purchased and obtained by means of the false representations made by said *Reed*, on the 9th of *July* preceding;

(at which time he had obtained other goods of the plaintiff in the same manner;) and that at the time of this last purchase, the plaintiff acted under the continued influence of those false representations, not having been undeceived as to their falsehood. 2. That though *Dingley*, a few days afterwards, at *Gardiner*, took possession of said goods under the name of a purchase of them, and received a bill of sale of them from *Reed*; yet that the above transaction was not a *bona fide* sale. 3. That the writ in this action was issued on the 24th of *August* 1824 ; that the replevin bond bore the same date ; and the officer's return of service on the defendant by leaving a copy of the writ, bears date *October* 13, 1824. 4. That the facts relied on as shewing a demand of the goods, took place on the 25th of *August*. 5. That the issue joined was upon the question of property. One or two other circumstances will be noticed and considered hereafter. On these facts, the question is whether the decisions and instructions of the presiding judge were correct, or in other words, whether the action is by law maintainable.

The case presents several points, which, in their nature, are preliminary to the consideration of the merits. 1. Is it essential to the maintenance of an action of replevin, that the plaintiff should prove a tortious or unlawful taking of the goods replevied ? 2. If not, is it not necessary for him to prove an unlawful detention of them ? 3. If so, do the facts in this case taken in connection with the declaration and plea, furnish proof of such detention ?

As to the first point. This has been a subject of much inquiry and learned investigation, in the case of *Badger v. Phinney*, 15 *Mass.* 359 ; and again in *Baker & al. v. Fales* 16 *Mass.* 147 ; and we presume that all or most of the common law principles and authorities are there collected and examined. As those volumes are in the hands of every lawyer, we refer to those cases ; instead of going through a critical examination of them here, and stating their import and bearing. The court, in both those causes, after mature consideration, decided, that whatever might be the strict principles of the common law, the statute of 1789, of which our statute of 1821, *ch.* 80, is a transcript, had so altered the common law, that an action of replevin may be maintained in case of

an unlawful detention, though the taking was not tortious and unlawful. As by these decisions the law was settled in the Commonwealth of Massachusetts, while Maine was a portion of it, we are not disposed to disturb or question them, even if we entertained doubts as to their correctness.

As to the second point, there seems to be no reason for hesitation. A part of the charge or declaration in a writ of replevin is that the defendant "unlawfully detains" the goods; and the two decisions before mentioned were founded on this principle; and so in fact, are all our actions of replevin; for, unless in case of detention, a suit would not be necessary, even where there had been a tortious taking. This point has been stated and the question answered, not because involved in any doubt; but merely as introductory to the third point; and this demands a particular examination; for if it must be answered in the negative, it must also defeat the present action. What then, is the true answer? What constitutes an "unlawful detention?" If goods are taken unlawfully, the detention of them is unlawful. As in an action of trover, if the goods were taken illegally, it is a conversion and a demand of the property is not necessary before the commencement of the action; but if the defendant came lawfully into possession of the goods, an action cannot be maintained until after demand and refusal, which are evidence of a conversion. For the same reason no action of replevin will lie for goods, of which the defendant lawfully obtained the possession, until after a demand. From that time the detention is unlawful, and the case comes within the language of the writ of replevin. But it is not necessary in an action of trover to state in the declaration a demand and refusal; it is matter of proof on the general issue, if such proof is necessary. It is implied and contained in the allegation that the defendant unlawfully converted the goods to his own use. Our statute of 1821, *ch.* 63, prescribes the form of a writ of replevin; and, as before stated, the charge or averment in the declaration is general—that the defendant unlawfully detained (the goods) "to this day;" which averment must be considered as containing, by implication, those facts necessary to render such detention unlawful. In *Buffington & al. v. Gerrish & al.*

15 *Mass.* 156, and in *Cross v. Peters* 1 *Greenl.* 376; both cases of rescinded contract on the alleged ground of fraud by the purchasers, it does not appear whether there was any previous demand or not; no question was raised about it. In the case of *Baker & al. v. Fales*, the writ, as usual, charged the defendant with having, "unlawfully and without any justifiable cause taken the goods, &c. and them unlawfully detained." The defendant pleaded in abatement, that the goods came lawfully into his possession; but did not deny the unlawful detention alleged in the writ; and the case, of course, is silent on this point. In *Badger v. Phinney*, the issue was on the property; and in that case a demand was proved before what was considered as the commencement of the action; though afterwards in *Baker & al. v. Fales*, the court say that the facts in *Badger v. Phinney*, "would have "warranted a decision for the plaintiff,on the ground of the orig-"inal tortious taking under colour of a purchase which was fraud-"ulent." In the present case the plaintiff, in his writ, makes the allegations required by statute; as to his own property in the goods, and the unlawful detention of them by *Dingley*; and the defendant pleads in bar of the action property in himself; thus waiving all objection as to the regularity of the proceedings on the part of the plaintiff; not denying that he took and detained the goods; but denying that he did either unlawfully; because, as he stated in his plea, the goods were his own. But the jury have decided that the goods were not his; but that his obtainment, possession and detention of them were all fraudulent. As by the plea of *non cepit*, the question of property is not in issue. 1 *Chitty's Pl.* 490; so, by his plea of property in himself, he did not deny the plaintiff's right to recover the goods, if they, by law,belonged to him,and as the jury have by their finding decided that fact in favor of the plaintiff, we are well satisfied that the defendant cannot now be received to urge the want of a previous demand of the goods, as an objection to the verdict. We do not perceive why a defendant in replevin, who has no merits, and pretends to none, might not plead in abatement, that the goods replevied came lawfully into his possession, and that he did not unlawfully detain them; or he might be more particular, and say that no demand

for the goods had ever been made upon him previous to the commencement of the action.

But there is another point of view in which this preliminary question may be considered. Did the goods replevied ever come lawfully into the possession of *Dingley*. The jury have decided that they were delivered by the plaintiff to *Reed* ; but they have also decided that the delivery was obtained by means of the fraud and falsehood of *Reed*; and that by fraudulent management, *Dingley* procured the goods, and the possession of them from *Reed*. The stream, in every part of it, is poisoned. Can the law pronounce a sale and delivery of goods as fraudulent and void, and allow the vendor at once to rescind it ; and at the same time, say that such delivery and subsequent possession are lawful ? As has been before stated, the court in *Baker & al. v. Fales* say that, a taking under color of a fraudulent purchase, may well be considered as tortious. Reasoning from analogy, we should be conducted to this conclusion. It is a principle of criminal law, perfectly familiar in our courts of justice, that if a person, on contract of hire, obtains the delivery and possession of a horse and chaise from the owner, but with a secret, fraudulent, and felonious intent at the time of hiring, and afterwards runs away with them, this is larceny ; notwithstanding the possession was obtained by the consent of the owner. Can it be that those facts which constitute an infamous crime, in the one case, and subject the offender to punishment in a dungeon, should in the other, constitute a legal defence in a civil action, and ensure him a verdict in his favor ? This would seem to be a blemish upon the purity, and a reproach upon the impartiality of the law, neither of which it deserves. Viewing the question immediately under consideration, in the several lights in which we have considered it, we are of opinion that this action is legally maintainable without any previous demand of the goods replevied ; and of course it is not necessary for us to examine the facts, which have been reported with a view of shewing such demand, or what could be deemed equivalent. Having thus disposed of this preliminary objection, we now proceed to the consideration of those which have been made to the decisions and instructions of the judge, touching the merits of the cause.

The objection that this action was prematurely commenced, cannot be maintained. A fraudulent sale is voidable ; it changes no property, if the vendor, on discovery and proof of the fraud, rescinds the contract, or treats it as a nullity ; and though this is done within the term of credit given, it makes no difference. This same objection was taken and overruled by the court in the above cited case of *Buffington & al. v. Gerrish & al.*

The first instruction of the judge given to the jury, of which the defendant complains, is that which relates to the effect of the false representations made to the plaintiff on the 9th day of *July* preceding, several weeks before the purchase of the goods in question. But upon examination of those instructions, they appear so distinct and guarded as that they could not mislead. He instructed them that if the goods now in dispute were obtained by *Reed* on the 18th of *August*, by reason of the false representations made on the 9th of *July*, and the plaintiff was not then undeceived, nor his clerk, as to the situation of *Reed*; the plaintiff had a right to vacate the contract as between him and *Reed*, by reason of the continued fraud practised on him. The simple question was whether the goods were fraudulently obtained ; not how many days or weeks after the falsehood and fraud were practised on the plaintiff. We perceive nothing incorrect in this direction. The following direction is equally unexceptionable; which was that unless *Dingley* was proved to their satisfaction to have fairly and *bona fide* purchased the goods of *Reed*, the plaintiff's right to vacate the contract was as good and perfect against him as against *Reed*. The defendant's counsel has compared a false and fraudulent representation to a warranty ; which, to be binding, must be made at the time of the sale, or upon the sale. Such is the law as to a warranty, because it is a part of the contract of sale ; but the false and fraudulent representations by means of which a man gains an undeserved credit, and obtains possession of property under the name and colour of a purchase, must from the nature of the thing precede the sale, because the sale is made in consequence of them. The time of the false and fraudulent representation is not of so much importance ; the main question always is, were the credit and the possession of the property ob-

tained by means of the fraud and falsehood; whether at the moment they were practised, or under their continued influence upon the deceived owner of the property?

The second instruction to the jury, and overruling the objection of the defendant, was, that the plaintiff had not forfeited his right to reclaim the goods by his delay. The objection to this is answered by the fact, that only six days after the sale, the plaintiff purchased his writ of replevin and prepared the proper bond; and by virtue of this writ the goods were replevied as soon as they were afterwards found at *Gardiner*, viz. on the 13th of *October* following. This objection must fail. The third objection related to the want of proof of a demand, but this point we have already considered.

The fourth objection stated in the report is, that the judge admitted proof of conversations between *Reed* and *Dingley*, as to the sale of goods, on the 12th of *August*; and also proof of conduct and conversation between the plaintiff's clerk and *Dingley*, on the 24th of *August*. The answer to these objections is very plain; those conversations were the declarations or confessions of the defendant, and so far, were certainly admissible; and although one of those conversations related to a sale of goods, other than those in question in this case; yet as such conversation had a tendency to show, and was offered for the purpose of showing, a collusive understanding between *Reed* and *Dingley*, as to the purchase of goods, we think the evidence was properly admitted. The conversation was only a few days before the fraud was practised on the plaintiff. It is always proper in the trial of an indictment against a person for passing counterfeit money, particularly described in the indictment, to offer proof that the defendant, about the same time, was in possession of, or passed, other counterfeit money though, not charged in the indictment, for the purpose of shewing a *scienter* and criminal intention on the part of the accused.

The fifth and last instruction of the judge complained of, relates to the trustee process. It was contended that as that process was instituted before the commencement of the present action, it ought to be considered as a bar to it. It is difficult to per-

ceive how the question of property, which was the only one in trial before the jury, could possibly be affected by the pendency of the trustee action. But if, by any form of pleading, the question had been brought before us, as to the effect of that process on this action, the answer to the defendant's objection is very plain and obvious. As it now appears by the verdict of the jury that the property of the goods replevied is in the plaintiff; it is very clear that he has no interest in the question whether *Dingley* is the trustee of *Reed* or not; nor can he be affected by the decision of that cause whatever it may be. If *Dingley* stood indebted to *Reed* on account, or otherwise, except on a negotiable security, at the time of the service of the trustee process, he will be adjudged trustee. But if the object of the plaintiffs in that action is to charge him as trustee in virtue of having the goods in possession then, which are now the subject of this suit, he may disclose the fact, that the verdict and judgment in this action have established the property of those goods to be, and to have been, in the plaintiff *Seaver*; and then he must, of course, be discharged. But, it is unnecessary to pursue this idea any further.

It has been further urged in the argument that the defendant had a lien on the property, which, as pawnee, he had a legal right to maintain, notwithstanding the circumstances under which it was procured by *Reed*; and some authorities have been relied on in support of this position; but the position itself is not sustained by the facts of the case. The bill of sale to *Dingley* was absolute, and he always claimed the property as owner, and in no other character, and the jury have decided against his claim, and by their verdict, involved him in the consequences of *Reed's* fraud, equally with *Reed* himself.

On view of all the facts of the case, the court are of opinion that the law is clearly with the plaintiff; and accordingly there must be

Judgment on the verdict.

Axtell *vs.* Coombs & al.

In proceedings under the statutes respecting damages for flowing lands, the respondent may plead any matter shewing sufficient cause why further proceedings should not be had; though such plea be not enumerated in the statutes. And if such plea is in its nature preliminary to the appraisement of damages by the commissioners, it will be tried at the bar of the court, previous to the issuing of the warrant.

If the plea in such case involves matter triable by the jury, with other matter cognizable only by the commissioners, the finding, as to this latter part, will be rejected as surplusage.

In this case, which was a complaint for flowing lands of the complainant, the respondents pleaded in bar that the land "had not been flowed and rendered of no value and use to the complainant" by reason of their mill-dam; on which issue was taken to the country; and the jury found that the lands had been so flowed and *rendered of no value and use*, &c. Hereupon the respondents moved that the verdict be set aside, because the issue made up and tried by the jury was not authorised by the statutes on which this process is founded; because the jury had undertaken to determine the extent of the injury done to the land, which was a question to be decided wholly by commissioners to be appointed by the court; or by a jury to be afterwards empannelled for that purpose; and because the verdict precluded the commissioners from making a report that the complainant had sustained no damage, if such should be their opinion.

Orr and *Boutelle*, in support of the motion, contended that as the proceedings were altogether of statute creation, no issues could be formed to the jury, except such as were enumerated in the statute; and the issue made up in this case not being of that description, it was a mistrial. 3 *Mass.* 184. 6 *Mass.* 398. The question of damage belonged wholly to the commissioners.

Bond and *R. Williams*, for the complainant, replied that the enumeration of certain issues in the statute, did not exclude any others which might be pertinent to the case, or necessary to elu-

cidate its merits. The respondent must of course be entitled to shew any legal cause why a warrant should not issue to appraise the damages; and to have the fact tried by a jury. As to the immateriality of the issue, it is not for the respondent to make the objection. 2 *Saund.* 317, *note.* 1 *Chitty's Pl.* 634. *Doug.* 396.

WESTON J. delivered the opinion of the court.

By the second section of the statute of Massachusetts of 1797, *ch.* 63, being an act in addition to an act for the support and regulation of mills, it is provided that the party charged by the complaint may, by his plea, dispute the statement made by the complainant, and issue being joined thereon, the same is to be tried by a jury at the bar of the court, if it be an issue of fact; but if of law, by the court themselves. Under this statute, *Parsons C. J.* says, in delivering the opinion of the court, in *Lowell v. Spring* 6 *Mass.* 398, that the respondent may deny that he is the owner of the dam, which may have occasioned the flowing. It would doubtless under this statute have been equally competent for the respondent to deny, that any flowing was caused by the dam.

By the second section, *ch.* 45, of the revised statutes of this State, which provides for the regulation of mills, the party charged in the character of owner or occupant of the mill, is to be notified to appear and show cause, if any he has, why a warrant should not issue in the manner, and for the purposes, prayed for in the complaint. The third section provides for the trial of an issue, if of fact, by a jury at the bar of the court; or if of law, by the court themselves; which may be joined upon a plea of the respondent, denying the title of the complainant to the lands alleged to have been flowed, or claiming a right to flow such lands, without payment of damages, or for an agreed composition. This second section is a re-enactment of the second section of the statute of Massachusetts before cited, omitting the specification of a plea, in which the respondent may dispute the statement made by the complainant. The fourth section of the revised statute provided that, if the owner or occupant of the mill shall

not appear, or appearing shall not show sufficient cause, the court may issue a warrant to the sheriff, or his deputy, to empannel a jury, who "shall be sworn to make a true and faithful appraisement of the yearly damages done to the complainant, by so flowing his lands, and how far the same may be necessary." And if such jury find that "no damage is done to the complainant by flowing his land, as aforesaid, the respondent shall recover his costs." By the additional act of *February*, 1824, *ch.* 261, the fourth and fifth sections of the revised statute of this State, before cited, are repealed ; and, as a substitute, it is by the additional act provided "that if any owner or occupant of a mill, being notified as directed in the second section of the act, to which this is in addition, shall not appear, or appearing shall not show sufficient cause, the court, in which the complaint therein mentioned may be pending, may appoint three or more disinterested freeholders of the same county, to make true and faithful appraisement, under oath, of the yearly damages, if any, by flowing his said lands, and how far the same may be necessary."

By the statutes of this State, both in the trial by the sheriff's jury, and in the examination afterwards substituted by commissioners, two facts are taken for granted ; that the party charged is the owner and occupant of the mill; and that the complainant's lands are flowed by reason of the dam, appertaining to such mill. These facts therefore, are not made the subjects of their inquiry. If then the pleas, specified in the third section of the revised statute of Maine, are the only ones which the party charged can be allowed to plead, he may have a just defence, and yet be altogether precluded from making it ; which the legislature could certainly never have intended. The pleas stated in the third section, cannot be considered as designed to exclude others, which show the complaint unfounded, and which are not subjected to the examination of the commissioners.

The respondent is notified to show cause why the court should not proceed to the appointment of commissioners, to ascertain the extent of the injury, in conformity with the statute ; which is to be done only, if no sufficient cause be shown against it. Any

plea, showing that the process ought to abate, as coverture, for instance, on the part of the respondent, would be a sufficient cause. So the respondent might, by demurrer, object to the complaint, as insufficient in law on the face of it, to charge him. Or he might plead that he was not the owner or occupant of the mill and dam, as averred in the complaint, by which the injury was occasioned ; or that the lands of the complainant were not flowed by reason of the dam. Either of these pleas would show sufficient cause why further proceedings should not be had; and they are in their nature preliminary to the appraisement to be made by the commissioners.

Whether the flowing of land at a distance from the dam, is or is not occasioned by it, may often be a nice question, as it was in the present case. If it could easily be determined by a view, that might best be made by the commissioners ; although, as before stated, their proceedings are predicated upon the assumption of the fact, that the complainant's lands are flowed by the respondent's dam. The precise fall of water, from one point to another, at a distance, can be ascertained only by accurate instruments, adapted to the purpose, in the hands of those, who are skilful in the use of them. And when that is known, what influence a dam may have upon the waters of a stream above, or of the larger collections from which it flows, is not always, it is believed, a question of very easy solution ; or one of mere calculation, upon any well ascertained principles of science. The best evidence upon this point would arise from proof of the state of the waters prior and subsequent to its erection ; making proper allowance for the difference of seasons. And from this comparison, especially if proved by those who had made accurate observations for a succession of years, a jury might be enabled to come to a satisfactory result ; taking care, as they ought to do, the burthen of proof being on the complainant, not to find for him upon this point, unless the fact be made out clearly, and beyond reasonable doubt.

That the complainant's land is flowed by the respondent's dam, is the very *gravamen* or injury complained of ; the respondent must therefore be received to deny this fact, and if he do, the

complainant must be holden to prove it. No provision having been made for the trial of this question by the commissioners; if tried at all, it must be, as other issues of fact are, by a jury at the bar of the court.

The averment that the complainant's land has been flowed by the respondent's dam, is established by the verdict of the jury. Had they found otherwise, the complaint could not have been sustained ; and the respondent would have been entitled to judgment. Notwithstanding the parties have, by their pleadings, submitted to the jury, and they have found matter, which is the proper subject of consideration for the commissioners, namely that the complainant's land is rendered of no value, by reason of the flowing ; yet we may regard this part of their verdict as surplusage, and consider it as conclusive only upon the fact of flowing.

The motion to set aside the verdict is overruled, and three disinterested freeholders within the county are to be appointed to examine, appraise, and report, according to the provisions of the statute.

RANDALL, *libellant*, *vs.* RANDALL.

In a libel for divorce for the cause of adultery, the record of the party's conviction for that offence will be received, after default, in proof of the crime charged in the libel.

THIS was a libel by the husband, for divorce *a vinculo matrimonii*, for the adultery of the wife. It appeared that she had been convicted of lewd and lascivious cohabitation with another man; who also was convicted and sentenced for adultery with her. And this evidence THE COURT received, after default, as sufficient proof of the crime charged in the libel.

GOVE *vs.* RICHARDSON.

If a dividing line be settled by parol agreement and actual location between the owners of adjoining tracts of land ; such location will be received as strong evidence of the accuracy of the line thus established; though it is not conclusive to prevent either party from shewing that it was settled erroneously.

THIS was a writ of entry, in which the demandant claimed to recover seisin and possession of a tract of land, described in the writ as part of lot numbered 226, and bounded as follows ;— "beginning on the easterly line of said lot, at the distance of 160 rods from the northeast corner of said lot ; thence west-north-west 67 rods ; thence southerly, at right angles, about five rods to land in possession of said *Gove* ; thence easterly, parallel with the first mentioned line, 67 rods to the easterly line of said lot ; thence northerly, about five rods, to the bounds first mentioned."

At the trial of this cause, upon the general issue, before *Weston J.* the demandant gave in evidence a deed from one *Hunt* to *Joseph Blake*, dated *June* 20, 1809 ; and another from *Blake* to himself, dated *January* 1,1810 ; describing a tract of land as follows ;—"being part of lot numbered 226, beginning at the south-westerly corner of said lot, thence running northerly about 160 rods to land belonging to *Jesse Eaton's* heirs ; thence easterly about 67 rods to land belonging to *Daniel Wing*; thence southerly about 160 rods to the land of *J. Bean* ; thence westerly about 67 rods to the bounds first mentioned." It appeared that the demandant's lot was more than 160 rods in length, exclusive of the demanded premises.

The demandant also read a deed from one *Stevens* to *Jesse Eaton*, ancestor of said heirs, dated *March* 21, 1787, conveying to him "50 acres of land, part of said lot numbered 226 ; beginning at the *northeast* corner of said lot, and running south-south-west 160 poles ; thence running west-north-west 50 poles to a stake and stones ; thence north-north-east 160 poles to a stake and stones ; thence east-south-east 50 poles to the bounds first mentioned." He then offered in evidence a plan and survey,

made by a surveyor appointed by order of court in this action ; from whose running, and from the testimony of the chainmen who accompanied him, it appeared that measuring from the northeast corner of the lot, as shewn by *Jesse Dorman*, a witness, the 160 rods would not include the demanded premises in the lot conveyed to *Jesse Eaton*, under whom the tenant claimed.

The tenant then introduced several witnesses, who testified that there was an old line across the lot as many as twenty-nine years ago, consisting of trees plainly spotted, which was called the southerly line of the *Eaton* lot ; but when or by whom it was made, they did not know. This testimony, though objected to, the judge admitted, as tending to prove an original location of *Eaton's* lot, when it was conveyed to him by *Stevens*. The tenant further proved, by two commissioners appointed by the Probate Court to divide the lot among the heirs of *Jesse Eaton*, that nineteen years ago they measured for that purpose 160 rods southerly from the northeast corner of the lot numbered 226, and fixed the south line where the fence now is, to which the tenant holds. They testified that they measured as exact as they could; making no allowance, except to bring it to horizontal measure. At the time of this survey and admeasurement, there was no one to represent the interest of the former owner of the lot, now belonging to the demandant ; and this evidence was therefore objected to. But as there was evidence tending to prove a subsequent acquiescence in the line by them made, the judge admitted the testimony.

It appeared that when the commissioners from the Probate Court measured and divided the land, there was a monument then existing at the northeast corner of the lot, from which they measured. That monument is since gone ; but the witness *Dorman*, before mentioned, testified that the point from which the admeasurement was made by order of court, was at, or very near, and as he believed, within five or six feet of the same spot; he having before and ever since that time lived in that neighborhood. It further appeared that a fence had been made for many years in the line fixed by the commissioners, which the demandant pointed out to two or three witnesses, at distinct periods, as

his line. And if this was the dividing line, the land in dispute would belong to the tenant.

The judge instructed the jury that the length of the tenant's lot must be limited to 160 rods, exact measure ; unless they were satisfied, from the evidence, that in 1787, when *Stevens* sold to *Eaton*, under whom the tenant claimed, the lot was then located, and the lines and corners marked by the parties. If so, and they were satisfied that the old line across the lot, to which the witnesses testified, was the line thus established ; although, in consequence of the liberal admeasurement of that day, the lot would somewhat exceed 160 rods, exact measure, yet the demandant was not entitled to their verdict.

And he further instructed them that if there was no original location, or if the lines of that location could not be ascertained; still, if, from the evidence, it appeared to them that the dividing line had been long fixed and acquiesced in by the parties, it ought not to be disturbed, unless it clearly appeared to be erroneous;—that if the demandant, and those under whom he claimed, were satisfied to adopt the admeasurement of the commissioners, and to fix the line accordingly, it was competent for them so to do ; although they were not represented at the time of that admeasurement ;—that both the commissioners had testified that that line was exactly 160 rods, by actual admeasurement, from the monument at the northeast corner then in existence ;—but that from a variety of causes there might be slight variations in different surveys and admeasurements of that distance;—that it was for them to consider whether the northeast corner could now be fixed with the same certainty as formerly; and that they would not be justified in disturbing the line recognized by the parties ; unless it satisfactorily appeared to them to be more than 160 rods from the true point of beginning. If it did, and no original location was proved or indentified, their verdict ought to be for the demandant. Under this direction, the jury returned a verdict for the tenant ; the points raised at the trial being reserved by the judge, for the opinion of the court.

Allen, for the demandant.

R. Williams, for the tenant.

The opinion of the court was read at the ensuing *September* term in this county, as drawn up by

WESTON J. It has been contended that the demandant's declaration, having excluded all the land to which the tenant's title extended, he should have disclaimed generally ; and that he can not defend any part of the premises demanded, without claiming beyond the limits to which his original title would carry him. If however the tenant's land might, upon a just construction, extend to a greater distance than one hundred and sixty rods, exact measurement, from the northeast corner of lot number 226, as his counsel insists that it does, he could not disclaim, without abandoning that which he has a right to hold. It must further be considered, that although the land demanded is represented as beginning one hundred and sixty rods from the northeast corner of lot number 226, that is not the only description by which it is to be identified and located ; it is also described as adjoining land in possession of the demandant. Now whatever uncertainty there may be in fixing the northeast corner of number 226, it appears from the evidence, that the respective possessions of the parties have been for many years plainly indicated by a line fence. The tenant cannot therefore disclaim, without giving up land, which he has long possessed, and to which he contends he has a just title. If his title to the land in dispute has been legally sustained by the evidence, his plea is fully justified ; and we can perceive no well founded objection to the consideration of the cause on its merits, upon the pleadings as they stand.

That part of the tenant's testimony, by which it was proved that as many as twenty nine years ago, there was an old line across the lot, consisting of trees plainly spotted, which was called the southerly line of the *Eaton* lot, now owned by the tenant, and which, if the true line, would give him the demanded premises, was objected to as inadmissible. It was, however, in our opinion legally received, as tending to show an original location. By whom that line was made did not appear. Twenty nine years prior to the trial, it was an old line, and it was proper for the

jury to consider how far it tended to prove that it was a line marked and established, in conformity with the deed, by the parties in interest in 1787, when *Stevens* conveyed to *Eaton*. If such was the fact, the tenant's title was legally maintained. In that deed, no terminating monument southerly is designated on one of the side lines ; but on the other there is, namely, a stake and stones ; and by the courses stated, the end lines were to be parallel with each other. If the monument, thus given on one of the side lines, could now be ascertained, the *Eaton* lot would clearly extend thus far. And if the jury were satisfied that the old line was made and established by the parties at the time, it was competent for them to presume that it coincided with the monument referred to in the deed.

The whole lot was supposed to be three hundred and twenty rods in length. In the division, *Eaton* had one hundred and sixty rods on the north, and by the deed to the demandant which is in the case, his land on the south is described as extending one hundred and sixty rods to the land of *Eaton's* heirs. It is apparent then that the lot was intended to be divided into equal parts ; and it appears that the demandant has more than one hundred and sixty rods, exclusive of the demanded premises. It is true that the demandant has made out a title to that part of the lot, which was not granted to *Eaton*. If he therefore had less than half, the demandant must have more. But if there was an actual survey and location, at the time the deed was executed to *Eaton*, it was probably made according to the liberal admeasurement of that early period. All these circumstances were properly referred to the consideration of the jury.

The testimony of the commissioners, appointed by the court of probate to divide the *Eaton* lot among his heirs, is objected to. It was not introduced or received upon the ground, that what they did was binding upon the demandant. It was to prove that, according to their admeasurement, which they testify they made with as much accuracy as they could, it was exactly one hundred and sixty rods from the monument then in existence at the north-east corner of lot number 226, to the place where the line fence is now established. We are not aware of any legal principle,

which would exclude this testimony. They were competent witnesses; and the fact to which they testified had a direct bearing upon the question in issue. If *Dorman*, a witness for the demandant, who pointed out to the surveyor, appointed by order of court, the place at or near which, according to his recollection, the monument at the northeast corner stood, was under no mistake, there may have been some error, either in the admeasurement or recollection of the commissioners; but it was the province of the jury to settle the facts, from all the testimony in the case. It was in evidence that the demandant did, on several occasions, point out the fence placed in the line to which the commissioners measured, as the dividing line between him and the tenant.

The jury were instructed that if there was no original location, or if it could not now be ascertained; yet however, if the parties had fixed a dividing line between them, in which they had long acquiesced, it ought not to be disturbed, unless it clearly appeared to be erroneous. The demandant was not represented in the proceedings by the commissioners; but as they were disinterested and under oath, he might be disposed to adopt their admeasurement, and if so, that the line thus ascertained ought to be considered as the true one, unless the jury were fully satisfied, from the evidence, that it was more than one hundred and sixty rods from the northeast corner of the lot; and it was for them to consider, whether that corner could now be ascertained with so much accuracy as formerly, while the monument then was in existence.

A dividing line, between owners of adjoining tracts, may be settled by them under a misapprehension or mistake, which, if clearly shown, may be corrected; but unless this act of the parties be regarded as strong evidence of the accuracy of the line thus amicably established, a fruitful source of litigation will be left open, of which one or both the parties may avail themselves, when under the influence of less friendly feelings. Surveyors of equal skill and judgment may differ a little in their admeasurement of long distances, especially through woods, and over ground presenting a broken and uneven surface. Slight, if

not considerable variances, might be occasioned by so many circumstances, that it is hardly to be expected, in such cases, that any two admeasurements would agree to a single foot. And this is an additional reason why a line fixed by the parties, ascertained by an admeasurement from a distant point, should not be lightly disturbed.

In the opinion of the court, the jury were properly directed by the judge, who presided at the trial; and the tenant is entitled to *Judgment on the verdict.*

WATERHOUSE *vs.* DORR.

A license to sell goods by auction, granted under *Stat.* 1821, *ch.* 134, *sec.* 1, is of no force beyond the limits of the town to which the selectmen and auctioneer belonged at the time it was granted.

THIS was an action of debt to recover the penalty in *Stat.* 1821, *ch.* 134, *sec.* 1, for selling goods at public vendue, the defendant not having been duly licensed therefor. In a case stated by the parties, it was agreed that the defendant was duly licensed by the selectmen of *Waterville*, where he resided; but that the sale of the goods was in *Gardiner*;—and whether the license authorized the party to sell by auction out of the limits of the town where he dwelt, was the question submitted to the court.

Allen, for the plaintiff, maintained the negative of this question; arguing from the mischiefs of a different construction of the statute, and the apparent intent of the legislature to prevent them. If the employment is not to be exercised in the town where the parties reside, it will not be in the power of the selectmen to determine whether it has been exercised in a proper manner, and made conducive to the public good; nor whether the party is entitled to a renewal of his license for another year. All that salutary restraint over the conduct of an auctioneer, which the eye of vigilant selectmen imposes, will thus be lost; and the citizens be exposed to all the frauds and deceptions which the statute was designed to prevent. Moreover, the inducement to take any

license would be removed, whenever the person intended to exercise the employment in a distant part of the State, remote from the means of ascertaining his want of a good moral character.

That this construction, seeking the intention of the legislature beyond the literal reading of statute, was warranted by precedent, he instanced the case of pauper laws, in *Shirley v. Watertown* 3 *Mass.* 322. *Somerset v. Dighton* 12 *Mass.* 383. *Hallowell v. Gardiner* 1 *Greenl.* 93 ;—and the case of sheriffs, in *Bristol v. Marblehead* 1 *Greenl.* 82. He also cited *Holbrook v. Holbrook* 1 *Pick.* 254. If the literal construction be adopted, the words of the statute will be satisfied by a license from the selectmen of any town in another State, if it be the town in which the party resided ; and the jurisdiction of our own selectmen will be made commensurate with the limits of the State.

Boutelle, for the defendant, adverted to the *Stat.* 1789, *ch.* 58, which required that auctioneers should have the approbation of the selectmen of their towns, and be licensed by the treasurer of the Commonwealth, paying a duty into the public chest ; and which expressly prohibited them from selling, out of the limits of their own town. As the object of this latter provision was to raise a revenue to the State, it was abandoned when the duty was abolished, on the revision of the law by *Stat.* 1795, *ch.* 8, which contained no such prohibition. The provisions of the latter statute, and of two additional acts, formed the materials of the statute of this State on which the present action is founded ; and the restriction having been thus deliberately omitted in the revised legislation on the subject, it ought not to be resuscitated by implication.

It is also in derogation of the common law right of every man to dispose of his property in his own mode. And being not a remedial statute, its provisions are not to be extended by any supposed equity of construction. *Melody v. Reab* 4 *Mass.* 473. Nor is it rendered necessary by any considerations of public convenience or good policy. The public has no interest in the subject, except that the auctioneer should be a person of good moral character ; and this security is obtained by requiring the appro-

bation and license of the selectmen of the town where he resides, and where, of course, he is best known. This is all which the law requires in the case of schoolmasters; whose integrity ought to be secured by as high sanctions, to say the least, as that of an auctioneer.

The objection that, upon the defendant's construction, the jurisdiction of the selectmen is extended beyond the limits of their town, loses its force when it is considered that no authority is claimed for them, except as to the citizens of their own town; and this, only in regard to their general character and fitness for the employment, as in the case of schoolmasters and pedlars, and not in respect of the place in which that employment may be exercised. And this is in accordance with the principle of several other statutes, which require selectmen to do many acts having no direct relation to the corporations they represent;—as in *Stat.* 1821, *ch.* 133, *sec.* 2—*ch.* 148, *sec.* 22—*ch.* 154, *sec.* 12—*ch.* 172, *sec.* 2—*ch.* 179, *sec.* 2, 3.

The opinion of the court was read at the ensuing *November* term in *Cumberland*, as drawn up by

Mellen C. J. The statute of 1821, *ch.* 134, declares that no person, unless licensed by the major part of the selectmen of the town to which he belongs, shall sell any goods or chattels at public vendue; and whoever violates the law in this particular, is subject to a penalty. For such penalty this action is brought. The defendant, being an inhabitant and resident of *Waterville*, was duly licensed by the selectmen of that town as an auctioneer; and afterwards sold the goods mentioned, in the town of *Gardiner*, at a public vendue; claiming a right so to do, in virtue of said license;—and the question is, whether it gave him any right. By the letter of the statute, the virtue of the license is not confined to the limits of the town to which the person licensed belongs. The penal provision is, "and if any person, without such license, shall sell," &c. Hence it is argued, that no penalty is incurred by a sale in any town, provided the person selling was previously licensed by the selectmen of some town. We cannot allow of so much latitude of construction. According to the reason of the

thing and the spirit of the law, the license can only be valid within the town where it is granted; the power of the selectmen does not extend beyond the limits of such town. It must be considered a matter of municipal concernment throughout. The person licensed must belong to the town where he is licensed. The selectmen are made judges of the number, and qualifications of such as the interests of a town may require to be licensed; but they are not competent judges how many may be necessary or proper in other towns: and, if they are, still the qualifications deemed sufficient by the selectmen of one town, might be wholly insufficient for such an office in another town. It could never be the design of the legislature that one of the smallest and most remote towns in the State should, by their selectmen, have the power to appoint a swarm of auctioneers, and thereby authorize them to go into the large and more populous towns, open their offices, and sell goods at vendue, to the exclusion, or at least the great prejudice, of those persons appointed by the selectmen of such towns. Reasoning from analogy, it would be just as proper and useful for the selectmen of one town to recommend persons as suitable to be licensed as innholders and retailers in another town. Such a thing was never heard of. The language of the statute respecting the choice of surveyors of lumber, is as general as that of the section we are considering. Yet each town has the right to choose its own surveyors; and as many as it pleases. The principle on which the defence depends cannot be sanctioned; and therefore, according to the agreement of the parties, a default must be entered.

DAVIS, *plf. in error, vs.* SMITH.

In mutual dealings between party and party, if there be items on both sides within six years, the statute of limitations does not attach to those of an earlier date.

And if there be an item in the defendant's account within six years, this will take the account of the plaintiff out of the statute, though the latter contain no item within that period.

THIS was a writ of error brought to reverse a judgment of the Court of Common Pleas, in which the plaintiff in error was defendant. From the bill of exceptions it appeared that the action was *assumpsit* for goods sold, of which a bill of particulars was annexed to the writ; to which the defendant pleaded the general issue and the statute of limitations; having also filed his own account in offset. Four items of the plaintiff's account were of more than six years' standing at the commencement of the action; the other three, and also the two charges which composed the defendant's account in offset, were within that period;—and the question was,—whether the latter charges prevented the statute from attaching upon those of more than six years' standing.

Smith J. at the trial in the court below, left it to the jury to find whether there were mutual unsettled accounts between the parties, within six years; instructing them that if there were, they might presume a new promise, so as to prevent the operation of the statute. To which the defendant excepted; the jury having found for the plaintiff.

R. Williams, for the plaintiff in error, contended that the salutary barrier interposed by the statute ought not to be done away by construction. Some older decisions had gone almost to the length of repealing the statute; but these have been overruled by the better reason of later times, and the statute restored, in a good degree, to the operation originally intended

And he insisted that the accounts of both parties must extend back more than six years, to prevent the statute from attaching to the earlier items.

W. W. Fuller, for the defendant in error, replied that the statute, being in derogation of the common law, ought to receive a strict construction. *Co. Lit.* 115 *a.* It does not presume a payment of the debt ; but only a waiver of the remedy. And hence it is no bar to the petition of a creditor, for a commission of bankruptcy ; nor, in chancery, does it operate upon any debt of a testator, who has directed by will that his debts, generally, should be paid. 5 *Burr.* 2628. 2 *Saund.* 62, *note.* Among the acts of the parties, by which the benefit of the statute may be understood as waived, the keeping open of mutual accounts is of a character not to be mistaken. It imports a promise to adjust them according as the balance shall appear. And thus the spirit of the exception of merchants' accounts, in the statute, is applicable to all classes of dealers. *Ballantine on lim.* 77 *& seq. Catling v. Skoulding & al.* 6. *D. & E.* 189. *Cranch v. Kirkman Peake's Ca.* 121. *Trueman v. Fenton Cowp.* 548. *Bryan v. Horseman* 4. *East.* 599. *Bull N. P.* 149. *Wilford v. Liddel* 2 *Ves.* 400. *Cogswell v. Dolliver* 2 *Mass.* 217.

The question whether the mutual dealings extended beyond six years, does not seem to have been raised in any of the cases reported ; in some of which it is manifest that they did not. And to hold it necessary that they should, would open a door to extensive fraud, by inducing one party to suppress that part of his demand which was of more than six years' standing, to amount of his adversary's claim.

But whether here was a new promise, or not, was purely a question of fact ; and it was therefore properly submitted to the jury. 4 *East*, 599, *note.* 3 *Campb.* 31, *note.* 2 *D. & E.* 760. 2 *Barnw. & Ald.* 763. 2 *Sellon's Pr.* 343. 15 *Johns.* 3,4, 520. 11 *Johns.* 140. 11 *Mass.* 452.

The opinion of the Court was read at the ensuing *November* term in *Cumberland*, as drawn up by

WESTON J. The construction of the exception in the statute of limitations, of such accounts, as concern the trade of merchandize between merchant and merchant, their factors or servants, together with the bearing and effect of mutual accounts upon the statute, is illustrated by serjeant *Williams*, with his usual intelligence, in his notes to *Saunders*, cited in the argument; where are collected the cases, both ancient and modern, in which this subject has been considered. A copious reference to authorities upon this point, with an abstract of the leading cases, is also to be found in 5 *Dane's Abridgment*, 394, 396. In the excepted cases, the plaintiff is not barred, although there has been no transaction of any kind between the parties within six years; but the plaintiff must, in his replication, bring his case within the exception. Where mutual accounts are relied upon, to repel the operation of the statute, it is upon the principle of a new promise; of which the acknowledgement of an unsettled account, implied from new items of credit within six years, is evidence. The relaxation of the express provisions of the statute of limitations, it has been said by eminent judges, has been carried far enough; and may possibly, in some instances, have defeated the intention of the original law; but we must now administer it, as qualified by judicial construction.

If the items are all on one side, the last item, which happens to be within six years, does not draw after it those of longer standing. *Buller's N. P.* 149, 150. *Cranch v. Kirkman*, cited in the argument. But in *Catling v. Skoulding*, 6 *D. & E.* 189, which is a leading case on the subject of mutual accounts, and does not appear any where to have been overruled or controverted, it was decided that where there were mutual accounts, every new item and credit, given by one party to the other, was an admission of there being some unsettled account between them. This case is cited with approbation in *Cogswell v. Dolliver*, 2 *Mass.* 217, and it is there stated, that every new additional charge by one party, revives the account of the other party, and is evidence, from which the law implies a promise of adjustment, and for the payment of the balance, as it shall appear; and it was held, in both these cases, that this is proper evidence to be

submitted to the jury. In the former, Lord *Kenyon* says that "daily experience teaches us that if this rule be now overturned, it will lead to infinite injustice." The principle is supported by great weight of authority; and certainly not without reason. A party has an account, the payment of which has been for some time delayed. His debtor subsequently, but before the statute has attached, performs for him services, sells and delivers him merchandize, or pays him, at various periods, sums of money, which he knows are made items of charge against him. He expects, and has a right to expect, that these accounts will be offset, and that the balance only will be paid, by the party against whom it may be found. This is a state of things of very common occurrence; and where such mutual accounts are supposed to be nearly equal, they often remain a long time unadjusted. It will be at once seen, that if the party, whose account is more recent, and within six years, is permitted to recover it at law, and to defeat the opposing account by the statute of limitations, great injustice will be done, and the true intent and meaning of the statute grossly perverted.

In the cases last cited, there were items in the accounts upon both sides, within the six years. Whether, if in these cases there had been no charge within that time in the plaintiff's account, an item within six years in the defendant's account would have taken the plaintiff's case out of the statute, is not expressly decided; although, from the general principle laid down, such would have been its effect.

Upon a view of the authorities, it does not appear to us that there was any error in the opinion and direction of the judge, in the case before us. It is manifest, from inspection, that there was a mutuality of accounts, and that there were charges upon both sides, within the period of six years. The jury were instructed that, if they were satisfied that any articles were furnished and charges made, as specified in their mutual accounts, within six years prior to the commencement of the action, the plaintiff's account was not barred by the statute of limitations. And such appears to us to be the law, as it is understood, both in England and in this country.

Judgment affirmed, with costs for defendant in error.

CARTER, & UX. *appellants*, *vs.* THOMAS, *Ex'r.*

The alienation of real estate by the testator himself, after he has devised the same by will, is a revocation of the will only as to the part thus alienated. The will being suffered to remain uncancelled, evinces that his intention was not changed with respect to the other property therein devised or bequeathed.

THE question in this case was whether the will of *Joseph Thomas* was revoked; he having devised part of his real estate to his daughters, and the residue to his two sons, whom he also made residuary legatees; and afterwards having in his lifetime sold and conveyed the same land to one of the sons, by deed. The Judge of Probate having decreed that this was no revocation of the whole will, one of the heirs appealed to this court.

Boutelle, for the appellants, relied on the rule that a deed of all the estate devised, though inoperative as a deed, is a revocation of the will. 1 *Roberts on Wills* 214, 219. *Powell on devises* 404, 405. *Toller's Ex.* 19. *Cowp.* 90. *Sparrow v. Hardcastle* 7. *D. & E.* 418, *note*. *Osgood v. Breed* 12 *Mass.* 534. *Cooper's Justinian* 497.

Sprague, for the respondent.

The opinion of the court was read at *November* term, 1826, in *Cumberland*, as drawn up by

WESTON J. The will in question is executed with the formalities required by the statute; and it does not appear to have been revoked in any of the modes therein prescribed. It is urged that the statute was not intended to exclude implied revocations; and that, by a conveyance of the real estate upon which the will was to operate, by the testator in his lifetime, by implication of law, the will before us was thereby revoked. The position, that revocations of this description remain unaffected by

the statute, is supported by respectable English authorities, since their statute of frauds, which contains provisions upon the subject of express revocations of devises of lands and tenements, similar to those which are to be found in our statutes relative to wills and testaments. It has been questioned, in *Toller on Ex'rs p.* 20, whether an attempt by the testator to convey, which is inoperative by reason of some defect, or want of necessary legal formality, in the mode of conveyance adopted, although indicative of a change of intention in the testator, would, since the statute, amount to a revocation; any more than a subsequent will, imperfectly executed. *Toller* however cites no authority for this query; and in *Cave v. Holford*, 3 *Ves. Jun.* 650, the old cases of implied revocations, from instruments not completed, are adverted to with approbation.

The general rule of law is, that a man must be seized of the estate he devises, at the time he makes his will; and that the estate must continue unaltered, and without any new modification, to the time of his death. *Powell on devises* 377. *Toller* 22. It has accordingly been repeatedly held, that any disposition of the estate, made by the testator, subsequent to his will, by which he holds the same by new limitations, or as a new purchase, although his beneficial interest therein remains as before, amounts to a revocation. *Powell*, 378, and the cases there cited.

By the revocation of a will, we generally understand an act, by which the will ceases to have any effect or efficacy. And this may be considered the meaning of the term, strictly and accurately speaking. It is not however uniformly used in this sense by legal writers, or in English judicial opinions; but it is frequently applied to cases, where the will operates upon some estates, but does not operate upon others, by reason of some conveyance, or new modification, made therein by the testator in his life time. When therefore this position is laid down generally, as it is in *Roberts*, cited by the counsel for the appellants, that an alteration made in the estate devised, amounts to a revocation of the will, we must understand the meaning to be, so far as such alteration is inconsistent therewith. Thus *Powell*, 377, states that any alteration in the estate will, at law, operate as a

revocation ; and he cites, in support of this position, *Burgoyne v. Fox* 1 *Atk.* 576, which was a case of partial revocation only.

In the case of *Brydges v. The Dutchess of Chandos*, 2 *Ves. Jun.* 417, the doctrine of implied revocations was considered at large by the chancellor ; and the same rules declared to be applicable thereto in courts of equity, as in courts of law. And he states it as a principle, not to be shaken in point of authority, "that any new disposition made subsequent to the will, or, in other words, any conveyance of that which had been conveyed by the will, shall defeat the will. It implies an alteration ; and the common rule that the estate must pass by the last conveyance, applies ; but then it must be a conveyance of the whole estate ; it must extend as far as that appointment, which the will has made ; for if it is but of a part, it affects the will no further than that part goes. If it is of a partial interest only, it will not operate as a revocation of the rest."

In *Cave v. Holford*, before cited, *Eyre C. J.* in an elaborate opinion, in the particular result of which, however, he differed from his brethren, more than once stated that the term "revoked" and "revocation," has been used with very little precision, and frequently in an improper sense. *Dane* says, 4 *Abr.* 575, that in several cases, a mere inoperation of a will is called a revocation. And in the same *vol.* 576, 577, he states that an alienation of a part of the estates devised, revokes only as to that part, for which he cites several authorities. Where a portion only of that which is the subject matter of the will is parted with by the testator in his life time, the will cannot bear the effect originally intended ; and whether the whole will remains, but partially defeated in its operation, or such alteration is regarded as a revocation *pro tanto*, the will has its effect upon the estate, which is left unaltered.

The counsel for the appellants has cited the case of *Osgood v. Breed*, 12 *Mass.* 525, in which *Jackson J.* in delivering the opinion of the court, adverts to the ninth section of the statute of wills of Massachusetts, *stat.* 1785, *ch.* 12, in which it is provided that a will, purporting to dispose of both real and personal estate, but not so executed as to pass the former, shall not be

allowed as a testament of personal estate only. The principle he says, is founded in justice, and "applies with equal force to every case, where a supposed will is originally defective and ineffectual, as to any material part. In distributing one's estate, especially if among children, each devise and bequest is in some measure the condition of every other." But very different is the case of a subsequent conveyance, by the testator, of a part of the estate devised. Upon this the will does not operate, not by reason of any defect therein ; but because it pleased the testator to make a different disposition of such part of the estate, which it is perfectly competent for him to do; either in that mode, or by a new will or codicil. Conveying a part of the estate, upon which the will would otherwise operate, indicates a change of purpose in the testator, as to that part ; but suffering the will to remain uncancelled, evinces that his intention is unchanged with respect to other property bequeathed or devised therein.

The probate of a will establishes the capacity of the testator, and the fact that it has been executed with the formality required by law. But upon what particular estate, real or personal, it may operate, is a question open for examination in the courts of common law. Those claiming the personal property under the will, are required to show that it belonged to the testator, at the time of his decease. And those claiming real estate devised therein, will be holden to prove that, at the time of making the will, the testator was seised of the same, and died sesied thereof, without any change or alteration of title.

The opinion of the Court is, that the will in question is entitled to probate ; and the decree of the judge allowing the same is affirmed with costs.

GILBERT *vs.* HUDSON.

Where goods were purchased by means of fraudulent representations made by the buyer, the party defrauded cannot avoid the sale, and claim the goods, against an attaching creditor of the fraudulent purchaser, whose debt accrued subsequent to the sale.

But if such creditor attach for a subsequent, and also for a prior debt, joined in the same writ, his lien on the goods, as against the party defrauded, extends only to so much of them as will satisfy the subsequent debt, and the costs.

THIS was an action of replevin for certain goods, which the plaintiff had delivered to one *Reed*, on a credit which had not expired when this action was brought. It appeared that *Reed* obtained the goods by false representations, made by him when the goods were delivered. On discovery of the fraud, the plaintiff replevied the goods, insisting on his right to vacate the contract of sale, and reclaim them as his own. The issue was upon the property of the plaintiff.

The defendant, in the exercise of his office of deputy sheriff, has attached the goods as the property of *Reed*, at the suit of one *Clark*, in which judgment has since been rendered for $68 29 debt, and $16 96 costs ; and execution issued. And it appeared that $43 58 of *Clark's* debt accrued after the purchase of the goods in question, and upon the credit of those and of other goods which *Reed* had obtained on credit at the same time. [See *Seaver v. Dingley*, *ante*. *p.* 306.]

Upon these facts *Weston J.* directed the jury to find for the defendant, reserving the legal rights of the parties for the consideration of the court.

Allen and *Sprague*, for the plaintiff, contended that here was no sale from *Gilbert* to *Reed*, the goods having been taken by fraud ; and the right of the plaintiff existed in all its force, to retake them at his pleasure. Nothing passed to *Reed*, and therefore no title can be derived, through him, to his creditor *Clark*. *Reed*, in the best light he can be considered, was no more than a bailee of the plaintiff's goods. Yet the goods of the principal

cannot be taken for the debt of the factor ; and even if the latter should pledge them for money lent at the time, the owner may retake them, and defeat the pledge. *Kinder & al. v. Shaw* 2 *Mass.* 398.

It will hardly be contended that had the plaintiff replevied the goods before *Clark's* attachment, the latter could have maintained an action against the plaintiff for the value of the debt due to him from *Reed* ; yet such an action ought to be maintained, if the plaintiff's property is liable, at all events, to pay that debt ; or, in other words, if the plaintiff is to be made the sufferer, under an application of the rule that where one of two innocent persons must suffer from the fraud of a third, the loss shall fall on him who enabled the wrong doer to commit the fraud. The plaintiff in this case, is the party defrauded. Had he merely bailed the goods to *Reed*, it has been shewn that *Clark* could not have attached them ; though he may have trusted *Reed* on the credit of the goods, supposing they were his own. Can his case be any better because *Reed* obtained them by fraud ; having no title at all, instead of a qualified property with power to sell?

But the case does not shew that *Clark's* debt did accrue on the faith of the plaintiff's goods ; but on them and others. For aught which appears, the "other" goods may have furnished the principal means by which *Reed* obtained credit. If, therefore, the other facts in the case would justify the application of a rule which would fix the loss on the plaintiff, this fact, of itself, forbids it. And the jury should have been instructed to inquire whether the plaintiff's goods formed the principal and prevailing ground on which the credit was given. As the case now stands, the same credit might have been obtained on the "other" goods in the hands of *Reed*; and yet, upon the defendant's principle, the plaintiff is to be made to bear the whole loss. This is not a case in which any right is acquired to the creditor by his attachment of the goods. *Buffington v. Gerrish* 15 *Mass.* 156. He stands only on the ground of a purchaser ; and can derive no rights except such as were possessed by his vendor, unless he can shew the plaintiff to be a participator in the fraud by unreasonable laches, or connivance ; neither of which had here any existence.

Boutelle, for the defendant, argued—1st, that the sale of the goods by the plaintiff to *Reed* was absolute and perfect; and that the right of the plaintiff to vacate the sale because of the fraud, existed no longer than while *Reed* had the goods in his own actual possession. Any intermediate sale to a *bona fide* purchaser would have been valid, even against the plaintiff. *Hussey & al. v Thornton* 4 *Mass.* 405. *Buffington v. Gerrish* 15 *Mass.* 156. *Worcester v. Eaton* 11 *Mass.* 368. 13 *Mass.* 371. *Gore v. Brazier*, 3 *Mass.* 541. *Parker v. Patrick* 5 *D. & E.* 175. *Somes v. Loud* 2 *Pick.* 184.

2. An attaching creditor is to be considered in the light of a purchaser for valuable consideration. *Marshall v. Fisk* 6 *Mass.* 24. *Lanfear v. Sumner* 17 *Mass.* 110. The only exception to this rule is where the debt of the attaching creditor accrued long before the fraudulent purchase of the goods attached; as in the case of *Buffington v. Gerrish*; and where, therefore, those goods could have formed no part of the inducement to give the credit in question. But in the case at bar the fact is otherwise, the credit having been given on account of the goods now replevied. The justice of the case then requires the application of the rule, that the loss ought to be borne by him who enabled the wrong doer to commit the fraud, by entrusting him, in the first instance, with goods. 6 *Mass.* 428. 9 *Mass.* 59. 2 *Pick.* 202.

The case of *Kinder & al. v. Shaw*, cited on the other side, proceeds on the ground that to allow a factor to pledge the goods of his principal would be to make a new contract for the parties, who had already made a special contract of bailment for themselves. But that case has been justly questioned by *Ld. Ellenborough* in *Pickering v. Busk* 15 *East.* 44, and in *Martini v. Coles*, 1 *Maule & Selw.* 146.

The opinion of the court was read at the ensuing *November* term in *Cumberland*, as drawn up by

Mellen C. J. The case finds that the goods in question were obtained by *Reed* under such circumstances as to render the sale of them to him voidable at the election of the plaintiff, and on proof of the fraud seasonably made. Before any attempt to re-

claim the goods, the defendant attached them as the property of *Reed* at the suit of *Clark*, for satisfaction of a debt, the principal part of which accrued upon the credit of the goods in question and some others, at a time when *Clark* had a right to presume they were the undisputed property of *Reed*; they being then in his open and undisturbed possession. Though on the facts proved, it is clear that the plaintiff could have reclaimed and recovered the goods prior to the attachment; yet the defendant contends he cannot now avoid the sale and reclaim them from his custody, in the circumstances stated. Whether the sale can be avoided, and the rights of the defendant, and of *Clark* the creditor, be thereby defeated, is the question before us. In the case of *Hussey & al. vs. Thornton & al.* 4 *Mass.* 405, it appeared that the articles replevied had been sold to *Todd & Worthly* on condition that they should not be delivered to them, until security should be given for the price; but soon after, the agent of *Todd & Worthly* sent for the goods—received them and carried them to the wharf—no security having been given—the condition having been probably forgotten at the time of delivery to the truckman; but before they were put on board the plaintiffs', vessel, one of the plaintiffs forbid their being put on board until security was given; however, after conversing with the captain, he consented that they should be put on board, upon the original condition, that until the promised security should be given, the property should be considered as in the plaintiffs. On these facts the court decided to sustain the action, against the defendants, who, some days after the above transactions, had attached the goods as the property of *Todd & Worthly*; but *Parsons C. J.* in giving the opinion of the court, observed, "had "the demands of the attaching creditors originated while the "goods were in the possession of *Todd & Worthly*, so that it "might be fairly presumed that a false credit was given them; "or had *Todd & Worthly* sold them *bona fide*, and for a valuable "consideration, our opinion would have been otherwise." The principles on which the court decided the case of *Buffington & al. v. Gerrish*, seem applicable to this; for though there the plaintiffs prevailed, because the debt, to secure which the

attachment was made, had been of long standing; yet the court evidently proceeded on the ground that if the debt had been contracted after the fraudulent purchase of the goods, and upon the credit of them, such a creditor's rights would have demanded and received protection, as much as those of a fair purchaser without notice; and it seems admitted that his rights would be respected. It is urged by the plaintiff's counsel that only a part of *Clark's* debt, viz. $46 58, accrued on the credit of the goods replevied; and that the balance of the debt, viz. $21 71, was contracted before *Reed* obtained the goods in question; and that as to such part, at least, the attachment cannot be considered protected and available, according to the case of *Buffington & al. v. Gerrish*, before mentioned. This proposition, considered in the abstract, and as an insulated one, is deemed correct; but is not applicable, in the peculiar circumstances of this cause. The reason is this; an attachment of property operates as a lien upon all and every part of it, to secure satisfaction of all and every part of the debt sued for; of course it is an answer to this action of replevin, and bars it, because the goods were legally attached as the property of *Reed*, to secure the sum of $46 58 above named; and *Clark* has a right to have that sum, and costs, satisfied out of the goods; and this right is not impaired by the circumstance that the attachment was made with a view of securing the sum of $21 71, also, which the law does not permit him to have satisfied out of this property. Such are the legal principles which must govern our decision. But the plaintiff is not without his remedy, should his property or any part of it be misapplied. At present we do not know the value of the goods replevied; they may not be more than sufficient, on sale, to satisfy the sum of $46 58, and costs; and should they not prove to be, the plaintiff can have no cause to complain. Should they be found more than sufficient for the above purpose, still the defendant will have no right to sell any more; those remaining will still belong to the plaintiff, and the defendant must return them to him, or stand answerable to him for them, or their value, in another action, but not in this. *Judgment on the verdict.*

GETCHELL *vs.* JEWETT.

In equity, relief will be given against mere lapse of time, where that is not of the essence of the contract; if the party seeking relief has acted fairly; unless the delay of performance on his part has been so long as to justify the inference that he had abandoned the contract.

It is not necessary, in order to found a decree for specific performance of a contract, that the breach be such as would support a claim for damages at law.

The want of mutuality of contract is no objection in equity, if it has been signed by the party sought to be charged.

THIS was a bill in equity, containing the following allegations. The plaintiff, being indebted to one *Johnson* in the sum of two hundred dollars which he could not then pay, obtained of *Johnson* the promise of a credit of six months for one half of the debt, and twelve months for the other half, upon condition of furnishing a satisfactory surety. The defendant, at the plaintiff's request, agreed to become his bondsman; and notes were accordingly given to *Johnson* on the 18th day of *September* 1822. To secure the defendant against this liability, and also to secure the payment of fifty dollars claimed to be due from the plaintiff to the defendant, the plaintiff on the same day gave to the defendant an absolute deed of a moiety in common of a lot of land and buildings in the town of *Gardiner*. It was at the same time agreed between them, that if the plaintiff should within six months pay to the defendant the fifty dollars due him, with interest, and should pay and take up the notes given to *Johnson* at or before the times they should become due, and save the defendant harmless therefrom; and also if the plaintiff should within thirty days give the defendant satisfactory security to indemnify him against a mortgage which the plaintiff and one *Ira Getchell* had given upon the same land; that then the defendant would release and reconvey to the plaintiff his right and title to the premises, which the plaintiff alleged to be worth three hundred and fifty dollars. This agreement was reduced to writing, bearing date *September* 19, 1822; on which day the plaintiff, to secure the defendant against the mortgage, gave him a further deed, conveying a pew in the church in *Gardiner*, and assigned to him a note of hand

against *Ira Getchell*, for fifty dollars and eleven cents. The receipt of these indemnities the defendant acknowledged, in a memorandum at the foot of the same agreement, and therein stipulated that, if the preceding terms were complied with, he would also reconvey the pew, and return whatever he might have received in part of *Ira's* note.

One of the first notes to *Johnson* was paid by the plaintiff on the 18th of *Sept.* 1823. The other was paid by the defendant, without giving notice of his intention to the plaintiff, and after the plaintiff had procured an extension of the time of payment, which was not then expired. On the same 18th of *Sept.* 1823, the plaintiff deposited in the *Gardiner* bank one hundred and fifty nine dollars for the use of the defendant, who was notified of the same ; and directed the cashier to pay it to the defendant, on his executing a release of the premises.

In *December* following the defendant received twenty-two dollars and thirty-nine cents of the administrator of *Ira Getchell's* estate, in part of his note. On the 26th of *April* 1824, the plaintiff tendered to the defendant one hundred and nine dollars and sixty three cents for the money he had paid to *Johnson*, with interest ; and fifty four dollars and eighty seven cents for the debt claimed by the defendant as due to himself, after deducting the money he had received of *Ira Getchell's* estate ; also ten dollars for the supposed amount of a bill of costs incurred by him in a writ of entry he had recently commenced against the plaintiff, to dispossess him of the same premises ; and six dollars and eighty nine cents as a compensation for his own trouble in the business, and to make up any errors of calculation ; the defendant having taken the rents and profits of the pew, from the date of his deed ; and thereupon demanded a release and reconveyance of the property ; which the defendant refused. The bill prayed for a specific performance of the contract ; and that the plaintiff might be restored to his title to the premises.

To so much of the bill as set forth the conveyances made by the plaintiff to the defendant, and claimed title in the former to redeem, the defendant demurred in law ; shewing for causes ;— 1st, that the plaintiff did not shew himself to be a mortgagor ; nor

that the defendant had possession of the premises, or had ever entered for condition broken ;—2d, that it did not appear that the plaintiff had any right in equity of redeeming the property, by virtue of any deed of defeasance, or other instrument under seal ;—3d, that the bill shewed no sufficient cause for a decree for specific performance.

And to the residue of the bill he answered, that he was obliged himself to pay the first note to *Johnson* after it became due, and after notice to the plaintiff that he had been called upon for payment, and after the plaintiff's reply that he was unable to pay it ; denying that the plaintiff had procured an extension of time ; and so the condition had not been performed by the plaintiff, upon which, by the agreement, the reconveyance was made to depend. He further insisted that the agreement was not mutual, as the plaintiff had not bound himself to indemnify the defendant, nor to pay him the debt of fifty dollars. He further alleged that long after the plaintiff's default, viz. *Oct.* 20, 1823, the other moiety of the land and buildings was put at sale by auction, at an administrator's sale ; and that not being suitable or conveniently situated for a tenancy in common, the defendant had purchased it for one hundred and twenty one dollars ; which was more than it was worth ; and more than the plaintiff, or any other person, would have given for it, to become a tenant in common with another ; and that if now obliged to reconvey the other moiety to the plaintiff, this moiety would become of little value, and the defendant unjustly be subjected to loss. And as to the money deposited in the bank, and the tender, and demand of a deed, he alleged that they were too late ; being after the forfeiture of the conditions in the agreement.

To this answer the plaintiff excepted as insufficient ;—1st, because the defendant relied on the lapse of the times of payment of the plaintiff's debts ; whereas that was not a material fact in the determination of his rights under the bill ; part of the money having been actually paid, and the residue tendered, and now brought into court ;—2d, because the defendant alleged that he was ready and desirous to perform his part of the agreement, but without alleging that he gave the plaintiff notice of any such

desire, or intimation that he wished for a literal performance of the conditions ;—3d, because the defendant was not destitute of a remedy, as he has alleged, for want of mutuality in the agreement ; the original evidence of his debt against the plaintiff still subsisting ; and his remedy at law being perfect for the money he might expend as surety, by his having signed the notes in that character ;—4th, because no sufficient reason was shewn by the defendant for refusing to receive the money tendered.

The arguments, of which the following is a brief summary, were delivered in writing, after the last term.

Allen, for the plaintiff, contended that this was a case within the jurisdiction of this court ; it being a contract in writing, upon which there was not " a plain, adequate, and complete remedy at law." The answer agrees with the bill in admitting the fact that the first note was not taken up by the plaintiff, but was paid by the defendant some days after it became due. But this fact rather gives, than takes away chancery jurisdiction ; for if the money had been paid at the day, by the plaintiff, he would then have had a plain and adequate remedy at law, at least for damages to the amount of his loss. But now he has none. It is difficult to imagine a case more strongly demanding the exercise of the equitable powers of this court.

That time is not of the essence of a contract, considered in equity, has long been established in England ; and the same principle is most explicitly recognized and adopted in *Brazier v. Gratz* 6 *Wheat.* 528, 553. And though the *dicta* of some English chancellors seem to treat the strict observance of the time of payment as essential in a certain degree; yet it will be found, on examination of the cases, that the remedy by bill has never been withheld, where the delay was slight, as in this case ; or where the neglect was not such as to furnish grounds to presume that the party, for the time being, at least, had abandoned the intention of complying with the stipulations on his own part ; and consequently had waived his right of demanding performance from the other party. This is more especially the case where no change has been made in the situation and circumstances of

the party, between the time stipulated, and the time of actual performance. *Waters v. Travis* 9 *Johns.* 450, and cases there cited.

As to the change of circumstances, mentioned in the answer, resulting from the defendant's purchase of the other moiety of the land; it should be observed that before that time the plaintiff had deposited the money in the bank, and given him notice of the deposit. He purchased, therefore, with full knowledge of the plaintiff's claim and intention to redeem. If the premises are of the value alleged in the bill, it will be manifestly unjust for the plaintiff to retain them for the very small sum he has advanced. If they are of as little value as the defendant pretends, he will not be injured by receiving back his money with interest, and a reasonable reward, and reconveying the estate.

Nor are these to be regarded as distinct and independent transactions, as the defendant in his answer alleges. The deed of the land, it is true, bears date on the 18th of *September*; and the contract to reconvey, on the 19th. But on this latter day the deed of the pew was given; and reference is made to a reconveyance of the whole property, on conditions. The original purpose, also, for which the bill alleges the first deed to have been given, is not denied in the answer. Evidently, therefore, the whole constituted but one transaction.

The objection of the want of mutuality in the contract, is equally unfounded. The defendant, as soon as he paid the money to *Johnson*, might have had his action for it; and he still held his security for the fifty dollars. He had also his remedy, by writ of entry, for the estate conveyed; in which he must have had judgment at last, the matters in the bill affording no defence at law. It will also be perceived that here has been a part performance, on the side of the plaintiff, by the payment of $100. The defendant, to have even a plausible pretence for holding the property, ought at least to have paid the whole sum to *Johnson*. The contract, in its strictness, gave the property to the defendant, only in case he was obliged to pay the whole sum. If it be not so, then, if only a single dollar was paid by him, he might retain a property worth hundreds. To prevent such manifest

injustice, was the intention of the legislature, in confering on this court the beneficial powers resorted to by the bill.

Evans, for the defendant, considered the two first causes of demurrer as conceded by the plaintiff; it not being contended that the conveyances of the 18th of *September* constituted a mortgage. .

The rights of the parties depend therefore solely on the written contract of the 19th of *September*; which is subsequent to the conveyances recited in the bill; and is in itself distinct, unambiguous, intelligible, and independent of all anterior transactions between the parties. All such transactions are wholly merged in the new agreement, deliberately put in writing; and can have no operation to vary, control, enlarge, or explain it. *Mumford v. McPherson*, 1 *Johns.* 418. *Vandervoort v. Smith*, 2 *Caines* 161. *Haynes v. Hare* 1 *H. Bl.* 664. *Parkhurst v. Van Cortlandt*, 1 *Johns. Chan. Ca.* 282. The facts alleged in the bill, to which the demurrer extends, are of this character; and being therefore in operative, as they regard the subsequent agreement, are unnecessarily recited, and impertinent. At most they can be regarded only as inducements to the written contract itself, to which the jurisdiction of the court is expressly limited by statute; and with the recital of which the bill ought to have commenced. 2 *Harrison's Chan.* 334, 336. *Equity Draftsm.* 74 *& seq.* The causes of demurrer, therefore, being well assigned, the parts demurred to may be treated as stricken out of the bill.

As to the answer; it is to be taken as true, because it is not traversed, nor put in issue by a replication. 2 *Mad. Ch.* 440. Nor do the exceptions invalidate it, because they do not shew that any part of the bill is unanswered, or that the facts are insufficiently stated. *Cooper's Eq.* 319, 32. 2 *Mad. Ch.* 347. But upon the facts in the answer, the defendant is not bound to a specific performance of the contract of *September* 19, 1822, for the following reasons.

1. Because the plaintiff did not perform on his part the conditions of the written contract, which were to be performed on the 19th of *March* 1823, and at no other time.

At law, the performance of precedent conditions on the part of the plaintiff is an indispensable prerequisite. *Appleton v. Crowningshield*, 3 *Mass.* 443. *Cutter v. Powell*, 6 *D. & E.* 324. *Cook v. Jennings*, 7 *D. & E.* 380. *Mounsey v. Drake*, 10 *Johns.* 27. *Berry v. Young*, 2 *Esp.* 640, *note n.* And if an action at law for damages cannot be sustained, neither will equity, in general, compel a specific performance. If it were otherwise, contracts would be binding or invalid, not according to the intent of the parties, but according to the form of remedy which might be adopted. Chancery cannot make that a binding contract, which is not such at law. It can no more compel a party to perform that which he did not engage to do, than courts of law can give damages in a similar case. When the right exists, the remedy may be had in either court. When the remedy at law is gone, it is because the right has ceased ; and when that is once gone, it is gone forever ; chancery can neither create nor revive it. 2 *Powell on Contr.* 17, 19, 21. *Whitnel v. Farrell*, 1 *Ves.* 256. *Reeve's Dom. Rel.* 382, 383, 386.

The exceptions to this general rule are in favor of the remedy at law ; by which damages are sometimes given, in cases where equity would not decree a specific execution of the contract. 1 *Harrison's Chan.* 29. *Doug.* 277. 1 *Wheat.* 204. *Cannel v. Buckle*, 1 *P. Wms.* 243. *Dwight v. Pomroy & als.* 17 *Mass.* 326. The rule itself is laid down in broad terms by *Ld. Raymond* in the case of *Dr. Bettesworth v. The Dean & Chapter of St. Paul's Select Ch. Ca.* 68; and although its universality, as there stated, is questioned by *Mr. Maddocks*, 1 *Mad. Chan.* 262, the cases cited by him, from 2 *Sch. & Lef.* 348,684, notwithstanding the high authority of *Ld. Redesdale*, have been regarded merely as decisions upon a local equity, applicable only to the particular tenure of estates in Ireland. *Baynham v. Guy's Hospital*, 3 *Ves.* 297. These cases therefore do not limit the general proposition of *Ld. Raymond* ; nor is its principle, as applicable to the present case, in any manner affected by the other exceptions, recognized in the books ; as, agreements arising under the act of the court itself ; covenants of a feme covert, being a minor, to convey to her husband ; and others of the like character. 2 *Powell on Contr.* 14, 15. 1 *Mad. Chan.* 362.

The doctrine that time is not of the essence of a contract, in equity, depends wholly on the case of *Gibson v. Patterson*, 1 *Atk.* 12, which is the authority uniformly cited to support it. But this doctrine, in England, is now considered as exploded. *Newland* 242 1 *Mad. Chan.* 415. And abundant authorities establish the contrary position, that time can no more be dispensed with in equity, than at law. *Harrington v. Wheeler* 4 *Ves. jr.* 689. *Spurrier v. Hancock ib.* 667. *Newman v. Rogers* 4 *Bro. Ch. Ca.* 391. 4 *Ves. jr.* 671. *Marquis of Hertford v. Boore* 5 *Ves.* 720. *Guest v. Homfray ib.* 822. *Alley v. Deschamps* 13 *Ves.* 228. *Popham v. Eyre Lofft*, 813. *Omeron v. Hardman* 5 *Ves.* 736. The cases in which the want of punctuality in time on the part of the plaintiff, has been dispensed with in equity, and specific performance decreed, are where the delay has been assented to by the defendant ; *Fordyce v. Ford* 4 *Bro. Ch. Ca.* 494. *Pincke v. Curtis ib.* 329. *Newland*, 231. *Seton v. Slade* 7 *Ves.* 265—or where the vendor was dead, and no person could receive the money ; *Vernon v. Stephens* 2 *P. Wms.* 66—or in other similar cases, growing out of the conduct of the parties, or inevitable accident ; 1 *Mad Chan.* 415 ; or depending upon grounds peculiar to the cases themselves ; *Waters v. Travis* 9 *Johns.* 450. But no case can be found where a neglect of the plaintiff to perform his part of the agreement at the given day, unless attended with these mitigating circumstances, has been overlooked in chancery. 1 *Mad Ch.* 35. *Eaton v. Lyon* 3 *Ves.* 690. In *Brazier v. Gratz* 6 *Wheat.* 523, cited on the other side, the remarks of the court to this point were not called for by the decision pronounced, which was against sustaining the bill. So in *Hepburn v. Auld* 5 *Cranch* 278 ; where there were also circumstances shewing a waiver by the defendant of punctual performance on the part of the plaintiff.

But if the court of chancery in England would sustain a bill under circumstances like the present ; it would not thence follow that this court has the same power, limited as it is by statute, to bills for the specific performance of written agreements, and to trusts. There, its jurisdiction extends also to all cases of fraud, accident, and mistake ; as well as to other subjects. It will not

be contended that our statute gives greater power over written contracts than is possessed by the court of chancery in England; yet whenever a contract has there been sustained in equity, which was ineffectual at law, it was by virtue of some other branch of its jurisdiction, not confided to this court. 2 *Powell on Contr.* 255. Thus the power to dispense with punctual performance as to time, is referred, in English books, to the head of "accident and mistake." 1 *Mad. Chan.* 35. But as this branch of equity jurisdiction has not been conferred by our statute, it seems to follow that even if the relief prayed for by this bill could be had in England, yet it cannot be granted here.

The object of our statute was not to extend or create rights, nor to vary the engagements of parties; but to give a new remedy, for rights already subsisting, but for which there was not a "plain, adequate and sufficient" remedy at law. It seeks merely to enforce existing stipulations, in the precise manner defined and agreed by the parties; but not to compel any man to do that which, of his own accord, he never engaged to do. The defendant in the present case never gave his assent, nor signified his intention to be bound, to convey the premises to the plaintiff, upon any other condition than the payment of the specified sums, at a given day. It is then a conveyance upon those conditions, and none other, that the court has power to compel; because such, and none other, was the contract. But to compel the defendant to make the conveyance required, is to oblige him to do an act which he never engaged to perform, and to execute a contract, into which he never entered.

2. The defendant ought not now to be required to make the conveyance, because circumstances have taken place, since the breach of the conditions by the plaintiff, which will render such a decree against justice and equity. He has since become the owner of the other moiety of the estate; and this because, being owned in common, it was of little value. But the relief sought by the bill, will place him again in the inconvenient situation from which he has extricated himself by the purchase of the second moiety; and make him the purchaser of that moiety at a price beyond its just value; and this, too, to relieve a party whose

neglect and violation of good faith had reduced him to that necessity.

3. The written contract, set forth in the bill, was void for want of mutuality; it being binding on the defendant alone. *Reeve's Dom. Rel.* 382. *Newland on Contr.* 152. *Lawrenson v. Butler* 1 *Sch. & Lefr.* 20. 1 *Mad. Chan.* 422.

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

The equity or chancery powers of this court are of a limited character, compared with the vast and extensive jurisdiction of the court of chancery in England; which exercises its authority in cases of accident and mistake, of account, of fraud, of infants and their interests, of trusts, and in compelling the specific performance of agreements; and yet, as *Maddock* observes, "according even to this enlarged classification of the subject, it "may not be very obvious how the great multiplicity of doctrines "arising out of the equity jurisdiction can be included." By our laws there are two cases where an equitable power is given to and exercised by this court, and the court of Common Pleas. One is given in the second and third sections of the Act of 1821, *ch.* 50; and is exercised in relieving against penalties and forfeitures, and rendering judgment for so much as is due in equity and good conscience; the other is given in the fourth section of said act; and is exercised in the total or partial remission of the forfeited penalties of recognizances taken in criminal prosecutions, in actions of *scire facias*. In these two instances the proceedings are at common law. By the act of 1821, *ch.* 39, equity powers are given to the same courts in cases of mortgage; and in these cases the powers are exercised for the benefit of the mortgagor by a bill in equity; and the proceedings described in the first six sections, are essentially conformable to chancery practice. But another chancery power was given to the Supreme Judicial Court of Massachusetts on the 10th of *February*, 1818, which they still retain; and similar power was given to this court by the first section of the Act of 1821, *ch.* 50, in these words;—"Be it enacted, that the justices of the Supreme Judicial Court shall have "power and authority to hear and determine in equity all cases

" of trust, arising under deeds, wills, or in the settlement of " estates ; and all cases of contract in writing where a party " claims the specific performance of the same, and in which " there may not be a plain, adequate and complete remedy at " law."—The act was passed *February* 20, 1821, and it contains a proviso that it should not apply to any contracts except those made in writing, since the 10th of *February*, 1818—the day the Massachusetts act was passed.

Thus it appears that the only chancery jurisdiction given exclusively to this court, has relation to trusts arising under deeds, wills, or in the settlement of estates ; and to the specific performance of contracts in writing. This jurisdiction is to be exercised according to the usual modes of proceeding in courts of chancery, as simplified by the " rules for the regulation of the practice in chancery," established by the Supreme Judicial Court of Massachusetts, at *March* term, 1818 ; and which were adopted by this court in *York*, at *August* term, 1820. As the plaintiff in his bill has not placed his claim to a specific performance on the ground that the deeds in question, and the defendant's agreement, taken in connexion, constitute a mortgage ; and as it is of no importance whether they do or do not, provided the plaintiff has equitable ground, independent of that consideration, on which to claim such specific performance, we overrule the demurrer, and proceed to examine the cause upon its merits.

Upon the facts appearing in the bill and answer, the defendant founds two objections to the plaintiff's claim. He urges first that, as the notes were not paid to *Johnson*, nor the debt due to the defendant, at the days specified in the agreement, this is a failure fatal to the bill ; and by means of it the defendant is wholly absolved from his engagement. And secondly, that if this omission and the lapse of time have not absolved him, the circumstances of the case shew that the plaintiff has no equity, nor any fair claim to a specific performance as prayed for in his bill.

As to the first point, the defendant's counsel contends that where a remedy cannot be had by an action at law to recover damages for a breach of the contract, the court will not compel a specific performance. In support of this position he cites 1 *Harri-*

son's Ch. Pr. 29. Such an action could not be maintained against *Jewett*, because his engagement was to reconvey, provided the plaintiff should make the before mentioned payments at the times appointed ; and this he did not do. The position in *Harrison* is not true in the broad sense in which it is laid down. *Newland*, in his treatise, page 109, says, "there are several species of con- "tracts which a court of equity will enforce, on which no action "could be maintained at law to recover damages;"—and he goes on to enumerate many of them. See also *Cannel v. Buckle* 2 *P. Wms.* 244. *Newland* 230. In the case of *Alley v. Deschamps*, 13 *Ves.* 224, which was a bill for specific performance, the Lord Chancellor in delivering his opinion says—"This relief, I have "formerly observed, was first given upon a legal right, instead of "damages ; which was followed by another class of cases equally "clear, that when a party was not able to perform his engagement "according to the letter of it, if the failure was not substantial, "the other should not be permitted to take advantage of the strict "form." In *Lloyd v. Collet* 4 *Bro.* 469, in note to *Harrington v. Wheeler* 4 *Ves.* 690, the Lord Chancellor held a language more severe. His words are, "Plaintiff says, by my own default this "contract is void in law ; I cannot succeed at law ; on the con- "trary, the other party is entitled to recover back the money he "has paid in expectation of the execution of his contract; there- "fore an equity arises to me ; an equity out of his own neglect! it "is a singular head of equity." Comparing this last case, which was decided many years before, with that of *Alley v. Deschamps*, we perceive an increasing disposition to extend equitable relief, where a failure in some unimportant particular has occurred, but no substantial injury been occasioned.

It is true that in *Gibson v. Patterson* 1 *Atk.* 12, Lord *Hardwick* seems to have laid down the doctrine, that lapse of time was of no importance ; and to have decreed in favor of a vendor, without any regard to his negligence in not procuring his title deeds, and notwithstanding a conveyance within the time limited for the purpose by the articles. But the accuracy of the report is denied ; and in *Lloyd v. Collet* and several other cases, the gen-

erality of the principle laid down by Lord *Hardwicke* has been overruled, and a different one established ; and it seems " now " the acknowledged rule in courts of equity, that where the " party who applies for a specific performance of a contract, " has omitted to execute his part of it for a considerable time " after the day appointed for the purpose, without being able to " assign sufficient reasons to justify or to excuse his delay, the " court will not compel a specific performance of the agree- " ment, considering his conduct to be evidence of his abandon- " ment of it." *Newland* 242. *Lloyd v. Collet* 4 *Ves.* 690. *Harrington v. Wheeler* 4 *Ves.* 686. *Marquis of Hertford v. Boore, Astor & Boore* 5 *Ves.* 719. *Spurrier v. Hancock* 4 *Ves.* 667, and other cases there cited. See also *Guest v. Homfray* 5 *Ves.* 818. *Payne v. Miller* 6 *Ves.* 349. *Smith v. Burnham* 2 *Anstr.* 527. *Seton v. Slade* 7 *Ves.* 265. *Vernon v. Stephens* 2 *P. Wms.* 66. *Brazier v. Grattz & al.* 6 *Wheat.* 528. In *Davis v. Hone* 2 *Sch. & Lef.* 347, the Lord Chancellor says, " a court of equity frequently " decrees performance, when the action at law has been lost by " the fault of the very party seeking the specific performance; " if it be, notwithstanding, conscientious that the agreement " should be performed; as in cases where the terms of the agree- " ment have not been strictly performed on the part of the person " seeking specific performance, and to sustain an action at law, " performance must be averred according to the very terms of " the contract." And in *Lennox v. Napper ib.* 684, the Chancellor says, that the courts, in all cases of contracts for estates in land, have been in the habit of relieving, where the party, from his own neglect, had suffered a lapse of time ; and from that circumstance, or others, could not maintain an action to recover at law. Courts of equity have, therefore, enforced contracts specifically where no action for damages could be maintained ; and in various cases of such contracts they are in the constant habit of relieving the man who has acted fairly, though negligently. Thus in the case of an estate sold at auction, there is a condition to forfeit a deposit, if the purchase be not completed within a certain time ; yet the court is in the constant habit of relieving against the lapse of time ; and so in cases of mortgage; and in

many instances relief is given against mere lapse of time where that is not essential to the substance of the contract.

With these principles in view, it is now proper to examine the facts so far as they relate to the point under consideration; and see if any sufficient reasons exist which, in a court of equity, will excuse the omission of the plaintiff to pay the debt which was due to the defendant, and both the notes which were due to *Johnson*, at the specified days of payment. In many of the cases above cited, the court compelled a specific performance, on the ground that the conduct of the party; having a right to object, had been such as to amount to a waiver of all objections, and an acquiescence in the conduct of the other party, though it had not been in strict compliance with the terms of the contract. It appears that the deed of the pew was executed on the 19th of *Sept.* 1822, and the defendant's agreement was signed at the same time. The deed of the moiety of the lands was executed on the day before. By the terms of the defendant's agreement, he was not legally bound to reconvey the land, or the pew, or to pay over to the plaintiff any money he might receive on *Ira Getchell's* note, unless the plaintiff should in all respects fulfil his agreement with the defendant. Of course, the conduct of the defendant as to any part of the property conveyed or pledged, will, as to its constructive effect, have relation to the whole.

The first inquiry is whether the plaintiff had for a considerable time delayed a compliance with his engagements. As to the debt payable to the defendant himself, it had been due six months at the time the plaintiff made the deposit in the bank for the defendant's use, and gave him notice of it. By the answer it appears that the plaintiff never paid to *Johnson*, the note due on the 18th of *March*, 1823; but that he, the defendant, paid it, after having given the plaintiff notice, and received for reply that he was unable to pay it. It is stated in the bill, however, that the plaintiff on the 18th of *September*. 1823, paid to *Johnson* one of the before mentioned notes, which must have been the one due on that day. It further appears that the sum of $159 was deposited in the *Gardiner* bank on the 18th day of *Sept.* 1823, the very day the defend-

ant paid the note to *Johnson*, and that notice thereof was then given to *Jewett*; and that this sum was sufficient to amount to a complete indemnity to him for his disbursements at that time, and liabilities on the plaintiff's account. In *December* following the defendant received in part of the contents of *Ira Getchell's* note $22,39, which he has appropriated to his own use; at least, he has not returned or offered it to the plaintiff. In addition to this, the defendant, ever since the conveyance of the pew, has occupied it; and it is not alleged that this continued occupation and use have been under any other title than the deed of conveyance of the same. Nor does it appear that the failure, on the part of the plaintiff, in a strict compliance with his part of the contract, has been injurious in a pecuniary point of view to the defendant. The only fact in the case, giving countenance to the idea of an abandonment of the contract on the part of the plaintiff, is his declaration to the defendant that he was unable to make payments according to the strict terms of his contract; a circumstance far from being unusual. It does not appear when this declaration was made; but it does appear that it was followed up by an important fact, flatly contradicting all idea of abandonment. We mean the deposit of the money in the bank And this fact was also followed by a tender in the ensuing *April*, of the same sum of $159; and also of the additional sum $16 89, for the defendant's costs and trouble in the business. Admitting that the receipt of the $22 39, on *Ira Getchell's* note cannot properly be considered a part execution of the agreement; it may very justly be deemed an important fact, as shewing among other things, a waiver of objections on the part of the defendant. For it must be remembered, this sum was received by him in *December*, 1823; nine months after a failure in point of punctuality on the part of the plaintiff; and nearly three months after the deposit was made at the bank. It must also be remembered, that the incumbrance of the mortgage could be no injury to the defendant, if the debts had been paid, to secure the payment of which the land, so mortgaged, was conveyed to him.

If by any means the value of a pledge is diminished in the hands of the pawnee, that circumstance is of no kind of importance to

him, if the pledge is redeemed. In the present case, if the defendant had received from the cashier the money deposited at the bank, he would have been indemnified, and the mortgage could never affect him. But he did not receive it, though it was placed at his complete disposal. And the question is now, whether, in a court of equity, this may not be fairly considered as having the same effect as a tender, when taken in connexion with the receipt of the $22,39 on *Getchell's* note in the *December* following; which sum, in case of redemption, or in other words, of indemnity to the defendant, he had no right to retain, but was bound to pay over to the plaintiff; and whether, inasmuch as an indemnity was given him by the deposit, placed under his controul, on the 18th of *September* his receipt of the money on *Ira Getchell's* note in *December* following, and omission to pay it to the plaintiff or offer to pay it, do not amount to a waiver of objections on account of a failure to comply strictly with the terms of the contract on his part ; and to an assent to consider the property conveyed as still redeemable, and the whole concern open to a fair adjustment by the parties themselves, or in a court of equity; especially, when in addition to other circumstances mentioned, we find that the defendant has availed himself of the payment to *Johnson* by the plaintiff of the note due *Sept.* 18, 1823; although he had failed to pay the other note to *Johnson*, due on the 18th of *March* preceding, and left the defendant to pay it himself. This of itself seems a waiver of objection on account of the plaintiff's want of punctuality. If he had not considered himself as waiving it, he should have offered to repay to the plaintiff the sum so paid to *Johnson*, by him. Considering all the circumstances which we have stated, and on which we have commented, we feel it our duty to answer the questions, thus discussed, in the affirmative ; accordingly our opinion is that the defendant's first objection cannot be sustained.

As to the second objection, viz. the want of equity on the part of the plaintiff ; the defendant's counsel, in considering it in his argument, has made two points. 1. That the case does not shew that mutuality of contract, which is essential to maintain a bill for specific performance. 2. That since the failure on the

part of the plaintiff to comply with the terms of his contract, there has taken place such a change of circumstances in relation to the property conveyed, as to render it improper and unjust for a court of equity to compel a specific performance according to the prayer of the bill.

With respect to the question of mutuality, it may be at least doubtful, whether, from the nature of the present case, the principle contended for can be applicable, because its application would be useless. The defendant could never have occasion for a power to compel a specific performance of the contract on the part of the plaintiff, for his contract was only to pay a sum of money ; and the plaintiff could never obtain a reconveyance of the property, without payment of such sum, as a preliminary measure. In this particular, the case before us differs from those cases where the object of the bill is to compel a man to complete a purchase, by receiving a conveyance, and paying the stipulated price for the estate for which he had contracted ; but without relying on this principle and view of the subject, we place our decision as to this point on another ground. The following decisions, some of them in courts of law, and some in chancery, have been relied upon to shew that mutuality of contract in these cases is not necessary ; but that the party who has signed a contract, and who "is sought to be charged by it, is estopped by his name from saying that the contract was not duly signed within the purview of the statute of frauds;" and that it is sufficient, if the agreement is signed by the party to be charged. *Hatton v. Gray* 2 *Ch. Cas.* 164. *Coleman v. Upcot* 5 *Vin. Ab.* 527. *Cotton v. Lee* cited in *Seton v. Slade* 7 *Ves.* 205. *Fowle v. Freeman* 9 *Ves.* 351. *Wain v. Walters* 5 *East*, 10. *Saunderson v. Jackson* 3 *Bos. & Pul.* 238. *Egerton v. Matthews* 6 *East.* 307. *Allen v. Bennett* 3 *Taunt.* 168, 175. By examining the defendant's agreement of the 19th of *Sept.* 1822, in connexion with the averment of identity in the bill, which is not denied in the answer, it is evident that it relates solely to the moiety of the lands conveyed by the plaintiff on the day before ; and has reference to a conditional reconveyance of the same ; the agreement, therefore, is sufficiently explicit in stating the names of

the contracting parties, as well as the terms and consideration of the contract. Opposed to the cases last cited, are those of *Hawkins v. Holmes* 1 *P. Wms.* 770, and *Lawrenson v. Butler* 1 *Sch. & Lefr.* 19. But since the decision of the latter case, though Lord *Eldon* for a time hesitated, out of respect to the opinion of Lord *Redesdale*, the courts have resumed their former course of decisions. In *Weston v. Russell* 3 *Ves. & Beame* 19, the Master of the Rolls did not feel at liberty to adopt the opinion of Lord *Redesdale*; and his successor, in the case of *Ormond v. Anderson* 2 *Ball & Beatty* 370, was of the same opinion. And in *Clason v. Bailey* 14 *Johns.* 434, chancellor *Kent* delivered the opinion of the court of errors to the same effect, in which, with his usual ability, he took a broad view of the subject, and presented it in a most luminous manner. From an examination of the foregoing authorities, we are led to the conclusion, that the defendant's second objection, so far as it relates to the want of mutuality of contract, cannot avail him; and we now proceed to that part of it which is founded on the change of circumstances.

In many cases it has been decided that an important change, with respect to the situation of the parties, or of the property which was the subject of the contract, furnishes a substantial objection against decreeing a specific performance, after a considerable lapse of time. Such for instance, as the increased value of the estate ; or where the property agreed to be sold was consumed by fire ; or perhaps, where the owner, supposing the contract abandoned by the purchaser, had conveyed or covenanted to convey it to another person. The defendant in his answer has alleged only one circumstance in relation to the land in question, to shew such a change in the situation of himself and the property, as ought to induce the court to dismiss the bill; which is, that on the 20th of *October*, 1823, he purchased at auction the other moiety of the land and buildings for the sum of $121, which he alleges is more than the just value of it, to be owned in common ; and that this moiety by him so purchased would be rendered of little value to him, if he should be compelled to reconvey the other moiety to the plaintiff. It should be noticed that this purchase was made one month after the deposit

of the $159 at the bank, and the defendant's notice of it; what he did, therefore, was done by him after he was informed of the plaintiff's intention to redeem the moiety conveyed. Besides, he did not hesitate to receive the plaintiff's conveyance of an undivided moiety, as security for $250, and surely there is just as much inconvenience in his holding one undivided moiety, conveyed to him by the plaintiff, as the other, conveyed to him by the administrator of *Ira Getchell.* From these facts we are unable to perceive any essential change of circumstances, or discover how they furnish any substantial objection to a specific performance of his contract. The second objection thus failing, our opinion, is that the defendant's answer is wholly insufficient.

It will be perceived that the court do not mean that time is not of any importance in any equitable point of view, where a claim is made for the specific performance of a contract. Our decision is placed on the peculiar circumstances of the present case, which have been particularly stated and considered in the foregoing opinion.

KIMBALL *vs.* MORRELL.

Extraneous proof of the contents of an instrument lost by time and accident, is not admissible, until a foundation is first laid by evidence that an instrument was duly executed with the formalities required by law, and that it is lost.

When the declarations of parties are admitted in evidence as part of the *res gesta*, it is because they go to explain the true intent and meaning of the parties at the time. But this rule is not applicable to the contents of a deed; which is not to be limited, restrained or enlarged, by any parol declarations of the parties.

AT the trial of this action, which was a writ of entry for lands in *Mount Vernon*, the demandant claimed the land under one *David Philbrook*; and to support his title, called a witness, who testified that about a year before the death of one *Benjamin Philbrook*, who owned several parcels of land in *Mount Vernon*, the said *Benjamin* and *David* called the witness and his brother

to subscribe their names as witnesses to a deed, made at the same time, from *Benjamin* to *David*, of a tract of land in that town ; and they accordingly did so subscribe their names. He also testified that the deed was acknowledged before a magistrate, and was handed by *David* to the witness, to be kept till he should return from the eastward; and that about three months afterwards he called for and received the deed. The witness did not particularly recollect that it had a seal.

The demandant proposed further to prove, by the same witness, that the grantor, at the time of executing the deed, declared that it was a conveyance of the premises demanded in this action. But *Weston J.* before whom the cause was tried, rejected this testimony as inadmissible.

There was no evidence of the loss or destruction of the deed ; nor that any search or inquiry had been made for it. But the evidence rejected was not objected to on that ground ; the trial proceeding upon the assumption on the part of the demandant that the deed, if it ever existed, was lost or destroyed ; and proof of the latter fact was not required or called for on the part of the tenant.

A verdict was taken for the tenant, subject to the opinion of the court, upon the question whether the evidence rejected ought to have been received.

Orr and *Emmons*, for the demandant, contended that the proof ought to have been admitted. It was part of the *res gesta*. The declarations of a grantor, made before or at the time of the conveyance, are always admissible, if made against his interest, and not prejudicial to rights of third persons existing at the time. The proof offered was precisely of this character. *Bridge v. Eggleston* 14 *Mass.* 245. The evidence admitted went to prove the existence of a deed of land in *Mount Vernon*, which was lost. The party offered further to designate the land, by the same mode of proof ; which was nothing more than giving in evidence the whole of the grantor's declarations made at the same time, and relating to the same subject ; where a part of those declarations was confessedly admissible, upon acknowl-

edged principles. The matter of the seal was wholly for the jury to determine, upon the evidence before them.

Bond, on the other side, argued against the admissibility of the evidence proposed, because no foundation was laid by the previous introduction of the preliminary proof of diligent but ineffectual search for the deed. It was not denied at the trial that the deed, if it ever existed, was now lost ; but the point in issue was, whether any such deed ever existed. The evidence offered to shew this, was nothing more than hearsay ; and the death of the grantor gives it no higher character. *Gray v. Goodrich* 7 *Johns.* 95. 15 *Johns.* 493. 1 *East* 373. The declarations of a grantor can never be admitted to prove the existence or contents of his own deed. He cannot explain its latent ambiguities ; 1 *Mass.* 91—even though he may not be interested in the event ; 2 *Day* 121—nor can he defeat it ; 12 *Mass.* 439. *Bridge v. Eggleston* 14 *Mass.* 245. 1 *Johns.* 159 ;—for such testimony would violate the statute of frauds. 6 *Johns.* 19. And as to the argument that the testimony offered was against the grantor's interest, the rule does not apply to lands ; nor can the court determine whether it was against his interest or not. 11 *Johns.* 437. 15 *Johns.* 286. Such declarations, even if made *in extremis*, are not received. 2 *Johns.* 31. 16 *Johns.* 302.

The opinion of the court, the Chief Justice not sitting in the cause, was delivered by

Preble J. When a party, on an issue to the country, would avail himself of an instrument in writing, lost by time and accident, he should first prove that an instrument was duly executed with the formalities required by law; and secondly, that the instrument so executed has been lost. Then, and not till then, he is permitted to give evidence of its contents. Though there was no evidence offered by the demandant, and no direct admission by the tenant, on the trial of the issue, that the deed in question was lost, he denying that there ever was any such deed; the cause was suffered to proceed. and did proceed without objection by the tenant, on that assumption. We may therefore

regard the objection to the testimony rejected, arising from the fact that the necessary previous proof of loss had not been offered, as having been waived.

It is contended that the declarations offered to be proved are not subject to the objection, nor within the rule of law in regard to hearsay testimony; because those declarations were parts of the transaction; and because they were against the interest of the person making them.

When the declarations of parties are admitted in evidence as a part of the *res gesta*, it is because those declarations go to explain the true intent and meaning of the parties at the time. Now the true intent and meaning of a deed, and the contents of that deed, are to be gathered from the deed itself. The language of the parties to it, whether used before, or after, or at the time of its execution, cannot be given in evidence to limit, restrain or enlarge its meaning. The declarations therefore of the parties to a deed, as to its contents, are no part of the *res gesta*.

Nor is the argument, urged from the supposed adverse interest of the party making the declarations, more tenable. It does not appear that the declarations were against his interest. If a grantor should convey away by deed a valuable estate, saying at the time that the premises conveyed were a certain parcel, known be of little value, how would his interest stand affected by his declarations? He has given a deed—he has conveyed something. His declarations alter not the fact. He wishes, perhaps, it may be understood he has conveyed little, when he has conveyed much. But I attach no importance, in this case, to this mode of meeting the argument of the demandant's counsel. Admitting the grantor's declarations to have been against his interest, that does not make these declarations evidence against the tenant. If by such declarations the demandant may prove a part of the deed, he may prove each part; and thus the mere parol declarations of a grantor may be proved to defeat or overreach his solemn subsequent conveyance to a third person. The objections are overruled and there must be

Judgment on the verdict.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

SOMERSET.

JUNE TERM,

1826.

RUSSELL *& al. vs.* HOOK.

Where a judgment debtor was out of the State at the time of the extent of an execution on his land, the appointment of an appraiser by his wife was holden valid.

THIS case, which was a writ of entry, came before the court upon a statement made by the parties in which it appeared that the demanded premises were once the estate of the tenant, and that the demandants claimed title under the extent of an execution in their favor against him.

By the return of the officer it appeared that one of the appraisers was chosen by the demandants, another by himself, and the third "by the debtor's wife, as his agent, he being absent out of the Commonwealth." And the question was upon the validity of this appointment, the appraiser not appearing to have been chosen by the debtor himself, nor, upon his neglect or refusal, by the officer for him.

R. Williams, for the demandants, and *Boutelle*, for the tenant, submitted the cause without argument.

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

The only question presented by the parties for our consideration is whether the levy of the execution, under which the demandants claim, was made conformable to law. It is contended that one of the appraisers was not legally appointed. The return states that he was appointed by the debtor's wife, as his agent ; he being absent out of the Commonwealth. From this it may be fairly presumed that the officer had proof before him of her power to act in behalf of her husband, and as his attorney. It furnishes *prima facia* evidence of such authority, and this is not contradicted by any direct proof in the cause. There is only a species of negative evidence, arising from the husband's conduct in contesting the levy on the ground above mentioned. By this construction no injury is done ; by the levy the defendant's debt has been paid; and if the land was appraised too low, he might have redeemed it ; the spirit of the law seems to have been complied with. The interests of the husband might well be considered as safe in the hands of an appraiser chosen by his wife, as in those of one designated by any other person. But there is another ground on which the levy may be shewn to be legal, and liable to no objection. The law has provided that in the absence of the debtor, or in case of his refusal to choose an appraiser, the authority to appoint an appraiser for him is vested in the officer. Now if what was done by the wife cannot be legally considered as an appointment by her, in virtue of authority derived from the husband; it may and ought to be considered at least as a nomination by her, and a legal appointment by the officer. In a word, it was an appointment, in one mode or the other, legal and effectual. Viewing all the facts and circumstances of the case, we are not disposed to sustain the tenant's objections ; and therefore, according to the agreement of the parties, a default must be entered, and

Judgment for the demandants.

Bisbee *vs.* Evans.

Without the express concurrence or assent of a town, or parish, in its corporate capacity, no person can become its minister ; and no minister, not thus recognized, can hold lands, reserved for the first settled minister in the town.

This was an action of trespass *quare clausum fregit*, in which a case was stated by the parties, presenting the question whether the plaintiff had title to the *locus in quo*, which was a lot reserved for the use of the first settled minister in the town of *Harmony*.

The plaintiff was a minister of the denomination of calvinist baptists, regularly ordained according to the usages of that sect of christians. In 1812 he removed, with his family, into the town *Harmony* ; where a church, consisting mostly of citizens of that town, but including some of the towns adjacent, had been previously organized ; which voted in the same year to receive him as their pastor. From that time, till the year 1822, he continued to perform all the duties of a pastor of that church ; and in the year 1821, as an " ordained minister of the gospel," he was duly commissioned by the Governor and Council, to solemnize marriages within the county of Somerset. There was no stipulation, on the part of the church, to pay him any salary ; nor did he ever receive any compensation for his services, except by occasional voluntary contributions, and by exemption from the payment of taxes in the town of *Harmony*. The usage of this denomination is to ordain their ministers to the work of evangelists or ministers of the gospel, at large, and not over any particular church or society ; and during the year 1821, nothing was required to connect such minister with any particular church as their pastor, except a vote of the church to receive him as such.

The town of *Harmony*, in its corporate capacity, never expressly recognized the plaintiff as a minister of the gospel ; but at a meeting in the year 1824, they chose a committee to agree with the plaintiff what part of the lot reserved for the first settled minister he should have, releasing his right to the resi-

due ; but the report of the committee was not accepted by the town. There never had been any separate parish organized in the town, distinct from the town itself.

R. Williams, for the plaintiff, contended upon these facts that he was the first settled minister within the town, and, as such, entitled to take and hold the lands reserved for that use. The object of the legislature, he said, was the diffusion of religious and moral instruction among the people, by inducing ministers, of any denomination, to mingle and reside among the first settlers of the new townships. And this object was attained by the actual residence of any minister of the gospel, having a parochial charge in the town.

McLellan and *Sprague*, on the other side, were stopped by the court, whose opinion was delivered by

WESTON J. The plaintiff claims the lot, which includes the *locus in quo*, as the person, for whose use it was reserved in the original grant ; he being, as he contends, the first settled minister in the town of *Harmony*. Unless he has shewn himself legally invested with this character, he is not entitled to judgment. The plaintiff, it appears, has been ordained, according to the usage of the sect to which he belongs. Being thus ordained, but not as it would seem over any particular church or society, he removed in 1812, into the town of *Harmony* ; and there, by a vote of a church, consisting principally of inhabitants of that town, but including individuals of other towns, was received as their pastor ; in which capacity he has since officiated. If this church is to be regarded as connected with the religious society constituted by the town in its parochial capacity, which does not appear, it has no authority to contract with or settle ministers; for this belongs wholly to the town or parish, of which such of the members of the church, as are inhabitants, are part. Without the express concurrence or assent of the town or parish in their corporate capacity, no one can become their minister, or be legally recognized as such. According to the ecclesiastical usages of the

country, the church is generally permitted to nominate a minister, who may be approved or rejected by the parish. If the parish approve, a contract of settlement is then made between them and the minister. *Burr v. The first parish in Sandwich* 9 *Mass.* 727.

The only act on the part of the town, relied upon, is the appointment of a committee to agree with the plaintiff what part of the lot, reserved for the first settled minister, he should have; who reported a certain part, which was refused by the town. This vote was predicated upon the assumption, that he was then their minister, as that relation had not been legally created between them; or it was adopted as a measure preliminary to their concurrence with the church, in the result of which they were dissatisfied.

From the facts agreed, it does not appear to us that the plaintiff can be regarded as the first settled minister in the town of *Harmony*; he is therefore to become nonsuit, and the defendant to be allowed his costs.

PHILLIPS *vs.* HUNNEWELL.

Where, in a negotiation for the purchase of a yoke of oxen, the buyer, having his arm over one of them in the act of measuring him, said he would give the price demanded; to which the seller replied that he might have them; and the seller then borrowed them to haul a load of lumber to his home, which was ten miles distant, engaging to put them to no other use; it was held that this was no delivery of the oxen; and so no title passed to the intended buyer; no earnest having been paid, and no memorandum given.

THIS case, which was replevin for a yoke of oxen, came before the court upon exceptions filed to the opinion of *Perham J.* in the court below.

It appeared, at the trial below, that the oxen were originally the property of *Samuel Walker*; or, at least, that he was the agent of his mother, who owned them, and by whom he was

authorized to sell them to the plaintiff. On the 19th of *July* 1824, *Walker* having the oxen at the village in *Anson*, the plaintiff inquired of him the price, which was set by *Walker* at sixty five dollars. The plaintiff then measured the girth of the oxen with a line, and immediately said he would give the price ; to which *Walker*, while the plaintiff had his arm over one of the oxen in the act of measuring him, replied that he might have them. The oxen were yoked at that time ; but nothing was said about selling the yoke. After this, *Walker* proposed to borrow the oxen to haul a load of lumber to his house, which was about ten miles distant from the place of sale; to which the plaintiff assented, upon condition that they should not be put to any other work; and they were taken accordingly. More than a month before this, *Walker* had told the plaintiff he might have the oxen at the same price.

On the day following this transaction at *Anson*, the defendant purchased the same oxen of Mrs. *Walker* and her son, for sixty seven dollars ; paying seventeen dollars down, and agreeing to pay the balance in a few days ; which he accordingly did, and took them away. At the time of this sale, *Walker* told the defendant that the plaintiff claimed the oxen by virtue of the supposed sale of them on the day previous ; but the defendant said that no earnest having been paid, the plaintiff had no right to them.

A few days after this, *Walker* told the plaintiff that he and his mother had sold the oxen to the defendant, and received seventeen dollars in part payment ; nine of which he had expended ; and the plaintiff requested him to get them back from the defendant ; and for that purpose gave him eight dollars ; taking his receipt as for so much in part payment for the oxen. In *August* following the plaintiff tendered to Mrs. *Walker* and her son fifty seven dollars, demanding the oxen.

Upon this evidence, if believed by the jury, *Perham J.* instructed them that a delivery of the oxen to the plaintiff was not sufficiently proved, and that the property was therefore in him ; and they accordingly found for the plaintiff ; to which the defendant excepted.

Boutelle, in support of the exceptions contended that the evidence shewed no sale to the plaintiff, but only a contract to sell. The measuring of the oxen was to ascertain their size ; and the acceptance was only closing with the offer to sell, and not an actual sale. The acts of the plaintiff were acts of examination; not of ownership ; *Vincent v. German* 11 *Johns.* 193 ;—and as the sale was to be for ready money, and none was actually paid, the contract was never completed. *How v. Palmer* 3 *Barnw. & Ald.* 321. *Tempest v. Fitzgerald ib.* 680.

Nor was here any constructive delivery to the plaintiff. The cases on this subject are those of bulky articles, not capable of delivery in any other mode. *Searle v. Keaves* 2 *Esp.* 598. *Chaplin v. Rogers* 1 *East* 195. *Elmore v. Stone* 1 *Taunt.* 458. And in such cases the circumstances from which a delivery was inferred, ought to be so strong and clear as to leave no doubt of the intent of the parties. *Dana v. Ogden* 3 *Johns.* 399.

Bond, for the plaintiff, argued from the evidence in the cause, that a delivery of the cattle to the plaintiff was sufficiently proved. They were as fully in his possession after the bargain, as they had before been in that of *Walker*. No particular ceremony was necessary. It was enough that the seller was willing to part with them, and that the buyer was ready and actually accepted them upon the terms proposed. Here was all the possession in the plaintiff which the nature of the case admitted ; and the contract is therefore not within the statute of frauds. *Roberts on frauds*, 173, 177, 182. 11 *Johns.* 283. *Elmore v. Stone* 1 *Taunt.* 458. *Hollingsworth v. Napier* 3 *Caines* 182, *note a. Shep. Touchst.* 57.

There having been no express agreement as to the time when the money should be paid, it was payable on request. The payment might have been made a condition precedent ; but it was not so stipulated ; and the seller was content to part with the possession of the oxen, reserving to himself a right of action for the price, if not paid upon demand. The consent of the plaintiff, asked for and obtained by *Walker*, that he might use the cattle for a particular purpose, and the plaintiff's prohibition of any

other use of them, which was assented to by *Walker*, are unequivocal recognitions of the transfer of the property.

These facts having been communicated to the defendant prior to his purchase of the oxen, he cannot be treated as having acted with good faith. The second sale was a fraud in *Walker*, to which the defendant became a party ; and from which, therefore he can derive no benefit. *Lanfear v. Sumner* 17 *Mass.* 110. *Brooks v. Powers* 15 *Mass.* 244.

WESTON J. delivered the opinion of the court.

The title of the defendant to the oxen in question has been made out, unless there had been a prior sale to the plaintiff, by the former owner. Such a sale has been set up and relied upon; but the defendant contends that it was at most only a contract, void by the statute of frauds ; the property exceeding thirty dollars in value, and no earnest having been paid, or note or memorandum given. This position is well founded, unless the property was then transferred by an actual delivery, or by such acts and declarations as are equivalent thereto. The plaintiff never had the use and control of the oxen ; nor was there ever a formal delivery to him. If there was any delivery sufficient to pass the property, it was constructive, and can be gathered only from the circumstances attending the transaction.

It is a general rule in contracts of sale, where no time of credit is given, that the property is not transferred, but upon payment of the price. 2 *Black. Com.* 447. 1 *Salk.* 113. 6 *East* 625. If therefore, in a negotiation of this kind, the one party offers to give a certain price for an article, and the other thereupon says he shall have it, there is no change of property, until payment is made by the purchaser. *Blackstone* says it is no sale without payment ; unless the contrary be expressly agreed. This may be laying down the rule somewhat too strongly ; or under certain circumstances, an intention to give credit may be implied ; but it ought to be clearly and unequivocally indicated from the acts and declarations of the parties.

In the case before us, the price had been fixed ; the plaintiff said he would give it ; and while he had his arm upon one of the

oxen, in the act of measuring him, the owner told him he might have them. There is nothing thus far, from which any inference is to be drawn, that payment was not to precede a delivery. What followed was only an intimation on the part of the owner that he was not then ready to part with his oxen ; but wished to borrow them to convey home certain timber. To this the plaintiff acceded, if he would not use them for any other purpose. The desire expressed by the former owner to borrow the oxen, might seem to imply that he then considered them as the plaintiff's property. A request of a favor of this kind, in strictness admits that the property does not belong to the party seeking it, but to him of whom the favor is sought. But language is qualified, by the manner and connexion in which it is used. We are to gather the intention of the parties from their acts and declarations, taken together ; and not from the strict and accurate meaning of a single term. *Walker*, the former owner, was aware that the price being settled, the plaintiff, upon payment, would be entitled to immediate possession. This being inconvenient to him, he desired that it might be postponed, until he had used them for the purpose intimated. He knew that the plaintiff's offer did not imply an engagement to receive them at a future day ; and the request made by him can fairly, under the circumstances, be understood as expressing nothing more than a desire on his part that the bargain might not be defeated, by the use he proposed to make of the oxen, and that the plaintiff would hold himself ready to take them, when that purpose had been answered. We cannot, from the facts, feel warranted in draw ing the conclusion that credit was contemplated; and, unless it was, the property was not transferred.

The statute of frauds is a very beneficial one ; and its objects are best secured by adhering strictly to its provisions ; unless in cases which clearly do not fall within the meaning of the law. It was intended to remove all doubts by requiring some clear and positive act to show the completion of the bargain. In the case of *Bailey v. Ogden* 3 *Johns.* 399, cited in the argument, *Kent C. J.* in delivering the opinion of the court, says, " the circumstances, which are to be tantamount to an actual delivery, should

be very strong and unequivocal, so as to take away all doubt as to the intent and understanding of the parties."

The case of *Elmore v. Stone* 1 *Taunt.* 458, was an action brought to recover the price of two horses. The plaintiff, who kept a livery stable, having demanded one hundred and eighty guineas for them, the defendant, after offering a less sum, which was rejected, at length sent word "that the horses were his, but that as he had neither servant nor stable, the plaintiff must keep them at livery for him." The plaintiff, upon this, removed them out of his sale stable into another ; and this was held to be a constructive delivery, sufficient to satisfy the statute of frauds. The case was decided upon the ground that expense was incurred by direction of the buyer, and that they were constructively in his possession, while at livery in the plaintiff's stable. In *Horn v. Palmer*, cited in the argument, *Bailey J.* expresses a doubt of the authority of the decision of *Elmore v. Stone*, but insists that at any rate it goes as far as any case ought to go.

If the bargain was complete, and the property changed, in the case before us, *Walker*, the former owner, could have maintained an action for the price ; and notwithstanding they remained in *Walker's* actual possession, they were at the plaintiff's risk, and would have been assets in the hands of his administrator. But what was said and done, prior to the sale to the defendant, could not be attended with these consequences. Actual possession taken, earnest paid, or a note or memorandum signed by the party to be charged, are unequivocal acts. Constructive delivery has in certain cases been held to be equivalent to actual ; but it was where acts of ownership have been exercised by the purchaser, or he had employed the seller as his agent in taking care of the property. Nothing of the kind appears in this case. Nor was there any language used, from which we can understand with any certainty, or even probability, that the parties considered the bargain consummated, and the oxen transferred.

For these reasons, the opinion of the court is, that the judge who presided at the trial in the Common Pleas, was incorrect in instructing the jury that a delivery was proved. The exceptions are therefore sustained ; and a new trial must be had at the bar of this court.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

PENOBSCOT.

JUNE TERM,

1826.

Memorandum. *Weston J.* was not present at this term.

The Trustees of Foxcroft Academy *vs.* Favor.

No action lies to recover the amount of monies subscribed in aid of the establishment of an academy ; it not appearing that any monies had been expended by the trustees, or any other act done as a consideration, or upon the faith of the promise.

This was an action of *assumpsit*, brought to recover the amount subscribed by the defendant, in aid of the funds of Foxcroft Academy. The subscription paper recited the incorporation, the terms and conditions on which it was granted, and the solicitude of the subscribers for the establishment of the academy ; and thereupon an engagement on the part of the subscribers, to pay to *Samuel Chamberlain Esq.* treasurer of the trustees, or his successor, the sums set against their respective names. The defendant subscribed "twenty five dollars, in labor or materials."

At the trial in the court below, before *Perham J.* a general objection was taken by the defendant against his liability on the subscription paper ; which the judge overruled, and a verdict

was returned for the plaintiffs. Whereupon the defendant filed exceptions, pursuant to the statute. Several other objections occurred in the progress of the trial ; but the case was decided upon the point already stated.

Mc Gaw, in support of the exceptions, relied on the cases of *Bridgewater Academy v. Gilbert*, 2 *Pick.* 579. *Limerick Academy v. Davis* 11 *Mass.* 113, and *Farmington Academy v. Allen* 14 *Mass.* 172.

Godfrey, for the plaintiffs.

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

This case comes before us on exceptions alleged against the opinion of the court of Common Pleas. It is not necessary to examine the merits of all of them ; as we are well satisfied that the action cannot be maintained upon the promise stated in the subscription paper set forth in the declaration. We need not enter into an examination of principles to shew that there is no consideration for the promise which can give it legal obligation. The present case differs little from that of *Limerick Academy v. Davis.* It is true there is a promisee named in the case at bar, and there was none in the other case. But the case almost exactly resembling the present is that cited from 2 *Pick.* 579, in which there was a promisee, but the action was not maintained. It does not appear that any monies have been expended by the trustees, or that any part of the subscription was ever paid, or offered to be paid ; nor are there any of those facts which were considered as taking the case of *Farmington Academy v. Allen* 14 *Mass.* 172, and the case of *Flint*, therein mentioned, out of the influence of the general principle, so as to render the action maintainable on any of the common counts. The exceptions are sustained, and the verdict below is set aside; and a new trial is to be had in this court.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

WASHINGTON.

JUNE TERM,

1826.

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

SWETT *vs.* GREEN.

Where the secretary of a corporation received an order for money, payable to himself, in his private capacity, the amount of which, when paid, was designed to be applied to the payment of a debt due from the drawer to the corporation; and he afterwards passed it over to the treasurer for that purpose, of which the acceptor had notice;—it was holden that this was a sufficient assignment; and that a subsequent discharge from the original payee could not avail the acceptor.

THIS case, which was *assumpsit* against the defendant as acceptor of an order, came before the court upon exceptions filed by the defendant to the opinion of *Smith J.* before whom it was tried in the court below.

It appeared that on *June 10th*, 1822, *Kelly & Coates* drew an order on the defendant for sixty dollars, in favor of *John Swett*; which the defendant on the day following accepted, to pay in six days. *Swett* was secretary of the Eastport Mechanic Association; and the order was drawn to pay a note due to that corporation, in which *Kelly & Coates* were principals, and *Richard M.*

Bartlett was indorser. Soon after the acceptance became due, the secretary presented it for payment, which was not made; and thereupon he handed it over for collection to *Samuel Rice*, the treasurer of the corporation, who presented it, and informed *Green* of the purpose for which it was drawn. The order being still unpaid, *Bartlett* afterwards paid the note, received the order from the treasurer, and now brought this action, in the name of *Swett*, for his own benefit.

The defendant pleaded the general issue; and offered in evidence a receipt given to him by *Swett*, dated *Feb.* 4, 1824, and acknowledging the receipt of one dollar in full of all debts, dues and demands, up to that date. This paper, the judge ruled, could not avail him, the foregoing facts, which appeared in the deposition of *Rice*, being sufficient proof of a previous assignment of the order.

The question as to the validity of the assignment was submitted without argument; and the opinion of the court was delivered by

MELLEN C. J. This case comes before us on exceptions alleged to the opinion and instructions of the court of Common Pleas. The question presented for our consideration is whether the facts stated in the deposition of *Samuel Rice*, shew a legal assignment of the order declared on to *Richard M. Bartlett*, for whose benefit the action is brought, and such notice of the same to *Green* the defendant, prior to the date of the discharge, or receipt, which he received from *Swett*, the nominal plaintiff, as to entitle it to protection in this court.

It seems that the order was drawn on *Green*, in favor of *Swett*, the secretary of the mechanic association, to raise money to pay a note, on which *Bartlett* stood liable to the association as an indorser. The order, though accepted by *Green*, was not paid, and *Bartlett* paid the note on which he stood liable as before mentioned; and thereupon *Rice* the treasurer of the association, delivered this order, so accepted, to *Bartlett*; and evidently for the purpose of indemnifying him on account of his suretiship for *Kelly & Coates*. This delivery, under these circumstances, and for such purpose, according to the decision of this court in *Vose v. Handy* 2 *Greenl.*

322, and *Robbins v. Bacon* 3 *Greenl.* 346, and the cases there cited, amounted to an effectual assignment of the order ; conveying to *Bartlett* an equitable interest therein, entitled to legal protection ; provided *Green* had notice of it, prior to the giving of said receipt or discharge. As to the point of notice, we must look to the facts. The case finds, as before stated, that the order was drawn on *Green* in *June* 1822, for the express purpose of relieving *Bartlett* from his responsibility, as indorser of the abovementioned note. When the order was presented for payment, it was not paid, though it was shewn to *Green*, and payment was requested. It appears also by the exceptions, that *Green* was " told the circumstances of the order being drawn"— as it is expressed ; that is, he was told the occasion on which, and the purpose for which the arrangement was made, in due season. This shews that he must have been aware that *Swett* had no controling power over the order, nor any legal interest in it ; nor did he pretend to have any when he delivered it over to the treasurer of the association. Besides, the receipt itself, dated and given almost two years afterwards, carries on the face of it no small proof of the same fact ; for the consideration or sum specified therein is only one dollar ; whereas the sum named in the order, is sixty dollars. Hence it seems to be clear that either the receipt was never intended to affect or apply to the order ; or else that it was given for a very improper purpose ; that is, to impair or destroy the rights of *Bartlett*, the owner of the equitable interest therein ; which by law he had no right to do. On either supposition it must be unavailing to the defendant. We have no hesitation in overruling the exceptions, and affirming the judgment of the court of Common Pleas.

Judgment affirmed.

KING *vs.* UPTON.

If one promise to pay the debt of another, in consideration that the creditor will "forbear and give further time for the payment" of the debt ; this is a sufficient consideration, though no particular time of forbearance be stipulated ; the creditor averring that he did thereupon forbear, from such a day till such a day.

The consideration of a collateral undertaking to pay the debt of another, need not be expressed in writing.

If, at the taking of a deposition out of court, the adverse party interrogates the witness touching his interest in the suit, and he testifies that he has none; this is an election of the mode of proof, and the party will not be permitted to shew such interest *aliunde* at the trial.

ASSUMPSIT, against the defendant as guarantor of the payment of a promissory note, dated *March* 8, 1820, made by one *Jedu-thun Upton*, and payable to the plaintiff on demand. The undertaking of the defendant was contained in the following memorandum written on the back of the note:—"*Boston*, *Dec.* 2,1820. I hereby guarantee the payment of the within note, *John Upton*." The declaration stated, as a consideration for this undertaking, a promise on the part of the plaintiff "to forbear and give further time for the payment of said note ;" and the plaintiff averred that he accordingly did forbear and give further time for the payment of the note, from *Dec.* 2, 1820, till *Feb.* 15, 1822.

At the trial before the Chief Justice, at the last *June* term, the plaintiff offered the deposition of *Joseph King* ; to the admission of which the defendant objected, on the ground that the deponent was interested in the event of the suit ; and was about to prove this interest by other witnesses. But on inspection of the deposition, it appeared that the defendant had interrogated the deponent himself as to this point, and that the latter had denied that he was interested in the event of the suit. The Chief Justice thereupon overruled the objection, and admitted the deposition. The defendant also objected to the admission of parol proof to shew on what consideration the undertaking was founded. But this objection also was overruled ; and a verdict was taken for the plaintiff, subject to the opinion of the court upon these two points.

The defendant also moved in arrest of judgment ;—because the only consideration alleged for his engagement, was a promise by the plaintiff that a longer time of payment of the note should be given, without saying what time.

McGaw, for the defendant, as to the admissibility of direct proof of the interest of the deponent, cited 14 *Mass.* 206. 15 *Mass.* 378. 1 *Phil. Ev.* 96, 290. To support the position that parol evidence of the consideration of the promise to pay the debt of another was not admissible, and that the consideration should be expressed in the writing itself, he relied on *Wain v. Warlters* 5 *East* 49.—And upon the motion in arrest of judgment, he contended that the consideration alleged was altogether void for uncertainty.

Deane, for the plaintiff, relied on the standing rule of practice, to allow the party but one of the modes of shewing the interest of a witness, at his election. As to the objection that the consideration should have been expressed in writing, however the rule in England might be, he considered it settled here against the defendant, in *Packard v. Richardson* 17 *Mass.* 122. To the motion in arrest, he cited 1 *Com. on Contr.* 420. 3 *Burr.* 1886. 10 *Mass.* 316.

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

This case presents one question arising on a motion in arrest of judgment; and two arising on a motion for a new trial, founded on the report of the judge.

In support of the first motion, it is contended that the declaration does not disclose a sufficient consideration for the defendant's promise ; the alleged consideration being only that the plaintiff would "forbear and give further time" to *Jeduthun Upton*, the maker of the note, "for the payment of said note"—without naming any particular time for the continuance of such forbearance. The declaration contains an averment that the plaintiff did "forbear and give further time for the payment of said note from the 2d day of *December*, 1820," (being the day on which the de-

fendant's promise was made) "to the 15th day of *February*, 1822;" a few months before the commencement of this action. The authorities on this point have been examined, and they seem not to sustain the motion. In 1 *Roll. Abr.* 27, *pl.* 45, the law is laid down in these words. "So if A. be indebted to B. in 100 pounds, and B. is about to commence a suit for the recovery thereof; but C. a stranger, comes to him and says, that if he will forbear him, he himself will pay it, this is a good consideration for the promise; B, averring that he had abstained and forebore to sue A. *et adhunc*, did abstain and forbear; though no certain time was appointed for the forbearance; for it seems a perpetual forbearance is intended, the which he hath performed. So if he will forbear *paululum temporis*, this is good; plaintiff averring a certain time of forbearance." See also 1 *Com. on Cont.* 420. The principle as last laid down is perfectly applicable to the case before us; and appears to be a decisive authority. The motion in arrest of judgment is therefore overruled.

As to the motion for a new trial, on the ground that the presiding judge excluded direct testimony, which was offered to prove the interest of *Joseph King*, we are well satisfied it must fail. He had been interrogated on oath by the defendant, and had expressly denied all interest in the event of the suit; and as the defendant had elected to prove the alleged interest of the witness in that manner, by appealing to his knowledge and conscience, though he failed so to prove the interest; he, by making this election, precluded himself from proving it by evidence *aliunde*. This rule has long been established, and invariably adhered to in case of *viva voce* testimony; and there seems to be no sound reason why the same rule should not govern in case of a witness deposing before a magistrate.

As to the objection to the admission of parol proof to shew on what consideration the promise or guaranty of the defendant was founded, we consider the case of *Packard v. Richardson* 17 *Mass.* 122, as furnishing a most satisfactory answer. We have often and carefully examined that case, and the able argument of the chief justice, and concur in the principles on which the decision reposes. It is needless for us to go into an argument on the

question. We at once refer to it as an authority entitled to high consideration, decisive of the point before us ; and as a clear, learned and convincing investigation of the whole subject. Accordingly there must be

Judgment on the verdict.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

YORK.

APRIL TERM,

1827.

Memorandum. The Chief Justice was not present at this term.

BRADBURY *vs.* WHITE.

In a bill in chancery, seeking the specific performance of a written contract, the party sought to be charged may shew by parol, that by reason of fraud, surprise or mistake, it does not truly exhibit what was agreed between the parties.

Where one being about to purchase a lot of land, agreed with the owner of the adjoining lot that if he completed the purchase he would let him "have thirty feet always to be kept open adjoining his house;" and the house stood ten feet from the line of the lot about to be purchased;—it was holden that the party was entitled to a conveyance of a strip of land thirty feet wide, measuring from the line of the lot, and not from the house, and extending back to the rear of the lot; and to as large an estate in the easement, as the other had it in his power to grant.

THIS was a bill in equity for the specific performance of a special contract in writing, of the following tenor;—"It is agreed between Mr. *Chrisp Bradbury* and myself, that if I purchase some land of the heirs of *Cyrus King* Esq. at auction next Monday, that said *Bradbury* shall have thirty feet always to be kept open, adjoining to said *Bradbury's* house, on the north-westerly side of his house, at a fair and equitable price, according to what I may purchase at. *Biddeford, August* 13, 1823. *Samuel*

White, Chrisp Bradbury." The land alluded to was bounded northerly by a lane leading to *Saco* river, westerly by the county road, southerly by land of the plaintiff, and easterly by low water mark ; and it was purchased by the defendant at a guardian's sale, as intimated in the agreement. The house of the defendant stood about ten feet from the line of the land purchased ; and his outbuildings extended back to a log or capsill at high water mark. The plaintiff in his bill claimed to have thirty feet in width, measuring from the line of the defendant's land, and extending from the front of the lot, to low water mark.

The defendant, in his answer, admitted the agreement, but insisted that the conversation between them related only to a passage way, extending thirty feet from the plaintiff's house, and running back only to the capsill at high water mark, for a convenient approach to the plaintiff's buildings ; and that in the memorandum, which was written in haste at the moment, without advice of counsel, this material part was accidentally omitted. The agreement, thus understood, the defendant alleged he was willing to perform.

Parol testimony was taken, on both sides, to the situation of the land, and to various conversations and declarations of the parties, shewing their understanding of the contract ; the material parts of which are noticed in the opinion of the court.

E. Shepley, for the plaintiff, contended that the agreement was in itself free from doubt ; and it shewed that the plaintiff was to have thirty feet in width, of whatever land the defendant should purchase ; for it was about this land that they treated. And it was to extend as far back as the land itself might extend. There was no other limitation.

He insisted that parol evidence was inadmissible to alter or control the terms of the contract. The rule on this subject is the same in equity as at law. The exceptions, allowed in equity, are addressed wholly to the discretion of the court ; and go no farther than to admit the party to shew accident, or omission of a material part of the contract, or want of equity on the side of the plaintiff. *Bridges v. Dutchess of Chandos* 2 *Ves.* 422, and the cases there cited. *Hunt v. Rousmanier* 8 *Wheat.* 211. *Dwight v. Pomeroy* 17 *Mass.* 303.

Greenleaf, for the defendant, argued that the written agreement was void for uncertainty. It did not appear, by the writing, whether the plaintiff was to have a piece thirty feet square, or a strip of that width;—nor, if the latter, whether it was to extend to the rear of the house only, or to high water mark, or, still farther, to low water mark ;—nor whether the width was to be measured from the plaintiff's own house, or from the line of the purchased lot. Neither did it appear whether the title to be conveyed to the plaintiff was a fee, or a life estate, or a perpetual right of way ; nor by what rule the price was to be ascertained, if the value of the two sides of the lot was unequal. It being thus uncertain, and the terms not being so precise but that either party might innocently and reasonably misunderstand them, equity will not run the hazard of doing injustice by a specific decree; but will leave the party to his remedy for damages at law. 1 *Mad. Chan.* 426, 427. *Lindsay v. Linch* 3 *Sch. & Lefr.* 7. *Colson v. Thompson* 2 *Wheat.* 337, 341. *Blake's Chan.* 7. *Harnett v. Yielding* 2 *Sch. & Lefr.* 555, 556, 567. *Ld. Walpole v. Ld. Orford* 3 *Ves. jr.* 419. *Bromley v. Jeffries* 2 *Vern.* 415. *Emery v. Wase* 5 *Ves.* 849. *Brodie v. St. Paul* 1 *Ves.* 326. *Newland on Contr.* 151.

Parol testimony, it is agreed, is inadmissible to reform the writing, or aid its defects, so as to lay the foundation for a specific decree; but it is equally clear that the defendant may prove, by parol, any circumstances shewing it inequitable to decree the specific execution of a written contract ; though such mode of proof is not open to the plaintiff. 1 *Mad. Chan.* 405, 406.

Other points were raised and discussed, on both sides, upon the evidence, at the argument, which was had *April* term 1826. The opinion of the court was delivered at this term by

Weston J. The plaintiff, by a bill in equity, seeks the specific performance of an agreement in writing set forth in the bill, upon certain considerations averred ; stating further that he has been and still is ready to perform what the agreement requires on his part ; and praying that the court would decree that the defendant should make execute and deliver a deed to the plain-

tiff, conveying thirty feet of land bought by the defendant, according to the written agreement.

The defendant, in his answer, admits the written agreement set forth in the bill; he admits also a sufficient consideration therefor. He avers, however, that in a conversation between him and the plaintiff, in which the plaintiff "expressed his desire to obtain the use of a passage way upon a part of the [*King*] land, extending in width thirty feet from the front corner of the plaintiff's house, which house they supposed to stand about ten feet from the line of the land aforesaid, and running back from the road on which said land fronts, to a certain log in the bank, at high water mark, and no further, for the express and only purpose of giving to the plaintiff a more convenient approach to his house, and the outbuildings thereto belonging, by widening the plaintiff's passage way from ten to thirty feet; but so as to take but twenty feet in width of the land, then about to be purchased by this defendant; to which this defendant assented." And he further states, that "there was at no time any conversation between them, relative to said land, and previous to said time of sale, of an import in any wise other than, or contrary to the conversation aforesaid, and that in pursuance of said conversation, and with the sole intent to carry the same into effect, the paper writing aforesaid was hastily drawn up and signed by said parties, without the aid or advice of counsel learned in the law; and in which a material part, to wit the extent of said passage, was omitted to be inserted."

Testimony has been taken on both sides, in pursuance of commissions, issuing from this court, and in answer to interrogatories and cross interrogatories propounded by the parties. The counsel for the plaintiff objects to a part of the testimony elicited by the defendant; and the counsel for the defendant objects to the parol explanations and the verbal agreement, which appears in the testimony on the part of the plaintiff.

It cannot be necessary to cite authorities to prove that, at common law, parol testimony is inadmissible to add to, vary, or contradict written evidence. And the rules of evidence are the same in courts of law and of equity. Therefore parol evidence, which goes to alter a written agreement, cannot be received in

a court of equity, any more than in a court of law. *Clinan v. Cooke* 1 *Sch. & Lef.* 38, 39, and the cases there cited. *Marquis of Townsend v. Stangroom*, 6 *Ves.* 328. *Woollam v. Hearn*, 7. *Ves.* 211. *Higginson v. Claves* 15 *Ves.* 516. *Moran v. Hays* 1 *John. Ch. Rep.* 343.

But when equity is called upon to exercise its peculiar jurisdiction, by decreeing a specific performance, *the party to be charged* is to be let in to show that, by fraud, mistake, or surprise, the written contract does not contain the terms really agreed. *Woollam v. Hearn*, *Townsend v. Stangroom* and *Clinan v. Cooke*, before cited. *Clarke v. Grant*, 14 *Ves.* 519. And this being done to the satisfaction of the court, the plaintiff will not be entitled to a decree for specific performance. If the plaintiff, therefore, in the case before us, is entitled to the relief he seeks, it must be upon the written contract as it stands. The defendant, however, may be permitted to show that, by reason of fraud, surprise, or mistake, it does not truly exhibit what was agreed between the parties.

The defendant resists the decree prayed for, upon several grounds;—viz. that the contract is too vague and uncertain in its terms, to justify a decree for specific performance ;—that it does not, upon a sound construction, embrace so much of the *King* land, as is contended for by the plaintiff; and, lastly, that however that may be, it ought not to be enforced, because, by mistake or inadvertency, there is an omission of a material part of what was really agreed.

The bill avers, and the answer admits, that the piece of land, formerly the property of *Cyrus King*, deceased, purchased by the defendant, is bounded on the road leading from *Saco* falls to Winter Harbor, and extends thence to *Saco* river, between ferry-lane on the north, and the land of the plaintiff on the south. The extent of what he is to have north of his house is given in the written agreement ; in the other direction, towards *Saco* river, it is not given ; but it was to be a part of the *King* land ; and as there are no restrictive words, it must be understood to extend as far as that land extended, namely, to the river. There was no intermediate point given or implied, as a boundary ; and with-

out giving it this construction, it must be held to be void for uncertainty; which is not to be done, if the intention of the parties can be collected, by any fair implication. The piece, from which the plaintiff's part was to be severed, was understood. His part is expressly limited to a certain number of feet in one direction ; in the other, it is not limited ; it must then be commensurate with the piece itself.

It is said that the quantity of interest intended, whether for life or in fee, is uncertain. But *King* owned the estate in fee ; that interest the guardian sold to the defendant ; and the plaintiff was to participate in the purchase. He is entitled, therefore, to as large an estate in the easement, as the defendant received, and had it in his power to grant, which is an estate in fee.

A more difficult question is presented in respect to the width of the piece, which the plaintiff was to have. If the passage way, of thirty feet to be kept open, is to adjoin the house, as stated in the agreement, it would require but twenty feet of the *King* land ; to which it should be limited, according to the construction contended for by the defendant. But notwithstanding this part of the description, connected with the fact, that the north side of the plaintiff's house is ten feet south of the line of the *King* land, a majority of the court are of opinion that the agreement fairly implies, that the plaintiff was to have thirty feet of that land. That land was the subject matter of the agreement. The plaintiff was to have a part of it. He was to receive it from the defendant. It was to be of that part which was northerly of the plaintiff's house ; and he was to have thirty feet at a fair and equitable price, the amount of the whole purchase indicating the scale of value, by which it was to be estimated. That which was to be estimated was the thirty feet ; and it was what the plaintiff was to have, not what he possessed. Indeed no one reading the agreement, without reference to any extraneous fact, could doubt that the number of feet stated was intended to be taken from that, which the defendant designed to purchase. But that land in fact not adjoining the plaintiff's house, he cannot have the stated quantity located, so as to correspond in every particular with the description given. Rejecting the words in

the agreement, "adjoining said *Bradbury's* house," the land to be conveyed may be understood and located ; and the object, which the parties manifestly had in view, the one to convey, and the other to receive, a certain and definite part of the contemplated purchase, may be carried into effect. If these words are retained, and regarded as the leading and essential part of the description, the defendant could convey no land, which would adjoin the plaintiff 's house ; and if one third of the passage way was to be furnished by him, the quantity which he would receive of the defendant, to be estimated upon the principles stated, would be a different one from that specified in the agreement. These words therefore may be disregarded, as they are not essential to ascertain the estate to be conveyed, and as they are inconsistent with other parts of the description, which indicate, with more certainty, the general intent of the parties. The case of *Worthington v. Hylyer*, 4 *Mass.* 196, may be cited as justifying this construction.

If the defendant made the purchase, that part which he was to reserve to himself, would adjoin the contemplated passage way on the south. It was to be kept open, and would be for their joint benefit and accommodation ; but if it was to consist in part of land, which the plaintiff before owned, no interest in that part could be secured to the defendant, in the conveyance to be by him made to the plaintiff; and it does not appear, either from the agreement, or the consideration proved on the part of the plaintiff, that he was to execute any instrument to the defendant. The consideration was, that the plaintiff would forbear to interfere, by bidding at the sale, and would pay, for the part he was to have, a fair proportion of what might be given for the whole.

It remains to determine, whether there was any such mistake in the agreement, as is set forth in the answer. It is there stated that the plaintiff wanted only twenty feet of the *King* land, and that it was this quantity alone, which the defendant consented that he might have. From an examination of the testimony, it appears that this suggestion is not only unsupported by proof, but that it is expressly disproved. Some of the witnesses depose that the plaintiff said he wanted the land for a road or passage

way, or principally for a passage way, but none of them say that it was to take twenty feet only of the *King* land, or thirty feet from the house. On the contrary, *Jacob Bridges* deposes that the defendant told the plaintiff he should have as much as he wanted, and that the plaintiff replied he wanted thirty feet from his line. *Elias Bradbury* deposes that the same conversation took place between the parties, when the agreement was signed. *Daniel Goodwin* also testifies to a similar conversation.

It is further stated in the answer, that it was agreed between the parties, that the plaintiff should go no further than to a certain log in the bank, at high water mark. Upon this point *Noah H. Tibbits* deposes that on the morning of the sale, he heard the plaintiff tell the defendant that he wanted only to go to the high water mark. *Samuel Floyd* and *Levi Floyd* testify that, after the sale, it was agreed between the parties, that the plaintiff should run, the one says to the corner, and the other to the cap-sill, of the plaintiff's wharf. *Samuel Floyd* also states, that it was agreed that *Fairfield* should make the survey ; and *Bridges* says that when *Fairfield* came for that purpose, the plaintiff appeared to be satisfied with what he supposed to be the defendant's offer; until *Fairfield* either shewed the defendant's proposition to the plaintiff on paper, or explained it to him, when he said he expected to go to low water mark, and thought that was the understanding between them ; but the defendant directing the surveyor to run only to high water mark, the plaintiff refused to acquiesce in this construction of the agreement. *Charles Adams* deposes that subsequent to the purchase, he heard a conversation between the parties, in which the word capsill was introduced, as he thinks by both, but he does not recollect what the conversation was.

Other witnesses testify, that the plaintiff claimed to low water mark. *Bridges* deposes that prior to the sale, he heard the plaintiff say he wanted the water privilege, as much as the upland. *Daniel Goodwin* says that in a conversation, which took place between the parties in his presence, the defendant tried to induce the plaintiff to consent not to go to low water mark, but to the end of his wharf only, and he would make a deduction from the

price; but that the plaintiff refused, and said he wanted what they had agreed for. The witness adds that the defendant did not at that time pretend to deny that, by the agreement, the plaintiff was to go to low water mark ; but said that thirty feet in width, and to the end of the wharf, was as much as the plaintiff could want.

The answer, being directly disproved in a material part, cannot be regarded as having much weight in verifying the facts stated in it; and the proof offered to show that the plaintiff agreed to stop at high water mark, repelled as it is by counter proof on his part, is far from being satisfactory.

In the case of *Townsend v. Stangroom*, before cited, *Ld. Eldon*, although he admitted evidence of surprise, in defence to a bill seeking a performance in specie, remarked that they who produce evidence of mistake or surprise in opposition to a specific performance, undertake a case of great difficulty.

Upon the whole, although it is be regretted that the written agreement is not more explicit in its terms, a majority of the court, are of opinion that the points taken in defence have not been sustained ; and that the plaintiff is entitled to the relief sought in the bill.

REED *vs.* WOODMAN.

If a creditor, having demands accruing partly before and partly after a conveyance by his debtor, which he would impeach on the ground of fraud, blends them all in one suit, and having recovered judgment, extends his execution on the land ; he can come in only in the character of a subsequent creditor.

If a creditor, to secure his debt, takes from his debtor an absolute conveyance of land, giving his parol promise to reconvey on payment of his debt ; this is not void against other creditors, without proof of actual fraud.

And if the debtor, in such case, having paid the debts, instead of taking the reconveyance directly to himself, procures the deed to be given to a third person, between whom and himself there was a corrupt intent to deceive and defraud his creditors ; yet a subsequent creditor cannot impeach this conveyance, no estate having passed back to the debtor.

IN this case, which was a writ of entry, tried before *Preble J.* the title of the demandant was under the extent of an execution in his favor, against one *Aaron Woodman*, made *Nov.* 13, 1824. His debt was for professional services rendered, and monies expended, in the management of a suit in the courts of Massachusetts, commencing in *August* 1821, and ending at the termination of the suit in *October* 1822. The demandant attached the premises *Jan.* 9, 1824, and extended his execution within thirty days after judgment.

The tenant, who was a brother of *Aaron Woodman*, claimed title under a warranty deed made by *Aaron Woodman* to *William* and *Edward Oxnard*, dated *Feb.* 1, 1822 ;—and a quitclaim deed from the *Oxnards* to *David Burbank*, dated *Aug.* 8, 1823 ;—and a quitclaim deed from *Burbank* to the tenant, dated *Jan.* 2, 1824, but not recorded till a year after the demandant's attachment.

The demandant then read the deposition of *William Oxnard*, who testified that at the time of making the deed to him and *Edward Oxnard*, said *Aaron Woodman* was indebted to them in about 450 dollars, and to him alone in about a hundred dollars more; as collateral security for which sums, the deed was given; on payment of which the land was to be reconveyed to said *Aaron*; —that afterwards, the debts being otherwise satisfactorily secur-

ed, they, at the request of *Aaron Woodman*, conveyed the land to *Burbank*, taking his negotiable note for 400 dollars, payable to themselves in six years without interest; which they transferred to said *Aaron*, without recourse to the indorser ;—and that their promise to reconvey the property on payment of their debt was merely verbal.

The demandant also read the deposition of *Burbank*, who testified that the conveyance to himself was made at the request of *Aaron Woodman*, for the sole purpose of secreting the property from his creditors, and was wholly collusive ; and that his own deed to *Ephraim Woodman*, the tenant, was also made at *Aaron's* request, and for his benefit, *Burbank* refusing to hold the title any longer.

The tenant proved that the land was worth about four hundred dollars ; and that *Aaron Woodman*, at the time of the conveyance to the *Oxnards*, was solvent, though embarrassed, and his credit somewhat impaired ; and that he continued solvent till *June* 1823, when he failed.

Upon this evidence the demandant's counsel contended—1st, that the proof of a secret trust or agreement between *Aaron Woodman* and the *Oxnards*, for the reconveyance of the property, it being inconsistent with the face of the deed, was conclusive evidence of legal fraud ; the conveyance being of real estate.

2. That if it was not conclusive, and if the conveyance to the *Oxnards* was to be treated as a conveyance merely voluntary ; yet it was not valid against the demandant, who was a prior creditor, his debt having accrued under a contract made and partly executed, before the date of that deed.

3. That if the demandant stood on the ground of a subsequent creditor, as it respected the conveyance to the *Oxnards*, and if that conveyance was good in law ; yet that if the conveyance from them to *Burbank* was fraudulent and void, the demandant had a legal right to attach and hold the land, as the estate of *Aaron Woodman*, while the apparent title stood in the name of *Burbank*.

But the judge instructed the jury that the proof of a secret agreement between *Aaron Woodman* and the *Oxnards*, for the

reconveyance of the estate, though it was strong evidence of fraud, yet was not conclusive ;—that the demandant by blending in one suit his charges for monies expended and services performed after, as well as before, the conveyance to the *Oxnards*, could come in only in the character of a subsequent creditor ;—and that, therefore, if they were satisfied that there was no actual fraud in the conveyance to the *Oxnards*, they ought to find for the tenant ; the demandant not being at liberty, in that case, to avail himself of any fraud in the conveyance to *Burbank*, or in that from him to the tenant.

These points, however, he reserved for the consideration of the court, a verdict having been returned for the tenant.

Greenleaf and *J. Shepley*, for the demandant, contended that the testimony of *Oxnard* amounted to conclusive proof of legal fraud, so far as to render his deed void against the creditors of *Woodman* ; and that this should have been so ruled by the judge, and not have been left to the jury ; the facts thus testified not having been controverted by the tenant. *Sturtevant v. Ballard* 9 *Johns.* 337. *Flint v. Sheldon* 13 *Mass.* 443. *Smith v. Lane* 3 *Pick.* 205. It was proof of a secret trust in the conveyance of land, inconsistent with the face of the deed, which ought always to exhibit every thing relating to the title. *New Eng. Ins. Co. v. Chandler* 16 *Mass.* 279. *Doe v. Rutledge Cowp.* 712. *Fitzer v. Fitzer* 2 *Atk.* 50. *Sexton v. Wheaton* 8 *Wheat.* 246. *Northampton Bank v. Whiting* 12 *Mass.* 110. *Gorham v. Herrick* 2 *Greenl.* 87. *Hills v. Elliot* 12 *Mass.* 31. *Harris v. Sumner* 2 *Pick.* 136. If a conveyance, with a power of revocation on its face, is void as against creditors ;—*Roberts on Fraud. Conv.* 618, 620; 4 *Cruise's Dig.* 380, *tit. Deed, ch.* 22 § 40 ; *a fortiori* it is void where the power of revocation is not on the face of the deed, but is secretly reserved. Even if *Oxnard's* deed be free from actual fraud, yet it may be construed in connexion with the deed to *Burbank*, that the statute against frauds be not defeated. *Roberts on Fraud Conv.* 379, 381, *note g. Burrell's case* 6 *Co.* 726.

And if none but prior creditors can impeach the conveyance, the demandant has that character. He was retained in a suit

previously commenced, and was bound to proceed in it to judgment. The contract was already executed in part, and he was obliged to complete it. *Dearborn v. Dearborn* 15 *Mass.* 316. It was enough that there was a contract made; though the services were not rendered which were to form the basis of the claim to compensation ; for it was in respect of the debtor's existing means to pay, that the credit was given, and the stipulation entered into ; and not in respect of such means as he might from time to time possess, during the progress of the business. *How v. Ward*, *ante p.* 195. *Damon v. Bryant* 2 *Pick.* 411. *Hind's lessee v. Longworth* 11 *Wheat.* 199.

But if the demandant is merely a subsequent creditor, yet the deed to the *Oxnards* is at best but a voluntary conveyance ; and all such, except family settlements, if made by a person indebted at the time, or with a view to future indebtedness, are void against subsequent creditors. *Sexton v. Wheaton* 8 *Wheat.* 242, 250. *Reade v. Livingston* 3 *Johns. Chan.* 501. *Roberts on Fraud. Conv.* 17, 18, 19, 29. They are also void against subsequent purchasers for valuable consideration; and by our law the extent of an execution is a statute purchase of the debtor's title ; and it gives the creditor a seisin, which he may assert, in any shape, against a wrong doer.

Though the *Oxnards'* deed were good ; yet the case is no better than if they had conveyed to *Aaron Woodman*, and he, at the same instant to *Burbank*. This latter deed, being clearly fraudulent, cannot be the foundation of title against any person whom it was designed to defraud. *Brooks v. Marbury* 11 *Wheat.* 90. *Roberts on Fraud. Conv.* 66, 451, *note a.* It is not necessary that he who sells the land should make the fraudulent estate ; if the estate be fraudulent, whoever sells it, it may be avoided. *Roberts on Fraud. Conv.* 377, 382. *Goodwin v. Hubbard* 15 *Mass.* 210. 4 *Dane's Abr.* 119. *Croft v. Arthur* 3 *Desauss.* 23. The estate never passed out of *Aaron Woodman*, so as to defeat his creditors ; but there always remained a resulting trust to him ; which may be shewn by parol. *Jackson v. Sternberg* 1 *Johns. Ca.* 153. And *Oxnard's* deed to *Burbank* can be regarded in no other light, than a renunciation and abandonment by the grantors

of all their estate in the premises, for the benefit of *Woodman's* creditors.

J. Holmes and *Goodenow*, for the tenant, denied that the demandant was a prior creditor of *Aaron Woodman*; he being under no obligation, as they contended, to prosecute the suit, but at his own pleasure ; or, at most, no farther than he was furnished with funds. The obligation of the attorney is commensurate with that of the client ; and nothing more. And the debt of the demandant consisting of subsequent as well as prior charges, the whole partakes of the character of a subsequent debt.

But the intent of the debtor was not to defraud, but to secure his creditors. The purpose of the *Oxnards* was lawful ; and no fraudulent designs of *Woodman* could impair their security, without their actual participation. *Bridge v. Eggleston* 14 *Mass.* 245. *Harris v. The Trustees of Phillips Academy* 12 *Mass.* 456. Having enough left to pay his debts, he had a legal right to dispose of this estate at his own will ; even by voluntary conveyance ; which the demandant had no right to question. *Drinkwater v. Drinkwater* 4 *Mass.* 451. *Bennett v. Bedford Bank* 11 *Mass.* 421. *Parker v. Procter* 9 *Mass.* 390. 2 *Starkie's Ev.* 616. *Cadogan v. Kennett Cowp.* 432. *Dewey v. Boynton* 6 *East.* 257.

Here was no constructive fraud. The conveyance to the *Oxnards* was, in its operation, an extinguishment of their debt ; and had they afterwards sued *Woodman* for the debt, he might have shewn this conveyance in bar of the action. The estate was absolute in them. And it never passed back to *Woodman*, by any of the methods known to our law. It therefore could not pass to the demandant, who succeeded only to the rights of his debtor ; and whatever may be the character of the subsequent conveyances *in foro conscientiæ*, *in foro legis* they are valid.

The opinion of the court was read at the ensuing *September* term in this county, as drawn up by

Weston J. The greater part of the debt, which was the foundation of the judgment rendered in favor of the demandant, accrued subsequent to the deed given by *Aaron Woodman* to the

Oxnards. The levy was entire, and cannot be so apportioned or divided as to constitute a satisfaction for that part of his debt, which was due prior to that deed. The demandant, having taken judgment for his whole demand, is to be regarded as a creditor subsequent to the conveyance of the land in question, by his debtor. He cannot therefore impeach that conveyance, but by showing actual fraud. This the jury have negatived; although by the conduct of *Aaron Woodman* and of the *Oxnards*, who lent themselves as his instruments in his attempt subsequently to put the property out of the reach of his creditors, there was some reason to infer that this course was originally meditated by him, and intended to be aided by them, to defeat the claims of such as then were, or afterwards might be, his creditors; and if the jury had been satisfied that such was their intention, the deed might have been defeated. But this does not clearly appear. The security of the *Oxnards* might have been the only ground of the conveyance at the time, and the fraudulent purpose conceived afterwards. And this is rendered the more probable from the fact, which the jury have found under the direction of the judge, that at the time of the conveyance, *Woodman* was possessed of property sufficient to pay his debts. It does not appear that the value of the land did much, if at all, exceed the amount due to the *Oxnards*; so that fraud was not to be inferred from inadequacy of consideration. Although, by the agreement of the parties, the conveyance, which was in form absolute, was regarded as collateral security for their debts, which were not therefore discharged; yet if they took the land, and held it to their own use, if of sufficient value, the debts, which it was conveyed to secure, would be considered as paid; as when a mortgagee takes possession for condition broken, he can no longer recover the debt, except so far as the value of the property mortgaged may fall short of the debt due. We are of opinion that the judge was correct, in declining to instruct the jury, as requested by the counsel for the demandant, that the verbal agreement between *Woodman* and the *Oxnards*, when they received their deed, by which the former was to have the privilege of redeeming the land, by otherwise paying their demands, was conclusive evidence of fraud.

The case of *Goodwin v. Hubbard* 15 *Mass.* 210, has been cited for the demandant. We have examined it with attention. Some of the principles there stated, and deductions drawn by the learned chief justice, by whom the judgment of the court was delivered, do not appear to us to have been illustrated with the clearness, which generally marks his opinions. The facts presented a case of gross fraud upon creditors ; and could not fail to excite the desire, manifested by the court, to defeat the accomplishment of the designs of the fraudulent party. The case is viewed in various aspects ; and several suggestions are made as to the ground upon which this might be done without violating legal principles, the correctness of some of which, if we have understood them, may, we think, admit of doubt. Some special legislation upon this subject has, it appears, been deemed necessary in New-York. A statute of that State is referred to in the opinion cited, which provides that whenever real estate is held in trust, it may be levied upon by a creditor as the property of the *cestui que trust* ; and that parol evidence of such trust should, in such cases, be admissible. This latter provision seems to have been introduced, with a view to give additional facilities to creditors, in defeating the fraudulent arrangements of their debtors. It may, however, well deserve consideration whether, by thus relaxing the spirit and policy of the statute of frauds, more frauds may not be occasioned than defeated.

The ground, upon which the opinion of the court is distinctly predicated in that case, at the close, is, that the demandant, having shewn no title but what originated in fraud, could not prevail. We are called upon to determine, not whether the tenant who holds, as it is insisted, under a fraudulent conveyance, has title, but whether the demandant has ; and however defective may be that of the tenant, yet if the demandant has shewn no title, he must fail in his action. With every desire to aid the latter in defeating the fraudulent practices of his debtor, we find ourselves constrained to determine, that having failed to satisfy the jury that the conveyance to the *Oxnards* was fraudulent, he has exhibited no title which can avail him.

The opinion of the court is, that the case was presented to the jury, by the judge who presided at the trial, as favorably as the facts would warrant. There must therefore be

Judgment on the verdict.

EMERY *vs.* HERSEY.

Where, in the usual course of business, goods shipped on freight are consigned to the master for sales and returns, the owner of the vessel is liable, as well for the payment of the proceeds to the shipper, as for the safe transportation of the goods.

To subject the hirer of a vessel to the liabilities of an owner, he should have the possession, and the entire control and direction of the vessel; so that the general owner, for the time being, could have no right to interfere with her management.

THIS was *assumpsit*, brought to recover of the defendant the value of a quantity of boards, which the plaintiff had shipped on board the defendant's sloop to *Newburyport*, consigned to the master ; and it came before this court by a writ of error upon the judgment of the court below.

At the trial in that court, before *Smith J.* the plaintiff called *Coolbroth*, the master of the sloop, as a witness; by whom it was proved that the vessel was let to the master on shares; the master to victual, man and sail the vessel, and to receive one half the freight money, and five dollars for each trip she might perform ;—that she was nearly loaded with wood by *Granger, Scamman & Co.* at the mouth of *Saco* river, at some distance from the defendant's house ; but not being fully freighted, the plaintiff, at the request of the master, shipped the boards in question, consigning them to the master for sales and returns. The boards were landed at *Newburyport*, and sold by the person to whom the wood was consigned, for the plaintiff's account, and the proceeds paid over to *Coolbroth*. On his return to *Saco*, he handed the account of sales of the plaintiff's lumber to Mr. *Gran-*

ger, of the firm of *Granger, Scamman & Co.* requesting him to pay the plaintiff, out of the freight money due on that trip, which he agreed to do. This arrangement was afterwards stated by the master to the plaintiff, and by him assented to. The master at this time was indebted to the defendant, but not on account of freight money.

While the vessel had been thus employed by *Coolbroth* on shares, he had several times contracted for the freight, at the defendant's request ; because, he said, *Coolbroth* could make the best bargain; and the freight money had been received by either of them, as was most convenient at the time.

The plaintiff subsequently spoke to *Granger* respecting the sales of his lumber, and was informed of the arrangement made by the master for payment of the balance due him, which he did not disapprove. *Granger* would then have paid him, had they met at his place of business. After this, the defendant, calling on *Granger* for the freight of the wood, was made acquainted with the preceding transactions, of which he expressed his disapprobation; denying the right of *Coolbroth* so to appropriate the freight money, and claiming it as belonging to himself. *Granger* then settled with the defendant for the freight of the wood, the amount of which was fifty one or two dollars, and paid him a balance of about twenty eight dollars, the residue having been previously advanced to *Coolbroth* ; taking the defendant's written promise to indemnify him for paying it over. The vessel had been in the employ of the same persons for several preceding trips ; and the freight account had been settled by *Granger* with the master, who had generally taken a note payable to the defendant for his half of the freight money.

It was proved to be customary at *Saco*, when lumber was shipped on freight, for the master to sell it, and pay over the proceeds himself to the owner of the lumber ; unless he had orders to the contrary.

The defendant filed an account in offset ; in which, among other things, he charged the plaintiff with the freight of the lumber in question.

The judge being of opinion that, upon this evidence, the defendant was not liable, and a verdict being thereupon returned in

his favor, the plaintiff filed exceptions. The record was brought up, on an assignment of the general error.

E. Shepley, for the plaintiff, argued first upon the general liability of the defendant, as owner of the vessel, to fulfil every lawful contract made by the master, relating to the ship The only exception to this rule, he insisted, was where the master was owner *pro hac vice* ; and in the present instance the master was not within the exception, even upon the strongest adjudged cases. In *Reynolds v. Toppan* 15 *Mass.* 370 the hiring was for a certain time, and by a written agreement. So in *Taggard v. Loring* 16 *Mass.* 336. In both those cases the contract was certain, and the master had the absolute control of the vessel, during the stipulated time. But in the present case the contract was at the will of the owner ; who denied the rights of the master to appropriate the freight money ; treating him as his servant, removable at his pleasure.

2. The defendant is liable, because he adopted the act of the master, by charging the freight to the plaintiff in account ; and by claiming the freight money of *Granger*. The contract of the master was binding on the owner, even without such adoption. *Abbot on Shipping* 136. And it was not out of the course of his legitimate power to bind the owner ; for his contract to bring home the money rests on the same principles with his contract to carry the goods. *Kemp & al. v. Coughtry & al.* 11 *Johns.* 107.

3. But if the defendant is not liable as owner, yet he is liable on the count for money had and received ; by taking from the hands of *Granger* the money deposited there for the plaintiff. If the defendant claimed it as owner, he is liable as owner ; if not, he could not touch the money, but by action. 1 *Com. Dig. Assumpsit E.* 205. *Hall v. Marston* 17 *Mass* 575. *Arnold v. Lyman ib.* 400. *Mason v. Waite ib.* 560.

Greenleaf, for the defendant, contended that the plaintiff's remedy was against the master alone, he being the owner *pro hac vice*. He had an interest in the vessel for each voyage, from its commencement, and could not be removed without his own

consent. *Abbot*, 184, 31. *Reynolds v. Toppan* 15 *Mass.* 370. *Taggard v. Loring* 16 *Mass.* 336. *Frazer v. Marsh* 13 *East* 238. Wherever the charterer has the whole management of the vessel, or is to victual and man her, he is deemed the owner. *McIntire v. Brown* 1 *Johns.* 229 *Hallet v. Columb. Ins. Co.* 8 *Johns.* 272. *Thompson v. Snow ante p.* 264. *Vallejo v. Wheeler Cowp.* 143.

But if the owner is in this case liable in general, his responsibility does not extend beyond the safe delivery of the goods at the port of destination. The cargo is then, in judgment of law, in the possession of the consignees. And if the master, being consignee, sells and misapplies the proceeds, he alone is responsible to the owner of the cargo. The owner of the ship is only bound for the acts of the master relative to her employment; and this chiefly in respect of the receipt of the freight, which is earned as soon as the goods are landed. *Pothier on Mar. Contr.* 22. *Jacobsen's Sea laws* 222. *United Ins. Co. v. Scott* 1 *Johns.* 106. *Abbot*, 178, *note* 132, 137. In this case, moreover, the plaintiff made a special contract with the master, not for the transportation of his goods, but for the disposal of them after they were landed.

As to the receipt by the defendant of the money in *Granger's* hands; no claim can be founded upon it in favor of the plaintiff. The defendant received in fact less than his own share of the freight money. And this share the master could not, on any principle, apply to the use of the plaintiff. *Granger* could pay over to the plaintiff only such money as the master might lawfully appropriate, and this was only his own proportion. The count for money had and received cannot therefore avail the plaintiff; especially as it is controlled by the bill of particulars annexed to the writ.

Nor can the defendant be regarded as having adopted the act of the master, by charging the freight of the goods in his account filed in offset; since he is entitled to protect himself by that precaution, against an adverse decision of the cause. And as to the custom, the evidence shews that the master is regarded as the agent of the shipper, who looks to him alone.

The opinion of the court was delivered at the succeeding *May* term in *Cumberland*, by

WESTON J. It appears in the case before us that the defendant's sloop was employed in carrying wood and lumber, on freight, from *Saco* river ; and that the plaintiff shipped on board said sloop, on freight, a certain quantity of lumber to be sold by the master, and the net proceeds paid over to the plaintiff.

Owners of vessels employed in the transportation of property, are common carriers ; and liable to the responsibilities, which by law attach to persons engaging in that business. They are made answerable for the safe carriage and delivery of all goods, entrusted to them, their servants, or agents ; unless a loss be occasioned by the act of God, or a public enemy. One of the objections taken in defence is, that if a liability ever attached to the defendant, it terminated upon the delivery of the lumber in *Newburyport*, and that the subsequent sale and disposition of it there, constituted no part of the duty of the owner or carrier ; that he derived no benefit from it ; and that in this part of the business, the master was made the special agent of the plaintiff, and that he ought to look to him alone. It is in testimony in this case, that the usage at *Saco* is, when lumber is shipped on freight, for the master to sell it, and bring home the money, and pay it over to the shipper ; unless otherwise directed. The freight or compensation, therefore, paid by the shipper, is a remuneration, not only for the carriage of the lumber, but for all the care and labor bestowed upon it by the master, until his trust is fulfilled. In the whole business, the master acts within the scope of his employment ; and we entertain no doubt that the owner is liable for the faithful performance of every duty, undertaken by the master in regard to the property, according to the usage proved. The case of *Kemp v. Coughtry*, cited from 11 *Johns.* 107, is an authority directly in point.

But it is principally insisted that the master, in this case, was owner, *pro hac vice*, and therefore the general owner not liable. If this fact had been established, the position is well founded

To constitute the hirer owner, *pro hac vice*, he should have the possession, and the entire control and direction of the vessel; so that the general owner, for the time being, would have no right to interfere with her management. 2 *Barn. & Ald.* 503. *Reynolds v. Toppan* 15 *Mass.* 370. *Taggard v. Loring* 16 *Mass.* 336, cited in the argument. In this case, he was to victual and man the vessel, and to have one half the freight money, and five dollars on each trip, for his compensation; but it is no where testified that he was to have the control of the vessel. On the contrary it appears, that the defendant claimed to interfere and did interfere, in her management as owner. The master testified that for some prior trips, he had contracted for the freights; but under the special direction of the defendant, who employed him for this purpose; because he said he could make the best bargain. He further testified, that sometimes he settled with the freighters, and sometimes the defendant. It is proved by *Joseph Granger*, that he made the agreement with the defendant, to freight the vessel with wood, for the very trip when the plaintiff's lumber was carried, which was received on board in consequence of the failure of *Granger* to furnish a full load. It also appears, that the defendant demanded, as his own, and actually received, the freight earned by the vessel for this trip; including that which arose from carrying the plaintiff's lumber. The conduct of the defendant clearly negatives the assumption that the master had the control of the vessel; or that he stood in the relation of owner, *pro hac vice*. His right to a portion of the freight, was only the stipulated mode of compensation.

The case of *Thompson v. Snow*, [*ante p.* 264,] cited for the defendant, varied essentially from the one before us. It appeared there that the master had the entire management of the vessel, without the interference of the owners, for several successive voyages; and until she was stranded and sold.

The opinion of the court is, that the general error is well assigned; that the judgment be reversed; and that a new trial be had at the bar of this court.

DESHON & AL. *vs.* EATON.

To take a case out of the statute of limitations, there must be an admission of present indebtedness, or a promise to pay, absolute or conditional ; and if conditional, it must appear that the condition, upon which the promise was to attach, has happened.

THIS was an action of *assumpsit* against *Tristram Eaton*, the maker of a promissory note dated *April* 12, 1815, payable to his brother *Humphrey W. Eaton*, and by him indorsed to the plaintiffs. It was tried upon the plea of the statute of limitations.

To take the case out of the statute, the plaintiffs proved by *Edmund Coffin*, the officer who served the writ, that at the time of service the defendant told him that he had been sued once before, upon the same demand ; that he had been down several times to settle with his brother *Humphrey*, and wished to cancel the note by an offset of the demands he had against *Humphrey* ; but that the latter was not ready to make a settlement. It also appeared that the defendant, about two years ago, informed *Charles Coffin* Esq. a counsellor of this court, that his brother *Humphrey* had sued him ; but he thought the action would not be entered ; as he knew some transactions relative to his brother's conduct in a store, which he should or could expose, if he persisted in carrying on the suit.

The sufficiency of this evidence to prove a new promise, was reserved for the consideration of the court, by *Weston J.* before whom the cause was tried ; a verdict being returned, by consent, for the plaintiff, subject to the decision of that question by the court.

W. Burleigh and *D. Goodenow*, for the defendant, contended that the evidence, upon the largest construction, was but a qualified admission of a debt ; which is not sufficient to take a case out of the statute. 2 *Serg. & Lowb.* 279. 11 *Wheat.* 309, 316 *note.* Nothing is now held to do this, short of an unconditional acknowledgement of present indebtedness. *Clements v. Williams* 8 *Cranch.* 72. 2 *Stark. Ev.* 893, 895. *Bangs v. Hall* 2

Pick. 374. *Brown v. Campbell* 1 *Serg. & Rawle* 176. 9 *Serg. & Rawle* 128. 1 *Moor* 240. *Hellings v. Shaw Thornt.* 608. *Ward v. Hunter* 1 *Serg. & Lowb.* 359.

E. Shepley, for the plaintiffs, insisted that in the conversation with *Edmund Coffin*, the defendant explicitly acknowledged his liability to pay the debt ; the only question being made upon the mode of payment ; which he had desired to accomplish in a particular manner. It was evidently upon this latter topic that his mind was employed ; his original and continued responsibility upon the note being plainly conceded.

WESTON J. delivered the opinion of the court.

The result of the most approved modern decisions, as to what declarations or admissions will take a case out of the operation of the statute of limitations is, that there must be an admission of present indebtedness, or a promise to pay, absolute or conditional ; and if conditional, it must appear that the condition, upon which the promise was to attach, has happened. The authorities upon this point were reviewed and considered in *Perley v. Little*, 3 *Greenl.* 94 ; and more recent cases, in the Supreme Court of the United States and of Massachusetts, fully warrant the deduction, just stated.

It cannot be pretended in this case, that there is any proof of a promise to pay, absolute or conditional. When the defendant was sued upon this note, by his brother the payee, he told *Charles Coffin*, Esq. the witness, that he did not think his brother would enter the action, or persist in the suit, as he knew, and could expose, certain transactions of his in a store. Whether these transactions furnished any defence to the note, upon the merits, or whether they were to be made use of, *in terrorem*, to procure a suppression of the suit, does not appear. If the latter, there might be some ground to infer that the note was unpaid ; but not necessarily or conclusively ; as the defendant might be satisfied that the suggestion made would answer his purpose, and that he had no occasion to disclose any defence. But in whatever

point of view this declaration may be considered, it certainly falls short of an admission that the note was due. Still less is this deduction to be drawn from what the defendant said to the deponent, *Edmund Coffin*. He stated that he had been sued once before upon the same demand, and that he had attempted several times to settle with his brother, the payee, but he was not ready. This does not admit that, upon a settlement, he would have been found indebted to his brother; and the deponent adds that he further stated that he expected to settle the note, by off-setting other demands, which he held against the payee. These opposing demands might have been for services done, articles delivered, or monies paid, under an expectation on both sides that, upon a settlement, they were to be applied to the payment of the note, of which it appears that the payee was the holder, and had commenced a suit upon it, long after it became due. The declarations therefore, made by the defendant to the deponent, are so far from admitting an existing debt, that they imply that it was fairly and equitably extinguished.

For these reasons, the opinion of the court is, that the note in question is barred by the statute of limitations.

TUCKER *vs.* SMITH.

The right of the maker of a promissory note, negotiated after it was over due, to set up, as a defence against the indorsee, transactions between himself and the payee, before its transfer; is not restricted to equitable grounds of defence only, as, payment, or failure of consideration; but extends to every thing which would have been good in defence against the payee; such as actual fraud between the parties in the original concoction of the security, &c.

THIS was *assumpsit*, on a promissory note, dated *April* 20, 1817, made by *William Smith* the defendant, to his son *George Smith*, payable on demand, and by him indorsed to the plaintiff.

At the trial, before *Preble J.* the defendant proved that the note was in the possession of the payee till the summer of 1823;

that it was in fact made in *March or April* 1818 ; and that although at the time it was made, it was pretended to be given for a debt due by the maker to his son, for services rendered since the latter came of age ; yet in truth it was given without consideration, and with the fraudulent intent, on the part of the defendant, by giving this and other notes, so to reduce his property, as to qualify him to be placed on the pension roll of the United States, he having served as a soldier in the war of the revolution. He also proved that *George Smith*, before he indorsed the note to the plaintiff, said that it was given without consideration ; that the business about which it was given had been adjusted ; and that he intended to give up the note to his father.

Upon this evidence, the counsel for the plaintiff contended that the defendant ought not to be admitted to allege his own turpitude by way of defence, notwithstanding the note was over due when it was indorsed. But the judge instructed the jury that the action was to be tried upon the same principles as if it were between the original parties to the note; that the payee, knowing the intent with which it was given, was a party to the fraud ; and that therefore the law would not lend its aid, either to him or to the plaintiff who stood in his place, to enforce the payment. And he directed them, if they were satisfied of the fraudulent intent, to find for the defendant ; which they did. And being interrogated by the judge as to the grounds of the verdict, the foreman stated that they found that the note was given to enable the defendant to obtain a pension ; and that the payee had declared it was settled and paid.

The plaintiff excepted to these instructions, and moved for a new trial, for the misdirection of the jury by the judge.

J. Holmes, argued for the plaintiff, that he was an innocent indorsee, not conusant of any fraud; and therefore stood precisely on the ground of an innocent purchaser of land from a frandulent grantee ; whose title, it is well settled, would be good. The case is the same with the innocent purchaser of any other property, where the title of the vendor is voidable only, and not *ipso facto* void. *Beals v. Guernsey* 8 *Johns.* 446. *Fletcher v. Peck* 6 *Cranch*. 87.

Though the note was over due, and so far dishonored when it was indorsed, yet this does not authorize the defendant to set up his own fraud by way of defence. *Nullus commodum percipere potest, de injuria sua propria.* The practice of admitting the maker to any original matter of defence against the indorsee, was first adopted in 1739 ; and was placed by *Buller J.* on the ground of fraud in the indorser, in selling a note which had been paid. And the rule has never gone farther than to admit the maker to any equitable defence against the note ; never so far as to allow him to set up his own fraud. *Nemo, allegans turpitudinem suam, est audiendus.* The caution of the courts in this respect, is apparent from *Brown v. Davis* 3 *D. & E.* 80. See also *O'Callaghan v. Sawyer* 5 *Johns.* 118. 2 *Caines* 369. *Henrick v. Judah* 1 *Johns.* 319. He is heard, at law, against the note, no farther than he would be heard in the courts of equity; in which he would be estopped, by his own fraud, in whatever stage of the proceedings it appeared. It is only by shewing that the indorsee was himself a participator in the fraud, that the defendant can avail himself indirectly of his own wrong, under the rule that *in pari delicto, melior est conditio defendentis.*

But the jury do not appear to have found that the payee of the note was conusant of any fraudulent intent in the maker. It is true that a part of the ground of the verdict was that the note had been paid. But this fact cannot sustain the verdict. If the legal ground of the verdict was even much the strongest, and most weighty in the scale, yet if any weight was given to illegal considerations, a new trial ought to be granted. From the answer of the foreman, it is apparent that some of the jury decided on the ground that the note was paid; and others because it was given to enable the maker to obtain a pension. But if the latter consideration had any weight, the verdict was wrong.

J. and *E. Shepley*, for the defendant. The record shews that the consideration of the note was not real, but pretended ; and that it was created with the intent to lay a foundation for perjury, and to violate a law of the United States. And this was known to the payee. The note therefore was void. *Thurston v. Mc-*

Kown 6 *Mass.* 428. *Ayer v. Hutchins* 4 *Mass.* 370. *Hemmenway v. Stone* 7 *Mass.* 58. *Loomis v. Pulver* 9 *Johns.* 244. *Coolidge v. Blake* 15 *Mass.* 409. *Russel v. De Grand ib* 35. *Wheeler v. Russell* 17 *Mass.* 258. 1 *Bos. & Pul.* 551. 1 *Maule & Selw.* 596.

It is also found by the jury that the note was paid, before it was negotiated to the plaintiff. It had therefore lost its negotiable quality, and the plaintiff acquired nothing by the indorsement. *Baker v. Wheaton* 5 *Mass.* 509. *Webster v. Lee ib.* 335. He only stood in the place of the indorser; having received the note six years after it became due; and therefore against him the maker is entitled to any defence, which was open to him before it was negotiated. The decided cases recognize no distinction founded on the nature of the defence; they only regard the character of the holder. If he receives the note fairly before it is dishonored, he acquires rights peculiar to himself. If not, he merely represents the original payee. *Boylston v. Greene* 8 *Mass* 465. *Blake v. Sewall* 3 *Mass.* 556. *Guild v. Eager & al.* 17 *Mass.* 615.

Weston J. delivered the opinion of the court.

There is no question but the note in controversy was made by the defendant with a fraudulent intent; but it is urged that it does not sufficiently appear that this was known to *George Smith*, the original payee. The report states the ground upon which the note was really made; that it was antedated, and that a fictitious consideration was pretended. Of the two latter facts the payee could not be ignorant; and knowing these, especially considering the relation in which the parties stood to each other, his knowledge of the fraudulent motives, by which the maker was actuated, might well be presumed. The jury were instructed by the judge, that *George*, the payee, knowing the intent with which the note was given, was a party to the fraud; and that therefore it could not be enforced by him, or by the plaintiff, against whom the same defence might be sustained. That *George*, knowing the fraud, is a party thereto, is tantamount to saying, if *George* knew the fraud; and the jury, under this

instruction, returning a verdict for the defendant, must be understood to have found this fact.

It is essential to the validity of a contract that it be founded on a good and sufficient consideration. The want of it, however, cannot be averred against an instrument under seal; a consideration being implied from the solemnity of its execution. A negotiable note, for value received, carries with it *prima facie*, but not conclusive evidence of a consideration, subject however to be impeached and disproved between the original parties. But after it has been negotiated, and goes into the hands of a *bona fide* indorsee, except under certain circumstances, where a note is declared by statute to be absolutely void, it cannot by law be defeated, upon the ground of a want or defect of consideration. This rule is adopted, that the free circulation of negotiable paper which is found to answer the most valuable commercial purposes, may not be impeded. If, however, the indorsee knew or might have known the circumstances under which the note was given, the rule does not apply. In the case of *Brown v. Davis*, cited in the argument, *Ld. Kenyon* intimated an opinion that to let in a defence of this nature against an indorsee, he must be proved to have had a knowledge of the facts, upon which it was founded; but the opinion given by Justice *Buller*, and by the other members of the court, that this defence may be sustained against him whenever the note had been dishonored before it was negotiated, had ever since been regarded as settled law. And this upon the ground, that the receiving of a note thus circumstanced, by which his suspicions as to its genuiness, or its existing validity, ought to have been awakened, may be considered as evidence either of a knowledge on his part, if he made inquiry, or of negligence, if he did not. It rarely happens in cases to which this rule is applied, that the holder is injured; he being often the mere instrument of the payee, or where he is not, having an adequate remedy against him.

The counsel for the plaintiff has contended that, by the principles of law and the adjudged cases, the generality of the rule before stated is so modified that no defence can be sustained against an indorsee, not proved to have had actual knowledge of

the circumstances under which the note was made, except what may be regarded as equitable. But we do not understand the principle to be thus limited. We find that a defence arising from proof of an illegal or fraudulent consideration, has been received against an indorsee, who became such after the dishonor of a note, as well as a want or failure of consideration, or payment before the negotiation of the note.

In *Thurston v. McKown* 6 *Mass.* 428, cited in the argument, *Parsons C. J.* says, "It is certainly a correct principle of law, that if the indorsee purchase a note, when from the length of time in which it has been payable, there is reasonable cause to suspect that it has been dishonored, he shall not deprive the maker of any defence, which would avail him against the promisee." And in *Ayer v. Hutchins* 4 *Mass.* 372, he says, "if the indorsee receives the note under circumstances, which might reasonably create suspicions that it was not good, he ought, before he takes it, to inquire into the validity of the note; and if he does not, he must take it subject to any legal defence, which might be made against a recovery by the promisee."

The defence arising from the averment and proof of an illegal consideration, operates as an exception to the maxim, that no one shall take advantage of his own wrong, or be permitted to allege his own turpitude. It is with a view to suppress illegal and fraudulent contracts, by withholding from them all legal remedies, by which they might be enforced. The purity of the law is thus preserved ; and it is relieved from the imputation of ministering to the consummation of a fraud.

It is of great public importance that the law in regard to negotiable paper, being once settled, should be steadily adhered to. It has been settled, and it is very generally known, that where a note has been indorsed after it is due, it is open to every ground of defence, which could have been sustained between the original parties. To qualify this rule by distinctions and refinements, would destroy its simplicity, and render it less easy to be understood. It tends to the furtherance of justice and the suppression of fraud, and leaves the holder to look, as he ought to do, to the party of whom he received it,for his indemnity, where

there is no secret trust and confidence between them, which is not unfrequently the case.

The opinion of the court is, that the jury were properly instructed at the trial, and that there must be

Judgment on the verdict.

WALKER *vs.* MCCULLOCH.

A covenant never to sue one of two or more joint obligors or promissors, cannot be pleaded as a release, except in a suit between the same debtor and creditor.

Nothing short of full payment by one of several joint debtors, or a release under seal, can operate to discharge the other debtors from the contract.

THIS was *assumpsit* upon a promissory note, dated *Nov.* 24, 1815, made by the defendant jointly and severally with *Jonas Clark* and *Henry Clark*, payable to the plaintiff as administrator of the estate of *Nathaniel Lord*, for the use of said estate, in the sum of 8000 dollars, in six months from the date. It was assigned *April* 1, 1816, by a writing on the back of the following tenor,—"Pay widow *Phebe Lord* or order, value received, in division of the estate, without recourse on us,"—which was signed by the plaintiff and by *Henry Clark*, who was also an administrator on the estate. The interest was paid and indorsed, up to *Nov.* 24, 1821.

At the trial, it appeared that the note was given by the makers, for a vessel, which they jointly purchased of the administrators of Mr. *Lord's* estate, to which it belonged, and in which they were equally interested. Some time after the date of the note, the affairs of *Jonas Clark* became embarrassed, and a compromise was effected with his creditors. Mr. *McCulloch* holding Mr. *Clark's* note for about nine hundred dollars, and being his surety at the bank for another less sum, proposed to give up his note of nine hundred dollars, provided he could be discharged from his suretiship at the bank, and Mr. *Clark* could be discharged from his third part of the note now in suit. This

arrangement was carried into effect; and Mr. *Clark* was discharged, with the consent of *McCulloch*, by a writing on the back of the note due to the plaintiff, in the following words;—"*April* 2, 1821. Received of *Jonas Clark* one third of the amount of the within note and interest, and he is hereby discharged from the same."

In the month of *October* 1822, *Henry Clark* also compromised with his creditors, who executed, on the 24th day of the same month, a deed of covenant of the following tenor:—"We, the undersigned, creditors of *Henry Clark* of Kennebunkport, do hereby agree that we will discharge him from our respective demands, on receiving our proportion of his property; and that in order that said *Clark's* effects may be disposed of to the best advantage, and his debts collected, and his business brought to a close, we further agree that said *Clark* shall have the undisturbed possession and control of his said effects and debts for one year; during which time he shall use his best endeavors to close his concerns, and make a dividend of his property among his creditors. And we hereby bind ourselves and our heirs by these presents not to make any demand on him by process of law, or otherwise, for said term of one year from the date of this instrument; and that in case of any disagreement of opinion relative to the mode of settlement and distribution, we agree to submit such points of disagreement to the arbitration of three disinterested persons, to be mutually chosen by the parties. In witness," &c. This instrument was executed by *Daniel W. Lord*, and nineteen others, among whom was the defendant. The effects of Mr. *Clark* were distributed under this agreement; and the sum received in payment of his part of the note now in suit, was indorsed thereon in these words:—"January 21, 1825. Received of *H. Clark* seventeen hundred and eighty-nine dollars and sixty nine cents, being 56 *per cent.* of one third of the within note and interest up to this date."

It appeared from the testimony of *Henry Clark*, who was offered as a witness by the plaintiff, that at the time he paid the 56 *per cent.* the defendant agreed or assented to it, and promised to pay the residue of the note. He further testified that he paid

one of his creditors 90 *per cent.* and 75 *per cent.* to another, by the direction of arbitrators appointed under the agreement.

Upon these facts a verdict was entered by consent, for the plaintiff, for the whole balance due upon the note, with interest; subject to the opinion of the court upon the questions whether the defendant was liable to pay any, and what part of the note; and whether *Henry Clark* was admissible as a witness.

The arguments were in writing, to the following effect.

J. Holmes and *Burleigh*, for the defendant, resisted the plaintiff's claim for any part of the note; contending that the discharge of *Jonas Clark* was a dissolution of the whole contract, because its character was thereby entirely changed. The defendant's original engagement was with the two *Clarks*, jointly. By this act of the plaintiffs, he is holden with one alone. But it is not in the power of a creditor thus to increase the liability of his debtor; nor to vary it from the original contract. 2 *Pothier on Obl.* 68. 2 *Saund.* 48. And this discharge is technically valid and sufficient, it being on the back of the instrument itself. Had it included all the makers of the note, in the same language, it could never have been enforced against any of them; and if it cannot be recovered against *Mr. Clark*, he is, to all intents, released from the contract. Nor can the consent of the defendant revive the note against him; for this would violate the rule that a written contract shall not be enlarged, restrained, or varied by parol; 2 *Stark. Ev.* 279. 1 *Phil. Ev.* 422;—nor by matter subsequent. 2 *Stark. Ev.* 129. Moreover, the defendant could not, by his consent, bind *Henry Clark*. However willing he might be to assume additional responsibilities himself; yet it does not appear that *Henry Clark* was consulted at all in the discharge of *Jonas*. And surely the defendant had no power to change the legal relations of the joint promissors, without the consent of all concerned.

2. But if the contract is changed, it is from joint to several; in which case the defendant is responsible for his third part only. The joint obligation ceasing as to one, ceases as to all. Each, in that case, is liable only for his own proportion, without the right of contribution from the others. The defendant's release of

Henry Clark could therefore have no effect upon this note, nor upon the defendant's liabilities under it ; for in respect of the note he was not a creditor. And such was the construction which Mrs. *Lord*, the plaintiff in interest, gave to the contract, by the terms of her indorsement, in which she speaks of Mr. *Clark's* third part of the debt ; clearly implying that each was holden only for his proportion. The testimony of *H. Clark* goes only to shew that the defendant admitted himself bound to this extent, and no farther.

The obligation to which Mrs. *Lord*, by her agent, was a party, was a covenant to discharge *H. Clark*, on a distribution of his effects ; and these having been distributed, the contract is executed, and he is discharged of his third part of the note. This also is evidence, under seal, both of her construction of the contract, and of its fulfilment. Upon any principle, she ought not to claim of the defendant any thing beyond a third part of the debt ; since, by releasing the other parties, she has deprived him of any claim on either of them for contribution. His consent to the discharge of *Jonas Clark* was founded wholly on the understanding that the joint character of the contract no longer existed.

If from these, or any other causes, the defendant was discharged, his promise to pay the note, if taken most strongly against him, is not binding ; for being a promise to pay the debt of another, it is void by the statute of frauds ; and it is also without consideration.

3. But *Henry Cark* was not admissible as a witness. Though the note is assigned to Mrs. *Lord* without recourse to the indorsers ; yet as Mr. *Clark* is one of the administrators, he stands precisely on the same ground with *Walker*, the nominal plaintiff, who, it is clear, could not be admitted to testify. But he also has a direct interest to charge the defendant with the whole balance of the note ; and if called upon for contribution, would set up the judgment, obtained upon his own testimony, to prove that the defendant had assumed the debt, and exonerated him. He was further incompetent because his testimony, going to absolve himself from the obligation, by throwing it upon the defendant, would tend to increase the fund out of which his own

debts are to be paid ; and to raise a surplus for himself. It is on this principle that a bankrupt is excluded. 1 *Phil. Ev.* 50.

J. and *E. Shepley*, for the plaintiff, contended—1st, that the instrument signed in behalf of *Mrs. Lord*, to exonerate *Henry Clark*, was a covenant not to sue, for the limited time of one year; and that therefore it did not operate as a release. To have that operation, it should shew an intent of the parties that the right to sue should at once and forever cease, without any other act done. *Tuckerman & al. v. Newhall* 17 *Mass.* 585. *Gibson v. Gibson & al.* 15 *Mass.* 112. *Wigglesworth v. White* 1 *Stark.* 173. 6 *Com. Dig.* 183. *Release A.* 1. 2 *Saund.* 48, *note.* But here the obligation is, that the creditors will discharge him on receiving their proportion of his property ; distinctly indicating a future act of release to be executed. And in the interim they covenant to suspend all legal remedies for a year.

2. Being a covenant not to sue, and not a release, it does not bar this action. *Shed v. Pierce* 17 *Mass.* 628. *Chandler v. Herrick* 19 *Johns.* 129. *Rowley v. Stoddard* 7 *Johns.* 207. 13 *Johns.* 87. Even if made to the defendant himself, it would not have been pleadable in bar ; much less can he avail himself of it, he not being either party or privy to the covenants, and the instrument not being strictly and technically a release.

3. The payment by *Jonas Clark*, and his discharge, does not exonerate the other parties to the note. *Ruggles v. Patten* 8 *Mass.* 480. It amounts to no more than an acknowledgment that he had paid one third part of the note, and an agreement thereupon not to sue him for any more ; and to this the defendant expressly assented. This was no discharge of the others; at all events not of the defendant.

4. The promise made by the defendant to pay the remainder of the note, is alone sufficient to maintain this action. Being made after the discharge of *Jonas Clark*, and after the covenant with *Henry Clark*, and the payment made by him, and with a perfect knowledge of the whole transaction; it shews that there was no payment beyond the sums indorsed. A technical discharge, under seal, cannot be set up as a bar against a subsequent

promise ; unless by way of estopping the plaintiff from denying that there has been a payment. *Perkins & al. v. Pitts* 11 *Mass.* 135. *Wilkinson v. Scott* 17 *Mass.* 249. *Golightly v. Jellicoe* 4 *D. & E.* 147 *note*. But here can be no estoppel, both because the defendant was not a party to the contract, and because the promise was subsequent to the deed, and in consideration of a debt still subsisting.

As to the admission of *Henry Clark* as a witness, they argued that his interest, if he had any, was on the side of the defendant ; since if the plaintiff recovered more than a third, he would be liable to contribution for the surplus ; but if the defendant should recover, he would be safe from any claim by the plaintiff, under the protection of his covenants.

The opinion of the court was read at the following *September* term, as drawn up by

Mellen C. J. This case presents three questions, viz—1st. Whether the defendant is discharged and released from the obligation of his promise, by reason of the covenant between *Henry Clark* and his creditors, of whom the defendant was one:—2. Whether he is discharged by reason of the payment made by *Jonas Clark*, and the receipt given to him by the plaintiff; and 3. Whether *Henry Clark* was properly admitted as a witness for the plaintiff. As to the first point, it is clear principle of law that a release to one of two joint or joint and several obligors or promissors, is a release to both. Authorities to this point are unnecessary. It is equally clear that a perpetual covenant, that is, a covenant never to sue a sole obligor or promissor is equivalent, and amounts to a release ; and, for the sake of avoiding circuity of action, may be pleaded as such ; and it will be a good bar. But, where there are two or more obligors or promissors, a covenant never to sue one of them, does not operate, and cannot be pleaded, as a release, except in a suit between him and the creditor. No other joint, or joint and several obligor or promissor can plead it as such ; for, in respect to them, circuity of action would not be avoided by allowing such plea. It is also clear that a covenant not to sue a sole obligor, or one of two or more

joint, or joint and several obligors or promissors for a limited time, can never be pleaded as a release by any one. *Co. Lit.* 232 *a*. *Lacy v. Kynaston* 1 *Ld. Raym.* 690. 11 *Mod.* 254. 12 *Mod.* 551. *Deane v. Newhall* 8 *D. & E.* 168. *Tuckerman v. Newhall* 17 *Mass.* 581. *Shed v. Pierce Ib.* 623. *Gibson v. Gibson* 15 *Mass.* 112 ; besides some other cases cited in the argument, establish the foregoing principles. According to these cases, the covenant of the creditors of *Henry Clark* with him, which is signed by the defendant, among others, cannot operate as a release to him or to either of the co-promissors, for it was a covenant not to sue within one year from its date in *October* 1822. Besides, it is difficult to perceive how it could operate upon the demand now in suit, even as between *Henry Clark* and the defendant. The note in question was not one of those demands contemplated in the covenant ; that related to demands which the defendant had on *Clark*, independent of the note ; not to the plaintiff's demand upon the note against the defendant and the Messrs. *Clark*. On this note the defendant does not appear to have paid anything; of course he had no claim on *Henry Clark*, originating from it.

As to the second point;—what is relied upon as a release to *Jonas Clark* is in these words "*April* 2d, 1821. Received of *Jonas Clark*, one third of the amount of the within note and interest, and he is hereby discharged from the same." It is not under seal ; and therefore is not a technical release. It might have been explained by parol evidence as other receipts are explainable. None of the cases cited shew that any discharge, except a release under hand and seal, made to one of two or more joint, or joint and several promissors, operates constructively as a release to any one but the promissor to whom it is given. But it is contended that, although each promissor was originally liable for the whole amount of the note, yet the payment of one third by *Jonas Clark* and the discharge to him, has released him from all liability. This is true, and the same consequence would have followed if the plaintiff had covenanted with him that he would never sue him on the note. As to *Jonas Clark* such a covenant might, in a suit against him. be pleaded in bar, as a constructive release to him ; but neither of the other

promissors could avail himself of it as such. The receipt in question cannot amount to more than a perpetual covenant for the benefit of *Jonas Clark*. Such was the defendant's understanding, and he consented to the discharge of Mr. *Clark*. Such was *Henry Clark's* understanding also, and the defendant's, when the compromise and covenant were entered into ; and such was the plaintiff's also, who, nearly four years after the discharge of *J. Clark*, received of *Henry Clark* 56 per cent of his third part of the note and interest. We see no principle of law which prevents the operation of all the contracts of the parties concerned, according to their true intent and meaning. The case of *Ruggles v. Patten* 8 *Mass.* 480, seems to be in point. The defendant there pleaded, as his third plea in bar, that he with five others, naming them, made the promise declared on, jointly to the plaintiff ; and that one of those five paid a certain sum, which was received as his quarter part ; and that the payee did then and there exonerate and discharge him from any further payment of the same note. On demurrer to this plea, the court adjudged it no bar, and observed that payment of a part by one promissor cannot operate to discharge the rest. The averments in the above plea presented as strong a case for the defendant, as the facts agreed by the parties do in the case at bar.

In *Rowley v. Stoddard* 7 *Johns.* 207, it was decided that a release of one of two joint and several obligors must be a technical release under seal in order to discharge both; and that a receipt in full, given to one of two joint and several debtors, on his paying half the debt, is no release of the other debtor. That was an action of debt on a judgment against two ; and the receipt was given to the other defendant, but was decided to be no discharge of *Stoddard*. So also in *Harrison v. Close & Wilcox* 2 *Johns.* 449, the same principle was recognized. That was an action of *assumpsit* on a promissory note One of the defendants had paid a part of the note, and thereupon the plaintiff agreed with and promised him that he should never be called upon for any part of the residue. It was contended that this was a discharge of both; but the court decided that it was not. Nothing short of full payment, or a release under seal, can operate as a

discharge to both debtors, where a part only is paid by one of them.

The note having been signed and the promise made by the defendant, *J. Clark* and *H. Clark* jointly and severally, each promissor became liable for the whole sum ; and each would be so liable now, had not two of them been discharged by the promissee ; one on payment of his third part ; and the other on paying a little more than one half of his third. As far as these payments have reduced the amount due on the note, so far is the defendant relieved from his original liability, but no further ; for the balance he stands responsible. Such are some of the legal consequences of a joint and several obligation. When two or more persons enter into such a contract, each by so doing places himself in some degree, under the control of the others, and exposes himself, to losses consequent on their failure or inability to perform their engagements. But if a man assume such liabilities, the law requires that he should keep his promise or be answerable for its violation. As to the third point, it is unnecessary to make any observations on the question of *H. Clark's* admissibility as a witness. He testified only to the defendant's subsequent promise to pay the balance due on the note. But as we consider the defendant liable without any such promise, the admission of the witness is of no importance, whether it was proper or improper. Accordingly our opinion is that there must be

Judgment on the verdict.

SCAMMAN & AL. *vs.* SAWYER.

Construction of a deed.

THIS case, which was a writ of entry, turned upon the construction of the tenant's deed, describing the line dividing his land from that of the demandants. His close was described as "situated in *Saco*, on the northeast side of the county road leading from the new meeting-house to *Buxton* ; and bounded beginning at the southern corner of said land, at said road, thence

running north 43 1-4 degrees east, on the line between the grantor and land now improved by *John Condon*, and others, to land of *Thomas Cutts*, now improved by Doct. *Thornton*, forty six rods; thence north 46 1-4 degrees west eighteen rods to the corner of said *Cutts's* land; thence southwest, with the variation, to the road aforesaid, to strike the fence on the line below said between said *Cutts*, and the grantor, forty one rods and three tenths of a rod; thence south 32 degrees east, by said road, nineteen rods and eight tenths of a rod; containing about five acres and sixteen square rods of land." The line in dispute was the third course in the deed, running southwesterly to the road. Its commencement, at the corner of *Cutts's* land, was not in controversy. On the opposite or lower side of the road was an old fence between the land of *Cutts* and the grantor, running up to the road, and nearly at right angles with it. If the disputed line should be made to strike the road in the range of this fence, as the demandants contended it should, the front of the tenant's lot would be narrower, by about two rods, than the distance of nineteen rods and eight tenths, given in the deed. But the tenant contended that the words "below said" in the deed, meant the fence along the road, and not the fence below the road at right angles with it; and that his third line was therefore to be drawn from *Cutts's* corner to the road by such a course, between south and west, as would give him the breadth of front mentioned in the deed. It was submitted to the court upon a case stated by the parties.

J. and *E. Shepley*, for the demandants.

N. Emery, *Storer* and *Goodwin*, for the tenant.

Weston J. delivered the opinion of the court.

The decision of this case, as it is presented by the parties, is made to depend on the extent of the tenant's land, located according to the courses, distances, and monuments, referred to in his deed. The south-east corner of his lot is not disputed. It was to run thence north, forty six and a quarter degrees west, eigh-

teen rods. As no terminating monument is there given, it must run upon the exact course, and to the exact distance, stated. It is thence, by the deed, to run "south-west with the variation, to the road aforesaid, to strike the fence on the line below said between said *Cutts* and me, forty one and three tenths of rods; thence south, thirty two degrees east, by said road, nineteen rods and eight tenths of a rod." It is agreed that there was, at the time when this deed was made, below the road mentioned, a fence extending nearly northeast and south-west, dividing the land of the grantor from the land of *Thomas Cutts*, referred to in the deed. The line in dispute was to run to the road, upon a course, which would strike the fence. There is no difficulty in ascertaining this course; nor any uncertainty presented in the case, as to the fence intended. If the words "below said" in the deed were stricken out, the fence referred to could not be mistaken; but as it was below the road, and the road had been last mentioned, it is very apparent that "road" was the word inadvertently omitted; and which the sense requires should be supplied. But whether supplied or omitted, it is not necessary, in order to ascertain the terminating monument, which is the fence; and to this, very clearly, that line must be restricted; whether the distance in the next and last line, given in the deed, exceeds or falls short of the number of rods stated as its length.

According to the agreement of the parties, the tenant is to be defaulted, and

Judgment rendered for the demandants.

PREBLE *vs.* YOUNG.

A deputy collector of the direct tax, appointed under the act of Congress of *July* 22, 1813, providing for the collection of internal taxes, was not authorized to collect the taxes imposed by the acts of subsequent years, without a new appointment and qualification.

THIS case, which was a writ of entry, came before the court upon a case stated by the parties. It was brought by one of the heirs at law of *Benjamin Preble*, to recover his proportion of the

farm of his late father, which the tenant claimed under a sale for nonpayment of the United States direct tax for 1816, by *Josiah W. Seaver* the collector of this district.

Mr. Seaver was appointed collector of the tax of 1813 ; and was duly commissioned and sworn. Under this commission, and without any new qualification, he acted as collector of the taxes of 1815 and 1816. In 1814, he appointed *Jedediah Goodwin* as his deputy collector, who was duly sworn ; and without any new appointment or qualification acted as deputy collector for the collection of the three taxes above mentioned. For the nonpayment of the tax of 1816, the farm was sold by the deputy, *Goodwin*, in *December* of that year, and a deed given by *Mr. Seaver*, the collector, in 1819. Prior to the sale, the deputy made no search for personal property on the farm, to distrain for the tax ; although sufficient might have been found there for that purpose ; it being his rule not to distrain, unless personal property was shewn to him by the person liable to pay the tax.

Daniel Wood was the principal assessor of the three taxes ; but there was no appointment of assistant assessors for the tax of 1816.

Upon these facts the validity of the title of the tenant was submitted to the court.

W. Burleigh, for the demandant.

J. Holmes, for the tenant.

Weston. J. at the ensuing term in *Cumberland*, delivered the opinion of the court.

By the act of Congress of *July* 22, 1813, the several States were divided into collection districts, for the purpose of assessing and collecting direct taxes and internal duties. By the second section of this act, the president of the United States was authorized and empowered to appoint one collector and one principal assessor, for each collection district. And by the third section, each principal assessor was to divide his district into a convenient

number of assessment districts, within each of which he was to appoint an assistant assessor ; and every assessor was required to take the oath, prescribed in the same section. By the act of *August* 2, 1813, a direct tax of three millions was laid and apportioned upon the United States; and by the fourth section of the last mentioned act, the tax was to be assessed and collected by the officers appointed in virtue of the act of *July*. By the act of *January* 9, 1815, to provide additional revenues for defraying the expenses of government, an annual direct tax of six millions was laid and apportioned ; and by the second section of this act, the act of *July* was repealed, except so far as the same respected the appointment and qualification of the collectors and principal assessors. By the third section of this act, provision was made for the appointment and qualification of assistant assessors, as by the act of *July*. By the act of *March* 5, 1816, so much of the act of *January*, as imposes an annual direct tax of six millions was repealed, and a direct tax of three millions, upon which the question before us arises, was substituted ; in the assessment and collection of which, all the provisions of the act of *January*, with certain exceptions, were held to apply to the assessment and collection of the tax of three millions. After the passing of this last act, the direct tax was no longer to be imposed annually ; and the tax of six millions, which, by the law of *January*, would have been assessed in 1816, was reduced to three millions. It is manifest that this last tax was to be assessed and collected in the manner and by the officers provided by the act of *January* ; and we are well satisfied that it was not necessary that the assistant assessors should be appointed and qualified anew by the act of 1816.

The case finds that the deputy collector, *Goodwin*, was appointed prior to 1815, and that he was not subsequently reappointed or commissioned. By the repeal of the act of *July* 1813, under which he was appointed, without any saving as to the office of deputy collector, his power and authority ceased. And that Congress so intended and understood it, is apparent from the fact, that the appointment of a deputy collector is distinctly and specifically provided for by the act of *January*. He was to be

appointed by an instrument, under hand and seal. The former appointment had lost its efficacy, by the repeal of the former law. Subsequent to the act of *January*, by and under which alone any authority existed for the appointment of such an officer, no appointment was made. It has been urged that the subsequent recognition of his authority by the collector, coupled with his previous appointment, brings his case sufficiently within the law. But the evidence of his appointment was to be an instrument under the hand and seal of the collector, which the deputy could at all times retain, and exhibit whenever his authority was called in question ; and this ought to have been, and was intended to be, sufficient, without any extraneous evidence. Now *Goodwin*, who assumed to act as deputy in the case before us, had no instrument under the hand and seal of the collector, except that which he received under the law of *July* 1813, and if he had to call in aid the subsequent recognition of the collector, extraneous evidence became necessary to make out his authority. If *Goodwin* had demanded of a person liable to pay, his proportion of the direct tax, the party, upon whom the demand was made, might say, satisfy me that you have authority to receive it, and that I shall be safe in paying it to you, and I will pay it. Had he thereupon produced his written commission, it might properly have been replied to him, this is under a law which has been repealed ; and is no evidence of your appointment under the existing law. *Goodwin* might thereupon affirm that his continuing authority had been recognized by the collector. Whether this affirmation were true or false, the party charged with the tax might have no means of ascertaining. And if the authority of the deputy was recognized by parol by the collector at one time, it might be disclaimed at another ; and both the deputy himself, and those who might make payments to him, would be subjected to great uncertainty of proof, with regard to his actual authority. This uncertainty, the law intended to prevent, by requiring that the power of the deputy should depend upon, and be proved by, an instrument under the hand and seal of the collector ; in which, from inspection alone, his authority for the time being would distinctly appear.

It being the opinion of the court, that the deputy collector, who assumed to act in this case, was not duly authorized, it results that the preliminary steps, which are made necessary by law to be taken, prior to the sale of the land for the nonpayment of taxes, imposed under the authority of the United States, not having been legally pursued in the case before us, the title, derived from the sale, is not sustained. According to the agreement of the parties, the tenant is to be defaulted, and

Judgment rendered for the demandants.

WISE, *plaintiff in error vs.* HILTON.

A note, or other engagement which may be enforced at law, whether negotiable or not, given to a third person by the appointment and direction of the creditor, is a discharge of the debtor from an existing simple contract debt.

A trustee judgment is no protection to the trustee, against the claims of the person whose effects or credits were in his hands, unless it has been satisfied.

The disclosure of a trustee is not admissible evidence for him in another action in favour of one not a party to the trustee-process.

IN a writ of error to reverse a judgment of the Court of Common Pleas, the case was thus.

Daniel Wise, the plaintiff in error, brought an action of *assumpsit* against *Hilton* for the price of a sleigh, sold and delivered. The writ contains the common money counts, and an *insimul computassent*. It appeared that in consideration of the sale, the plaintiff told the defendant he might draw an order for the amount of the price, on *George W. Bourne*, payable to *John Wise*, in goods, at ten days' sight; which was done; the defendant promising the plaintiff that if *Bourne* should not accept and pay the order, he would himself immediately pay the money to the plaintiff. No receipt or discharge was given by the plaintiff to the defendant. *John Wise* presented the order to *Bourne*, who refused to accept it. He then presented it for payment to the defendant, who said he would pay it to him in a few days.

Afterwards the order being still in the possession of *John Wise*, the defendant was summoned as his trustee, at the suit of *Thomas Drew* and others; in which suit he disclosed the drawing of the order as above mentioned; stated that he had received notice of its being dishonored; that he had subsequently promised to pay it to *John Wise*; and that he had no knowledge of its having been transferred. Hereupon he was adjudged the trustee of *John Wise*; but he had paid nothing under that judgment; nor had any *scire facias* been issued against him. The plaintiff objected to the admission of this evidence, but the objection was overruled. It further appeared that after the service of the trustee process, the plaintiff presented the order to the defendant, requesting him to take it back, and give a new one, payable to the plaintiff himself; and that before making his disclosure the defendant was requested by the plaintiff's counsel fully to disclose all the facts before stated.

Upon this evidence *Whitman C. J.* ruled that the plaintiff's action was barred; and the verdict and judgment in the court below were for the defendant; which the plaintiff now sought to reverse.

Daveis, for the plaintiff in error, contended that the order was no bar to the action; but was a mere accommodation paper, which the plaintiff was willing should be paid to one of his relatives, in charity. The payee named in the order was the agent of the plaintiff; and between him and the defendant no privity was created. Not being a negotiable security, it was no discharge of the debt till paid. 9 *Johns.* 310. *Rhodes v. Barnes* 1 *Burr.* 9. *Tobey v. Barber* 5 *Johns.* 68. *Putnam v. Lewis* 8 *Johns.* 389.

He also insisted that the disclosure in the trustee process was improperly admitted, it being only the declaration of the defendant, himself in a cause in which the present plaintiff was not a party. It was also evidently collusive, and intended to defeat the plaintiff's claim, as it suppressed material facts which were within the knowledge of the trustee.

E. Shepley, for the defendant, argued that the order, and the relations created by it, were a substitute, by law, for the original debt ; as it gave a right of action to a third person, instead of the plaintiff ; a right, too, which the plaintiff could not afterwards control. The cases where the giving of a promissory note is no extinguishment of a verbal contract, are where the note was between the same parties. But where it is not so, the verbal contract is merged in the note. *Varner v. Nobleborough* 2 *Greenl.* 121. *Johnson v. Johnson* 11 *Mass.* 361. *Wiseman v. Lyman* 7 *Mass.* 286.

As to the disclosure ; it was part of the evidence of payment, and, as such, was admissible ; as would be the record of a judgment recovered by the indorsee of a note against the maker, in a subsequent suit by the payee.

WESTON J. at the ensuing term in *Cumberland*, delivered the opinion of the court.

The plaintiff had a cause of action against the defendant, which still exists, unless it has been discharged or extinguished. It is contended that it has been so, as between these parties, by the order given in *January*, 1826, and what took place afterwards. At common law, one simple contract is not discharged by another. But an exception to this rule has been established in Massachusetts, and in this State ; it being held that the giving of a negotiable note, in consideration of an existing simple contract, discharged the contract for which it was substituted. The reason upon which this exception is founded, is, that otherwise the party might be twice charged ; upon the original debt, and upon the note, in the hands of an indorsee. A note or other engagement, which may be enforced at law, whether negotiable or not, given to a third person, by the appointment and direction of the original creditor, ought, for the same reason, to have the same effect. It is an assignment of the debt, with an express promise by the debtor to pay to the assignee, to whom alone he ought subsequently to be chargeable ; that he may not be subject to two suits, and a double liability. If therefore the debt, for which this action is brought, has been assigned to *John Wise*, and the

defendant is, or was, legally obliged to pay the debt to him, he cannot be holden to the plaintiff. But we do not find this fact sufficiently proved, from any evidence in the case. The plaintiff received from the defendant an order for certain goods, payable to *John Wise* ; but whether for his benefit, or for the use of the plaintiff, does not appear. If the order had been given by the defendant, by the plaintiff's direction, to the payee therein named, and he had been beneficially interested in it, and the party on whom it was drawn had failed to pay it, upon notice given, a cause of action would have accrued to the payee against the defendant, upon a promise implied by law, the obligation of which would not have been increased by the express promise, proved to have been made by the defendant. But the order, although made payable to *John Wise*, was given to the plaintiff, the defendant promising at the time, if it was not accepted and paid, he would immediately pay the money, not to the payee, but to the plaintiff. These facts seem to render it probable that *John Wise* was merely the agent of the plaintiff in the business, and that the latter continued the real creditor. The subsequent possession of the order by *John*, is not inconsistent with this assumption ; as that possession might be in the character of agent. If not accepted and paid, the defendant had promised to pay the plaintiff the amount of his debt, and he is not discharged from his liability, unless he entered into a legal obligation to pay the money to *John*, by the plaintiff's direction. But whether this is, by just inference, negatived or not by the facts in the case ; there is no sufficient proof that the defendant had ceased to be the debtor of the plaintiff, and had become the debtor of *John Wise*. On a further trial this fact may be established, and the defence thereupon sustained.

The proceedings in the case, in which the defendant was summoned as the trustee of *John Wise*, at the suit of one of his creditors, cannot affect the rights of the plaintiff ; he being no party to that suit. A trustee judgment satisfied, protects the trustee from being held answerable to the party, whose trustee he has been adjudged to be ; that party being the principal defendant in the suit, in which such judgment is rendered. But

the plaintiff was a stranger to the process, exhibited in evidence by the defendant. The disclosure there made, might have been used in another cause as evidence against him ; but could not be adduced for him. They are his own declarations, verified indeed by his oath, but not from that circumstance entitled to be received as evidence in his favor. It would be making the defendant a witness in his own cause. The judge instructed the jury that the drawing the order, and the facts connected with it, and the disclosure of the defendant, and the proceedings in the trustee process, were a bar to the plaintiff's action. We are very clear, that the disclosure, and the trustee judgment, did not bar the plaintiff. Whether the drawing of the order, and what followed thereupon, will legally have this effect, will depend upon the fact, whether the party, to whom it was directed to be paid, was beneficially interested therein, or the mere agent of the plaintiff; and this fact was not left to the consideration of the jury.

For these reasons, the judgment is reversed ; and a new trial ordered at the bar of this court.

LOW'S CASE.

Grand jurors may be examined as witnesses, in court to the question whether twelve of the panel actually concurred, or not, in the finding of a bill of indictment ; under *art.* 1, *sec.* 7, of the Constitution of Maine.

If an indictment is found without the concurrence of twelve of the grand jury, this may be shewn to the court by motion in writing, in the nature of a plea in abatement, made at the time when the defendant is arraigned.

AN indictment was found at the last *April* term in this county, against this defendant, for the alleged forgery of a deed. At the last *September* term, being brought in to plead to the indictment, he filed a motion in writing under oath, in these words :—" And now the said *John Low* comes into court, and alleges that he ought not to be holden to answer to this indictment, because he

says that the said indictment was not found by any twelve of the grand jury ; but simply by a majority of the number who constituted the grand jury panel, at the court at which said bill purports to be found. And he now moves the court for liberty to prove these facts by the testimony of *James Gray*, foreman of the grand jury who returned said bill into court ; and by Col. *Thomas W. Shannon*, *Joseph Frost*, Esq. *John S. Foss* and *Miles Ford*, who were grand jurors on the panel aforesaid, and who are now here present in court ; and that said bill was so returned under a mistaken idea that it was only necessary that a majority of the panel should agree to a bill of indictment." The affidavits of the grand jurors named in the motion being taken *de bene esse*, they all testified that their impression was, that it was sufficient if a majority of the grand jury concurred in the finding of a bill, though the number composing the majority was less than twelve. The foreman and two others stated that in the present case the number of grand jurors so concurring was less than twelve. One of the others testified that such was his impression, but that he did not feel certain of the fact ; and the other said that he did not know whether there were or were not twelve who concurred in finding the bill. The motion was then ordered to stand over for argument at this term.

E. Shepley, in support of the motion, founded his argument on the constitution of Maine, *Art.* 1 *sec.* 7, which provides that the usual number and the unanimity of jurors, in indictments as well as convictions, shall be held indispensable. The constitution having secured this right to the consent of twelve men in the finding of every indictment, it must be understood as securing also, to the party interested, the means of proving the fact ; and this can be known only by the evidence of the grand jurors themselves, since no other person is presumed to be present at their deliberations.

If the court are judicially informed, in any mode, of the want of such concurrence, it is their duty to quash the indictment. 2 *Hawk. P. C.* 307. *Commonwealth v. Smith* 9 *Mass.* 107. *United States v. Coolidge* 2 *Gal.* 367.

And the motion violates no principle of law. Certainly not the oath of the grand juror; which relates only to the opinions, remarks and counsel both of the attorney general, his fellows and himself, upon any particular case before them; but not to extrinsic facts. Thus, if a witness swears before the traverse jury, contrary to what he swore before the grand jury, this fact may be proved by the testimony of a grand juror. 1 *Chitty's Crim. law* 260 2 *Bl. Com.* 126, *note* 5. So in case for a malicious prosecution. 3 *Selw. N. P.* 945. *Thompson v. Mussey* 3 *Greenl.* 305. Grand jurors are members of the court, and their testimony is within its legal control. It is enough for the citizen to suggest to the court his grief, resulting from the misprision or improper conduct of its officers; and the court will inquire into it. 12 *Co.* 98. 3 *Inst.* 33. Nor does it contradict the record; for it is not stated on record that twelve jurors did concur. And the rule that the record is not to be contradicted, relates only to formal pleas; not to a motion or suggestion like the present; which may be made at any time before verdict, and is the proper mode of bringing the fact to the knowledge of the court. 4 *Com. Dig.* 334. *Indictment A.* 9 *Mass.* 109, 110. 2 *Pick.* 563. If the constitution, in giving the right, is not to be understood as having also secured ample and sufficient means for its assertion; the boasted constitutional privilege sinks into a mere mockery of the citizen with the semblance of protection; and the barriers raised by that charter, to preserve his liberty and insure his safety, will be found to be but the shadows of defence.

The Attorney General objected to the call of any grand juror, to disclose the views or opinions of the grand inquest, directly or indirectly, for any of the purposes proposed.

1. Because it is against public policy. It has a direct tendency to bring their opinions and deliberations into public discussion. It exposes them to the malice or the favor of the accused; to the influence of fear, favor, affection and hope of reward; and places them in a situation destructive to the independence of

that important tribunal. Nor is it necessary that this inquiry should be opened. To an innocent man, it is of no utility, since he can always vindicate himself, in a trial upon the merits.

2. It is against immemorial usage, and against law. No case can be found in which such testimony has been resorted to ; and the total silence of the books on a point which, if grand jurors could be called at the pleasure of the defendant, might have been made, many times, and for centuries, is proof that no such usage or practice ever existed. It violates law, in that it renders public that which is by law a sacred deposit in the breast of the grand juror. With so much jealousy was this principle guarded by the law, that if one of the grand jury disclosed the evidence, he became an accessory, in felony, and a principal in treason. 4 *Bl. Com.* 126. 2 *Hawk. P. C. ch.* 46, *sec.* 93. 1 *Chitty's Crim. law* 496.

It is not the best evidence of the fact sought after. The record is the only testimony to be resorted to ; and it is not to be contradicted by parol. It states that the grand jurors, on their oath, present such an offence ; which plainly imports that at least twelve concurred in finding the bill, and is conclusive evidence of the fact. It cannot be avoided or contradicted by plea. *Commonwealth v. Smith* 9 *Mass.* 110. Even traverse jurors can be received only to explain and support their verdict ; never to contradict it. *Grinnell v. Phillips* 1 *Mass.* 543. No juror, grand or traverse, can be heard, in proof of his own misconduct, or that of his fellows ; not even to say that he assented to the verdict merely because a majority were of that opinion, believing he was bound by law so to do. *Commonwealth v. Drew* 4 *Mass.* 399. *Jackson v. Williamson* 2 *D. & E.* 281. *Davis v. Tucker* 4 *Johns.* 487. *Haskell v. Becket* 3 *Greenl.* 92. *Taylor v. Greely ib.* 204.

If the facts stated in the motion were thrown into the form of a plea, it must be either in bar or abatement ; to which the regular answer would be that the indictment was returned by a full panel, *prout patet per recordum.* And this must be tried solely by inspection of the record itself. 1 *Inst.* 117, 260. 6 *Co.* 53. 3 *Bl. Com.* 331. There could be no issue of *nul tiel record*, it being a criminal case. *Hale's P. C.* 241, 243, 255. *Starkie's*

Crim. Plead. 350. And any other mode of trying it would vitiate the plea. 9 *Co.* 25. *Binney v. Merchant* 6 *Mass.* 192. As the motion seeks another mode of trial, it is bad.

The cases cited on the other side support, rather than impugn, these positions. In *Sykes v. Dunbar* 3 *Selw.* 1064, *Ld. Kenyon* said that after the criminal trial, the right to withhold the testimony of the grand juror might be waived by the crown, in order to prove perjury in the witness. But it is admitted in no other case. In *United States v. Coolidge* no grand juror was examined; but a witness was called who had been before them. In *Thompson v. Mussey* the witness was the county attorney; and he was called to prove an independent fact; not to contradict a record.

Davis, in reply, said that the object of the motion was not to contradict a record; but to ascertain whether the paper purporting to be a record was entitled to that character. The objection is, that it is not what it purports to be; and the argument on the other side assumes the very point in dispute, being founded on the supposition that the paper is a record.

The English practice is to express in the caption of the indictment that it was found by twelve grand jurors. Thus the finding by twelve becomes matter of record, and therefore cannot be contradicted. But in our courts the practice is otherwise; the caption only saying "the jurors of the State aforesaid," without stating any number. The presumption is, that it was the legal number; but this presumption, like any other, may be rebutted by contrary proof.

After this argument the *Attorney General* moved for leave to take the affidavits of others of the same grand jury, *de bene esse*, to the same point; which was granted.

The counsel for the defendant then moved for leave to ask each grand juror whether any person, other than the grand jurors, was present when they deliberated on finding the indictment. But the court refused to put the interrogatory, because this point was not a subject of the original motion; and they would not receive a motion now for that purpose, until the other was disposed of.

The judges afterwards delivered their opinions, as follows.

WESTON J. In the case before us, no objection was made to the indictment at the term in which it was found. The party accused has not been recognized to appear at that term ; nor was he required to answer, nor did he appear, until the succeeding term. He then made the motion, now under consideration, to the presiding judge, who received the affidavits of the foreman and of four other jurors, *de bene esse*, and ordered the continuance of the indictment and of the motion, that it might be determined by the whole court. The preliminary question now presented is, whether the court will so far sustain the motion, as to go into an examination of the facts, upon which it is founded.

The concurrence of twelve grand jurors is necessary to find a bill. The party accused cannot be legally held to answer, upon the finding of a less number. And this privilege is secured to the citizen, in crimes capital or infamous, by the provisions of the constitution. These positions are not denied; but it is insisted that, when an indictment is once verified by the attestation of the foreman of the grand jury that it is a true bill, and as such been presented to the court, and ordered to be put on file, it then becomes a matter of record ; and furnishes conclusive and incontrovertible evidence, that it was found by the requisite number. I am satisfied that an indictment, thus sanctioned, is to be regarded as a record, and that it has all the legal verity which belongs to that species of evidence; and I admit that according to our practice, it proves the fact that twelve or more agreed to the bill. I think the certificate of the foreman must be necessarily understood as implying this, and as constituting the proper evidence of the fact ; it not here appearing in the caption that it was found by twelve men, according to the usage in England. But while I recognize the absolute certainty, which a regular judicial record carries with it, and the policy upon which it is founded, I am also of opinion that there is, and always has been, and from the necessity of the case must be, a power in the court to vacate, or to cause to be amended, a record which has been erroneously or falsely made, by inadvertency or otherwise, by any of its officers. I entertain no doubt that the court may e- ise

this power at any time, according to their discretion ; but unquestionably while a criminal prosecution, or a civil suit, is yet in progress, and has not finally terminated. It is not to be understood that the rights of parties are to be concluded, and that without remedy, by the errors and mistakes, to say nothing of the fraud, of a recording officer. To subject a record to the superintending and revising inspection of the court, is not to impair the rule of evidence under consideration. That there may be an end of controversy in regard to facts, the truth of which has been established in judicial proceedings, no averment or proof is received against a record ; but it is competent for the court to say, if they are satisfied that the claims of justice require it at their hands, this is not our record ; it is false and erroneous; and the authentication which it bears is unauthorized and unwarranted.

The return of the sheriff, upon mesne or final process, has the character of a record ; and as such is incontrovertible ; and yet it is no uncommon practice for the court, in their discretion, to permit him to amend it. And upon the suggestion of the clerk that an error has crept into the record, through the inadvertency either of himself or his substitutes, the court, being satisfied of the truth of the suggestion, do not hesitate to order its amendment.

It is well known that in our practice, when the grand jury come into court, upon being inquired of whether they have agreed in any bills, and the foreman answering in the affirmative, he is directed to hand them in; whereupon they pass from his hands, through the intervention of an officer, to the clerk. They are not read over, nor is the substance of them stated, or the persons named against whom they are found. It is taken for granted that the foreman returns only such as the requisite number have concurred in ; but no inquiry is made of his fellows, nor is it made known to them at the time what bills are passed over to the court. Let it be supposed that after they have been received, and ordered to be filed, and the grand jury discharged, it should happen to be suggested to them that, among the number, is one charging a certain citizen with a certain crime. If therefore every juror, except the foreman, should present himself and

offer his affidavit that he never agreed to such a bill, is there no power in the court to receive such testimony, and if assured of its truth, to give relief? Or if the foreman, after the grand jury has been dismissed, discovering his mistake, should suggest to the court, and offer to support his statement by oath, and by the corroborating testimony of every member of the jury, that the Attorney General had drawn two bills against a party accused, one for murder and one for manslaughter, and had left them with the jury, that they might make use of one or the other, as they might find the facts ; that a competent number of them had agreed in the bill for manslaughter ; but that he had since discovered that he had inadvertently signed and presented as true the bill for murder, to which they had not agreed ; is the judicial power so defective, that this error must remain without correction? If so, the life of a citizen may be brought into jeopardy, in violation of both his legal and constitutional rights, under the pretence of a necessary adherence to the letter of a technical rule.

It may be said that to permit an inquiry of this sort, would open the door to great abuses ; that it would afford opportunity to tamper with the jury ; and that it would lessen the respect due to the forms and solemnities of judicial proceedings. These are considerations, which address themselves strongly to the attention of the court ; and cannot fail to have a deep influence, in the exercise of their discretion. It could only be in a very clear case ; where it could be made to appear manifestly and beyond every reasonable doubt, that an indictment, apparently legal and formal, had not in fact the sanctions which the law and the constitution require, that the court would sustain a motion to quash or dismiss it, upon a suggestion of this kind.

The oath of the grand juror requires him to keep secret the State's counsel, his fellows', and his own. Of this character may be, what particular jurors agreed or dissented, upon the questions whether a true bill or not ; and also the testimony exhibited before them ; or such parts of it as the Attorney General may wish to keep secret, until developed at the trial. But the fact, whether twelve or more concurred or not in the bill, is not a

secret. It is a result which they are required, through their organ the foreman, to make known ; and it is of the deepest importance to the public and to the accused, that it should be truly disclosed.

There might have been less difficulty in supporting this motion, if it had been made at the first term, when the facts were fresh in the recollection of the jury ; but their mistake, it is stated, had not then been discovered ; and the party charged was not before the court. It is understood that the foreman, who signed this bill, happening to be present at the succeeding term, was, from the charge of the judge to the grand jury, apprised that a bill could be found only by twelve or more ; whereas he had before supposed that a majority was sufficient. Finding that his mistake had operated to the prejudice of *Low*, the defendant, he disclosed the fact ; and he now states in his affidavit, if it can be received, that although a majority of the jury agreed in finding the bill, that majority did not consist of twelve. If the mistake had been discovered before the discharge of the grand jury, better and more satisfactory means of ascertaining it would have been afforded. But it appears to me that the door to further inquiry is not therefore necessarily closed ; and that this presents a case, in which the superintending power of the court, in correcting any mistakes which may arise in its proceedings, may and ought to be exercised ; and that the testimony offered in support of the motion, together with any counter evidence, which may be adduced on the part of the State, ought to be received.

The conclusion to which I have arrived is not, I apprehend, without authority. In 2 *Hawk.* 307, cited in the argument, it is stated that if it appear, from the caption, or otherwise, that less than twelve jurors agreed in the indictment, it must be quashed. In the *Commonwealth v. Smith*, also cited, *Sewall J.* who delivered the opinion of the court, adverting to the principle that indictments, not found by twelve good and lawful men, are void and erroneous at common law, says, "an irregularity in this respect, if it should happen, might become a subject of inquiry, upon a suggestion to the court." This position is not inconsistent with

what he afterwards states, that no averment to this effect can be admitted by a formal plea. No averment by way of plea can be received against a record; but the court may determine, upon suggestion, whether that, which is apparently a record, is in truth entitled to that character. The judge further intimates that objections to the personal qualifications of the jurors, or to the legality of the returns, are to be made before the indictment is found. In the *Commonwealth v. Parker* 2 *Pick.* 563, the court do not appear to approve of this limitation, stating that "there is a difficulty in the case; for a bill may be found against a person, who has not been recognized to appear, and who has no opportunity to challenge." But after the grand jury is returned and impanelled, the question whether an indictment, presented to the court as a true bill, was assented to by twelve or more, is in its nature subsequent to any which may be raised, as to their personal qualifications.

PREBLE J. Among the indictments presented at a previous term, to this court, in behalf of the grand jury, by their foreman, was found a bill, purporting to be an indictment in due form of law, against the defendant, for forgery. A capias issued as of course, returnable at the next term; and the defendant, having been arrested by the sheriff in vacation, appeared at the next term, to abide the order of the court in the premises. On being called, for the purpose of being arraigned, he prayed that he might not be held to answer for the crime charged, nor be put upon trial on the bill read to him, suggesting to the court, in writing, that no twelve of the grand jurors concurred in finding the bill, laid before them by the Attorney General, to be a true one; and therefore, that no indictment had ever, in truth, been found by the grand jury against him, and that the foreman of the grand jury had certified the bill, as a true bill, through mistake of law. This suggestion the defendant verified by his own affidavit, and further offered to prove the facts suggested, by the foreman, who certified the bill, and by several of the grand jurors, his fellows, then present in court. The defendant therefore made his suggestion, and prayed the court to inquire into the facts, at the first moment he had an

opportunity to be heard in court, and he made it in the most solemn form, accompanied by a tender of the most certain, direct, and ready means of ascertaining the truth of the facts suggested by him. No laches therefore are imputable to him. He has lost no right by neglecting to avail himself of it in due season. And we are called upon to decide the present preliminary question, on the assumption that the facts suggested by the defendant disclose the true interior state of the case.

It is provided in the bill or declaration of rights, that "no person shall be held to answer for a capital or infamous crime, unless on presentment or indictment of a grand jury," except in certain specified cases, among which the case at bar is not one. By immemorial usage, and the well known principles of the common law, no presentment can be made, or bill of indictment be found by a grand jury, unless twelve at least of their number concur in so doing. These principles were deemed so important to the security of the citizen, that, to preserve them inviolable from the spirit of innovation and encroachment, they were ingrafted from the common law into our constitution. Here we find it expressly ordained that in regard to juries, "their usual number and unanimity, in indictments and convictions, shall be held indispensable." And in this connexion, I may take occasion to remark, it is the boast of the common law, that for every violation or infringement of a right, recognized by law, there is a certain and effectual remedy, or mode of enforcing that right, provided, if not by special enactment of the legislature, by the very genius of the common law itself. Here too I may observe that while in the process, forms of action, declarations, and pleadings, in civil suits, the law is incumbered with technicalities, and rendered complex and unintelligible to all who have not made it an object of special study; in criminal prosecutions, so far as the accused is concerned, the proceedings are free from intricacy, and partake of the most simple and intelligible character. On the other hand, the precision and nicety required to be observed on the part of the prosecution, are so many guards and defences interposed to protect and pres-

erve the accused. Even matters of form become, in an indictment, matters of substance, in his behalf. So also the principles adopted by the courts of law, in regard to the course of proceedings in criminal cases, and the effect of those proceedings, were never intended or understood to debar the accused from asserting his rights, but to give him full opportunity to vindicate and maintain them. Now according to these principles, admitting the fact to be as suggested by the defendant, there ought to be a time, and mode, in which he may avail himself of the objection, and claim his constitutional right not to be held to answer. It seems to be clear, as well on principle as on authority, that the objection cannot be taken by way of formal plea. The very nature of the objection is prior in order to that of a plea; for it is an objection to being held to answer or plead in any form. It goes not to the abating or answering of the indictment, but to its annihilation; to the denying that it ever had legal existence. If therefore, the objection can be made at all, the course which the defendant has adopted seems to be the proper one.

According to the English practice, it is necessary to state in the caption of every indictment, that it was found on the oath of twelve men. But the caption of an indictment is no part of the indictment itself, and the facts recited in the caption are no part of the finding of the grand jury. Hence, in certain cases, the caption may be amended, under the authority and sanction of the court, and made agreeable to the truth of the case. 1 *Saund.* 248 *in note*; 249, *note* 1. Hence also, according to the authority cited in argument from *Hawk. book* 2, *chap.* 25, *sec.* 16, if it appear by the caption, or otherwise, that less than twelve concurred in the finding, the indictment is erroneous. The grand jury and their proceedings, are under the general superintendence of the court; and the court will institute inquiries, where necessary to protect the rights of the citizen. Irregular and illegal proceedings, in important particulars, will vitiate their findings. *United States v. Coolidge* 2 *Gal.* 364. *Commonwealth v. Smith* 9 *Mass.* 107. It seems to me, therefore, to be alike at variance with the constitutional right of the citizen, and the principles of the common law, with the general course of proceeding in criminal

trials, with analogous cases, and with the general superintending power and duty of the court, that the court should be solemnly made acquainted with the fact, that through mistake of the law, ignorance of his duty, or malicious design, the foreman of the grand jury had certified and delivered into court a bill, as a true bill, which had never been found by the jury, and yet the court not have power to institute any inquiry into the subject, nor to interfere and arrest the evil, and prevent further wrong. Our practice, in regard to the form of captions, and to the mode of delivering indictments into court, differs in some respects from that which obtains in England; but it was from an enlarged view of the whole subject, as I apprehend, as well as from analogy to the rules and principles adopted by the English courts, that Mr. Justice *Sewall*, that eminent lawyer and most excellent judge, was led to remark, in *Commonwealth v. Smith*, "an irregularity in this respect, if it should happen," (namely that of an indictment not found by twelve men,) "might become a subject of inquiry upon a suggestion to the court."

But there is a view of this subject, already alluded to, which is in a manner peculiar to our own State. In construing constitutional provisions, courts have, for the purpose of carrying into effect the intent of the people, as expressed in their constitution, considered those provisions, where they are not manifestly merely directory, as operating by their own proper power, independent of legislative enactments. And of such paramount authority are these provisions, that even an act of the legislature, contravening them, is void. If therefore, there had been any mere technical rule of the common law in existence, prior to the adoption of our constitution, which inhibited the court from looking into the true interior state of the facts in such a case, as the defendant had suggested to us, our constitutional provision, that in regard to juries "the usual unanimity in indictments shall be held indispensable," would so far modify that rule, as not only to justify but to render it the duty of the court, to take the necessary measures to see that the constitution itself was not violated, by holding a person to answer for an infamous crime, on indictment of less than twelve good and lawful men of

the grand jury. Such a rule is inconsistent with these provisions of the constitution. For, if it could still exist, unmodified, and in its full extent, it would render these provisions merely directory, and that not to the courts, but to the grand juries. Aud should a grand jury disregard the direction, there would be neither prevention, nor adequate remedy,for the party aggrieved.

But I am satisfied that no such rule, precluding all inquiry into the true state of the facts, does exist at common law. The reasons already assigned afford a strong presumption against the existence of any such rule. The authority of *Sewall J.* that inquiry may be made, is directly in point; and that of *Hawkins* seems equally clear. All the authorities concur, that unless twelve good and lawful men of the grand jury do agree in finding the bill, the indictment is void and erroneous. Now every grand jury consists of twelve men, at least; and according to our practice it never does appear whether a greater or less number concurred in finding the bill, because there is no reference to the number in the caption. That twelve did concur, is matter of inference merely, from the fact that the bill is regularly signed by the foreman, and delivered into court in the usual manner. Now for courts to be solemnly resolving, and legal writers of the first eminence to be gravely stating as matter of settled law, that if twelve at least of the grand jury do not concur in finding the bill, the indictment is void and erroneous, seems to me to be very idle, to say the least of it, if the party interested is not permitted to suggest the fact, and the court are precluded from inquiry into the subject, or allowing the party to avail himself of the error. I would borrow the language of Lord *Mansfield*, in *Rex v. Atkinson*, changing what should be changed ;—"courts have invariably proceeded on the same idea, as a fundamental rule, that a fiction of law shall never prevail against the truth of the fact, to defeat the ends of justice." Besides, there is something so purely artificial in the reasoning urged in support of the rule contended for, and something so seriously repugnant to the plain unsophiscated sense and perception of things, in the doctrine, that I could not bring my mind to acquiesce in the principle, but in submission to the most clear and unquestionable

authority. I concur with my brother therefore in the opinion that it is competent for the court to go into the inquiry, as prayed for by the defendant.

The question already disposed of, involves in itself the principal difficulty. The objection that admitting the inquiry may be instituted, the grand jurors cannot be permitted to testify, seems to be entitled to less consideration; because if we cannot inquire of them, the right to institute the inquiry is, after all, but a nominal one. The grand jury is supposed to be placed in some appropriate apartment, secure from the scrutiny of eavesdroppers and listeners. No person is permitted to be present, during their deliberations, nor at the taking of the question on finding a bill. It would be a serious objection to their proceedings, perhaps, if even the law officer of the government was present at such a period. How any juror voted, is a secret no juror is permitted to disclose; but whether twelve of their number concurred in finding a bill, is not a secret of the State, their fellows, or their own. It is a fact they of necessity profess to disclose, every time they promulgate their decision upon any bill laid before them. Accordingly we are of opinion that it is proper, under the circumstances of this case, and on the suggestion made by the defendant, for the court to inquire into the truth of the statement laid before them; and that the defendant may, if in his power, prove his statement by the foreman, and his fellows of the grand jury. But it must be remembered, that the indictment being in due form indorsed as a true bill, by the foreman, the inference is that the fact is not as the defendant states it to have been;—an inference not to be controlled by vague, uncertain, or doubtful testimony. He will therefore be held to make out his case, to the entire satisfaction of the court, so as to leave no doubt on the subject.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

CUMBERLAND.

MAY TERM,

1827.

ROUNDS *vs.* BAXTER.

Where one contracted to give to another a deed of land, upon his punctually paying certain sums of money by instalments, some of which were paid, and the rest neglected ; whereupon the owner of the land sold it to a stranger ; it was holden that the party who had paid part of the money could not recover it back; the non-performance of the contract not having been caused by the fault of the other party, nor the contract, on his part, waived or rescinded.

THIS was an action of *assumpsit*, upon a written memorandum of a contract made between the parties, *August* 8, 1819, by which the defendant agreed to convey to the plaintiff a certain parcel of real estate in *Portland* ; stating that he had received twenty four dollars in part payment ; and was to receive twenty six more, in thirty days, twenty more in one year, and eighty dollars more in three subsequent annual instalments ; and that the plaintiff was to give the defendant good security when the deed was given. It was signed by the defendant only.

At the trial, which was before the Chief Justice upon the general issue, it appeared that only ten dollars of the first instalment had been paid according to the contract ; that none of the other instalments had been paid or tendered as they fell due, or secur-

ity given or offered therefor ; and that after several of the instalments had become due, and were not paid, the defendant conveyed the premises to one *Thomes*.

Proof of various kinds was offered by the plaintiff to shew that the defendant had waived all objections to the plaintiff's omission to comply with the terms of the contract ; and it appeared also that in *May* 1822 he offered to give the plaintiff a deed of the land, if he would then pay or secure the payments of the purchase-money according to the contract ; which offer was not accepted, nor the terms complied with. This evidence the chief justice left to the jury ; instructing them that if, in their opinion, the defendant had waived all objection on that score, he could not now legally urge that objection against the plaintiff's right to recover upon the special contract. But if not, then the action could not be maintained on that contract. On the count for money had and received, he instructed the jury that the plaintiff could not recover back the money he had paid in part performance, unless the defendant either had consented to waive and rescind the special contract, or was the cause of its non-performance. And whether either of these was the fact, was for them to decide. They returned a verdict for the defendant ; which was taken subject to the opinion of the court upon the correctness of the instructions given to the jury.

Longfellow and *Daveis*, for the plaintiff, argued that the paper was void as a contract ; for want of mutuality ; and because it was evidently an unfinished transaction. It was therefore only evidence of money received by the defendant, which he is liable to refund, upon the general count in the writ.

But if it was valid as a perfect contract, they contended that the stipulations were independent; and that the defendant, having disabled himself to perform, by conveying the land to a stranger, was liable instantly to the plaintiff, for the monies already advanced to him. The plaintiff was not bound to wait till after the last day of payment; when his remedy might become worthless; but was at liberty to consider the defendant as having rescinded the contract, by the alienation of the land. The omission of

the plaintiff to pay the instalments as they fell due, was no evidence of rescinding the contract on his part; since it was simply an omission, for which the plaintiff had his remedy at law.

Greenleaf and *Adams*, on the other side, contended that the contract was perfect and entire between the parties; and that the plaintiff, though he had not signed it, could not now be admitted to deny its validity, having alleged on the record that it was a mutual agreement. *Clason v. Bailey & al.* 14 *Johns.* 484. And the stipulations were mutual; the defendant being bound to give a deed, only on payment of the money, or receiving security. Neither of these being done, and the plaintiff having deserted the contract, the defendant was at liberty both to sell the land to another, and retain the money paid by the plaintiff. *Faxon v. Mansfield* 2 *Mass.* 147. *Seymour v. Dennett* 14 *Mass.* 266. *Stark v. Parker* 2 *Pick.* 267.

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

The contract upon which the special counts are founded is drawn in a very clumsy and imperfect manner; but its meaning may be easily understood; and it is evident that the counsel who drew those counts did understand what must have been the fair intention of the parties. The essence of the agreement was that for a certain sum of money, (of which $24 were paid to the defendant at the date of the agreement, in part,) payable by several annual instalments, for which good security was to be given, the defendant agreed to release to the plaintiff all his right and title to certain real property in *Portland*, at the time of receiving such good security. The obligation of the defendant to make the release was conditional; and the condition was to be previously performed by the plaintiff. So the bargain was understood; and accordingly, in each of the special counts, there is an averment that such condition had been duly performed, or that all things which it was incumbent on the plaintiff to perform, had been performed. The case finds that not one of the instalments was paid or tendered in season, and it is not pre-

tended that any kind of security was ever given or tendered. The question as to a waiver of objection was properly left to the jury, and they have decided it against the plaintiff. On these facts, and on legal principles, it is very clear that no action can be maintained on the special contract.

The only remaining question is, whether, on the general counts, the plaintiff has a right to recover back the sums he paid towards the performance of his agreement. On this point the case finds that the defendant never consented to waive or rescind the special contract, and was not the cause of its nonperformance ; or, in other words, the jury by their verdict, under the instruction they received, have so settled those facts. The failure in the article of performance, then, was owing to the plaintiff's own fault, negligence or inattention, and we are to decide whether the law, in such circumstances, will furnish him an indemnity against the consequences of this fault, negligence or inattention. It is a proverbial principle that a man is not permitted, in a court of justice, to take advantage of his own wrong or neglect. The principle is founded in the highest reason. If a man, after he has made a fair contract, and partially fulfilled it, may, without the consent, or any fault, on the part of him with whom he has contracted, rescind the agreement, excuse himself at once from all further concern about it, and recover back whatever he has paid, he may speculate and disappoint and injure his neighbor whenever his interest or his passions may dictate ; and thus triumph over him in security and enjoy, himself, a complete indemnity. Justice will not sanction such a proceeding. The cases in which one of the parties to a contract may lawfully disaffirm and rescind it, are those in which the other party has been in fault, or where, by the terms of the contract, a right to rescind it is reserved. But in this case we need not depend on mere reasoning, because it has been decided, in numerous instances, that such a claim as the present cannot be sustained on legal principles. The defendant never made an express promise to repay the money in question; and why should the law imply one, in favor of a man who has violated his contract, on the part of one who stands fair and innocent ? If a man gives his neighbor $100, he cannot by law recover it back ; no promise

of repayment is implied. And when the plaintiff concluded not to perform his contract, but abandon it, we must consider him as waiving all claim to what he had paid, as much as if he had given it without any pretence of consideration received.

It is a general rule that when the parties have made an express contract, the law will not imply one. *Howes v. Baker* 3 *Johns* 506, 511. *Worthen v. Stevens* 4 *Mass.* 448, 449. *Whiting v. Sullivan* 7 *Mass.* 107. *Jewett & als. v. The County of Somerset* 1 *Greenl.* 125. This is the unquestionable rule where the express contract remains in force, and not rescinded by any act of the parties. In the case at bar the parties had not rescinded the express contract ; the plaintiff had merely broken his part of it ; but the defendant could, if he had so inclined, have maintained an action upon it, against the plaintiff, for his violation of it, in not paying the several sums therein named, according to the terms of it. Notwithstanding there has been some variance in the decisions on the subject now under examination, as appears at large in 1 *Dane's Abr. ch.* 9, *art.* 22, *& seq.* still the true principle, when extracted from all the cases, appears to be, that the plaintiff must go on his special contract, while it remains in force, not varied by mutual consent. See the cases as collected by him, and 2 *Phil. Ev.* 83. The principles of law in relation to this point have recently undergone a careful examination in the case of *Stark v. Parker* 2 *Pick.* 267. In that case the plaintiff agreed to work with the defendant for one year, for the sum of $120 ; worked with him a part of the year, and then left his service, without any fault on the part of the defendant. The court decided that the contract was entire, and so no action could be maintained upon that ; and they also decided that he could not renounce the express agreement, and recover upon a *quantum meruit.* In that case the plaintiff had benefitted the defendant, to the amount of about $27, by his labour, for which he could not and did not recover any thing. In the present case the plaintiff has benefitted the defendant to the amount of $34, by so much of his money ; but the principle is the same in both cases ; the defendant made no promise, nor does the law imply one from him to the plaintiff, in either case; in both the loss of the plaintiff is the consequence

of his own voluntary act, not assented to by the defendant, nor attributable to any fault or neglect on his part. We are of opinion that the instructions of the judge were correct, and that there must be

Judgment on the verdict.

THE INHABITANTS OF CUMBERLAND, *plfs. in error*, *vs.* THE INHABITANTS OF NORTH-YARMOUTH.

A submission, once made a rule of court, is no longer countermandable by either party.

Reports of referees, whether made under a rule of court, or under a submission before a justice, pursuant to the statute, may be recommitted by the court at their discretion, as well for the revision of the whole case, as for the amendment of matters of form.

After the recommitment of a report, it is not competent for two of the referees, in the absence of the third, to revise the essential merits of the case.

After referees have once undertaken the execution of the trust confided to them, and their report is recommitted, if they or one of them should refuse to re-examine the subject, the court may enforce obedience to the order of recommitment, by *mandamus*, or attachment.

ERROR to reverse a judgment of this court, rendered at *November* term 1824, upon a report of referees. The original action was *assumpsit*, brought by the town of North-Yarmouth, to recover the sum of 1975 dollars, awarded by commissioners appointed by the special statute of 1821, *ch.* 78, *sec.* 9, dividing that town, and incorporating the town of Cumberland. At *November* term 1823, the suit was referred by rule of court, to the same commissioners, viz. *Nathan Elden*, *John Perley*, and *Ebenezer D. Robinson*, Esquires, with power also to consider other claims and demands subsisting between the two towns. The report of the referees, being made at *May* term 1824, in favor of *North-Yarmouth*, for $918,11, was contested on the merits, and recommitted. At *November* term 1824, another report was made by *Perley* and *Robinson*, two of the referees ; in which they stated that Mr. *Elden*, the chairman, having refused to notify either the par-

ties or the other referees, or to fix any time or place for the meeting ; they, the other two referees, had appointed a time and place for a further hearing, of which they had given notice both to the parties, and to the other referee ;—that the agents of *North-Yarmouth* attended ; but after some time had elapsed the attorney for Cumberland informed them that the inhabitants of that town would not appear ;—that thereupon the agents of *North-Yarmouth* stated that they would not offer any further evidence, nor again argue the cause ; but would submit it on the evidence already before them, requesting that the referees would take it into consideration, and make such report as the justice of the case might require ;—that thereupon, in the absence of Mr. *Elden*, who did not attend at this sitting, they carefully examined all the evidence in the case, and maturely weighed the same, and the allegations of the parties previously made ; and awarded that North-Yarmouth should recover of Cumberland $1622,95, including interest, with costs of court ; and $126,47 for the former costs of reference, and the further sum of $27,32 for costs of this last hearing. In the former report, made by all the referees, it was awarded that fifty dollars of the costs of reference should be paid by North-Yarmouth.

The latter report, made at *November* term 1824, was accepted by the Chief Justice, and judgment rendered thereon ; which the town of Cumberland sought to reverse.

The errors assigned were, in substance, that the court had recommitted the report, after all the referees had expressed their opinion ;—that it did not appear for what reason it was recommitted ;—that it did appear that two of the referees had usurped the right to regulate the time and place of meeting, before the chairman had an opportunity of declining the office of referee in open court ; and that in his absence, they had undertaken to revise the essential merits of the case, and make a new report, different from the former ; and this, after their jurisdiction was expressly denied by the town of Cumberland ;—and that it did not appear that the chairman refused the office of referee ; but only that he declined to give notice and meet them at that particular time.

N. Emery and *Greenleaf* argued for the plaintiffs in error. 1. The jurisdiction of two of the referees over the merits of the case was expressly denied by the plaintiffs in error; and this, *quoad hoc*, was a revocation of their authority. There is no submission, either at law or in equity, which is not revocable. 3 *Vin. Abr.* 131. *Arbitrement H. a. pl.* 2. *I. a. pl.* 18 *Milne v. Gratrix* 7 *East* 608. *Vynior's case* 8 *Co.* 81. *Skinner v. Dayton* 19 *Johns.* 538. And it is not necessary that the revocation should be by deed. The marriage of a woman who was one of two defendants was held a revocation as to both. 3. *Vin. Abr.* 434. *Authority I. pl.* 4. So where one had judgment in ejectment, and submitted the matter, and then sued out execution; this was held a revocation. *Green v. Taylor T. Jones* 134. And if the party may not revoke his consent before the referees proceed to act, yet he may refuse them the power to act again.

2. The error alleged in the original report was matter of substance; yet the court recommitted it generally, without the defendant's consent. *Snyder v. Hoffman* 1 *Bin.* 43. *Shaw v. Pearce* 4 *Bin.* 485. But an arbitrator cannot, after award made, exercise a new and distinct act of judgment, without consent of the parties. It is a power which the court cannot confer. *Henfree v. Bromley* 6 *East* 309. He cannot even correct an error of calculation; *Irvine v. Elnon* 8 *East* 54; nor explain doubtful matter; *Eveleth v. Chase* 17 *Mass.* 458; nor correct a mistake; *Scott v. Wray* 1 *Chan. Rep.* 45. *Caldw. on Arb.* 173. *Woodbury v. Northey* 3 *Greenl.* 85. The power of the court is derived wholly from the consent of the parties, and extends no farther. Even the arbitrators themselves cannot reserve the power of judging again. *Winch v. Saunders Cro. Jac.* 584. Nor can they delegate their authority, even to one of their own number; as, to award that one party should make such a release as one of the arbitrators should approve. 3 *Vin. Abr.* 65 *Arbitr. H.* 15.

3. But if the court have authority, generally, to recommit a report, against the will of a party, who may have invincible objections to a referee; then referees are placed on the footing of jurors; and what will disqualify the one, ought to be sufficient to set aside the other. *Williams v. Craig* 1 *Dal.* 315. Now here

the two arbitrators had already formed and expressed an opinion on the whole case; and therefore were unfit to try it again, without consent of both parties.

4. The award is bad, because made by two of the referees, who, in the absence of the third, assumed to revise the merits of the case. All must hear the parties; and deliberate on the merits; for the arguments of the dissenting referee might have an influence on the judgment of the others. *Short v. Pratt* 6 *Mass.* 496. *Walker v. Melcher* 14 *Mass.* 148. After a recommitment, two may return the report without alteration; but they are not competent to alter it. *May v. Haven* 9 *Mass.* 325. *Peterson v. Loring* 1 *Greenl.* 64. Now here, two of the referees acted on the subject of interest, which was excluded in the former report; and also adjudicated upon the whole matter; as is apparent from the very great difference between the two sums awarded; and this too, when the absent referee had not refused the office, but had only declined to call a meeting and attend on that particular day.

Orr, *Longfellow* and *Fessenden*, argued for the defendants in error. 1. The authority of the referees is to be found in the original submission, by which the report of any two of them was to be binding and final. The parties have a right to a hearing before all the referees; but when all have once heard them, the power to make an award is devolved on a majority. If it be not so, then one may always absent himself after the first hearing, and defeat the award. And if the majority are competent to act in the absence of the third referee at one time, they are equally so at all times after the cause is once heard by all. Their jurisdiction, once given, continues till the cause is determined by a final award; and enables them to do every act which could be done by the three. *Short v. Pratt* 6 *Mass.* 496. Of course they are competent to revise the whole subject matter. 2 *Barnes' Notes*, 53, 57. *Dalling v. Matchett*, *Willes* 215.

2. The authority thus given, it was not in the power of either party to revoke. The referees were amenable to the court alone; were liable to an attachment for contempt; and to a

mandamus if they refused to act. *Haskell v. Whitney* 12 *Mass.* 47.

3. There was no error in the recommitment of the report; the court having that authority, by the common law of the State. And as neither party entered a dissent upon the record, which they might have done, if dissatisfied, it must now be taken to have been recommitted by consent, if any consent was necessary; both parties having been present at the time. *Whitney v. Cook* 5 *Mass.* 139. *Boardman v. England* 6 *Mass.* 70.

After this argument, which was heard at *May* term 1826, the cause was continued for advisement, and the opinion of the court, the chief justice dissenting, was delivered at *June* term 1827, in *Kennebec*, by

WESTON J. Under the first error assigned, it has been contended that the referees had no power to proceed to make a second report after the recommitment, because their authority had been revoked by the plaintiffs in error. It was resolved in *Vinyor's* case, cited in the argument, that an authority countermandable by the law, cannot in any way be made irrevocable. Hence, it was there decided that if one becomes bound to abide the award of an arbitrator agreed upon, and afterwards revokes the submission, such revocation is good, although the bond is forfeited. And this principle has been recognised in subsequent cases. But in *Milne v. Gratrix*, cited from 7 *East* 608, Lord *Ellenborough* says, after the submission is made a rule of court, the party cannot rescind it, without incurring a breach of that rule. It would seem therefore from this authority, that a submission once made a rule of court is no longer countermandable by the law; the party attempting to countermand it being liable to an attachment for a contempt; which is the coercive process by which rules of court are enforced in England. And in *Haskell v. Whitney* 12 *Mass.* 47, it was decided that where an action has been referred by a rule of court, neither party has a right, without the consent of the other, to rescind or discharge it.

The authority of the court to recommit generally, without consent of parties is controverted; it being urged that their

power to recommit can only be exercised for the purpose of correcting mistakes in matters of form. In support of this position, cases have been referred to in the English books, where courts have refused to sustain alterations made in awards by arbitrators, after the time limited for the exercise of their authority had ceased, or after they had once executed the powers delegated to them. Of this kind also is the case of *Woodbury v. Northey*. But all these were cases of submission to arbitrators out of court, in some of which they were expressly restricted as to time, and in others their power was held to be at an end, after it had been once exercised. But recommitments of reports made under a rule of court, or under a submission before a justice, in regard to which the common pleas has, by statute, the same power as it has over its own rules, have been uniformly made, both in this court and in the common pleas, whenever, in the opinion of the court, the purposes of justice required such a course. Nor has this practice been confined to the amendment of mere matters of form, but has extended to the substantial merits of the matters in controversy, whenever a re-examination of the whole subject has been deemed expedient. And nothing is more common than an award of referees, after recommitment, presenting results differing materially from their first report. Where the court, from any cause, not arising from the misconduct of the referees, deems it improper to accept the report first made, it is generally much more convenient to the parties to recommit it for revision, than to discharge the rule. The power of the courts to do this is fully recognized in the cases of *Whitney v. Cook* and *Boardman v. England*, cited by the counsel for the defendants in error.

One of the errors assigned is, that it does not appear for what reason the report was recommitted. It is not usual, nor is it necessary, to spread upon the record the reasons which induce a recommitment. Whether the report shall, or shall not, be thus disposed of, depends upon the sound discretion of the judge; whose determination upon this point is conclusive.

From the assignment of errors, and from the record before us it appears that *Nathan Elden*, the chairman of the referees, did

not act with his colleagues after the recommitment; he having refused to notify a meeting, or to meet at the time and place by them appointed. And a majority of the court are constrained to determine that this error is well assigned ; and that the judgment must be reversed. The sum awarded against the plaintiffs in error, in the second report, signed by two of the referees, being nearly double the amount awarded against them in the first report, signed by them all, evinces that the subject matter was re-examined, and that it resulted in a great change of opinion, on the part of those who signed the second report. The authority of referees to adjudicate between the parties, can originate only from their assent. The assent of the plaintiffs in error to this submission, may have depended upon the confidence they reposed in the judgment and integrity of the chairman of the referees. Unless he was appointed, and consented, to act, they might have declined the reference altogether. To oblige them therefore to abide the award of the two other referees, made and concluded at a meeting at which he was not present, and without the benefit of his assistance and advice, even though he might refuse to act, which might happen without the fault of the plaintiffs in error, would be to subject them to the determination of a tribunal differently constituted from that to which they had submitted. It is true they had consented to be bound by the report of a major part of the referees; but that must be intended to mean upon a final difference of opinion, after a hearing by all, and after availing themselves of the aid, which each could afford, in the consideration and discussion of the merits. That the views and arguments of one may justly and fairly have an important influence upon the opinion and judgment of others, is a fact which will not be controverted. If therefore two have come to a certain result, without the assistance of the third, it by no means follows that they would have come to the same result, if they could have had the benefit of his advice. It would not probably have been contended that, upon a reference to three, the original award of two, the third not having been present at the hearing, could have been binding upon the parties. A majority of the court are unable to perceive any difference in principle between such an award and one made by two, in the absence and without the assistance of

the third, after a recommitment, substantially varying from the first award, to which all had assented.

After the referees had once undertaken the execution of the trust confided to them, if they, or any one of them, should refuse to re-examine the subject, the court might enforce obedience to their order of recommitment, by *mandamus* or attachment. It is believed however that no precedent can be found of a resort to such a process, in a case of this kind. It would without doubt be deemed a more eligible course to discharge the rule, and leave the parties to the ordinary modes of trial at law. In *Boardman v. England*, *Parsons C. J.* in stating the practice of the courts in regard to rules of reference, says, if either of the referees refuse to execute the trust, the rule is discharged. In *Short v. Pratt* 6 *Mass.* 496, it was decided that upon the recommitment of a report, it must appear that all the referees heard the parties ; although if they disagree, the award of two is binding. That was the case of a report made to the common pleas, upon a submission before a justice ; but as reports of that kind are by statute to be treated precisely like reports made under a rule of court, it is an authority directly in point.

There is nothing in the case of *May v. Haven* or of *Peterson v. Loring*, referred to in the argument, at variance with the authority last cited. The reports originally made in these cases, had been signed by all the referees After this recommitment, two of them, in the absence of the third, in each case, made a report conforming to the first. As the same results had been assented to by all, they were deemed to have been substantially made by three, and not by the two only, who had last signed. *Peterson v. Loring* was decided upon the authority of *May v. Haven*, and in the opinion of the court in the former case, both are declared to be consistent with the case of *Short v. Pratt.* In *Walker v. Melcher*, the referees met and heard the parties on the thirtieth of *November*, which they set forth under that date ; on the same day one of them certified that he was present at the hearing, but gave no opinion as to the damages ; and on the seventh of *March* following, the other two referees made up and signed their report ; the third not being present. One of the errors assigned

was, that the assessment of damages was made on the seventh of *March* ; and that it did not appear that the referee, who did not subscribe, had any notice of the meeting on that day, or of their assessment of damages. Upon this point, the court say that the referee, who did not join in the report, appeared to have been present at the hearing ; but did not agree with his brethren, as to the amount of the damages. If he did not agree in the amount, he must have known what it was. And it is apparent, from the opinion of the court, that it was founded upon the assumption, that every thing was virtually and substantially agreed by the two in *November* ; the third dissenting as to the amount of damages ; and that the result, to which they had then arrived, was put into form and signed by the two in *March*. The court did not overrule this error ; but denied the fact upon which it was predicated.

MELLEN C. J. After the most serious consideration of this cause, in all its bearings, I have not been able to agree with my learned brothers in the opinion which has just been delivered ; and though I regret that an ultimate difference should exist, still I must pursue that course which my judgment and sense of duty prescribe. Though my own opinion will not affect the decision of the court, yet, in justice to myself, I deem it proper to state distinctly the reasons and principles on which it is founded ; observing at the same time that I agree with the other members of the court in their opinion, so far as it overrules several of the errors assigned, and objections urged by the plaintiffs' counsel.

I consider the law to be well understood and settled, that when *one* referee refuses to accept his appointment, the *others* have no authority to proceed.

When he has *accepted* and entered on the duties of his appointment, he must be considered as *retaining* his authority, until he shall refuse to proceed any further; and give notice to *the court* under whose commission he has been acting, or at least to *both the parties* in the cause.

As nothing of this kind has been done in the case we are examining, *Elden's* powers as a referee were continuing at the

time the last report was made ; and, of course, the powers of the *other* referees also.

There is then no objection to the report by reason of a determination of the authority of any of the referees.

Is it objectionable on any other ground ?

The power given to referees to *hear* and *try* a cause, is a *joint* power.—All agree in this.

The power given them to *decide* is *not a joint one* ; because the decision of a majority is legal and sufficient.

If, after a *joint hearing* of the parties and their *proofs*, in the *first* instance, and *before* a recommitment, *one* of the referees *absent himself immediately*, or *refuse to consult* with his brethren, or to give *any opinion*, then the *other two* have full power to decide the cause *upon the evidence* previously *produced*, and *heard* by *all*.

After *such* a hearing, each referee has an unquestionable right to *express* and *continue to hold* his own opinion ; and *neither* of the other two, while continuing in office, can by any act of his, defeat, impair or control this right.

So after a report has been *recommitted*, this right *continues*; and if no *further evidence* be offered, or *hearing of the parties had*, *a majority* has the *same* authority to decide the cause on its *original facts and merits*, as they had when the *first* report was made; because the order of recommitment does not *take away* any of the original powers of the referees ; but only *authorises* them to re-examine the cause upon the *former facts*, or upon *additional* facts also, as circumstances, or the wishes of the parties, may render proper or require.

If *no additional* evidence be offered, or hearing of the parties had by the referees, then the *only* power exercised by them under the order of recommitment, is that of *reviewing*, and, if thought proper, of *correcting* their former opinion and report.

In doing *this*, *each* referee *may* and *must* judge and decide *for himself*. The operations of the minds of the referees, *are not*, and *cannot* be *joint* ; they may *reason* and arrive at their *conclusion* separately, as well as together ; and when *any two* of them agree in their conclusions, they may, after due notice to the third referee to join them in making a report, *decide* the cause, *without* or *against* his opinion.

Hence his *absence*, after due notice, cannot be of more importance than his *presence* and *express dissent* from the opinion of the majority ; and, most certainly, *that* cannot affect the validity of the report.

I am not able to discover any fallacy or unsoundness in either of the foregoing propositions, or incorrectness in the results, as I have stated them.

It is *not* denied that, upon these principles, the *majority* of the referees may, *after* a recommitment, report the *same sum*, which was originally reported ; such was the decision in *May v. Haven* 9 *Mass.* 325, and *Peterson v. Loring* 1 *Greenl.* 64; but it *is* denied by the plaintiffs in error that, in such circumstances, *two* of the referees can legally report a *larger* sum in *damages* than the sum named in the *first* report. It appears, in both the above mentioned cases, that the majority of the referees, in the absence of the third, made a report, however, by which, though they did not increase the *damages*, they allowed additional *costs*; but both reports, notwithstanding this increase, were sanctioned and accepted. It is not easy, at least for *me*, to perceive why *two* of the referees, in the circumstances mentioned, had not as good a right to increase the amount recovered, in the *form* of *damages*, as in the form of *costs* ; the *latter* are as much a part of the report as the *former*. In both cases new liabilities and *additional obligations* are created by the *second* report. It has been said, by way of reply to this suggestion, that costs are only a *consequence* or incident ; but, though in some cases they are, in case of a decision by *referees*, they are not so. The allowance and recovery of cost arising before them, depend on their reports. If they do not make such costs a part of their report, they cannot be taxed or recovered. In *principle*, then, there is no difference between an increase of *damages*, and an increase of *costs only*, in a report made by *two* referees, after a recommitment ; and I am unable to see why one should be made *in fact*.

The case of *Walker* in error *v. Melcher* 14 *Mass.* 148, seems to me to be worthy of consideration. By the printed report of it, and an inspection of the record in the clerk's office, it appears that *all* the referees met and fully heard the parties *November* 30,

1813, as they state in their report ; and then it is stated thus ; "and now on this seventh day of *March* 1814, report" &c. This report was signed by *two only* of the referees; but the *third* certified at the bottom of the report, under date of *November* 30, 1813. in these words ;—"I *William Hawes*, one of the referees within named, do not give any opinion as to the *damage* ; but say said *Melcher* 3d, has cause for action against said *Walker* for a libel." The natural implication from the whole is, that nothing was said, or at least, decided, on the day of the hearing. In *March* following, *two*, in the absence of the *third*, agreed and signed the report. In that case *two* of the referees decided, upon the evidence which *all* had heard, and decided in the absence of *Hawes*. In the case at bar two did *no more*, in the absence of *Elden*. They only corrected an error in their *former* opinion upon the evidence, and thereby increased the damages ; and in *Walker v. Melcher*, the two formed an *original* opinion upon the evidence as to the amount of damages. What sound distinction is there, in principle, between the two cases ? I do not perceive any.

The supposed error which is assigned, viz. that the last meeting of the referees was not notified by the chairman, cannot be a circumstance of any kind of importance. If referees meet by a mutual understanding, without formal notice from any one, it is sufficient ; the object of the notice is to convene the referees. The chairman, as he is called, possesses no more or greater authorities and powers than either of his associates. It is merely a matter of courtesy that he should, as he generally does, notify the other referees, and the parties, of the time and place of hearing ; but, in legal contemplation, one of them may as well do this, as the other ; or else there might be a failure of justice. Surely, if the chairman refuse to notify a meeting, he cannot thereby arrest and frustrate all proceedings under the submission ; this would be extending courtesy to an unreasonable and dangerous length. In the present case, for some unexplained reasons, best known to Mr. *Elden* himself, he declined to notify a new meeting, pursuant to the order of recommitment, though he was particularly requested so to do; but by the record it appears that such meeting *was* notified ; and that all the referees and

both the parties had notice, and were requested to attend at the time and place appointed; and it also appears that no new evidence was offered of any kind, or any *hearing of the parties* or *their counsel* had ; and that in the absence of *Elden*, the *other* referees agreed upon and signed the report in question ; and that it is predicated on the *original facts* and *merits*, and on them *only*. They had no other sources of information, or *basis* of calculation and judgment, than *all* had on the former hearing. All that was done by the two was, to review and revise the evidence and first report, and to exercise the unquestioned right of judging for themselves, and drawing their own conclusions upon such review and revision. But it is said that they had no authority to do this, in the absence of *Elden*, because, had he been present, his arguments might have changed their opinion, and convinced them that the damages ought not to have been increased. Why then did he not attend as requested, and give his brethren the benefit of his arguments and opinion? His absence is not chargeable to them, nor to the town of *North Yarmouth* ; and why should his *absence* under such circumstances, and his consequent *silence* upon the subject of the submission, affect the validity of the report, any more than his *presence* and *total silence* would have done ? In the *latter* case, surely, the report would be liable to no objection. For one, I do not feel at liberty to establish *distinctions*, where I can discern no *difference*.

In my opinion the report was properly accepted, and judgment thereon properly rendered ; and, of course, that it ought to be affirmed. *Judgment reversed.*

CHILD & UX. *vs.* FICKET.

Where one who owned three adjoining parcels of land, each of which was particularly described in the deed by which he held them, made a deed of conveyance commencing in the language of the former deed, as a conveyance of three parcels, but describing only the first parcel, and referring to the deed from his grantor to himself ;—it was held that all the three parcels passed by this deed.

IN this action, which was a writ of dower, the question was whether *James Wylie Jr.* the former husband of the *feme* demandant, was seised of both the parcels of land described in the writ.

It appeared that *James Wylie*, the father, being seised of both the parcels, which were contiguous, and of another parcel, conveyed them all to *Cotton B. Brooks*, on the 9th of *April* 1807, for the consideration of 3600 dollars; describing them thus,—"three parcels or lots of land situated in said *Portland*, and bounded as follows, to wit, the first lot beginning at" &c.—setting forth the boundaries ;—"being the same land which was conveyed to me by *Ebenezer Newman's* deed, bearing date the 18th of *November*, A. D. 1800,and on record;"—and then proceeding to describe the second and third parcels in the like manner. On the 24th day of *December* 1810, *Brooks* made a deed to *James Wylie Jr.* for the consideration of 778 dollars, purporting to convey "three parcels or lots of land situated in said *Portland*," and proceeding exactly in the language of the former deed, as far as the end of the description of the *first parcel*, which he closed with these words,—"being the same which was conveyed to me by *James Wylie*, by deed dated *April* 9, 1807, now on record." Here the description closed, and was immediately followed by the *habendum*. All the parties lived in *Portland* ; and it did not appear that *Brooks* had occupied either of the parcels, after the making of this deed.

The Chief Justice, before whom the cause was tried, ruled in favor of the demandants, for whom a verdict was returned ; and reserved the question of construction, for the consideration of the court.

Longfellow, for the tenant, contended that the general allusion to three parcels, in the second deed, was to be explained and controlled by the particular description of a specific lot by metes and bounds. *Lyman v. Clark* 9 *Mass.* 235. And to this description the concluding reference to the deed of *James Wylie* the father, must be understood to apply. The difference also in the consideration paid, clearly shews that it was only a part of the first purchase which *Brooks* intended to convey.

Fessenden and *Deblois*, for the demandants, interpreted the second deed as a conveyance of the three parcels purchased of

James Wyllie, the first of which, only the grantor undertook to describe. Upon this construction, they said, all the words of the deed were regarded, agreeably to the well known rule of law. *Shep. Touchst.* 87. 2 *Cruise's Dig.* 293. 1 *P. Wms.* 457. *Troup v. Blodget* 16 *Johns.* 176. *Jackson v. Myers* 3 *Johns.* 395. 1 *Vern.* 416, 424, 457. 1 *Phil. Ev.* 473. If the language of the deed is doubtful, it is to be expounded most strongly against the grantor. *Adams v. Frothingham* 3 *Mass.* 361. *Worthington v. Hylyer* 4 *Mass.* 205. 3 *Johns.* 375. *Co. Lit.* 183 *a. Gilb. Ev.* 185. *Webb v. Dixon* 9 *East.* 15. 8 *Johns.* 394. 5 *Mass.* 411. And if the intent of the parties is to govern, it is evident that the first deed was before them when the second was written ; and that the general reference to the first deed was inserted to include the whole. 2 *Cruise's Dig.* 294. *Bott v. Burnell* 11 *Mass.* 163. *W. Jones* 405. 5 *East.* 81. 2 *Rol. Abr.* 49. *Runnington on Eject.* 41, 120, 215. *Rogers v. Clark* 7 *Johns.* 217. 1 *Caines* 493. 1 *Phil. Ev.* 468. 1 *Maule & Selw.* 299. 11 *East.* 59. *Goodtitle v. Bailey Cowp.* 597. *Ludlow v. Myers* 3 *Johns.* 398. *Vose v. Handy* 2 *Greenl.* 322. *Keith v. Reynolds* 3 *Greenl.* 393.

WESTON J. delivered the opinion of the court.

In the construction of a deed, the entire instrument is to be regarded ; and, if it may be, every word is to have effect, and none be rejected ; and it is to be so understood, if possible, that all the parts may agree together. *Plow.* 160, 161. These and other rules have been devised, as best adapted to give effect to the legal intention of the parties ; which is the general governing principle in the exposition of deeds and other instruments.

But for the particular description of one piece of land, in the deed of *Cotton B. Brooks* to *James Wyllie, Jun.* it would have been altogether plain and intelligible ; conveying three parcels of land in *Portland*, being the same which passed from *James Wyllie* to the grantor ; reference being made to his deed, in which each parcel is described by metes and bounds. The words of the deed in question, express three parcels or lots of land in *Portland*. To restrict its operation to one parcel, would be giv-

ing it an effect far short of what the words require; and it ought not therefore to receive this limited construction, if it can be avoided. Without the reference to the deed, under which the grantor held, the piece described would alone have passed; as the deed would have furnished no *data*, by which the other two pieces could have been ascertained and located. But with the reference, although but one parcel is particularly described, the other two are designated with equal certainty. Three lots are conveyed, "bounded as follows." From this language, we are led to expect a description of each. The deed goes on to describe the "first," plainly implying, by the use of this term, that more than one piece is conveyed. The second and third are not described, as seems to have been designed in the outset, except by the reference before stated. It has been insisted that the words of reference are limited to the first parcel. These words, "being the same which was conveyed to me by *James Wyllie*, by deed, dated *April* 9, 1807," immediately follow the particular description of the first piece. If the deed had professed to convey but one piece, without doubt the sense would have required that they should have been thus restricted. Even then, if the deed had been drawn with precision, the words of reference should have been "being one of the parcels," or "being part of the same land which was conveyed to me," &c. But when the deed distinctly states, that three lots or parcels are the subject of the conveyance, and, after describing one, refers in this manner, without qualification, to a deed in which three parcels are conveyed to the grantor by metes and bounds, the reference cannot, by any consistent construction, be restricted to one of the parcels, to the exclusion of the other two. If the word "same" is understood to embrace the three pieces, stated in both the deeds, all the words are operative and consistent; if restricted to one, terms of great importance must be rejected as useless and unmeaning.

That words are to be taken most strongly against the grantor, is an ancient principle of the common law; the operation of which, however, is in modern times, very properly restrained, where it would not accord with the apparent intention of the

parties. But if he use terms, not sufficiently precise, the meaning of which is not to be fixed with certainty, from a view of the whole instrument, as it was incumbent on him to have explained himself, the rule adverted to may be very properly applied. It is certainly far from being clear that only one piece was intended to be conveyed by the deed in question ; and if it were a doubtful and balanced case, this rule might justly incline the scale. But it is not necessary to invoke this principle, which is regarded with less favor than it was formerly, in aid of the more extended construction. This result best comports with the plain and ordinary meaning of the language used, reconciles the different parts of the deed, and gives effect to all its terms.

It has been urged in argument by the counsel for the tenant, that more general words in an instrument are to be restrained by other expressions, more limited, in the same instrument. This principle is unquestionably a sound one ; and may be resorted to wherever the object, intent and design of the parties require, as they often do, this limitation. But it cannot apply in the case before us. Giving the words of reference the meaning which, from an inspection of both deeds, the sense plainly requires, the deed from *Brooks* is to be construed, as if the description in the deed to him had been inserted therein ; and taken both together, the second and third pieces are described as particularly as the first. *Judgment on the verdict.*

The Inhabitants of GORHAM *vs. The Inhabitants of* CALAIS.

The notice required by *Stat.* 1821, *ch.* 122, *sec.* 17, may properly be sent or delivered to such persons, or any one of them, as appear, by the records of the town notified, to be overseers of their poor for the current year; though subsequently they may have declined to accept the office.

IN an action of *assumpsit*, for supplies furnished to a pauper, it appeared that the notice was delivered to *Joseph Whitney*, Esq. of *Calais*, and had never been answered. The plaintiffs proved by the town records of *Calais*, that *Abner Sawyer*, *Ebenezer Reding* and *Joseph Whitney* were chosen overseers of the poor of that

town for the same year ; and relied on their neglect to answer the notice, as estopping *Calais* to contest the question of settlement.

The defendants read the depositions of the men thus chosen, who all testified that at the time of their election they declined the office, in open town meeting ; and had never served in the office since, nor been sworn. *Whitney* added that he had once subsequently concluded to serve, if the others would ; but that they could not be induced to consent. He also testified that he had in divers instances refused to act in the office when applied to ; that it was a matter of notoriety in *Calais* that year, that the persons chosen overseers refused to serve as such; but that when the notice from *Gorham* was delivered to him, he did not inform the person who brought it that he was not an overseer ; nor did he communicate the notice to the selectmen of *Calais* for that year ; who, it appeared, were duly chosen and qualified.

The defendants relied on this evidence, to the admission of which the plaintiffs objected, as shewing that the office of overseers of the poor in *Calais* was vacant, and that the duties of that office were devolved by law upon the selectmen ; and therefore that the notice was not delivered to the proper officers. But the Chief Justice, before whom the cause was tried, overruled this point, and directed a verdict for the plaintiffs, reserving the question for the consideration of the court.

Greenleaf, for the defendants, contended that the office was vacant, the persons elected having refused it, upon the spot; and never having afterwards acted, or been sworn ; as was the custom of that place, though not required by law. *Mussey v. White* 3 *Greenl.* 290. *Morrell v. Sylvester* 1 *Greenl.* 248. And the evidence was admissible, being of matter *en pais*, not contradictory to the record. The fact was notorious in *Calais* ; and the plaintiffs might have known it, by common diligence of inquiry.

Adams, for the plaintiffs, resisted the admission of the evidence, as being against the record. But he contended further that it was sufficient for *Gorham* to deliver the notice to such persons

as *Calais* held out, upon their records, as overseers of the poor. If they would not have such papers delivered to these men, they should have entered on record their refusal to accept the office.

WESTON J. delivered the opinion of the court.

By *Stat.* 1821, *ch.* 114, *sec.* 1, the selectmen are to be overseers of the poor, where other persons shall not be particularly chosen to that office; which any town may do, if they shall think it necessary and convenient. And by *Stat.* 1821, *ch.* 122, *sec.* 3, it is provided, that every town may, at their annual meetings, choose any number, not exceeding twelve suitable persons, dwelling therein, to be overseers of their poor; and where such are not specially chosen, the selectmen shall be overseers of the poor. In the case before us, the inhabitants of the town of *Calais* did think it necessary and convenient, and actually did choose three persons particularly for this office, for the year when the notice in question was given. From the depositions of the persons thus elected, it appears that they declined serving at the meeting at which they were chosen; but of which however no notice is taken in the records. One of them afterwards proposed to act in the office, and endeavored to persuade the others to do so; and on a certain occasion invited a meeting for this purpose; his colleagues however did not attend; nor did they ever meet together to transact the business of their appointment. In what condition the office was left, under this state of things, and upon whom it devolved to discharge it, need not now be decided. The town might have excused the persons elected, and have proceeded to choose others in their stead; and this would without doubt have been the more eligible course. Indeed the second section of chapter 114, provides, that where by reason of the non acceptance, death, or removal of any person chosen to office in any town, or by reason of a person's becoming *non compos*, there is a vacancy, or want of such officers; the town, at a regular meeting, may choose others to supply their place. But whether the legal administration of the duties of the office resulted to the selectmen, or a vacancy existed, which the town neglected to supply, we are of opinion that notices from other towns

might properly be sent or delivered to such persons, or any of them, as appeared by the records of *Calais* to be overseers of the poor, for the current year. It is not for them to say that notice given to those persons, to whom by their records this department was confided, was insufficient. They held out this evidence to the public, and as it respects other towns, they ought to be concluded by it. Were it otherwise, the overseers of other towns, employing the most vigilant agent to make inquiries, might be at a loss as to whom they ought to notify. The citizens of the town to be notified might not be disposed to give them the necessary information, or might deal disingenuously by them. In this case, the person appearing by the record to be an overseer of *Calais*, to whom the agent of the overseers of *Gorham* delivered the notice in question, deposes that he did not inform the agent that he had not accepted the office, as, if he had acted fairly and frankly, he should have done; nor did he give notice thereof to the selectmen, but did to the other persons who had been chosen with him.

If towns are held chargeable with notices delivered to such persons as appear by their records to be overseers of the poor, there is accessible to other towns, or their agents, evidence of the highest nature upon this point; and by this evidence, they may be safely guided. Upon this view of the case, it is unnecessary to determine, whether the depositions objected to were properly received or not; as notwithstanding the facts therein detailed, the opinion of the court is, that the defendants are concluded by the notice proved; there must therefore be

Judgment on the verdict.

GREELEY & AL. v. THURSTON.

Bills of exchange, and negotiable notes, should be paid on demand, if it be made at a reasonable hour, on the day they fall due ; and if not then paid, the acceptor or maker may be sued on that day ; and the indorser or drawer also, after notice given or duly forwarded.

Whether the plaintiff may alter his writ after the service is commenced, and before it is completed ; *quære.*

IN this case, which was *assumpsit* by the payee against the maker of promissory notes, the writ was issued *Oct.* 21, 1825, between the hours of four and five in the afternoon ; and contained one count upon a note dated *April* 18, 1825, for $156,25, payable in six months from the date with grace ; and another upon another note, dated *June* 20, 1825, for $93,76, payable in four months from the date with grace. The service of the writ was commenced on the following day, by attaching the defendant's goods.

On or about *Oct.* 26, the plaintiffs caused the second count to be stricken out of this writ ; and on the 9th of *November* a new writ was made upon the last mentioned note, and the same property again attached. The service of both writs was completed *Nov.* 15, by leaving the summonses at the defendant's place of abode ; and the second suit proceeded to judgment.

Upon these facts the cause was submitted to the court, to determine whether the action was prematurely brought ; and whether the alteration made in the writ, by erasing the second count, was such as to render it void.

Kinsman, for the plaintiffs, contended that the note was due on the last day of grace, and that an action might well be commenced upon it at any hour of that day. *Castle v. Burditt & al.* 3 *D. & E.* 623. *Jones v. Fales* 4 *Mass.* 251. But if the day of the date was to be excluded from the computation, and so the note not matured till the expiration of the last day of grace, yet this day, in mercantile acceptation, ended at the closing of the banks at four in the afternoon ; after which an action would lie.

Davis, for the defendant, insisted that the action was premature ; upon the ground that the day of the date of the note was to be excluded from the computation ; in which case the promissor had the whole of the last day of grace, in which to make payment ; the law not regarding fractions of a day. *Henry v. Jones* 8 *Mass.* 453.

But however this may be, he said that the plaintiffs had destroyed their own writ, by altering it in a vital part, without leave of the court, and after the defendant had a vested interest in the action, by the attachment of his property. To permit such an act, especially when done, as this was, without the concurrence of the counsel, would go far to destroy all confidence in the sacredness of legal proceedings.

The opinion of the court was read at the ensuing *November* term, as drawn up by

WESTON J. Prior to the service of a writ, the plaintiff may change, modify, or amend it at his pleasure. Whether, after the service had commenced by attaching the defendant's goods, but prior to its completion, it was competent for the plaintiffs in this case to strike the second count out of their declaration, from the view we have taken of the cause upon other points, need not now be decided.

The note declared on in the first count, dated *April* 18, 1825, payable in six months with grace, became due on the 21st of *October* following. Was it sueable on that day ? It is remarkable that no decision directly upon this point has been adduced, nor have we, after considerable research, been able to find one. The treatises of *Kyd*, *Chitty* and *Bayley* on bills of exchange and notes of hand, have also been examined with a view to this question ; but they contain no intimations, affording any satisfactory aid in the solution.

The objection on the part of the defendant, the maker of the note, is, that he has the whole of the last day in which to pay it; and that until that day is passed, he cannot be said to have broken his contract. There is no question, that with regard to bonds, mortgages and instruments in writing, other than notes of hand, or

bills of exchange, the party who engaged to pay money, or to perform any other duty, fulfils his contract, if he does so on any part of the day appointed. Unless the case of negotiable paper forms an exception to the general rule, which attaches to other written contracts, the maker of a negotiable note of hand, and the acceptor of a bill of exchange, are not liable to be sued until the day after these instruments become due and payable.

In the case of *Leftley v. Mills* 4 *D. & E.* 170, we have the opinion of Mr. Justice *Buller*, given in strong terms, although the decision was finally placed upon another ground, that the general rule before intimated, does not apply to bills of exchange. In that case, a clerk called with the bill, upon which the question arose, at the house of the defendant, the acceptor, on the day it became due, and not finding him at home, left word where the bill might be found, that the defendant might send and take it up ; this not being done, at six o'clock in the evening, it was noted for nonpayment. Between seven and eight o'clock, the same clerk called on the defendant again with the bill, who then offered to pay the amount of it ; but refused to pay an additional half crown demanded for the notary. Lord *Kenyon* was of opinion, at the trial, that the tender was sufficient ; and directed a verdict for the defendant. A rule was obtained to show cause why the verdict should not be set aside, and a new trial granted. The court said, in granting the rule, that the main question was whether the acceptor had the whole day to pay the bill in, or whether it became due on demand at any time on the last day. After argument, Lord *Kenyon* stated that in this, as in other contracts, the acceptor had the whole day ; but said, if there were any difference between bills of exchange and and other contracts in this respect, the claim for the notary could not be supported ; this being an inland bill, payable fourteen days after sight ; and the statute of *William*, which first authorized a protest upon inland bills, giving it only upon such bills as were payable a certain number of days after date. Upon this last ground *Buller J.* concurred ; but he added, "I cannot refrain from expressing my dissent to what has fallen from my Lord, respecting the time

when the payment of bills of exchange may be enforced. One of the plaintiffs' counsel has correctly stated the nature of the acceptor's undertaking, which is to pay the bill on demand, on any part of the third day of grace ; and that rule now is so well established, that it will be extremely dangerous to depart from it. With regard to foreign bills of exchange, all the books agree that the protest must be made on the last day of grace; now that supposes a default in payment, for a protest cannot exist, unless default be made. But if the party has until the last moment of the day to pay the bill, the protest cannot be made on that day. Therefore the usage on bills of exchange is established ; they are payable any time on the last day of grace, on demand, provided that demand be made within reasonable hours. A demand at a very early hour of the day, at two or three o'clock in the morning, would be at an unreasonable hour ; but on the other hand, to say that the demand shall be postponed until midnight, would be to establish a rule attended with mischievous consequences."

Upon consideration, we adopt the views of Mr. Justice *Buller*; and it is our opinion that bills of exchange and negotiable notes should be paid on demand, if made at a reasonable hour, on the day they fall due ; and if not then paid, that the acceptor or maker may be sued on that day, and the indorser or drawer also, after notice given, or duly forwarded.

It has been decided in two cases in Massachusetts, *Shed v. Britt*, 1 *Pick.* 401, and *City Bank v. Cutler & als.* 3 *Pick.* 414, that after demand and notice, the indorser may be forthwith sued, without waiting until the expiration of the day on which the note falls due. These cases presented in principle the same question which is now before us. The indorser is collaterally and conditionally liable. It would be a very extraordinary doctrine to hold that he might be sued, before any action could be sustained against the principal and ultimate debtor. If therefore an action lies against the indorser under these circumstances, of which we are well satisfied, it must equally lie against the maker or acceptor.

But notes of hand and bills of exchange, like other instruments, are not suable until the day of maturity be passed ; unless demanded on that day. The failure to pay on such demand, constitutes a breach of the contract and a dishonor of the bill or note, by the usage and custom of merchants. The necessity of a demand on that day, prior to the institution of an action, is clearly deducible from the opinion of Mr. Justice *Buller*, and from the cases cited, decided in Massachusetts.

In the case before us, it does not appear, from the statement of facts, that the note was demanded of the defendant, prior to the commencement of the action ; we must therefore decide, in accordance with the principles before stated, that it was prematurely brought, and that the plaintiffs must be called.

Plaintiffs nonsuit.

GILBERT *vs.* SWEETSER.

Where a statute confers certain powers upon, or requires certain duties to be performed by, any two justices *quorum unus*, it is only necessary that one should be of the *quorum*.

IN this case, which was a writ of entry, the tenant obtained a verdict by means of a deposition *in perpetuam*, before two magistrates, styled, in the caption, "justices of the peace *quorum unus*." The demandant objected to the admission of the deposition, because only one of the magistrates was a justice of the *quorum*, the other holding simply a commission of the peace; but the Chief Justice overruled the objection, and saved the point for the decision of the court ; together with some others which were taken at the trial, but not afterwards insisted on.

Greenleaf and *Davis*, for the demandant.

Hopkins, for the tenant.

WESTON J. delivered the opinion of the court.

The term, *quorum unus*, we derive from our ancestors. In England, all the justices for a county are appointed and named in one commission, under the great seal. This appoints them all, jointly and severally, to keep the peace ; and any two or more of them, that is, in a court of sessions, to inquire of and determine felonies and other misdemeanors ; in which number, *Blackstone* says, 1 *Com.* 351, some particular justices, or one of them, are directed to be always included, and no business to be done without their presence ; the words in the commission running, *quorum aliquem vestrum, A. B. C. D. &c. unum esse volumus.* This formerly embraced only a select number, eminent for their skill and discretion; now all are named over in the *quorum* clause except some inconsiderable person, for the sake of propriety. In accordance with this commission, an assembly of two justices or more, *quorum unus*, makes a session, not only for inquiry, but to hear and determine. 4 *Com. Dig.* 670. *Justices of the peace, D*, 1. Here it is very manifest that this term does not require that they should all be of the *quorum* ; but only that one of them must be. It will, it is believed, be found, that wherever a British act of parliament has conferred special powers upon any two or more justices, *quorum unus*, it is always understood, and that clearly, by reference to the terms of their commission, that the presence of one only, of the dignity of the *quorum*, is made necessary.

This class of justices has been long known in Massachusetts, and this State; but as each individual appointed receives a separate commission, their designation as of the *quorum*, is not made as it is in the general English commission. The phrase however, *quorum unus*, being a familiar legal term, and carrying with it, where it was first used, a plain and definite meaning, has been continued in our statute book; although, like the names of certain writs, not to be understood by rendering it into English, without adverting to its origin or history.

By the provincial act of 11 *W.* 3. *Ancient Charters, &c.* 326,

a court of general sessions was constituted, consisting of the justices of the peace in each county. And by statute of 1782, *ch.* 21, subsequent to the revolution, it was re-established in the same manner. No provision is made, in either of those acts, as to what number should constitute a *quorum* ; nor are the different grades of justices recognized. But as much of their judicial power could be ascertained only by adverting to the authority of the same court in England, derived there principally from statutes adopted here as part of our common law, and which is expressly referred to in the statute of the commonwealth, as one of the sources of their jurisdiction; it was understood here, as in England, that the court might be holden by a limited number of justices. There it might be holden by any two or more, *quorum unus*, but here it seems, according to the tenor of the old commissions, while the court of general sessions continued, by any three or more, *quorum unus*. Why this number varied from that which was limited in England, or by what authority it was thus settled here, does not appear. From this limitation was derived the only distinction between the two grades, which appeared in the commissions of the justices in Massachusetts ; a distinction not created, although often recognized, by statute, but depending on common law. Thus if, in the old commissions, the justice was empowered, with any two justices of the peace for the same county, to hear and determine thefts, trespasses, riots, routs, &c. he was of the *quorum*. If he was empowered to do so with other justices of the peace for the same county, he was not of the *quorum*. After the court of general sessions ceased to exist, the style was changed ; and those appointed to the higher grade, were expressly commissioned as such.

From a consideration of the origin and history of this term, we are well satisfied, that whenever a statute confers certain powers upon, or requires certain duties to be performed by, any two justices, *quorum unus*, it is only necessary that one should be of the *quorum*. And this we have no doubt, has been the practical construction. When the legislature have a different intention, it is otherwise expressed. Thus where jurisdiction is given to two justices, in regard to bailable offences, each is required to be

of the *quorum*; so the same expression is used in designating the justices, by whom the oath to poor prisoners is to be administered. *Stat.* 1821, *ch.* 68, and *ch.* 209, *sec.* 13.

The law requiring that depositions *in perpetuam*, should be taken and certified by two justices *quorum unus*, and one of the justices being of the *quorum*, who officiated in taking the deposition in question, the opinion of the court is, that it was properly admitted. No objection can be legally taken, nor has any been urged in argument, to the instructions of the presiding judge to the jury, the correctness of which was one of the points reserved; there must therefore be

Judgment on the verdict.

ANDERSON, *petitioner vs.* PARSONS & ALS. *appellants.*

Where one devised lands to his son, and his daughter, and two grandsons, (surviving children of a deceased daughter) to be divided between them into three parts, one third to the son, one third to the daughter, and the other third to the two grandsons; and devised other portions to other children in full of their share of his estate; and charged the devisees of the first three parts with the payment of his debts, in equal thirds; and one of the grandsons died in the lifetime of the testator, unmarried;—it was held that the devise to him did not lapse, but survived to his brother.

THIS was an appeal from a decree of the Judge of Probate, on a petition for partition of land, among the devisees under the will of the late Col. *Parsons*. The question was, whether a devise to *Rufus Anderson*, the petitioner, and his brother *James*, was lapsed, so far as it respected *James*, by his death; or whether it survived to *Rufus*. The devise was in these words;—"Thirdly, I give and devise to my son *Isaac Parsons, Jr.* and to my daughter *Esther Chandler*, and to my two grandsons, viz. *Rufus Anderson* and *James Anderson*, (the two surviving children of my daughter *Hannah* deceased,) their heirs and assigns, to be divided between them into three parts, viz. one third part to my said son *Isaac*, one

third part to my said daughter *Esther*, and the other third to my two said grandsons *Rufus* and *James*, all the following parts of my estate," &c.

There was another specific devise to his daughter *Susan*, to be accounted "as her full proportion" of his estate ;—and another devise to his grandson *Moses Edward Parsons*, the only child of another deceased son, to be accounted in full "for his share or portion" of his estate.

Lastly, the testator designated certain property, to be sold for the payment of his debts ;—"and that the overplus, if there be any, be divided one third to my son *Isaac Parsons, Jr.* one third to my daughter *Esther*, and the other third to my grandsons *Rufus Anderson* and *James Anderson* ;—but in case it should fall short, and there be a deficiency, it is my will that they shall make it up by paying each one their part, in the same proportion, sufficient to make it up for the above purpose."

There was no residuary devise.

James Anderson died in the lifetime of the testator, and unmarried ; and *Rufus* filed this petition for partition, stating his share or proportion as one third. And the Judge of Probate being of opinion that the devise was not lapsed, the respondents appealed from his decree.

Fessenden and *Deblois*, for the appellants, argued that by the terms of the devise, it was a tenancy in common, and not a joint tenancy. All devises are to be so taken, by *Stat.* 1821, *ch.* 35, *sec.* 1, unless a joint estate is expressly created, or clearly implied, by the words of the devise. The only exception is where a conveyance is made to a husband and his wife; and this is on the ground that in law they are but one person. *Shaw v. Hersey* 5 *Mass.* 521. *Fox v. Fletcher* 8 *Mass.* 274.

But it is equally well settled that where a devise is to two, to hold as tenants in common, and one dies in the life of the testator, the devise lapses. *Morley v. Bird* 3 *Ves.* 628. *Cray v. Wallis* 2 *P. Wms.* 529. *Buxton v. Coke* 1 *Salk.* 238. *note C. Bagwell v. Dry* 1 *P. Wms.* 700. *Page v. Page* 2 *P. Wms.* 489. *Webster*

v. Webster ib. 347. Suvivorship takes place only where a joint tenancy is expressly created ; or where the will is explicit that upon the death of one of the devisees his share shall go to the survivors.

Greenleaf, for the petitioner, argued from the language of the will, that it was the intent of the testator to give one third of the property to the representatives of his daughter *Hannah*. But if the devise to *James* is lapsed, then *Isaac* and *Esther* will each receive more than the third part devised them, and the representative of *Hannah* less ; contrary to the manifest intent of the testator that these three children should share alike. The English courts have laid much stress upon this principle, always adopting such construction as would give to devisees the portion devised to them, and no more. Such were the cases of *Bagwell v. Dry.* 1 *P. Wms.* 700. *Page v. Page* 2 *P. Wms.* 488. *Rider v. Wager ib.* 331. *Show* 91. Such also was the decision of the court in *Butler v. Little* 3 *Greenl.* 239.

Upon the appellants' construction, the intention of the testator in the last item will also be defeated ; since any deficiency of funds for the payment of debts is there expressly charged on *Isaac*, *Esther*, and the children of *Hannah*, in equal third parts, having regard to the proportions of the estate devised to them ; yet *Rufus* will receive but one sixth of the estate, and the others hold more than a third. It will also defeat his intentions in regard to *Susan*, and the other grandson, by giving them property beyond what he had expressly declared to be in full of their proportion of his estate. *Man v. Man* 2 *Stra.* 905.

Thus by construing the devise a tenancy in common, the utmost confusion is introduced into the estate ; while by taking it as a joint tenancy in the two grandsons, agreeably to the rule in *Stuart v. Bruce* 3 *Ves.* 632, there being no words of severance in the devise to them, the principle of survivorship carries every part of the testator's intention into full effect.

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

By the common law, when a devisee dies before the testator, the devise to him is lapsed and void ; no person being *in esse* to

ake. When a devise is to two or more persons jointly, or to them as joint tenants, if one dies before the testator, the survivor will be entitled to the whole. 1 *Show.* 91. 1 *Salk.* 237. *Roper on legacies* 121. 3 *Ves.* 628. 2 *P. Wms.* 529, 331. *Cowper* 257. But when a devise is to two or more as tenants in common, if one of the devisees dies before the testator, then the devise as to him is void and lapsed ; and it shall not go to the survivor, but it is intestate property. 3 *Ves.* 638. 2 *P. Wms.* 529. 1 *Salk.* 238. 1 *P. Wms.* 700. 2 *P. Wms.* 469. Of course the only question is, whether the devise to *James* and *Rufus* was a devise of an estate in joint tenancy, or of an estate in common. The appellant contends it was the latter; the appellee contends it was the former.

Our statute of 1821, *ch.* 35, *sec.* 1, declares that all grants, devises, &c. "to two or more persons shall be taken, deemed and adjudged to be estates in common, unless in express terms declared to be otherwise, or unless there are other words therein used, clearly and manifestly showing it to be the intention of the parties to such grants, devises, &c. that such lands, tenements and hereditaments should vest and be held as joint estates, and not estates in common."

In many cases, the evident intentions of a testator are inconsistent with certain settled principles of law ; and so such intentions cannot be carried into effect. In the case before us no such difficulty exists ; on either construction a fee simple estate was devised to *James* and *Rufus* ; and the only inquiry is whether it was to be holden in common, or in joint tenancy. The statute has left this to be settled merely by the intention of the testator ; and it may be an intention expressed or implied in the will. To ascertain this intention, all the provisions of it must be regarded; and such a construction should then be adopted as will give operation and effect to them all, if that can be done. Hence the importance of examining the several parts of the will; and if on such examination it shall be found that his intentions cannot be carried into execution, unless by construing the devise to *Rufus* and *James* to pass an estate to them as joint tenants, then the court are warranted, and it is their duty, to give it such construction.

It is evident that the testator's affections have been equally divided among his three children, *Isaac*, *Esther* and *Hannah*, (the deceased mother of *Rufus* and *James*) and hence he was desirous of shewing that fact, by providing in his will that her representatives should have the share which he gave to *Isaac* and to *Esther*, viz. one third of the property described in the devise in question. The object of the testator seems to have been that the issue or surviving issue of *Hannah*, should enjoy the same proportion of his estate, as though she had been living at the time he made his will, and the devise of that third part had been to her in fee. This same idea appears in the bequest of the overplus that might arise from the sale of the property designated for the payment of his debts; one third is given to *Rufus* and *James*. Again it is provided that in case the designated property should fall short, and be insufficient for the payment of his debts, the devisees, *Isaac*, *Esther* and *Rufus* and *James* should make up the deficiency "by paying each one their part in the same proportion." It is argued that by this provision, such deficiency is to be made up by the devisees in the following proproportions; viz. *Isaac* and *Esther* must pay one third each; and *Rufus* and *James* the other third; and therefore, unless the devise to them is construed to be an estate in joint tenancy, either *Rufus* must pay the one third, and yet hold only one sixth; or else pay one sixth, and all the estate be rendered liable for the payment of the other one sixth, which is expressly contrary to the terms of the will and the testator's direction; or else the one sixth given to *James*, and that only, is to stand chargeable with this one sixth of deficiency; and this is contrary to the statute, which subjects all the estate of a deceased person to the payment of his debts. It is urged that these consequences could not have been intended by the testator; and as by considering the devise to *Rufus* and *James* a joint tenancy, all these difficulties will be avoided, the court should give such a coustruction to the will as to avoid them; and do it on the ground, that such must have been the testator's views and intentions. These arguments certainly deserve consideration. There is also in the language of the testator a plain distinction between that which relates to the

devise generally, and that which relates to the devise to *Rufus* and *James*. The words are, (placing the subject of the devise first) "I give and devise all the following parts of my estate, to my son *Isaac Parsons, Jr.* and to my daughter *Esther Chandler*, and to my two grandsons, *Rufus Anderson* and *James Anderson*, (the two surviving children of my daughter *Hannah*, deceased,) their heirs and assigns, to be divided between them into three parts, viz. one third part to my said son *Isaac*, one third part to my said daughter *Esther*, and the other third to my two said grandsons *Rufus* and *James*." By the words "to be divided between them into three parts" a tenancy in common is clearly created, not only according to our statute, but also according to the principles of the common law; that is, so far as the respective owners of the three shares or parts stand in relation to each other; but it seems equally clear that, at common law, the devise of the third part to *Rufus* and *James* would be a joint tenancy as between those two devisees; and these different kinds of estates or tenures may exist at the same time, in the same persons, and in respect to the same property. Thus in *Co. Lit.* 189 it is said, "If there be three joint tenants, and one alien his part; the other two are joint tenants of their parts that remain; and hold them in common with the alienee."—Therefore if by the will in question the estate had been given in thirds to the before named devisees, as an estate in joint tenancy, and *Isaac* and *Esther* had conveyed their two thirds to a stranger; then by the above principle he would have held his two thirds in common with *Rufus* and *James*; and yet they would have held their one third in joint tenancy, as between themselves. Now if such different tenures would be the consequence of an alienation by one or more of the joint tenants, there seems no difficulty in creating such an estate in the first instance, to be holden under a deed undevised; that is, there is no legal inconsistency or confusion in such a tenure. From several parts of the will it distinctly appears that the testator considered that he had made such a disposition of his propty, as that the proportion he had given to his other children was not to be increased by any part of that which he had devised to *Rufus* and *James*. The will contains no residuary clause; and

no provision is made for the event of the death of *Rufus* or *James*, either before the death of the testator, or, after his death, unmarried and without issue. This circumstance may be fairly used as an argument in favor of construing the estate devised to them as a joint tenancy ; because, if such was the testator's intention, then such prospective arrangements were wholly unnecessary. In a case where no rule of law forbids giving full latitude to a testator's intention, the courts are liberal in their construction in favor of a devisee, upon the subject of intention ; as in the case of *Sargeant & al. v. Town* 10 *Mass.* 303, the court decided that a devise of wild and uncultivated land carried a fee, without any words of inheritance ; because a life estate would be of no use to the devisee. So in the case before us, unless the devise to *Rufus* and *James* made them joint tenants, some provisions in the will cannot be carried into effect without disturbing others, nor the obvious design of the testator, respecting his bounty to the issue of his deceased daughter, have its complete operation. For these reasons, the court are of opinion that the decree of the Judge of Probate ought to be affirmed.

KNIGHT *vs.* GORHAM & TRUSTEE.

Where one, for an agreed premium, entered into a contract with the payee of a note, to guaranty its payment at maturity by the maker, but without the request or knowledge of the latter ; and afterwards the maker, being in failing circumstances, but still ignorant of the guaranty, was induced by the payee to convey property to the guarantor, as a friend, in order to make provision for the payment of the note ;—it was holden that the latter could not retain this property against a foreign attachment, the guaranty having created no contract between him and the maker of the note, and the conveyance of the property being without consideration.

It appeared in the disclosure of *George Willis*, who was summoned as the trustee of the defendant in this case, that on the 15th of *May* 1826, *Gorham*, the defendant, gave to *Millions & Leavitt* his promissory note for $603 02 payable in six months.

In *July* following, *Millions & Leavitt* being alarmed for the safety of several debts due to them, and of this among the others, procured *Willis*, for an agreed premium, to guaranty their punctual payment. This was done by a separate writing, and it was agreed that the transaction should be kept secret, lest it should injure the credit of the several debtors. The premium, given for the guaranty of this debt was about twenty-five dollars. In about a month afterwards *Gorham* failed ; and was at that time induced by *Millions & Leavitt*, at the suggestion of *Willis*, to place in the hands of the latter the schooner *Seaflower*, and her fare of fish, to secure the payment of this debt. But it did not appear that he knew any thing of the guaranty till some days after the transfer ; nor was any notice taken of the debt in the transfer of the property, which was made by an absolute conveyance to *Willis*, who, at the same time, accepted a draft, payable to *Gorham's* own order, for the amount of the proceeds, after paying any demands he might have against *Gorham*. He stated, however, that at this time he had no such demand. The note was then in one of the banks, where it had been discounted, on the indorsement of the payees alone. Soon after this transaction *Willis* informed the president of the bank that he should see the note paid at its maturity; and he accordingly paid it, some time after he was summoned as trustee in this action. The value of the property transferred to him did not exceed the amount of the note.

Willis, for the trustee, insisted upon his right to retain the property. The transaction was *bona fide*, and the property was placed in his hands expressly for the payment of that debt. Upon the faith of the assignment, the trustee promised to pay the debt to the bank, and afterwards actually paid it. The object of the debtor was to provide funds for its payment ; and it was of no consequence to him in whose hands it was placed, or who was liable as guarantor or indorser. His object, which was a lawful one, is effected by applying the funds to that specific purpose ; and they ought not now to be withdrawn from the possession of an innocent party, to be applied at his expense to any other.

Owen v. Estes 5 *Mass.* 330. *Cushing v. Gore* 15 *Mass.* 69. *Stevens v. Bell* 6 *Mass.* 339. 16 *Mass.* 275. 1 *Pick.* 462. 16 *Mass.* 476. *Van Staphorst v. Pierce* 4 *Mass.* 258.

Fessenden, *Deblois* and *Anderson*, for the plaintiff, denied the right of the trustee to retain the property, on the ground that his guaranty of the debt created no contract between him and *Gorham* ; and that he stood merely in the situation of a creditor, happening to have specific articles belonging to the debtor in his hands. *Allen v. Megguire & trustee* 15 *Mass.* 490.

PREBLE J. in delivering the opinion of the court, observed that the conveyance, instead of being made for the benefit of *Willis*, was evidently intended for the security of *Millions & Leavitt* as payees of the note. It was manifest that *Gorham*, at the time of the transfer, had no knowledge that *Willis* had guarantied the payment ; and between them, therefore, there was no privity, and no contract created by that guaranty. Had *Willis* been called upon for the amount of the note, by reason of his separate stipulation, the payment of that amount would not, of itself, have given him a right of action against *Gorham*. It was a distinct matter, collateral to the note ; between other parties, and upon another consideration. There being therefore no consideration moving from *Willis*, for the conveyance of the property in question, he holds it as the trustee of *Gorham*, and must be charged as such in this action.

QUINT *vs.* LITTLE.

Where a mortgagee, having entered into the mortgaged premises in presence of two witnesses, pursuant to the statute, afterwards stipulated by a memorandum in writing that he would reconvey the premises whenever the debt should be satisfied out of the rents and profits, or otherwise ; the mortgagor, notwithstanding the lapse of more than three years since the entry, may have a bill in equity to redeem.

And if the bill sets forth these facts, a plea in bar, stating only the entry for condition broken, more than three years before the filing of the bill, and that the debt is still unpaid, is a bad plea.

IN this case, which was a bill in equity brought to redeem certain mortgaged real estate, the facts sufficiently appear in the opinion of the court, which was delivered by

MELLEN C. J. The plaintiff, in his bill in equity, states two conveyances of parts of a saw-mill, made by him in mortgage to *Little* ; one dated *July* 5th, 1819, and the other *February* 21, 1822. The bill further charges that *Little* entered into possession and has received in money, and from the rent and profits, more than sufficient to pay and satisfy the sums, to secure the payment of which the mortgages were given ; and it further states that on the 21st of *February*, 1822, *Little*, by his memorandum in writing of that date, promised, engaged and undertook to, and with the plaintiff, that when the sum, for which the mortgage of *July* 5th, 1819 was given, should be paid by the rents of the mill, or in any other way, that the mortgage should be discharged, notwithstanding three years might elapse after his taking possession and before payment. In deciding on the merits of the plea in bar, which is the only subject of consideration in this stage of the cause, it is not necessary to state any of the other facts set forth in the bill. As to the mortgage of *February* 21, 1822, *Little* pleads a disclaimer ; to which no objection is made. As to the mortgage of *July* 5, 1819, he pleads in bar that on the third of *March*, 1820, in the presence of two witnesses, he entered into, and took peaceable and open possession of the premises mention-

ed therein, for and because the condition of said mortgage deed was broken; and continued in the open and peaceable possession of the same for more than three years, for the breach of the condition of said deed ; and so possessed the same to the present time ; and that the sum mentioned in the condition of said mortgage deed has never been paid. Several objections have been made and urged against this plea ; but it is not necessary that we should enter into a particular examination of all of them, because we are of opinion that one of them is substantial.

It appears by the bill that the plaintiff founds his claim to a reconveyance of the lands described in the first mortgage, (for it is not proper here to speak of the second,) not only on the condition of the mortgage deed, but also on the subsequent memorandum or special agreement of *February* 21, 1822 ; and if, in virtue of either, the plaintiff is entitled to a reconveyance, then the bill is sustainable, although there was an entry by *Little* for breach of the condition of the mortgage before two witnesses, at the time and continued in the manner, alleged in the plea in bar; that is, theplea does not meet all the allegations in the bill, as to the plaintiff's equitable rights,though it professes to be,as pleaded a full bar to the plaintiff on every ground, so far as it respects the contents of the mortgage of *July* 5, 1819. The plea merely discloses a bar, so far as the plaintiff's claim in equity is founded on the mortgage deed ; but no further. For these reasons we are all satisfied that the plea is bad and insufficient, and it is accordingly overruled. As before intimated, it becomes needless to ascertain whether the plea is overruled by the answer, or is falsified by it, as contended by the counsel for the plaintiff.

Orr, for the plaintiff.

Longfellow, for the defendant.

SMALL & AL. *vs.* QUINCY & AL.

Where two citizens of this State agreed by a written memorandum, the one to deliver, and the other to receive, at *Philadelphia*, "from one to three thousand bushels of potatoes;" it was holden that the seller had the right to deliver any quantity he chose, within the range of the terms of the contract; and that he was not bound to make his election, till they arrived at the place of delivery, though requested by the other party after the shipment was made.

In such a case parol testimony is inadmissible to prove that it was also agreed, at the time of making the contract, that the quantity intended to be delivered should be designated and made known to the buyer, as soon as the cargo was shipped.

THIS was *assumpsit*, to recover the price of a quantity of potatoes, which the defendants refused to receive in *Philadelphia*, as the plaintiffs alleged they were bound to do. The contract, as exhibited by the plaintiffs, was a written memorandum in these words;—"We agree to receive of *John B. Osborn* and *Joseph Small* from one to three thousand bushels of potatoes, more or less, to be delivered in *Philadelphia* as soon as practicable, at fifty cents per bushel, to be delivered in good order. *Portland*, *September* 14, 1825;"—which was signed by the defendants. The plaintiffs also proved that in *Philadelphia* they offered a cargo of potatoes, consisting of about three thousand bushels, to the agent of the defendants, who received only one thousand bushels, being instructed by the defendants to refuse the residue.

The defendants exhibited the counterpart of the agreement signed by the plaintiffs, which was of the same date, and of the following tenor;—"We agree to sell and deliver to *William J. Quincy & Co.* or to their order, in *Philadelphia*, from one to three thousand bushels of potatoes, more or less, to be delivered in good order, at fifty cents per bushel." The defendants then offered to prove, that at the time of making the contract, it was further agreed between the parties, that the precise quantity of potatoes which the plaintiffs would deliver, should be ascertained and made known to the defendants when the potatoes should be shipped at *Portland*, and ready for sea; all the parties residing and

trading in the latter place; and that the contract was so written because the quantity could not be ascertained, until they should be measured and shipped. This evidence the Chief Justice, before whom it was tried, refused to admit.

The defendants then proved, that when the vessel, which the plaintiffs had chartered for this purpose, was loaded and ready for sea, and after the manifest of her cargo was made out and in the hands of the plaintiff *Osborn*, they asked how many bushels of potatoes he had on board; to which he at first answered, that he did not know; but afterwards he said he did know, but refused to tell. The defendants then offered to receive all he had on board, or any lesser quantity he might choose to deliver, and would then specify to them. But *Osborn* declined to name any particular quantity, only saying he should deliver from one to three thousand bushels. The defendants then informed him, that if he would not specify the quantity he intended to deliver, they would name the quantity they would receive; viz. one thousand bushels and no more; and that they should instruct their agent accordingly. They also proved, that *Osborn* said he had given orders to his captain, that if, on the arrival of the vessel at *Philadelphia*, the price of potatoes should be about fifty cents per bushel, he might deliver the whole cargo to the agent of the defendants in that city; but if the price should be seventy-five cents or more, he was directed to deliver only a thousand bushels, and to dispose of the residue for the plaintiffs.

Upon this evidence the counsel for the defendants contended, —1st, that the right to elect the quantity to be delivered to the defendants was mutual, and to be exercised by either party upon reasonable notice to the other;—2d, that if it belonged first to the plaintiffs, they were bound to give notice of the quantity when reasonably required, in order that the defendants might make preparation to receive and pay for it; and that failing or declining to do this, the right of election vested in the defendants, and by this election the plaintiffs were bound. Both these points the Chief Justice overruled for the purpose of ascertaining the amount of damages, and directed the jury to find a verdict for the plaintiffs, which was taken subject to the opinion of the court upon the whole case as reported.

Greenleaf, for the defendants, maintained the points taken at the trial ; contending that upon the whole contract, the rights and obligations of the parties were strictly reciprocal ; and that the defendants had the same right to designate the quantity they would receive, as the plaintiffs had to specify the amount they would deliver. He insisted that it was due to mercantile honor and good faith, that upon reasonable request, either party, when it was in his power, should be holden to inform the other of the extent to which the contract was to be carried ; both that no unnecessary expense should be incurred on the one hand, and that, on the other, the requisite funds might be remitted to meet the demand.

As to the evidence rejected, he denied that it went to contradict the written contract. It was offered to supply a defect in the writing, by establishing a distinct and independent fact, and fixing the quantity, which the writing had left uncertain.

Longfellow and *Willis*, for the plaintiffs, proceeding to argue that the parol testimony was rightly rejected, as its effect was to set up a new and different contract, controlling that which was written, were stopped by the court, after having referred to these cases ;—*Countess of Rutland's case* 5 *Co.* 26. *Haines v. Hare* 1 *H. Bl.* 629. *Clifton v. Walmsley* 5. *D. & E.* 564. *Roulstone v. Fibbert* 3 *D. & E.* 406. *Hunt v. Adams* 7 *Mass.* 518. *Richards v. Kilham* 10 *Mass.* 244. 14 *Mass* 155. *Powel v. Edwards* 12 *East.* 6. *Stackpole v. Arnold* 11 *Mass.* 27.

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

This case presents two questions. 1. Was the parol evidence which was offered properly rejected? 2. Were the judge's construction of the contract and instructions to the jury correct and proper? In considering these questions we shall reverse the order in which they were presented at the trial; that course appearing to be the most direct and plain. The first inquiry then is, as to the nature and true construction of the written contract. The case presents us the evidence of the written promise of each party to the other ; both promises having been made at

the same time, and together constituting one contract; and it seems to be an intelligible one, and easily understood. By its terms the plaintiffs were bound to sell and deliver to the defendants at *Philadelphia*, at least one thousand bushels of potatoes, at the agreed price; but they were not bound to deliver more than three thousand bushels; and the defendants on their part, were not bound to accept and receive less than one thousand bushels; nor more than three thousand. These were the respective rights of the parties according to the written contract. The plaintiffs were to do the first act by delivering or tendering the potatoes at the place appointed; and our opinion is, that they were not obliged to determine as to the quantity they intended to deliver, until the arrival of the vessel at *Philadelphia*. They reserved to themselves an option as to the quantity, within the stipulated limits; and surely they are not accountable for anything more than a performance of their contract with the defendants; or chargeable with any wrong for declining to name the quantity they intended to ship and deliver. *Osborn's* answer was, in the words of the contract, "from one to three thousand bushels." As by the terms of the contract tho option or election was given to the plaintiffs with respect to quantity, we do not perceive why they might not lawfully make use of it. We are therefore of opinion, that the construction which was given by the judge to the contract, was the true one; and that his instructions to the jury were correct, inasmuch as the plaintiffs had fairly performed their part of the contract by seasonably shipping the potatoes to *Philadelphia*, and there offering to deliver to the agent of the defendants a quantity, a little short of three thousand bushels. The defendants were bound to receive them, though the price had recently fallen. In this view of the cause the verdict is right.

Our next inquiry is, whether the parol evidence offered by the defendants ought to have been admitted. The evidence offered was to prove, that at the time of making the contract, there was a further agreement (not reduced to writing) that the plaintiffs should inform the defendants at the time of shipping the potatoes, the precise quantity they intended to deliver; and that the written

contract was drawn in the manner it was executed, because the quantity could not then be ascertained. This is not a case of an additional parol agreement, made subsequently to the written contract ; and so we need not examine it in that point of view. In the case before us the parol agreement, offered to be proved, was prior to the signature and completion of the written agreement. The defendants' motion to introduce this evidence expressly discloses this fact. We apprehend, that parol proof is not admissible to contradict or vary a contract made by deed or other writing. The authorities to this point are numerous and decisive. The principle is so well settled, that it must not be disturbed. We refer generally only to the cases which have been cited by the plaintiffs' counsel—though we may notice some others particularly in the course of this opinion.

It is clear, that the proposed proof goes directly to vary and contradict the defendants' agreement ; because it is to shew that the plaintiffs had not a right to deliver to the defendants at *Philadelphia* any quantity of potatoes between one and three thousand bushels, and receive the stipulated price for them; and that they were not bound there to receive any greater quantity than should be named to them by the plaintiffs at *Portland.* The offered proof goes essentially to vary the written agreement, by taking from the plaintiffs the right of election, which they reserved to themselves, of judging of the market on their arrival at the place of delivery. Besides, if the evidence is not intended to contradict or vary the written agreement, why is it offered ? It is said it is only to explain it ;—but does it need any explanation ? Is there any latent ambiguity? The motion to introduce this proof is not predicated on any such idea; no such idea exists. The agreement, which was carefully drawn up by one of the defendants, is perfectly plain, intelligible, and free from all pretence of ambiguity; not even a mistake is suggested ; but according to the report, the fact which the defendants wished to prove by parol was intentionally omitted in the written contract. The most important case, as to the question we are now considering is, that of *Stackpole v. Arnold*, before mentioned; as it contains a review of some preceding cases, and professes to settle

the law on the subject, and has been since so recognized. It was decided in the year 1814, and has ever since that time been considered as a decisive authority in Massachusetts and this State. It has narrowed the generality of the language of the court in the case of *Hunt v. Adams* 6 *Mass.* 519, and also in the case of *Barker v. Prentiss* 6 *Mass.* 439. In the former of those cases, *Parsons C. J.* intimates, that where the whole contract is not reduced to writing, parol evidence may be admitted to prove the part omitted ; but when the same cause came before the court again, as reported in 7 *Mass.* 518, the court distinctly decided, that parol evidence was inadmissible and incompetent to control the effect of a written contract ; and the only exceptions to the rule, are cases of latent ambiguity and of peculiar usages,which are by law considered as always referred to. *Sewall J.* in delivering the opinion of the court uses this strong and clear language. "When a contract has been stated in a writing assented to and signed by the parties concerned, and that continues in being and under the control of the party relying on it, evidence of other parol agreements, would be a rejection of that evidence which is necessarily the best." The court in giving their opinion in *Stackpole v. Arnold*, allude to and confirm this decision in the case of *Hunt v. Adams*, and state that *Parsons C. J.* participated in it ;—and they also restrict the decision in *Barker v. Prentiss* ; and evidently seem disposed to confine it to cases exactly similar to that. The decision in *Stackpole v. Arnold* is full and direct, that generally parol testimony is not to be received to contradict, vary or materially affect by way of explanation, any written contract, provided the same is perfect in itself, and is capable of a clear and intelligible exposition from the terms of which it is composed. See also *Preston v. Merceau* 2 *Wm. Bl.* 1249, and *Coker v. Guy* 2 *Bos. & Pul.* 565. Independently of the cases above cited and commented upon, it would seem to be a complete abolition of the rule of law, which excludes parol proof where a contract is reduced to writing, to allow the introduction of such proof on the principle that the whole contract was embraced in the writing ; it would open a door, through which evidence might enter, that would do away

the whole effect of the written contract, which contract the law presumes was all reduced to writing.—So say the court in *Stackpole v. Arnold.* We are, for the reasons above assigned, of opinion, that the evidence which was offered and rejected, was not by law admissible, and we are therefore all agreed that there must be

Judgment on the verdict.

COBB *vs.* LUNT *ex'r.*

In order to prove the authority of an agent in a particular transaction, it is competent for the party, under certain limitations, to give evidence of his conduct, dealings, and declarations in other contemporaneous affairs of the principal, from which a general agency might be inferred.

IN this action, which was *assumpsit*, the defendant filed, by way of offset, an account in which the plaintiff was charged with a certain quantity of hay, as having been sold and delivered to him by *Daniel Lunt*, the testator. The plaintiff admitted the delivery of the hay, but alleged that he received it of *George W. Lunt*, the defendant, as the agent, and by the authority of his father the testator, in part payment for a piece of land which he bought of the plaintiff. To establish these facts, he offered to prove, by witnesses, the conduct and dealings, and accompanying statements of the defendant, in the lifetime of the testator, relating to them. The defendant objected to the admission of this evidence, till his agency should first be proved; but as the plaintiff stated that the proof of the agency would grow out of and be collected from the transactions offered to be proved, the Chief Justice, before whom the cause was tried, admitted the testimony, not deeming it practicable to separate it; but instructed the jury that all such acts, and dealings, and accompanying statements must be considered as of no importance in the cause, unless they should be satisfied from all the evidence, that in the transac-

tions relating to the hay in question, the defendant was the authorized agent of the testator, or that his acts as such were subsequently recognized and adopted by the testator. The plaintiff also offered to prove the declarations of the defendant, since the decease of his father, stating that he delivered of the hay to the plaintiff, as his father's agent, and for the purpose alleged by the plaintiff. To the admission of this evidence also, the defendant objected; but the Chief Justice overruled the objection.

It appeared that in the afternoon of *April* 9, 1823, the defendant delivered to the plaintiff fifty dollar's worth of hay at his father's barn; and that in the conversation immediately preceding, the plaintiff stated to the defendant that "he had sold all he had there, and had got *Daniel Lunt's* note for 450 dollars, and that squire *Bishop* had been up and done the business;" and that the fifty dollar's worth of hay was to make up the price of the land sold, and was so received by the plaintiff.

Against this evidence it was contended by the defendant, that the contract for the land was perfect and completed by the plaintiff and the testator himself, in the forenoon of that day; and that by the terms of the contract the price was 450 dollars; which was so stated in the deed of conveyance, and also in a mortgage taken at the same time by the plaintiff; and that a note was then given for that sum as the purchase money; and therefore the parol proof was inadmissible, as it was intended to contradict or vary the contract previously completed with the testator. To support this objection the defendant called Mr. *Bishop*, who testified that being sent for, he went to the testator's on the ninth of *April*, where he found the plaintiff, with an unexecuted deed of the land; that the testator was sick in his bed; that the defendant also was present; that he saw the deed signed and sealed by the plaintiff, and witnessed and took the acknowledgement of it; that a note was written for 450 dollars as the price of the land, which was signed by the testator; who also executed and acknowledged before the witness a mortgage of the same land to the plaintiff. This took place at about eleven o'clock in the forenoon; no other contract or considera-

tion for the land was mentioned on that occasion ; the papers were laid on the table ; but the witness saw no formal delivery of them ; and soon after left the house. The deed was produced by the defendant, at the trial ; and the plaintiff had received the note. There was no other proof of any exchange or delivery of the papers.

The Chief Justice left this evidence to the jury, to decide at what time the contract was completed by the delivery of the deeds and the note; instructing them, that if it was thus completed before the conversation and bargain about the hay in the afternoon, and for the price specified in the deeds and note, they ought to find for the defendant, on the offset ; on the ground that such completed contract was not susceptible of contradiction or explanation by the subsequent transactions of the afternoon, between the plaintiff and defendant. But they found for the plaintiff, disallowing the offset. The defendant moved that the verdict should be set aside, because it was against the evidence as to the time when the contract was completed. The other points raised at the trial were reserved by the chief justice for the consideration of the court.

Longfellow, for the defendant, argued upon the evidence, in support of the motion at common law. He also contended that the parol testimony ought not to have been admitted ; because it went to contradict the written contract, which was already perfected by the testator himself, by the signature and delivery of the deeds and note ; and because the contract related to real estate, and therefore could not be proved by parol. The declarations also, of the defendant, made in the life time of his father, were inadmissible, being but hearsay, not connected with the transaction in issue, and so no part of the *res gesta*.

Fessenden and *Deblois*, for the plaintiff, contended that parol testimony of the defendant's general authority to act for his father was properly admitted; the authority not having been expressly conferred, but resulting from a course of conduct and dealing, in a great variety of transactions. *Paley on Agency* 137. *Show.*

95. 12 *Mod.* 564. *Hazard v. Treadwell* 1 *Stra.* 506. 3 *Salk.* 234. *Holt*, 278. *Peake's Ca.* 48. *King v. Bigg* 3 *P. Wms.* 427. 1 *Stark. Ev.* 57. *Whitehead v. Tuckett* 15 *East.* 400. 2 *Esp.* 511. *Burt v. Palmer* 5 *Esp.* 145. *Emerson v. Blonden* 1 *Esp.* 142. *Peto v. Hayne* 5 *Esp.* 134. *Watkins v. Vince* 2 *Stark.* 368. *Ward v. Evans* 2 *Salk.* 442. *Erick v. Johnson* 6 *Mass.* 193. 2 *Stark. Ev.* 42. 1 *Bay*, 158. *Fairly v. Hastings* 10 *Ves.* 127. The declarations of the defendant after he became executor, were admissible upon another ground, being the confessions of a party to the record. *Bauerman v. Radenius* 7 *D. & E.* 663. 1 *Phil. Ev.* 74. *Johnson v. Beardsley & al.* 15 *Johns.* 3.

To the objection drawn from the statute of frauds, they cited *Wilkinson v. Scott* 17 *Mass.* 257. *Shepherd v. Little* 14 *Johns.* 210. *Rex v. Scammonden* 3 *D. & E.* 474.

The opinion of the court was read at the following *November* term, as drawn up by

Mellen C. J. Notwithstanding the counsel have deemed it prudent to cite numerous authorities, we apprehend that the questions raised in the cause may be satisfactorily answered without any laboured investigation.

The first question is, whether the verdict ought to be set aside and a new trial granted, on account of any incorrect decisions or instructions of the judge, who presided at the trial.

The plaintiff, in order to shew that the defendant was the agent of his father, *Daniel Lunt*, offered to prove a series of facts from which it was contended the jury might fairly presume such agency ; such as the implied authority or subsequent assent and ratification of said *Daniel*. This was objected to ; but the very nature of the evidence offered was such as to render it improper for the judge to exclude it ; and proper for him to admit it, subject to those limitations and instructions which accompanied the evidence. No other course could have been pursued, without at once depriving the plaintiff of the benefit of all presumptive proof ; a species of proof peculiarly proper for the consideration of a jury. The objection to this admission under the instructions given, is overruled.

The next evidence objected to by the plaintiff, was that of the confessions or declarations of the defendant, since his father's death, and since he assumed the character of executor of his will. Little reliance seems to have been placed on this objection, and with good reason ; the authorities seem clear on the point, that the confessions or declarations of a party on record are proper evidence for the jury. We therefore approve of the judge's decision by which evidence was admitted of such confessions or declarations.

The remaining question is, whether the motion at common law, to set aside the verdict on the ground that it is against the evidence in the case, shall be sustained. This motion has reference merely to the testimony respecting the time when the bargain for the land was completed, and the terms of that bargain. The jury have found, that it was not completed until the hay was delivered ; and that the hay, so delivered, was in itself the completion of the contract, and of the payment of the purchase money. If the evidence on these points authorized them to draw this conclusion, then the verdict is right and the plaintiff is entitled to judgment.

In examining this point, we must remember that the question of agency has been settled by the jury ; so that whatever took place at the time the hay was delivered must be considered as done by the plaintiff and *Daniel Lunt*. Now there is no positive proof when the deed was delivered. *Bishop*, the justice, does not know, nor does it appear with certainty, when the note for $450 came into the hands of the plaintiff. The only evidence on this subject is, that in the conversation immediately preceding the delivery of the hay, it was stated by the plaintiff to the defendant that "he had sold all he had there, and had got *Daniel Lunt*'s note for $450, and that Esquire *Bishop*, had been up, and done the business ; and that the fifty dollar's worth of hay was to make up the price of the land." It does not therefore appear from all this evidence, what was the exact amount of consideration. There being no precise proof as to the time when the deed was delivered, that point was a matter of inference, and consequently a proper subject for the consideration of the jury ;

and we cannot pronounce their verdict on this head to be against the evidence in the cause. But admitting that the facts were such as that *Cobb* could not by law have recovered the fifty dollar's worth of hay ; still, the proof is that *Daniel Lunt*, by the defendant, his authorised agent, actually delivered the hay to the plaintiff, as in part payment for the land ; and having voluntarily done this, he must not now be permitted to convert a payment into a charge, and a right of action. Though a man is not bound to pay a debt barred by the statute of limitations, or perform a promise made without legal consideration ; and though no action can be maintained on such promises ; yet if such debt has been voluntarily paid, or such promise voluntarily performed, no action will lie to recover the money back again ; *volenti non fit injuriæ*.

On these grounds our opinion is, that the motion at common law to set aside the verdict and grant a new trial cannot be sustained. Let there be

Judgment on the verdict.

The INHABITANTS *of the First Parish in* BRUNSWICK *vs.* MCKEAN.

Legal presumptions generally apply to facts of a transitory character, the proper evidence of which is not usually preserved with care ; but not to records or public documents, in the custody of officers charged with their preservation, unless proved to have been lost or destroyed.

A motion to set aside a verdict for the supposed misdirection of the jury by the judge, in a matter of law, will not be sustained, unless the grounds of the motion appear in the judge's report, or are stated in a bill of exceptions.

Pleas in justification of a trespass *quare clausum fregit* for cutting down a fence, which allege that the act was done on two public highways, leading the one from the other : and also that it was done on one of the highways only, are not inconsistent with each other ; and a verdict finding each of these issues for the defendant is not void for inconsistency or uncertainty.

THIS was an action of trespass *quare clausum fregit*, against the defendant, for cutting down a fence erected by the plaintiffs on what they alledged to be their close in *Brunswick*. The defendant pleaded the general issue, and several special pleas in justi-

fication; alledging in one of them, that the fence was on two public highways, viz. the twelve-rod-road, and the *Harpswell*-road leading from it; and in another, only saying that it was on the twelve-rod-road.

At the trial, before the chief justice, the plaintiffs, in order to show that the twelve-rod-road, which was laid out and accepted *March* 21, 1769, had been reduced to the width of eight rods, offered in evidence two votes;—one passed at a meeting of the inhabitants of *Brunswick*, *April* 2, 1792, appointing a committee to lay out the same road eight rods wide, from the old fort, to *Maquoit*-bay, except at the landing place, where it was to remain at its full width;—and the other passed at a town meeting *April* 1, 1793, accepting the eight-rod-road as then laid out on the plan, with the amendments made on the same plan. The counsel for the defendant objected to the admission of these votes, unless preceded or accompanied by attested copies of the warrants for calling the town-meetings at which they were passed, to shew that the votes were authorised by the warrants; and no reason in fact being assigned, why such copies of the warrants could not be, and were not produced, the chief justice rejected the evidence. A verdict being afterwards returned for the defendant, this point was reported by the chief justice at the request of the plaintiffs, for the consideration of the court. The plaintiffs also filed a motion for a new trial;—1, because the verdict found the same trespass done on two different roads, which is impossible;—2, because it also found that the same trespass was done on both roads, and also on the twelve-rod-road only, which is impossible;—3, because the jury were instructed, that twenty years' uninterrupted use of the roads, adversely to the plaintiffs, was evidence of a grant, though there was no proof of their actual location; and that this rule applied as well to the plaintiffs in their corporate capacity, as to individuals;—4, because the copies of the votes before mentioned were rejected;—5, because the verdict found the trespass done on both roads, without distinguishing what was done on each.

Longfellow and *Mitchell*, for the plaintiffs, argued that the evidence rejected was admissible, the transactions being of more

than thirty years standing; in which case the existence of proper warrants is to be presumed. *Monumoi Great Beach v. Rogers* 1 *Mass.* 159. *Blossom v. Cannon* 14 *Mass.* 177. *Sumner v. Sebec* 3 *Greenl.* 223. *Little v. Libby* 2 *Greenl.* 242. *Pitts v. Temple* 2 *Mass.* 538. *Colman v. Anderson* 10 *Mass.* 105. Courts have gone so far as to presume the incorporation of a town. *Stockbridge v. West Stockbridge* 12 *Mass.* 400.

They also contended, that the findings of the jury were contradictory and uncertain, and therefore void.

The third ground of the motion was not argued, the court considering it not regularly before them.

Orr and *Greenleaf*, for the defendant.

WESTON J. delivered the opinion of the court.

It does not appear, that the town of *Brunswick* had any legal right to alter the road in that town, originally laid out in 1769, twelve rods wide, by contracting its width to eight rods; but if they had, and it had been recently done, attested copies of the warrants, under which they exercised this authority, ought to have been produced, as in its nature preliminary to the votes, by which such alteration was accepted. But it is urged, that this being an ancient transaction, this proof is by law dispensed with, and the regularity of the proceedings presumed. A general and very important rule of evidence is, that the best must be given, of which the nature of the thing is capable. Where from lapse of time or other circumstances, it appears that a party has it not in his power to produce the evidence, usually required to prove certain facts, such facts may often be legally presumed from other facts and circumstances, the existence of which cannot fairly be accounted for, without such presumption. But this presumption does not legally arise, where there is nothing in the case from which to infer, that the regular evidence is not in existence, or not accessible to the party intrusted to establish the facts in question. On the contrary, a failure to produce the best evidence in the power of the party, justly creates a suspicion, that its effect might not be favorable to him, if produced

Legal presumptions generally apply to facts of a transitory character, the proper evidence of which is not usually preserved with care; but not to records or public documents, in the custody of officers, charged with their preservation and safe keeping; unless proved to have been lost or destroyed.

In *Colman v. Anderson*, cited in the argument, *Sewall J.* who delivered the opinion of the court says, "the judge was right in submitting such evidence as there was, although incomplete, if the jury were satisfied that the deficiencies in the evidence were not chargeable to the fault or negligence of the party, and that nothing, in the power of the party to produce, was wilfully withheld."

The votes in question, passed at the meetings of the inhabitants of the town of *Brunswick*, could have no efficacy, unless in pursuance of articles regularly inserted in the warrants, by which these meetings were called. According to the usual course of proceedings, these warrants were either recorded, or preserved, in the office of the town clerk. For any thing that appears in the case, they might have been there found, and certified copies obtained. No sufficient reason having been assigned why they were not produced, copies of the votes were, in our opinion properly rejected.

The foregoing is the only point presented, by the report of the judge. A motion for a new trial has been filed in the case, predicated upon several reasons distinctly assigned; the third of which is upon a supposed misdirection of the judge to the jury in a matter of law. As this does not appear in the report, and is not taken by way of exception, it is not regularly before us. The other reasons are founded upon the alleged uncertainty and inconsistency of the verdict.

The trespass proved was the cutting down of two posts, one of which stood at the intersection of the *Harpswell*-road with the twelve-rod-road, the former of which is described in one of the pleas, as running from the latter. This post therefore, standing on the line of confluence, must have been partly in the one road, and partly in the other. The other post stood on the opposite side of the twelve-rod-road. As to the second issue, the jury

found the supposed trespass was done on both roads. This would be true, if part was on one and part on the other; and it ought to be so intended, if it be impossible that the whole could be done on each. But if the *Harpswell*-road ran across the twelve-rod-road, the common ground traversed by both might well be called the *Harpswell*-road and the twelve-rod-road; and thus there would be no inconsistency in finding the whole of the supposed trespass done on both roads. This is not absolutely inconsistent with the averment in the plea, that the one road ran from the other; the term "from," whether applied to time or place, in legal contemplation, not uniformly or necessarily excluding such time or place. And a verdict, if by fair intendment it may have a consistent construction, is not to be set aside for uncertainty. As to the third issue, the jury found the supposed trespass done on the twelve-rod-road. This may be reconciled with their finding upon the second issue, upon the assumption that the *locus in quo*, being common to both roads, might be called by the name of both, or of either.

But it is of no importance to the merits of this case, to distinguish with accuracy upon which of these roads the posts stood, or whether they may be regarded as standing on both roads, or partly on the one and partly on the other. The real question in controversy, and the point substantially in issue was, whether they stood in the public highway, and, obstructing the same, might be removed; and this is very clearly found.

The motion for a new trial is overruled.

Judgment on the verdict.

THOMAS, *treasurer of the State, vs.* MAHAN & ALS.

In the exposition of a private statute, conferring special privileges, or imposing particular obligations, it is not proper to resort to the language of any other private act, not relating to the same parties and the same subject matter; such private statute standing upon the same basis with contracts by deed, which are not to be affected by evidence *aliunde*.

The managers of the *Sullivan*-bridge lottery are not liable, under the private statute of 1826 *ch.* 430, *sec.* 3, to pay into the treasury of the State, the price of any tickets, which in the diligent and faithful execution of their trust, they have been unable to sell.

THIS was an action of debt, brought by the Treasurer of State, upon the bond given by the defendants as managers of the *Sullivan*-bridge lottery, pursuant to the private statute of 1826 *ch.* 430. The question at issue was stated in a case agreed by the parties; and was argued at this term by *Adams* for the plaintiff, and *Orr* and *Greenleaf* for the defendants. The facts appear in the opinion of the court, which was delivered at the succeeding term in this month, in *Kennebec*, by

MELLEN C. J. On the 7th of *March* 1826, the legislature granted a lottery to *John Sargent*, to raise the sum of four thousand dollars, in consideration of expenses incurred by him, in erecting a bridge across an arm of the sea at a place called *Sullivan* ferry, and for finishing and keeping the same in repair; and by the act above mentioned, authorized the Governor and Council to appoint the managers of said lottery, removable at their pleasure; who, before entering on the duties of their office, were to be sworn to the faithful performance of said duties, and give bond, in the sum of ten thousand dollars, "conditioned for the faithful performance of all the duties of their office," and that they would "at such time, and in the manner by law provided, pay into the treasury of the State the whole proceeds of said lottery, after deducting for their expenses and services such sums as" should "be allowed them by the Governor and Council, not exceeding twenty-five per cent on the sum raised by said

lottery." The defendants were appointed the managers; accepted the trust; and after having been duly sworn, and having given bond as provided by the act, proceeded in the execution of the duties of their appointment; and it appears, from the facts before us, that in so doing, they carefully exercised their best judgment and discretion, and so conducted the business assigned them, as that the council have discovered nothing in their doings, which has induced them in the least degree to doubt their integrity and fidelity in the discharge of their duties. Still it appears that in the prosecution of the business by the managers, while there has been a gain, on the whole, a loss has been sustained on the tickets remaining unsold; and the question is, on whom that loss shall fall; or, to speak with more precision and limitation of language, we state the question in the very words of the counsel, who have signed the statement of facts before us. The words are,—"whether the managers are holden to pay into the treasury of the State the price of every ticket made in each class of said lottery, sold or unsold; or whether they are holden only for such tickets as, after using due diligence, they may have been able to sell." It will be perceived at once, by the terms in which the question is proposed and submitted, that there may be several questions growing out of a critical examination of the act, and connected with some unforeseen and unexpected consequences in the execution of the powers given to the managers. It may be inquired, who are to bear a loss like the one in the present case, and when will the business of the lottery be completed, if the managers are not by law holden to be liable on their bond for such loss? Other inquiries might be suggested, which might lead to some difficulties that were never anticipated at the time the act was passed; but with these suggested questions, or doubtful consequences, we have no connexion. One question and one only, is by the parties submitted for our decision; and that is, whether the managers are obliged, by the condition of their bond, to pay into the State treasury the price of tickets unsold, and which, after using due diligence, they were unable to sell. Leaving all other questions, and the consequences to which they may lead, untouched, it will be understood, that our decision is confined to the single question stated by the parties.

The defendants are presented to our view as public agents, clothed with certain powers, and under obligation to execute those powers with honesty and faithfulness, as well to the State, as to all persons interested in the lottery. To this extent the managers would have been bound upon the principles of morality and justice, independently of the condition of the bond on which this action is founded. Does this condition, upon a fair construction of it, go beyond such obligation, and subject them to additional liabilities and duties? In other words, does the act granting the lottery, impose the risk of its productiveness upon *Sargent*, to whom and for whose benefit it was granted; or does the act impose that risk upon the managers, who are regarded by it as merely disinterested public agents? If the risk is imposed on the managers, then it will result, that the fewer tickets in a class they are able to sell, the more certainly productive will be the lottery to *Sargent*, though it may be ruinous in its consequences to the upright and faithful agent. Before attempting to answer these questions by a careful examination of the several provisions of the act, it is proper to ascertain and decide, whether we are at liberty to travel out of the condition of the bond, and beyond the provisions of the act to which it refers, for a description of the duties of the managers, to obtain aid in arriving at a true construction of their import and intention; because it has been contended in the argument that the act of *February* 11, 1823, authorising a lottery for the benefit of the Cumberland and Oxford Canal corporation, contains provisions more liberal in favor of the managers of that lottery, than are contained in the act of *March* 1826, which we are now considering; and hence it has been argued that the difference of phraseology in this latter act, is proof that a more strict, and a deeper accountability was intended on the part of the managers of this lottery, than in the Canal lottery. We might at once reply to this argument by saying, that as the Canal lottery is a private or special act, and is not presented to our consideration in the statement of facts, it is no part of our duty to take judicial notice of it; but when the cause was argued, we listened to all the reasons, which the counsel on both sides thought proper to urge, as well in relation to the

Canal lottery act, as to the *Sullivan*-bridge lottery act ; still, in the decision of the cause, it is a question of law, not of courtesy or expedience, how far we are authorised to seek the true construction of the latter act, by comparing its language and provisions with those of the former. It is unquestionably a correct principle, that public statutes, made *in pari materia*, should be construed as though their several provisions were embraced in one act ; or that one act may be explained and construed, by comparison with another ; all having a general relation to the same subject matter. It is at least doubtful, even in the construction of public statutes, whether the principle before stated can in any case be admitted, where they relate and extend to subjects distinct and independent of each other, which have been the occasion of legislation at successive periods. Be this as it may, there is a manifest distinction between a public statute, which is of universal concernment and obligation, and prescribes a rule of action to all, and a grant by the legislature, or a private act, granting certain chartered privileges to individuals ; or to be executed by persons appointed for the purpose, and under bond for their fidelity. The former is the declaration of the sovereign will; and when constitutionally proclaimed, it becomes binding on all the citizens, without any subsequent assent on their part, expressed or implied. But such is not the effect of a grant or charter of privileges to individuals, or of any private act to be executed in the manner before mentioned. Such an act, though passed with all constitutional sanctions, possesses no binding force, even on the grantees of such chartered privileges, unless expressly or by implication accepted by them; or on those appointed to carry its provisions into execution, until they have accepted the appointment, and subjected themselves to a legal obligation to perform the duties it imposes. Then, and not otherwise, is it in effectual operation. And why is it not? Simply because such an act is in the nature of a contract, to the perfection of which the assent of two or more minds is always necessary. Can an individual, when he receives a grant from the legislature, or when a private act is passed for his benefit, be bound to look into and carefully examine the language of other grants and private acts, in order to ascertain the true meaning

of the grant or act made for his own benefit? This question seems to be one of easy solution. If in the present instance the condition of the bond had contained a distinct recital of the several duties to be performed by the defendants in their character of managers, without any reference to the act granting the lottery, it would then present the common case of a contract by deed between two parties, in which evidence *aliunde* could not be admitted to limit or extend the condition, or in any manner be brought in aid of its construction. And can it make any difference in principle, whether the condition contains this distinct recital of duties, or describes those duties by reference to the act in question in which they are distinctly stated? *Id certum est quod certum reddi potest.* The bond refers to no other act; and hence we are not at liberty to refer to any other. The same principle must exclude proof *aliunde* in both cases; for both are cases of contract, and in both the condition is the same. In the case at bar, the act itself, so far as it describes the duties and liabilities of the defendants, is a part of the condition, and of course being a private act or grant, it must be construed by a careful examination of its language, and by no other mode. Contracts may be varied, *ad infinitum*; and the true rule to be applied in their construction, is, as far as can be done, to ascertain the fair and honest intention of the parties, without affixing to words or expressions any other than the meaning which they ordinarily bear. This is the general principle, and by this the act in question must be tested. We therefore lay out of the case the act granting the Canal lottery, as furnishing no rule of construction in the case at bar. We are not at liberty to ascertain the meaning of the bond before us, and the act to which it has exclusive reference, but by resorting to the provisions of the act itself.

Our next inquiry is what those provisions are.—We will state the import of them all; though many of them have no bearing upon the question under our immediate consideration.—We have arranged them, as nearly as we could, in their natural order.—1. The managers are to publish in a certain way the scheme of each class, the time of drawing, and the list of prizes.—2, They shall keep a book containing an account of their doings relating to

each class, and exhibit it to the Governor and Council at their first session after each class is drawn, and file a transcript of it in the treasurer's office.—3, They may deduct the amount of six per cent on tickets sold for the purpose of resale.—4, They shall pay all prizes drawn in any class, on demand, after sixty days next after the completion of the drawing of such class.—5. They shall, within sixty days after the drawing of each class is completed, pay into the treasury the whole proceeds of such class, deducting the sum allowed them for services and expenses.—6. "And said managers shall be holden to account for all the tickets in every class in said lottery; and all prizes not claimed within one year as aforesaid." 7. When the whole business of the lottery shall be completed, the managers shall make up and present to the Governor and Council a fair account of their whole proceedings.—The controverted question in the cause, originates in the sixth provision, which we have quoted above in the words of the act; and the decision of the present action depends upon its construction. The counsel for the plaintiff contends, that the defendants stand accountable to the public treasury for the price of all the tickets in each class, whether sold or unsold, after deducting expenses and certain allowances made to them by the Governor and Council; and that as they did not sell all the tickets, they must by law be held answerable for those which remained unsold, at their established price, and assume the risk of their drawing blanks, in the same manner as though they had expressly appropriated them to their own use, considering themselves in the light of purchasers. This certainly seems to be a harsh principle, to be applied to a public agent who has been faithful and honest; and its application should be justified and required by language clear and unequivocal. But can it be correct to give to doubtful expressions a construction that shall lead to such serious consequences? The very design, in appointing managers of a lottery, is to guard the interests of all concerned; and to inspire confidence, on the part of the community, in the fairness and correctness of all proceedings in relation to it. Hence the importance of keeping this object in view, and as far as possible, of effecting this design. Now it is worthy of dis-

tinct observation, that the construction contended for by the plaintiff's counsel, has a tendency, in its principle, to expose the managers to temptation; and if they were not honest men, to expose others to losses occasioned by a species of management which could with ease be rendered secure from detection. For if the managers of this lottery, or of any other, granted by an act containing similar provisions, are at all events holden to pay for all the tickets in each class remaining unsold, and to consider themselves as the purchasers of such tickets, strong inducements are at once placed before them, so to arrange the machinery of the lottery, or the process to be observed in drawing it, as to secure to themselves as many of the highest prizes as possible, and even the highest. In estimating the power of this temptation, and its probable influence and effect, and applying it in the construction of the act in question, we must not make the application to the defendants in particular, but to men in general as they are; and test it by our own knowledge of human nature.—On the other hand, when the tickets unsold are considered as appropriated for the use of the lottery, this temptation is removed, and the danger avoided. As we have before observed, the plaintiff's claim to maintain this action reposes on these words in the act, viz. "and said managers shall be holden to account for all the tickets in every class in said lottery; and all prizes not claimed within one year." By a provision in the third section of the act, such unclaimed prizes become a part of the proceeds of the lottery; and by the second section, they are expressly bound to pay the whole proceeds into the state treasury; so that their supposed liability for the amount of the established price of unsold tickets, depends entirely on the words, "holden to account for." In those provisions of the act, which we have distinguished as the fourth and fifth, the word "pay" is used; now unless the legislature intended a different kind of liability for unsold tickets, why did they not use the same word again, and declare that the managers should be holden to pay for all the tickets, in each class? and why are there so many regulations as to accounts to be rendered in a particular form, if the managers are liable, from the moment a scheme is made, to pay for all the tickets in the

class?—The expression "holden to account for," means, not merely to "render an account of," but, "to be responsible for;" it stands in opposition to the right of appropriation to one's own use and benefit.—In common cases of principal and agent, the expression would as well be satisfied by an honest return of that part of the principal's goods, which the agent could not sell, as by a payment of their proceeds in case he had sold them; such is the common understanding of language thus used. But we may go further. Some of the provisions in the fourth section of the act, (and which we have numbered as the second provision,) seem very distinctly to show the correctness of our construction. The words are (speaking of the duty of the managers,) "and shall keep a book, in which they shall charge themselves with the amount received for each ticket in every class in said lottery, numbering the same; and of prizes not claimed within one year: and they shall credit themselves with the amount of the prizes paid to the purchasers of tickets." These three items compose the whole account to be rendered to the Governor and Council. There are but two subjects of charge; and one of credit. The provisions above quoted proceed upon the idea that the tickets have been sold; otherwise we cannot perceive the meaning of the expression, "the amount received for each ticket." According to the doctrine contended for by the plaintiff's counsel, the managers ought to charge themselves, at once, with all the tickets in each class, at the established price. Again, if they are liable for all the tickets sold or unsold, what is the use of the words "numbering the same?" Was it not that the Governor and Council might know the success of the managers in the sale of tickets in each class? We might proceed further in this investigation, but we do not deem it necessary. Being satisfied with the construction we have given to the act before us, it remains to apply the principles thus stated to the facts agreed by the parties. The managers used due diligence, but in the careful exercise of their best discretion, they were unable to dispose of all the tickets in the first or second class of the lottery. Then they were in no fault thus far. In the next place, it appears, that they were not disposed to consider the

unsold tickets as their own, or to take any risk on themselves in respect to them; these tickets, therefore, were distinctly set apart and sealed up and preserved, at the risk, and for the benefit, of the lottery. The prizes drawn against any of these numbers are fairly credited to the state; and in this manner justice seems to have been done. Had there not been this distinct appropriation of the unsold tickets to and for the use of the lottery, other questions might have been made. So also there might have been in case the managers had been unfaithful or dishonest; but we have nothing to do in this cause, but decide the question submitted to us; leaving supposable facts and unforeseen consequences to be examined eleswhere. The court are unanimous in the opinion that, on the facts agreed, the action cannot be maintained. *Plaintiffs nonsuit.*

NORTON & AL. *vs.* EASTMAN.

When a written guaranty or letter of credit is given, for a debt about to be created, and uncertain in its amount, so that the party cannot know beforehand whether he is to be ultimately liable, nor to what extent; it is necessary, in order to charge him, that he should have notice, in a reasonable time, that the guaranty is accepted, and of the amount of debt created upon the faith of it.

A collateral undertaking to guaranty the payment of a debt, is not discharged by the creditor's taking a new stipulation from the debtor, with an additional surety; nor by the recovery of judgment against the surety, nor by his discharge from prison after commitment in execution, nor by any other transactions between him and the creditor, so long as the original debt remains unpaid.

THIS was an action of *assumpsit* for the price of sundry goods sold and delivered by the plaintiffs to one *Jonathan S. Farrington* upon the credit of the defendant; and it came before the court upon the following case stated by the parties.

The plaintiffs having previously refused to trust *Farrington* for goods, without additional security, he produced to them a letter from the defendant, addressed to the plaintiffs, of the following tenor;—"I hereby recommend *Jonathan S. Farrington*,

of *Fryeburg Addition*, as a man of good credit for the amount of seventy-five dollars, or one hundred, if he should want so much ; and should you trust him with the above amount, I will be accountable for the same at the end of one year from the date of said credit, in case the said *Jonathan* neglects to pay as above. *Lovell, Sept.* 2, 1824." Upon the receipt of this letter, which was two days after its date, the plaintiffs sold and delivered to *Farrington* goods to the value of $120,36, for which he paid three dollars down, and gave his own negotiable promissory note for the balance, at ninety days ; upon which he afterwards paid sixteen dollars in part. In *October* following the plaintiffs sold and delivered to him other goods to the amount of $25,20 ;—and in *December* $45,73, more ;—and on *February* 3,1825, another parcel amounting to $77,03 ;—taking at the same time, his several notes for each of those sums. These three last notes were put in suit at *October* term 1825, and the plea of infancy being made, and supported by proof, the plaintiffs discontinued their action, and the notes still remain unpaid.

At the time of the last purchase, *Feb.* 3, 1825, there was due upon the note given by *Farrington* for the first parcel of goods, purchased in *September* preceding, including interest, $102,53, for which sum, at the request of the plaintiffs, *Farrington* gave a new note payable on the fourth day of *September* then next, one *James Abbot* becoming his surety, as a joint and several co-promissor. At this time the original note was given up to *Farrington*. On the new note thus given, after various partial payments, a judgment was recovered against *Abbot* at *June* term 1826, and he was committed to prison on execution ; but having signified his intention to take the poor debtor's oath, the plaintiffs discharged him from prison, taking his recognizance before a magistrate, for the amount of the debt and costs. It was agreed that *Farrington* at the time of the last sale, was still a minor.

Willis, for the plaintiffs, argued—1. That the letter of the defendant was an original undertaking, and that the debt created by it, formed a sufficient consideration for the promise. *Perley v. Spring* 12 *Mass.* 297. *Stadt v. Sill* 9 *East*, 348. *Leonard v.*

Vredenburg 8 *Johns.* 29. It is not affected by any thing except gross negligence in the creditor, in omitting to secure his debt; *Duval & al. v. Trask* 12 *Mass.* 154—certainly not by the acceptance of a promissory note from the vendee. *Sturgis v. Robbins* 7 *Mass.* 301.

2. The taking of a new note from the debtor, with a surety, was not in itself any discharge of the defendant's liability, the debt itself, which was the subject of the contract, still subsisting, unpaid—3 *Salk.* 118. *Tobey v. Barber* 5 *Johns*, 68. 6 *Cranch*, 264. 8 *D. & E.* 451, 454, 176. *Rhodes v. Barnes* 1 *Burr.* 9.

3. Nor was it discharged by the arrest and imprisonment of *Abbot*; nor by his subsequent release from gaol. These proceedings could not affect the demand of the plaintiffs against the principal debtor; much less one wholly collateral and independent. *Porter v. Ingraham* 10 *Mass.* 88. 2 *W. Bl.* 1235. 3 *Bos. & Pul.* 363. 1 *Stra.* 515. *Dyke v. Mercer* 2 *Show.* 394. *Leonard v. Giddings* 9 *Johns.* 355. *Sheehy v. Mandeville* 6 *Cranch* 253. *Dennett v. Chick* 3 *Greenl.* 191. *Hart v. Waterhouse* 1 *Mass.* 433. The undertaking of the defendant, was in fact a continuing guaranty of any debt which *Farrington* might contract for goods to the amount specified in the letter, until notice to the plaintiffs that the credit was withdrawn; as in *Mason v. Pritchard* 12 *East.* 227. *Merle & al. v. Wells* 2 *Camp.* 6, 413, 436.

Fessenden and *Deblois*, for the defendant, contended,—1. That the defendant was not bound at all, until he was notified that credit had been given to *Farrington* in consequence of his letter, and that the plaintiffs should hold him responsible. 1 *Maule & Selw.* 557. 3 *Conn. Rep.* 438. 2 *Stark. Ev.* 649, *note*. *Buckman v. Hale* 17 *Johns.* 134. *Russel v. Clark's Ex'rs* 7 *Cranch* 69. *Cremer v. Higginson & al.* 1 *Mason* 323.

2. But if originally liable, it was only to the amount of the first hundred dollars contracted for. *Lambert v. Warren & al.* 8 *Johns.* 119. *Walsh & al.* 10 *Johns.* 183. Nor even for this sum, unless credit was given for the period stipulated, which was one year. But as the plaintiffs did not give this term of credit, but took a note payable in three months, they must be considered as not having accepted the proffered guaranty. 2 *Stark. Ev.* 649, and cases there cited.

3. And whatever may have been the liability of the defendant, it was extinguished by the giving up of the original note, and the extension of credit given to the debtor, upon his offering new security ; with the subsequent proceedings against *Abbot*. 3 *Meriv*. 272.

The opinion of the court was read at the ensuing *November* term, as drawn up by

MELLEN C. J. In deciding this cause it is not necessary to inquire whether the defendant's guaranty was a limited or continuing one, because the sum for which the first credit was given has never been paid, and in either case the guaranty would not bind him beyond the sum of $100. In his letter to the plaintiffs, after recommending *Farrington* as a man of good credit for the amount of seventy-five or one hundred dollars, he says, "if he should want so much, and should you trust him with the above amount, I will be accountable for the same at the end of one year from the date of said credit, in case the said *Jonathan* neglects to pay as above." The letter was dated *September 2d*, 1824, and on the 4th the plaintiff delivered to *Farrington* goods to the amount of $117,36, and took his note for the same, payable in ninety days ; only $16 have been paid, and the residue is now due. More than a year had elapsed after the above credit was given and before the present action was commenced. Several objections have been made to the plaintiffs' right to recover. It is urged that the condition, on which the guaranty was given, has not been complied with. This is a valid objection, if founded in fact. *Bacon v. Chesney* 1 *Stark. N. P. R.* 192. On this point the language of the guaranty is not explicit. It is clear, that the defendant could not have been liable to an action till after the end of one year from the purchase of the goods, though *Farrington* did not pay for them in ninety days according to the tenor of his note ; but the question is, whether the limitation of one year applies by a fair construction of the guaranty, to the credit to be allowed to *Farrington*. "I will be accountable for the same," says the defendant, "at the end of one year from the date of

said credit, in case the said *Jonathan* neglects to pay as above." Do not these words, "as above," have immediate reference to the one year previously mentioned; and is there in the guaranty any thing else to which they can, by a sensible construction, be applied? This seems to have been the meaning of the defendant; but still, considering the uncertainty of the language, we do not give a definite opinion, or place the decision of the cause upon it.

The next objection is, that the plaintiffs, by giving up *Farrington's* note on the third of *February* 1825, and receiving a new one signed by *Farrington* and *Abbot*, discharged the defendant from his guaranty. It is not easy to perceive why the precautionary measure on the part of the plaintiff, in procuring additional security, should operate to the prejudice of the defendant, and thus excuse him from performing his express engagement. There is nothing in the language of the guaranty forbidding it. The measure might be an advantage, but could not be an injury to the defendant. But it is said, that as this substituted note was negotiable, it amounted to payment, and that payment discharges all concerned. Several cases are cited to this point. In reply to this argument, it may be observed that the note given up was also negotiable; and the whole amounts to no more than an exchange of securities of the same grade; but if the substituted note was a payment of the first one, as between the plaintiff and *Farrington*, it cannot have this effect, in relation to the defendant, who has no connection with either note, and whose guaranty depends on neither for its obligation.

Again it is urged, that inasmuch as the plaintiff discharged *Abbot* from imprisonment on execution, and received a recognizance for the amount of debt and costs, he thereby released the defendant. The answer to this is also, that it is a transaction which in no way concerns the defendant. It is true, such a voluntary release of *Abbot* from prison prior to the statute of 1822, *ch.* 209, would have forever discharged him from the execution and judgment; but here again the plaintiff has only exchanged securities; a judgment for a recognizance. The answer to this and the last objection is, that they are founded on facts, having no connexion with the defendant's contract. He agreed to pay the plaintiff a sum not exceeding $100 in one year from *Sept.* 4, 1824,

as the facts show, if *Farrington* did not pay that sum ; and he never has paid it.

The want of notice of the acceptance of the guaranty and of the amount of goods delivered to *Farrington*, constitutes the last objection. It seems to be well settled, that when a guaranty is absolute in its terms, and definite as to its amount and extent, in such case no notice to the guarantor is necessary; the very act of the party in giving the guaranty, is inseparably connected with the knowledge of its nature and limits. In such a case notice is superfluous ; as if A holds a note against B for $100, payable in one year, and C guarantees the payment of the same when due. In the present case, however, it is contended that the guaranty was conditional and uncertain as to its amount ; and that therefore, there should have been seasonable notice to the defendant that his guaranty was accepted, and also of the amount of goods delivered upon the faith of it, so that he might secure himself against *Farrington*. In support of this objection and reasoning, several authorities have been cited, and others have been examined. In *M'Iver v. Richardson*, there was only what the court call a proposition tending to a guaranty ; not conclusive nor accepted, and so not binding. The same remark is applicable to *Beekman v. Hale* ; but in both, the necessity of notice is recognized. In *Russell v. Clark's Ex'rs.* 7 *Cranch* 69, the alleged guaranty was not in any manner limited ; the court said the language did not amount to a guaranty ; but if it did, it would not bind without notice. In *Cremer & al. v. Higginson & al.* 1 *Mason* 324, the alleged guaranty was " for such sum as *S.* and *H. Higginson* should want ; as far as $50,000—say $50,000." No notice had been given to the defendants of the amount of advances made on the strength of the guaranty; though the plaintiffs, at the time it was given, informed the defendants of their readiness to advance as much as $50,000 as soon as they could. Under these circumstances the court were clear in the opinion that notice was absolutely necessary. This is similar to the case at bar, as to uncertainty of amount proposed ; and stronger, as it regards the proof of readiness to accept. In *Russell v Perkins* 1 *Mason* 371, necessity of notice is also recognized. In *Rapelye v. Bailey* 3 *Conn.* 438, the language of the defendant's letter was, " Should

you be disposed to furnish my brother with such goods as he may call for, from $300 to $500 worth, I will hold myself accountable for the payment of the same, should he not pay you as he shall agree." In this case the court held notice to be necessary. It is not distinguishable from the case before us, as to the terms of the guaranty. In *Stafford v. Low* 16 *Johns.* 67, the court proceeded on the same principle as to notice. In guarantees, similar to that in the present case, the law considers the engagement of the guarantor as conditional in the same manner as it does that of an indorser or drawer of a bill of exchange, or the indorser of a note ; who are not liable to an action unless the condition has been complied with by the holder, and due notice given of it to the party to be charged. To be sure in these cases, the law is more strict as to the time of notice than in cases of guaranty; but the principle, requiring notice, is the same in both cases.

The law as settled on this subject conducts us to the conclusion that this action cannot be maintained ; and according to the agreement of the parties, the plaintiff must be called.

Plaintiff nonsuit.

Dole *vs.* Allen.

If the overseers of a society of friends or quakers, in a certificate granted to one of their members, under *Stat.* 1821, *ch.* 164, *sec.* 1, state that he "measurably" conforms to the usages of the society ; the certificate is good, notwithstanding that qualification.

A certificate of membership, granted by the overseers of a society of friends or quakers, pursuant to *Stat.* 1821, *ch.* 164, *sec.* 1, is conclusive evidence of the facts it contains.

In a writ of error, brought to reverse the judgment of a justice of the peace, in a military prosecution, the case was thus.

The plaintiff, who was clerk of a company of militia, having brought an action of debt, upon the statute, to recover of the defendant a fine for non-appearance at several company trainings; the defendant produced in bar of the action, a certificate from the overseers and clerk of the society of Friends or Quakers, in

Windham, of the following tenor ;—*Windham*, 3 mo. 28, 1826. We the subscribers, of the society of people called Quakers, in the town of *Windham*, and county of *Cumberland*, do certify that *David Allen* is a member of our society, and that he frequently and usually attends with said society for religious worship, and *measurably* conforms to the usages of the same, and we believe is conscientiously scrupulous of bearing arms." And the question was, whether this was a compliance with the act for regulating and governing the militia, *Stat.* 1821, *ch.* 164, *sec.* 1, the word "measurably" not being contained in the form prescribed in the statute.

The plaintiff offered to disprove, by witnesses, the facts set forth in the certificate ; but the justice refused to admit the proof, and rendered judgment for the defendant; upon which the plaintiff brought this writ of error.

Fessenden, *Deblois* and *Eveleth*, for the plaintiff in error, rested their argument upon the ground that the performance of military service was a duty of general obligation on all able-bodied citizens, of the proper age ; and that the party claiming an exemption, must bring his case strictly within the terms of the statute. This requires, in the case of a quaker, the concurrence of four particulars ;—1, that he be a member of the society ;—2, that he frequently and usually attend public worship with them;—3, that he conform to their usages ;—4, that he be conscientiously scrupulous of bearing arms. All these must be absolute, unqualified, and certain. But if the word "measurably" may be inserted to qualify any one of these, it may qualify them all; and thus a class of exempts be created which the statute never intended, and with which religion and conscience have nothing to do. *Commonwealth v. Fletcher* 12 *Mass.* 441. *Lees v. Childs* 17 *Mass.* 351. *Thurtell v. The Hundred of Mutford* 3 *East.* 400. *Worsley v. Wood* 6 *D. & E.* 720.

They further contended, that the certificate of the overseers was not conclusive evidence of the facts it contained. They are not under oath ; nor subject to a penalty for certifying falsely ; and their official acts stand on no higher ground than the books

a corporation ; which are not received as evidence in favor of its members. 1 *Stark. Ev.* 298. 12 *Mass.* 441. Of the same character is a surgeon's certificate, until approved and signed by the proper officer. *Commonwealth v. Fitz* 11 *Mass.* 542. *Commonwealth v. Smith*, *ib.* 456.

Longfellow and *Greenleaf*, on the other side, contended, that the certificate was conclusive evidence of all the facts which the law had directed those officers to certify; being in the nature of an inquest of office, by a court of competent jurisdiction. 2 *Stark. Ev.* 173. *Bull N. P.* 229. 4 *Stark. Ev.* 217, *note y. ib.* 363. *Brown v. Bullen Doug.* 407.

And they insisted, that it was a substantial compliance with the law ; the object of which was to protect the conscience of those who were scrupulous of the lawfulness of bearing arms. The words "measurably" which the overseers had inserted out of abundant caution, ought to be received in its popular sense ; and meant no more than general conformity to the external discipline of the society.

WESTON J. delivered the opinion of the court at the succeeding term in *Kennebec*.

The sect to which the defendant belongs, after suffering much both in England and in this country, from the intolerant spirit of the age in which they first appeared, have long since entitled themselves to public favor, by their exemplary and inoffensive deportment. The wisdom and expediency of religious toleration although it commends itself to the reason and feelings of all, who give the subject a just consideration, was not readily adopted, nor until its utility and necessity was fully demonstrated by experience. It is now, however, generally acknowledged by the enlightened part of mankind.

It is one of the known tenets of this denomination of christians, that it is not lawful to engage in war, or bear arms, or to do any other act preparatory to a state of war. It is true, that during our revolutionary struggle, a portion of them, upon the principle of necessary self defence, did take part with their country, in

their endeavors to repel the enemy ; but this was regarded as a departure from their general principles, and however justified by the dictates of patriotism and sound morality, it was held by a majority of their brethren, to be inconsistent with the purity of their religious profession. If those, who take a more enlarged view of the relations of mankind with each other, and the danger to which, in their present moral condition, the most unoffending are exposed, are impressed with the necessity of arming in defence of their rights ; it does not accord with the temper of the times to enforce the performance of this duty upon those, who, from religions scruples, cannot do so, without violating their consciences. Such are left to contribute their proportion to the general good, by cultivating the arts of peace. Accordingly, both in Massachusetts and in this State, friends or quakers have been by law exempted from military duty. To regulate this privilege, and to secure it from abuse, the legislature has prescribed what evidence shall be required from the party to prove himself entitled to the exemption he claims. This consists in a certificate, the substance of which is specified, to be signed by two or more of the elders or overseers of the society with which the party meets for public worship ; and countersigned by the clerk. This certificate must state, in substance, that he is a member of the society ; that he frequently and usually attends with it for religious worship ; and conforms to the usage of the same ; and that they believe he is conscientiously scrupulous of bearing arms.

The certificate in question is in the form prescribed, except that it states that the party "measurably" conforms to the usage of the society ; instead of setting forth that fact simply, and without qualification. It is insisted, that this is a substantial variance from that which the statute requires. Measurably, by the best lexicographers, has the sense of moderately ; and moderately is, by the same authorities, defined to mean temperately, mildly, in a middle degree. The law intended to give this immunity to all who conscientiously belonged to this religious persuasion ; whether distinguished by their very strict and undeviating conformity to its usages ; or by that which could

deserve only the appellation of ordinary or moderate. And we are therefore of opinion that the interposition of this term, "measurably," does not substantially change the character of the certificate; even regarding it as used in its established and accurate sense. But when introduced as expressive of the degree, in which an individual conforms to his religious theory; especially by those who, as spiritual overseers, may be supposed to have in their contemplation a high and elevated standard, it ought perhaps to be considered, as indicating an opinion that the conformity of the party is mingled with the imperfection, which belongs to human nature; and that they could not, consistently with veracity, represent it as complete, unqualified and perfect. If a religious professor, of exemplary piety and great purity of life, should speak of himself or be spoken of by others, as measurably conforming to the duties of religion, we should at once perceive that the qualifying term was used in reference to that perfect standard, to which no man in this world attains; and by no means as indicating that the party might not be entitled to be placed in the highest class, as a religious and moral character.

The certificate then, in the case before us, substantially conforms to the law. We must regard it as having been seasonably produced to the commanding officer of the company; as no objection appears or is made to it, upon the ground that the fact was otherwise. This being done, the law declares the party exempt from the performance of military duty. Evidence adduced to contradict that in which the law reposes confidence was, in our opinion, properly rejected by the justice. It is not to be presumed that persons, raised to the office of elders in a religious society, even if we could suppose them capable of disregarding the ties of conscience, would so expose themselves in the eyes of their brethren and of the community, as to certify as true, what might be easily ascertained to be false. The society themselves have an interest in preventing abuses of this kind; which might occasion the loss of their privileges; or the imposition of some equivalent burden.

The opinion of the court is, that there is no error in the judgment complained of; which is therefore affirmed, with costs, for the defendant in error.

STAPLES *vs.* STAPLES & TRUSTEE.

An attorney who has collected debts for his client, is not liable to an action for the money, till it has been demanded of him.

But where an attorney, in the exercise of his profession, has received money in satisfaction of a demand in favor of his client, it may be attached in his hands in a foreign attachment ; though it was received in bank bills ; and though it has not been demanded.

The question in this case was upon the liability of Mr. *Adams*, an attorney and counsellor of this court, as the trustee of *Jacob Staples*, the defendant. He had prosecuted a suit, and obtained execution, in favor of *Jacob*, against *Jeremiah Staples*, the present plaintiff; who paid the amount to Mr. *Adams*, as the creditor's attorney, and in about ten minutes afterwards caused him to be summoned in this suit as the trustee of *Jacob*. The money was paid to him in bank bills, solely in his capacity of attorney in the suit; and no demand of the money had been made on him by the creditor, previous to the service of this writ.

Adams, pro se, resisted the claim of the plaintiff to charge him, 1. Because he had not in his hands any specific goods of the principal which could be exposed, and sold in execution ; the debt being paid in bank bills, which are mere *choses in action* ; *Maine Fire & Marine Ins. Co. v. Weeks* 7 *Mass.* 438. *Perry v. Coates* 9 *Mass.* 537. *Clark v. Brown* 14 *Mass.* 271 ; 2. because the defendant had no right of action against him, no demand of the money having been made, before the present process was served. *Brooks v. Cook* 8 *Mass.* 246. 3 *Mass.* 289.

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

It was decided in *Maine Fire and Marine Insurance Company v. Weeks & als. & trustees* 7 *Mass.* 438, that promissory notes, and in *Perry v. Coates* 9 *Mass.* 537, that promissory notes and bank bills, in the hands of the supposed trustee, belonging to the principal debtor, did not render the trustee chargeable under the

statute relating to the subject. But the present case differs from those, inasmuch as Mr. *Adams* states in his disclosure that he, as the attorney of *Staples* the defendant, received of the plaintiff the bank bills in question in full satisfaction of an execution in his hands in favor of the defendant against the plaintiff. Therefore, if the mere possesion of those bills by the trustee, would not render him chargeable as trustee, though belonging to the principal debtor, on the ground that they are not goods and effects, still such receipt of them by the trustee in full satisfaction of the judgment and execution, rendered him the debtor of the defendant *Staples*. The question then is, whether, at the time of the service, he was such a debtor of the principal as to be chargeable in this process. His liability to be so charged is denied on the ground that the money had not been demanded before the service, and that so the principal had at that time, no right of action against him. We admit the principle to be correct, that until after demand made, the attorney in this case was not liable to the action of the principal ; and it appears that no such demand had been made ; but it does not follow, that he was not liable to this process at the suit of the plaintiff under the circumstances disclosed. In *Coburn v. Ansart & trustee* 3 *Mass.* 319, and *Thayer v. Sherman & trustee* 12 *Mass.* 441, it was decided that money collected by an attorney may be attached in his hands by a trustee process ; and it does not appear in either of those cases that any demand had been made of the money collected. It was also decided in *Frothingham v. Haley & al. & trustees* 3 *Mass.* 68. *Davis v. Ham & trustees*, *Ib.* 33. *Willard v. Sheafe & trustee* 4 *Mass.* 234. *Wood v. Partridge* 11 *Mass.* 488, and *Clark v. Brown & trustee* 14 *Mass.* 271 ; that a debt due *in presenti*, but *solvendum in futuro*, is attachable by this mode of process ; though by several of these cases it was also settled that contingent debts are not so attachable. The case before us differs from that of a sheriff or other officer, who has collected money on execution ; who is not liable to the suit of the judgment creditor, or as his trustee upon this kind of process, until after demand made, or until the officer has been guilty of some official neglect, by which he has deprived himself of his official protection, and the money has ceased to be in the custody

of the law. *Wilde v. Bailey & al.* 2 *Mass.* 289. *Pollard v. Ross & al. & trustees* 5 *Mass.* 319. While the officer lawfully, and consistently with his duty, holds the money collected, it is considered as in the custody of the law, and therefore protected from attachment. So it is protected in several other cases, as in the hands of an administrator; *Brooks v. Cook & trustee* 8 *Mass.* 246, and in the hands of a public officer. *Barnes v. Treat & trustee* 7 *Mass.* 271.

In addition to what has been stated, we would observe, that no injury can result to the trustee by sustaining this kind of process against him under such circumstances, and calling the money out of his hands; because he is not liable to any costs of suit. On the facts disclosed, we are all of opinion that the trustee is chargeable.

STURDIVANT, *petitioner for review, vs.* GREELEY & ALS.

Whether the process by petition for partition, is within the meaning of the statute authorizing the courts to grant reviews in civil actions, *quære.*

But if it is, yet no review can be had of either one of the judgments in partition, without the other.

Therefore, where the judgment *quod partitio fiat* was rendered upon demurrer, the title of the petitioners not being contested, but a mistake was made by the commissioners, which was not discovered till after the final judgment; it was held that a review could not be granted, for the correction of this error.

THE petitioner in this case complained, that in a process of partition pursued according to the statute, in which the present respondents were petitioners, the commissioners appointed to divide the land, had committed material errors, which he specified, and which were not discovered till after the final judgment; and therefore he prayed this court that the cause might be reviewed.

Longfellow, for the respondents, opposed the petition *in limine* on the ground that the power given by the statute to grant re-

views did not extend to cases of this description, but only to suits prosecuted by writ, at common law ; and he cited *Bordon v. Bowen* 7 *Mass.* 93. *Dickenson v. Davis* 4 *Mass.* 570. *Stone & als. v. Davis* 14 *Mass.* 360.

Greenleaf and *Daveis*, for the pettiioner, stated that the case of *Bordon v. Bowen* must be taken with reference to the law then in force, permitting reviews in civil actions, as of right, and which admitted no latitude of interpretation ; but the present statute, vesting the subject in the broad discretion of the court, in all cases, to advance the purposes of justice, has placed it on a foundation totally different.

And they insisted that notwithstanding the distinction which technically exists between the remedy by action, and by petition, yet the legislature, in the present statute of reviews, evidently used the word "action" in its more enlarged sense, as the pursuit in a court of law, of one's right—*quod sibi debetur. Co. Lit.* 284, 285, *d. Cooper's Justinian* 386. *de actionibus. 2 Inst.* 40. *Brown's Civil Law* 440. This construction is necessary in order to carry into effect the intent of the legislature, that the remedy should be as extensive as the mischief. On the same ground the bastardy process has been treated as a civil action. *Mariner v. Dyer 2 Greenl.* 165.

N. Emery, on the same side, in a written argument delivered in the following vacation, deduced the history of the remedy for partition, both by writ and by petition ; shewing that the latter was designed for a more extended and beneficial remedy, to obviate the inconveniences incident to the common law process ; and that after appearance, the course of proceeding was in both cases identically the same. The petition, and order of notice thereon, contained all the essential attributes of a writ; to which all persons interested were bound to appear, or be concluded by the judgment. The legislature also had manifested a disposition to place this mode of remedy on a footing at least as favorable as any other, from the provincial statute of 5 *W. & M. ch.* 19, to the latest enactments on the subject. They have provided

for the trial of every question which can arise, allowed appeals, and costs, and secured the right to a new partition, in favor of parties out of the State, and not notified, wherever a division is found to be unequal. There can in truth, be no difference to the injured party, between the loss of his land in his absence, by an unequal partition, and a similar loss, while at home by a palpable and great, but undiscovered mistake of the commissioners. The mischief in both cases is the same ; and though only one case is specially provided for in the statute of partitions, yet the other is equally within a fair and liberal construction of the statute of reviews.

He then referred to the several statutes granting reviews and new trials, from the year 1672, down to 1821, shewing that this remedy had been gradually extended, as it had been found more and more beneficial ; until it was placed, by the last statute, in the broadest terms, within the discretion of the court, to grant reviews in all civil actions where justice had not been done. And a remedy so necessary, and so consonant with the just policy of the law, he contended, ought not to be denied upon grounds merely technical, nor upon dry authority. Judges, it has been said, have power over statute laws, to mould them to their truest and best use, according to natural reason, and best convenience ; and the words of a statute ought not to be interpreted to destroy natural justice. 19 *Vin. Abr.* 154, 156.

The opinion of the court was delivered at the ensuing *June* term in *Penobscot*, by

Mellen C. J. The question in the case before the court is, whether they have jurisdiction, authorising them to sustain the petition and grant the prayer of it. The original process was a petition for partition, in which the present respondents were petitioners, and *Sturdivant*, the respondent. To that original petition he demurred specially. The demurrer was joined ; and the court below decided against *Sturdivant*, and entered the proper interlocutory judgment. On his appeal to this court, the demurrer was again overruled ; the usual interlocutory judgment entered ; and commissioners were appointed, whose return was

duly made to this court at *November* term 1825; and after objection, and a full hearing of the parties, the same was accepted and final judgment entered. On these facts, are we by law authorized to grant a review as prayed for? We have listened with attention to the arguments of the counsel at the hearing of the cause, and have since examined with care the written argument of one of the petitioner's counsel. Our opinion will now be delivered.

The statute of this State, authorizing this court and the Court of Common Pleas, to grant reviews in civil actions, is a transcript of several statutes passed by the legislature of Massachusetts, at successive periods, from 1788 to 1791 inclusive, with some unimportant verbal variations and transpositions of sections or provisions; and they were doubtless passed, as the petitioner's counsel has observed, as gradual improvements in the administration of justice, by furnishing relief in cases which seemed to demand it, and which new circumstances presented to view. Those provisions of our statute which have a bearing on the question before us are these; *Stat.* 1821, *ch.* 67, *sec.* 1, "That whenever there shall be any legal cause for any judicial court before judgment, to set aside any verdict, but nevertheless judgment shall have been rendered on such verdict, the party aggrieved by such judgment may petition the justices of the court," &c. &c. "who are empowered, after due notice, to grant a review of said cause." It is further provided in the second section as follows. "And the said justices shall be, and they are hereby vested with discretionary power to grant reviews in all civil actions, in manner as aforesaid, whenever they shall judge it to be reasonable, without being limited to particular cases"—with a proviso that the application be made within three years after the rendition of the judgment complained of. This provision is found at the close of the third section. The fourth section provides that "whenever a review is granted by virtue of this act, a writ of review shall be sued out and prosecuted to final judgment and execution; and the party bringing such action of review, shall produce in court attested copies of the writ, judgment and all papers used and filed in the former trial; and each party

shall have the liberty to offer any further evidence; and the whole cause shall be tried in the same manner as though no judgment had been given thereon." It has been urged, that the original petition was a "civil action;" and so was embraced within the express language of the general clause in the statute; that the petition is only a substitute for the writ of partition, for purposes of convenience; that it is an adversary suit, in which the usual course of pleading is pursued; and in which a trial may be had by a jury in the same manner as in any other civil action; but if not within the words of the statute it is urged that it certainly is within the spirit and equity of it. There seems to be much good sense and reason in this argument. The case of a petition for partition appears to be very different from a submission of a claim to referees before a justice of the peace; judgments on the reports of such referees cannot be re-examined on review; as the court have observed respecting such cases, there is no writ or declaration which the defendant can plead to; it has nothing in the form of a proceeding at common law; nor can it be made to assume any such character. But in a petition for partition there is a species of declaration which may be denied in the usual mode of pleading, and the cause may proceed to judgment through the ordinary mode of trial by jury. If this were a new question, it might perhaps be said, that such a petition is "a civil action" within the fair construction of this remedial statute. But it appears by the case cited from the Massachusetts reports that in that case, as well as several times before, it had been decided that the power of the court to grant reviews did not extend to petitions for partition and judgments therein; and these decisions must have been known to our legislature, when they re-enacted those statutory provisions in Massachusetts, in the same words. Upon this general question, however, as to the power of the court to grant a review in partition cases, instituted by petition, we give no explicit opinion, because it is not necessary, but leave it open for future consideration. Our decision is founded on the special nature of the proceedings, which have been had in the cause, of which the petitioner prays for a review. In that cause no issue in fact has been tried or even joined by the par-

ties. The demurrer to the petition was an admission of the facts it stated ; and it was decided that those facts, admitted to be true, entitled the petitioners to have partition. Accordingly, the proper interlocutory judgment was entered and commissioners were appointed, whose return has been accepted. Up to the time when such judgment was entered, no fact was in contest between the parties ; they only disagreed as to certain points of law, which were settled by the court in the usual manner. The only parts of the procedings of which the petitioner complains, are the doings of the commissioners and the acceptance of their return. This acceptance was either a discretionary measure on the part of the presiding judge, or a matter of law by him decided. If merely a measure of discretion, then it is not a subject of re-examination by the whole court in any form. If it is a matter of law apparent on the record, then it is a proper subject for correction on a writ of error ; but in the present case, the alleged error of the judge does not appear on the record, and therefore it cannot be so corrected ; and no exception having been alleged against the opinion of the judge, a writ of error would not lie.

The next question is, whether a point or principle of law can be corrected by a review ? The answer to this seems to be a very plain one. A review of a cause is a re-examination or another trial of the facts. The statute speaks of a judgment rendered on a verdict, of cases where facts are contested, and put to a jury for decision ; not of cases where the facts are agreed, and the question is settled upon those facts ; being a pure question of law. It is impossible for us to admit the construction contended for by the petitioner's counsel; it savors too much of legal inconsistency. But they endeavor to avoid this imputation by saying, that they do not complain of the decision of the court on the demurrer; but merely of the doings of the commissioners and the acceptance of their return, on which the final judgment was rendered. But here we are met by another difficulty, presented by the fourth section before mentioned. This provides, as we have stated before, that when a review is granted, a writ of review shall be sued out ; that each party may

introduce further evidence ; and that the whole cause shall be tried in the same manner as if no judgment had been rendered. Now, who can inform us how, on review, the whole of such a cause can again be tried ? Law and facts are intermixed ; and yet not one of those facts is tenable by a jury. Again, can we grant a review of one third or one half of a cause, and leave the residue undisturbed ? This would be a judicial novelty ; we might as well grant a review of the cause so far as it relates to the facts tending to establish the plaintiff's claim, but not to those on which the defendant relies for his defence. But it cannot be necessary to pursue this train of reasoning any further; a review of such a cause as this was never granted in Massachusetts or this State ; and the reasons are as sound and satisfactory as they are, in our view, obvious and consistent.

It has been observed, that if by the laws of the land no redress can be had, Mr. *Sturdivant* must endure the injustice without a hope of remedy, but it is added, that it is believed our law does not merit this reproach. In reference to this remark it may be observed, that if the opinion of the presiding judge, by whom the return of the commissioners was accepted and judgment rendered thereon, was incorrect, the petitioner might have obtained redress by alleging an exception to such an opinion, and thus availed himself of the correcting opinion of the whole court. This he did not do ; but the law is not, on that account liable to any reproach ; and if the law is not sufficiently comprehensive to embrace the case of the petitioner within its salutary provisions, though we may regret the consequences, we have no authority or disposition to prevent them at the expense of sound principles. We are all of opinion, that we cannot sustain the petition and grant a review. Accordingly it is dismissed.

DENNISON'S CASE.

The statute of 1823, *ch.* 233, saving the right of appeal in criminal cases from the sentence of the court of Common Pleas, without specially mentioning any condition, does not constructively repeal the prior statute, which requires a recognizance with sufficient sureties, to be given for the prosecution of such an appeal.

Sarah Dennison, was indicted for an assault and battery in the Court of Common Pleas; and being thereof convicted, she claimed an appeal to this court, and was ordered to recognize, with sureties, in the sum of four hundred dollars, to prosecute her appeal here with effect. She thereupon prayed the court below to take her single recognizance, with her husband, they being poor; and for default of sureties she declared herself content to remain in prison, till a trial could be had in this court, on the appeal. This application the court below did not consider itself at liberty to grant; and she was sentenced to imprisonment for a term which was yet unexpired. She applied to this court, at the last *November* term, to sustain her appeal.

N. Emery and *Daveis*, for the appellant, argued that the statute of 1823, *ch.* 233, which enlarged the criminal jurisdiction of the court of common pleas, was a revision of the whole subject of that jurisdiction; and therefore operated a repeal of all former laws *in pari materia*, according to the principle adopted in *Towle v. Marrett* 3 *Greenl.* 22. There is now, they contended, no right of appeal from any conviction in that court, but by virtue of the latter statute; and as this requires no recognizance for the prosecution of the appeal, none is a necessary condition of such appeal. But upon general principles, the only use of a recognizance being to compel the personal appearance of the party in the higher court, to receive sentence, there is no room for its operation where the party remains in the custody of the sheriff, ready to be brought up at the order of court. To require it in such a case would be superfluous.

Adams, for the State, referred to the several statutes granting appeals in criminal cases, and contended that the provisions, of the last statute were wholly cumulative, so far as they related to offences of which the court of Common Pleas already had jurisdiction; and that the conditions under which appeals might be made, remained as before.

THE COURT, *absente Weston J.*, said that the statute of 1823, *ch.* 233, appeared to have been enacted for the purpose of enlarging the criminal jurisdiction of the court of Common Pleas by extending it to all other crimes and misdemeanors, of which it previously had not cognizance, except certain offences therein enumerated. It is not therefore to be considered as a revision of the whole criminal jurisdiction of that court which depends as well on the statutes in force at the time when that court was constituted by *Stat.* 1822, *ch.* 193, as on those subsequently enacted. The conviction in the present case being by virtue of the former laws, the offer of a recognizance with sufficient sureties was indispensably necessary to give effect to the claim of an appeal. And in the *Stat.* 1823, *ch.* 233, "the right of appeal" is evidently adverted to as an existing right, to be exercised only upon the well known condition of giving sureties to prosecute the appeal with effect.

TITCOMB & AL. *vs.* SEAVER & TRUSTEE.

The contract created by a sale of goods by a factor is between the buyer and the owner, and not between the buyer and factor; and it makes no difference, in this respect, whether the factor acts under a *del credere* commission or not.

Therefore where one who bought goods on credit of a factor *del credere*, was summoned as his trustee, in a foreign attachment, it was held that, after notice, he would not be charged as the trustee of the factor for any thing beyond the amount of the lien of the latter for his commissions.

BY the disclosure of *Warren*, one of the trustees in this case, it appeared that he and his partner purchased a bale of Sheetings on credit, of *Seaver*, who was the factor of the *Brunswick Cotton*

Factory, and who guaranteed his sales; but *Warren* did not know that he acted as factor in the sale, or that he was the factor of the company; they dealt with him, supposing him to be the owner of the goods. The price had never been paid. Some time previous to the service of the writ they were regularly notified in writing, that the company owned the bale of sheetings in question when sold, and claimed payment of the sum due from them.

Willis, for the plaintiffs, at the last *November* term, before the Chief Justice, contended that as *Seaver* was a factor *del credere*, he must be considered in the light of an owner of the goods at the time of sale; and of course that the purchasers stood indebted to him; and that no claim would be maintained by the company against any one else for the proceeds of the sale.

Fessenden and *Deblois*, for the trustee, cited and relied upon the case of *Thompson v. Perkins* 3 *Mason* 222; as decisive of the question in their favor.

MELLEN C. J. afterwards delivered the following opinion in the same term, *Preble J.* concurring.

One of the trustees has been defaulted, and from the disclosure of *Warren* who is the other, it appears that *Seaver* sold to them the bale of sheetings as the factor of the company, and guaranteed the sale; and that the company in due season asserted their claim to the proceeds of the sale, and gave notice thereof to the trustees. The question is, whether the company have a claim on the trustees as purchasers for the price of the goods, or whether their claim is only against *Seaver*, and of course that the debt due from the trustees is exclusively due to *Seaver*. The law seems to be perfectly settled, that the principal is entitled to recover, whenever he can trace his own property and distinguish it or its proceeds from the mass of the property of his factor. See *Livermore on Agency* 1818, *p.* 267, *ch.* 7, where the cases on the point are collected. On this ground it is clear, that the debt in question belongs to and is claimable by the company, and so *Warren* is not trustee, unless the fact that *Seaver* was

a factor *del credere*, changes the relation of the parties, and renders the debt contracted on his sale, the absolute property of the factor. It is true, that at different periods there have been variant decisions as to the principle above stated ; but at present it appears to be settled and at rest. In the above mentioned case of *Thompson v. Perkins*, nearly all the cases directly bearing on the question are collected and commented upon by Mr. Justice *Story* with his accustomed learning and clearness. The decision of the court was, that a *del credere* commission does not change the relation of the parties ; and that the same principles of law, as to the point under consideration, are applicable to a factor *del credere* as to any other factor, except as to the amount of his lien for his commissions, &c. His language, when speaking of the nature of the guaranty of a *del credere* factor, is this ;—"What is the nature of such a guaranty? It is merely an undertaking to pay, in case there should be a failure of payment by the buyer ; it is not a direct original liability, to the principal, in the same way as if the factor was himself the purchaser; excluding the liability of the real purchaser. The principal may, at any time, waive the guaranty and claim possession of the notes" (which had been in that case taken for the debt) "from the hands of the factor, discharging any lien of the latter." Agreeing, as we do, in the result at which the court arrived in that action, we will merely, in addition to what has been stated, cite the cases referred to in support of our opinion. They are cited in *Thompson v. Perkins. Levinshire v. Alderton* 2 *Str.* 1182. *Morris v. Cleasby* 4 *Maul & Selw.* 566. *Peele v. Northcote* 7 *Taunt.* 478, *also note d.* 480. *Escot v. Milward*, cited in *Cooke's Bankr. Law*, 8 *Ed.* 383, 384. 1 *Montague Bank.* 577. 1 *Cooke's Bank.* 400. 7 *Mass.* 319. 2 *Dal.* 60. 1 *Yeates* 540.

For the amount of commissions, &c. in the present case, *Seaver* has a lien on the debt due from the trustees; and the company are not entitled to claim and recover it from him, or intercept it in *Warren's* hand by means of the present process. For the amount of such commissions, &c. therefore, he is the trustee of *Seaver*. We accordingly adjudge him trustee, and the parties can probably ascertain the true sum, without any further proceedings.

CHRONOLOGICAL LIST

OF

CONTEMPORARY REPORTERS,

Taken (chiefly) from Clarke's Bibliotheca Legum.

HENRY III. COMMENCING 1216.

Jenkins, 4, 19, 21.

EDWARD I.—1272.

Jenkins, 18, 34
Keilwey, 6

Year book (Maynard) part 1—1 to 29.

EDWARD II.—1307.

Jenkins, 5, 15, 18

Year book (Maynard) part 1—1 to 19

EDWARD III.—1326.

Benloe, 32.

Year Book, part 3—17, 18, 21 to 30, 38, 39

Keilwey, 1 to 47
Jenkins, 1 to 47
Year Book, part 2—1 to 10

Year book, part 4—40 to 50
Year book, part 5—Liber Assisarum, 1 to 51

RICHARD II.—1377.

Bellewe, 1 to 22

Jenkins, 1 to 22

HENRY IV.—1399.

Jenkins, 1 to 14

Year Book, part 6—1 to 14

HENRY V.—1413.

Jenkins, 1 to 10

Year book, part 6—1, 2, 5, 7 to 9

HENRY VI.—1422.

Benloe, 2, 18
Jenkins, 1 to 39

Year book, part 7—1 to 4, 7 to 12, 14, 18 to 20—part 8—21, 22, 27, 28, 30 to 39

EDWARD IV.—1461.

Jenkins, 1 to 22
Year book, part 9—1 to 22

Year book, part 10—5

EDWARD V.—1483.

Jenkins

Year book, part 11

RICHARD III.—1483.

Jenkins, 1 to 2

Year book, part 11—1 to 2

HENRY VII.—1485.

Benloe, 1
Jenkins, 1 to 24
Keilwey, 12, 13, 17 to 24

Moore, 1 to 37
Year book, part 11—1 to 16, 20, 21

HENRY VIII.—1509.

Anderson, 25, &c.
Benloe, 1 to 38
N. Bendloe, 22, &c.
Bendloe, Keilwey, and Ashe
Brook's new cases
Dalison, 38

Dyer, 4, &c.
Jenkins, 1 to 38
Keilwey, 1 to 11, and 21
Moore, 3
Year book, part 11, 12, 13, 14, 18, 19, 26, 27

EDWARD VI.—1547.

Anderson, 1 to 6
Benloe and Dalison, 2
Brook's new cases
N. Bendloe, 1 to 6

Dyer, 1 to 6
Jenkins, 1 to 6
Moore, 1 to 6
Plowden, 4 to 6

MARY—1553.

Anderson 1 to 6
Benloe and Dalison, 1 to 5
Benloe in Keilwey, and Ashe, 1 to 5
N. Bendloe 1 to 5
Brooke's new cases, 1 to 5
Cary, 5
Dyer, 1 to 5
Dalison in Keilwey and Ashe 1, 4, 5
Jenkins, 1 to 5
Leonard, 1 to 5
Moore, 1 to 5
Owen, 4 to 5
Plowden, 1 to 5

ELIZABETH—1558.

Anderson, 1 to 45
Benloe in Keilwey and Ashe, 2 to 20
Brownlow and Gouldesborough 11 to 45
Cary, 1 to 45
Coke, 14 to 45
Croke, 24 to 45
Dalison, 1 to 16
Dalison in Keilwey, and Ashe, 2 to 7
Dickins, a few cases
Dyer, 1 to 23
Godbolt, 17 to 45
Gouldesborough, 28 to 31, 39 to 43
Benloe, 1 to 21
Bendloe, 1 to 17
Hobart, a few cases
Hutton, 26 to 38
Jenkins, 1 to 45
Leonard, 1 to 45
Moore, 1 to 45
Noy, 1 to 45
Owen, 1 to 45
Plowden, 1 to 21
Popham, 34, 39
Saville, 22 to 36
Tothill, 1, 45
Yelverton, 44, 45

JAMES I.—1603.

Anderson, 1
Bendloe, 19 to 23
Bridgman, 12 to 19
Brownlow and Gouldesborough, 1 to 23
Bulstrode, 7 to 15
Cary, 1
Coke, 1 to 13
Croke, 1, 23
Davis, 2 to 9
Godbolt, 1 to 23
Hobart, 1 to 23
Hutton, 10 to 23
Jenkins, 1 to 21
William Jones, 18 to 23
Lane, 3 to 9
Leonard, 1 to 12
Ley, 6 to 23
Moore, 1 to 18
Noy, 1 to 23
Owen, 1 to 12
Palmer, 17 to 23
Popham, 15 to 23
Reports in chancery, 13
Rolle, 12 to 22
Tothill, 1 to 23
Winch, 19 to 23
Yelverton, 1 to 10

CHARLES I.—1625

Aleyn, 22 to 24
Bendloe, 1 to 3
Bulstrode, 1 to 14
Clayton, 7 to 24
Croke, 1 to 16
Godbolt, 1 to 13
Hetley, 3 to 5
Hutton, 1 to 14
William Jones, 1 to 16
Latch, 1 to 3
Ley, 1 to 4
Littleton, 2 to 7
March, 15 to 18
Nelson, 1 to 24
Noy, 1 to 24
Palmer, 1 to 4
Popham, 1 to 2
Reports in chancery, 1 to 24
Style, 21 to 24
Tothill, 1 to 21

CHARLES II.—1660.

Carter, 16 to 27
Cases in chanc. part 1—12 to 30
Cases in chanc. part 2—26 to 37
Clayton, 1 to 2
Dickens, a few cases
Finch, 25 to 32
Freeman, 22 to 37
Hardress, 7 to 21
Thomas Jones, 19 to 37
Keble, 13 to 30
Kelynge, 14 to 20
Levinz, 12 to 37
Lutwyche, 34 to 37
Modern, vol. 1, 2, 1 to 29
Modern, vol. 2, 26 to 30
Modern, vol. 3, 34 to 37

Nelson, 1 to 37
Parker, 30
Pollexfen, 22 to 37
J. Raymond, 12 to 35
Reports in chancery, 1 to 37
Saunders 18 to 24
Select cases in chancery, 33
Shower, 30 to 37
Siderfin, 9 to 22
Skinner, 33 to 37
Style, 1 to 7
Vaughan, 17 to 25
Ventris, 20 to 37
Vernon, 32 to 37

JAMES II.—1685.

Carthew, 2 to 4
Cases in chan. part 2—1 to 3
Cases of settlement, 2 to 4
Comberbach, 1 to 4
Freeman, 1 to 4
Levinz, 1 to 2
Lutwyche, 1 to 4
Modern, vol. 3, 1 to 4
Parker, 3 to 4
Reports in chancery, 1 to 3
Shower, 1 to 4
Skinner, 1 to 4
Ventris, 1 to 4
Vernon, 1 to 4

WILLIAM III.—1689.

Carthew, 1 to 12
Cases conc. settlements, 1 to 14
Colles, 9 to 14
Comberbach, 1 to 10
Comyns, 7 to 14
Fortescue, 7 to 14
Freeman, 1 to 14
Kelynge, 8 to 13
Levinz, 1 to 3
Lutwyche, 1 to 14
Modern, vol. 3, 1 to 2
Modern, vol. 4, 3 to 7
Modern, vol. 5, 5 to 11
Modern, vol. 12, to 2 14
Parker, 4 to 13
Precedents in chancery, 1 to 4
Lord Raymond, 4 to 14
Reports in chancery, vol. 2, 5
Reports temp. Holt, 1 to 14
Salkeld, 1 to 14
Select cases in chancery, 5, 9
Shower, 1 to 6
Skinner, 1 to 9
Ventris, 1 to 2
Vernon, 1 to 14
Peere Williams, 7 to 14

ANNE—1702.

Brown, parli. cases, 1 to 13
Bunbury, 12 to 13
Cases concerning settlements, 1 to 13
Cases of practice, C. P. 5 to 13
Colles, 1 to 8
Comyns, 1 to 13
Dickins, a few cases
Fortescue, 1 to 13
Freeman, 1 to 5
Gilbert, cases in law and equity, 12 to 13
Gilbert, 4 to 13
Kelynge
Lutwyche, 1 to 2
Modern, vol. 6, 2 to 3
Modern, vol. 7, 1
Modern, vol. 10, 8 to 13
Modern, vol. 11, 4 to 8
Parker, 6 to 12
Peere Williams, 1 to 13
Practical register, C. P. 3 to 13
Precedents in chanc. 1 to 13
Lord Raymond, 1 to 13
Reports in chancery, 4 to 8
Reports temp. Holt, 1 to 9
Salkeld, 1 to 10
Sessions cases, 9 to 13
Vernon, 1 to 13

GEORGE I.—1714.

Barnardiston, K. B. 12 to 11
Brown, cases in parli. 1 to 13
Bunbury, 1 to 13
Cases conc. settlements, 1 to 13
Cases of practice, C. P. 1 to 13
Comyns, 1 to 13
Dickins, 1 to 13
Fortescue, 1 to 13
Gilbert, 1 to 12
Modern, vol. 8 and 9, 8 to 12
Modern, vol. 1, 1 to 11
Moseley, 12 to 13
Parker, 4
Practical register, C. P. 1 to 13
Precedents in chancery, 1 to 8
Lord Raymond, 1 and 10 to 13
Select cases in chanc. 10 to 12
Sessions cases, 1 to 13
Strange, 2 to 13
Vernon, 1 to 5
Peere Williams, 1 to 13

GEORGE II.—1727.

Ambler, 11 to 34
Andrews, 11 to 12
Atkyns, 9 to 27
Barnardiston, K. B. 1 to 7
Barnardiston, chancery, 13 to 14
Barnes, 5 to 34
Wm. Blackstone, 20 to 24, 30 to 34
Brown, parl. cases, 1 to 34
Bunbury, 1 to 14
Burrow, 30 to 34
Burrow, sett. cases, 5 to 34
Cases of settlement, 1 to 5
Cases of practice, C. P. 1 to 20
Cases temp. Talbot, 7, 10
Comyns, 1 to 13
Cunningham, 7, 8
Dickins, 1 to 34
Fitzgibbon, 1 to 5
Fortescue, 1 to 10
Foster, 16 to 34
Kelynge, 4 to 8
Leach's crown law, 4 to 34
Moseley, 1 to 3
Northington, 30 to 34
Parker, 16 to 34
Peere Williams, 1 to 8
Practical register, C. P. 1 to 15
Lord Raymond, 1 to 6
Reports temp. Hardwicke, 7, 10
Sayer, 25 to 29
Select cases in chancery, 6
Sessions cases, 1 to 20
Strange, 1 to 21
Vesey, (senr.) 20 to 28
Willes, 11 to 32
Wilson, K. B. 16 to 26
Wilson, C. P. 26 to 34

GEORGE III.—1760.

Acton, prize causes, 49, 50
Ambler, chancery, 1 to 24
Anstruther, excheq. 32 to 37
Ball & Beatty, chanc. 47 to 51
Barnewall & Alderson, K. B. 58
Blackstone, (sir Wm.) K. B. 1 to 20
Blackstone, (Hen.) C. P. 28 to 36
Bosanquet and Puller, C. P. 37 to 44
Bosanquet and Puller, new Rep. C. P. 44 to 47
Brown, parl. cases, 1 to 40
Brown, chancery, 18 to 34
Buck, bankruptcy, 57
Burrow, K. B. 1 to 12
Burrow, settl. cases 1 to 16
Caldecott, settl. cases, 17 to 26
Campbell, N. P. 48 to 56
Cases of practice, K. B. 1 to 14
Cooper, chancery, 55
Cowper, K. B. 14 to 18
Cox, chancery, 23 to 36
Daniel, excheq. 57, 58
Dickins, chancery, 1 to 38
Dodson, admiralty, 51 to 55
Douglas, K. B. 19 to 21
Dow, parl. cases, 53 to 58
Durnford, and East, K. B. 26 to 40
East, K. B. 41 to 53
Edwards, admiralty, 48 to 50
Espinasse, N. P. 33 to 47
Forrest, excheq. 41
Holt, N. P. 55 to 58
Leach, crown law, 1 to 55
Lofft, K. B. 12 to 14
Maddock, chancery, 55 to 58
Marshall, C. P. 54 to 56
Maule and Selwyn, K. B. 53 to 56
Merivale, chancery, 56, 57
Moore, C. P. 57, 58
Nolan, settl. cases, 32 to 34
Northington, chanc. 1 to 6
Parker, excheq. 1 to 6.
Peake, N. P. 30 to 35
Phillimore, eccl. courts, 57
Price, excheq. 54 to 58
Robinson, admiralty, 39 to 48
Rose, bankruptcy, 50 to 56
Schoales and Lefroy, chan. 42 to 46
Smith, K. B. 44 to 46
Starkie, N. P. 55 to 58
Swanston, chancery, 58
Taunton, C. P. 47 to 58
Vesey, chancery, 29 to 52
Vesey and Beame, chan. 52 to 54
Wightwicke, excheq. 50, 51
Wilson, K. B. 1 to 14
Wilson, ex. and ch. 57, 58

Barnewall and Alderson, K. B. 58 to 60
Broderip and Bingham, C. P. 59 to 60
Chitty, K. B. 59 to 60
Gow, C. P. 58 to 59
Price, excheq. 54 to 60
Russell and Ryan, crown cases, 40 to 60
Starkie, N. P. 55 to 60

GEORGE IV.—1820.

Broderip and Bingham, C. P. 1 to 2
Bingham, C. P. 3 to 7
Starkie, N. P. 1 to 3
Ryan and Moody, N. P. 4 to to 6
Carrington and Payne, N. P. 4 to 7
Russell and Ryan, crown cases, 1 to 5
Price, excheq. 1 to 4
McCleland and Young, exchq. 4 to 6

A TABLE

OF THE PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.

4. To subject the hirer of a vessel to the liabilities of an owner, he should have the possession, and the entire control and direction of the vessel; so that the general owner, for the time being, could have no right to interfere with her management. *ib.*

STAMPS.

1. A promissory note, liable to be stamped by the act of Congress of *July* 6, 1797, cannot be read in evidence, unless it has been stamped, or the holder has complied with the requisitions of the act of *April* 6, 1802. *Leavitt v. Leavitt.* 161

STATUTE.

1. In the exposition of a private statute, conferring special privileges or imposing particular obligations, it is not proper to resort to the language of any other private act, not relating to the same parties and the same subject matter; such private statutes standing upon the same basis with contracts by deed, which generally are not to be affected by evidence *aliunde*. *Thomas, treas. &c. v. Mahan.* 513

STATUTES CITED AND EXPOUNDED.

Constitution of Maine, Art. 10, *sec.* 1.—judgments rendered in Massachusetts before the separation of Maine. 124

Statutes of the United States.

July 6, 1797—Stamp duties. 161
April 6, 1802—Stamp duties. 161
July 22, 1813—Direct taxes. 431

Statutes of Massachusetts.

7 *W.* 3 *ch.* 35—depositions *in perpetuam.* 88
1753, *ch.* 253—proprietors' meetings. 237
1762, *ch.* 289—proprietors' meetings. 237
1782, *ch.* 21—depositions *in perpetuam.* 485
1793 *ch.* 39—proprietors of lands. 237
1786 *ch.* 55—Probate bonds. 157

Statutes of Maine.

1821 *ch.* 43—proprietors of lands. 237
1821 *ch.* 45—regulation of mills. 323
1821 *ch.* 47—real actions. 297
1821 *ch.* 50—remedies in equity. 157
1821 *ch.* 51—foreign wills. 134
1821 *ch.* 57—reviews. 58
1821 *ch.* 59—indorsers of writs. 79
1821 *ch.* 67—bail. 10
1821 *ch.* 68—justices of the *quorum.* 486
1821 *ch.* 80—replevin. 306
1821 *ch.* 116—assessment of taxes. 72
1821 *ch.* 117—schools. 117
1821 *ch.* 122—paupers. 293, 298, 475
1821 *ch.* 134—license to auctioneers. 333
1821 *ch.* 164—militia. 527
1821 *ch.* 180—repealing act. 157
1822 *ch* 182—tender. 276
1822 *ch.* 193—reviews 58
1822 *ch.* 193—sureties on appeal. 62
1822 *ch.* 193—costs on appeal. 66
1822 *ch.* 196—schools. 45
1823 *ch.* 233—appeals. 542
1824 *ch.* 261—regulation of mills. 324
1826 *ch.* 430—Sullivan bridge (private) 513

English Statutes.

21 *Hen.* 8, *ch.* 11—writ of restitution. 165
3 *Jac.* 1, *ch.* 8—sureties on *supersedeas.* 65

STATUTE OF FRAUDS.

See FRAUDS.

STATUTE OF LIMITATIONS.

See LIMITATIONS.

SULLIVAN BRIDGE LOTTERY.

1. The managers of the *Sullivan* bridge lottery are not liable, under the private statute of 1826, *ch.* 430, *sec.* 3, to pay into the treasury of the State the price of any tickets, which, in the diligent and faithful execution of their trust, they have been unable to sell. *Thomas, treas. &c. v. Mahan.* 513

SURETIES.

See DEFAULT 1.
FRAUDULENT CONVEYANCE 6.
GUARANTY 2.
MORTGAGE 1.

TAXES.

1. Under *Stat.* 1821, *ch.* 116, *sec.* 1, the lists of assessment of taxes must be *signed* by the assessors. The signing of the warrant, usually inserted at the end of the tax-bill, is not a sufficient compliance with the statute in this particular, *Foxcroft v. Nevens & als.* 72

2. A collector of taxes, having given bond conditioned that he should "well and truly collect all such rates for which he should have *sufficient warrant*, under the hands of the assessors, according to law, and pay the same into the treasury," &c. received of the assessors a tax-bill *not signed*, together with a warrant in legal form for the collec-